HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

CHRISTOPHER VANDERSTOCK & ANOR PLAINTIFFS

AND

THE STATE OF VICTORIA DEFENDANT

Vanderstock v Victoria
[2023] HCA 30
Date of Hearing: 14, 15 & 16 February 2023
Date of Judgment: 18 October 2023
M61/2021

ORDER

The questions stated for the opinion of the Full Court in the amended special case filed on 6 September 2022 be answered as follows:

Question 1: *Is s 7(1) of the* Zero and Low Emission Vehicle Distance-based Charge Act 2021 *(Vic) invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the* Constitution*?*

Answer: *Yes.*

Question 2: *Who should pay the costs of the proceeding?*

Answer: *The defendant.*

Representation

R Merkel KC and C L Lenehan SC with F I Gordon SC and T M Wood for the plaintiffs (instructed by Equity Generation Lawyers)

R J Orr KC, Solicitor-General for the State of Victoria, with S Zeleznikow and M R Salinger for the defendant (instructed by Victorian Government Solicitor)

S P Donaghue KC, Solicitor-General of the Commonwealth, and D F C Thomas SC with C G Winnett and M P A Maynard for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with Z C Heger for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor for New South Wales)

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, with H Younan SC for the Attorney-General for the Australian Capital Territory, intervening (instructed by Government Solicitor for the Australian Capital Territory)

J A Thomson SC, Solicitor-General for the State of Western Australia, with J D Berson for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzer for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

N Christrup SC, Solicitor-General for the Northern Territory, with L S Peattie for the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

S K Kay SC, Solicitor-General for the State of Tasmania, with E A Warner for the Attorney-General for the State of Tasmania, intervening (instructed by Solicitor-General for the State of Tasmania)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka and S E D Spottiswood for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

Australian Trucking Association appearing as amicus curiae, limited to its written submissions

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Vanderstock v Victoria

Constitutional law (Cth) – Duties of excise – Exclusive power of Commonwealth Parliament – Scope and operation of s 90 of *Constitution* – Where s 7(1) of *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("ZLEV Charge Act") purported to oblige registered operator of zero or low emissions vehicle ("ZLEV") to pay charge for use of ZLEV on "specified roads" ("ZLEV charge") – Where "specified roads" defined to include all roads in Victoria and elsewhere in Australia over which public has right of way – Where ZLEV charge a debt due by registered operator to Victoria – Where question of law stated for opinion of Full Court as to whether s 7(1) of ZLEV Charge Act invalid for imposing duty of excise within meaning of s 90 of *Constitution* – Whether ZLEV charge properly characterised as tax on goods – Whether definition of duty of excise stated in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 and *Ha v New South Wales* (1997) 189 CLR 465 as tax on production, manufacture, sale or distribution of goods exhaustive or descriptive – Where application for leave to reopen *Capital Duplicators [No 2]* and *Ha* refused – Whether inland tax on goods imposed at stage of consumption answers description of duty of excise – Whether *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 should be reopened and overruled.

Words and phrases – "affect goods as articles of commerce", "articles of commerce", "close relation to goods", "commodities", "constitutional fact", "consumer", "consumption", "consumption tax", "criterion of liability", "dealing in goods", "direct tax", "distance-based charge", "distribution", "duty of customs", "duty of excise", "electric vehicle", "excise", "exclusive power", "imposts on goods", "incidence of tax", "indirect tax", "inland tax on goods", "manufacture", "markets in goods", "natural tendency", "point of consumption", "point of receipt by the consumer", "price of goods", "production", "sales tax", "stage of consumption", "stream of production and distribution", "tax on commodities", "tax on consumption", "tax on distribution", "tax on goods", "tax on manufacture", "tax on production", "tax on sale of goods", "tendency to depress demand for goods", "trading tax", "zero or low emissions vehicle".

Constitution, ss 51(ii), 51(iii), 53, 55, 86, 87, 88, 90, 92, 93, 109.
Road Safety Act 1986 (Vic), s 3.
Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic), ss 3, 6, 7, 8, 9, 10, 11, 15, 18, 19.

1 KIEFEL CJ, GAGELER AND GLEESON JJ. For the first time this century, there is need for the High Court to examine the scope and operation of s 90 of the *Constitution* insofar as that section provides for the power of the Commonwealth Parliament "to impose duties of customs and of excise" to be "exclusive" of the powers of the States and self-governing Territories.

2 The need arises in the context of a proceeding in the original jurisdiction of the Court challenging the validity of the central provision of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("the ZLEV Charge Act"). The impugned provision purports to oblige the registered operator of a zero or low emissions vehicle ("ZLEV") to "pay a charge" ("the ZLEV charge") for "use of the ZLEV" on "specified roads", an expression which will be seen to encompass all roads in Victoria and elsewhere in Australia over which the public has a right to pass. The ZLEV charge is determined annually at a prescribed rate for each kilometre travelled by the ZLEV on specified roads in a financial year. The ZLEV charge is a debt due by the registered operator to the State of Victoria.

3 By special case in the proceeding, the plaintiffs (individuals who are registered operators of ZLEVs) and the State of Victoria as defendant agreed in stating a single substantive question of law for the opinion of the Full Court: is the impugned provision of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*?

4 On the hearing of the special case, the Attorney-General of the Commonwealth intervened in support of the plaintiffs to argue for an affirmative answer to the question. The plaintiffs have also been supported by the Australian Trucking Association, which sought and was granted leave to participate amicus curiae on the hearing of the special case limited to the filing of written submissions. The Attorneys-General of each other State and of the Australian Capital Territory and the Northern Territory intervened in support of Victoria to argue for a negative answer to the question.

5 When the Court last examined the scope and operation of s 90 of the *Constitution*, in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[1] and *Ha v New South Wales*[2], it held, in each case by a majority of four to three, that the constitutional reference to "duties of customs and of excise" exhausts the categories of "taxes on goods". The distinction between duties of customs and duties of excise it held to lie not in the place of manufacture or production of the goods that are taxed but in what is done with the goods which attracts their

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1 (1993) 178 CLR 561.

2 (1997) 189 CLR 465.

taxation. Duties of customs are "border taxes" on goods. They are imposed at the stage of importation or exportation. Duties of excise are "inland taxes" on goods. Taxes on goods imposed at the stage of sale or distribution accordingly answer the description of duties of excise, irrespective of where those goods have been produced or manufactured, just as taxes on goods imposed at the stage of manufacture or production answer the description of duties of excise.

6 Not considered in the reasons for judgment of the majority in *Capital Duplicators [No 2]* or *Ha*, and expressly left undecided in each of those cases, was the question whether a tax on goods imposed at the stage of consumption, by destruction or use, similarly answers the description of a duty of excise.

7 Standing in the way of an affirmative answer to that question then was, and still is, *Dickenson's Arcade Pty Ltd v Tasmania*[3]. There it had been held, by a majority of four to two, that a tax on goods imposed at the stage of consumption did not answer the description of an excise. The correctness of that holding in *Dickenson's Arcade* was touched on in argument in *Capital Duplicators [No 2]* but was not raised for decision by the legislation in issue in that case, leading the majority to say nothing about it and to record that consideration of taxes on the consumption of goods was unnecessary. The majority in *Ha* likewise recorded that consideration of taxes on the consumption of goods was unnecessary in that case.

8 Leave to reopen *Capital Duplicators [No 2]* and *Ha* was sought by Victoria during the hearing of the special case to argue for the adoption of the view of the minority in each of those cases that duties of excise should be confined to taxes which discriminate against goods manufactured or produced in Australia. That leave was unanimously refused. Victoria advanced no consideration in support of the proposed argument which had not been advanced and fully taken into account in *Capital Duplicators [No 2]* and *Ha*. The differently constituted majorities in each of *Capital Duplicators [No 2]* and *Ha* adopted common reasoning which they expressed in each case in joint reasons for judgment. Those joint reasons for judgment, published four years apart, in aggregate encapsulated the shared views of six Justices of the Court. The prudential considerations repeatedly identified as appropriate to be considered on an application to reopen a decision of the Court[4] could not justify now taking the momentous step of unsettling the resultant constitutional doctrine. That is particularly so given that the doctrine bears centrally on Commonwealth-State financial relations, has not since been doubted in any decision of the Court, and has now been acted upon by Australian polities

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3 (1974) 130 CLR 177.

4 See *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71].

for more than 25 years[5]. Significant in that latter respect is that *Capital Duplicators [No 2]* and *Ha* furnished the stable foundation upon which Commonwealth, State and Territory revenue raising and sharing arrangements were entered into at the turn of this century in the form of the Goods and Services Tax ("GST") settlement as originally expressed in the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999. Those arrangements have endured. For the past 15 years, they have been expressed in the Intergovernmental Agreement on Federal Financial Relations 2008. They are currently implemented through the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (and related taxing and tax administration legislation) and through the *Federal Financial Relations Act 2009* (Cth). They are not to be judicially disturbed.

9 Treating *Capital Duplicators [No 2]* and *Ha* as having settled the proposition that duties of excise within the meaning of s 90 of the *Constitution* are inland taxes on goods – there being no dispute that the ZLEV charge is a tax – the ultimate question whether the ZLEV charge is properly characterised as a duty of excise within the meaning of s 90 can be addressed by reference to two questions: (1) Does the imposition of the ZLEV charge at the stage of consumption take it outside the scope of a duty of excise as a tax on goods? (2) If not, is the ZLEV charge properly characterised as a tax on goods?

10 The answers to those questions will be seen to be: (1) no; and (2) yes. To the extent that *Dickenson's Arcade* stands in the way of the first of those answers, it is to be reopened and overruled. The proposition that a tax on goods imposed at the stage of consumption of those goods cannot answer the description of a duty of excise is an anomalous and unsustainable exception to the understanding of the scope and operation of s 90 of the *Constitution* adopted in *Capital Duplicators [No 2]* and *Ha*.

11 From the second of those answers, it follows that the substantive question of law stated for the opinion of the Full Court in the special case is to be answered in the affirmative: the provision of the ZLEV Charge Act which purports to impose the ZLEV charge is invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*.

12 The passage of time since *Capital Duplicators [No 2]* and *Ha* makes it appropriate to commence the exposition of the reasons for those conclusions by recalling the historical context in which *Capital Duplicators [No 2]* and *Ha* came to be decided and examining in some detail what was said by the majorities in those cases about the scope and operation of s 90 of the *Constitution*. That will provide the foundation for an examination of the question left undecided in those

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5 Compare *Victoria v The Commonwealth* (1957) 99 CLR 575 at 601.

cases as to the proper characterisation of a tax on goods imposed at the stage of consumption and as to the status of *Dickenson's Arcade*.

13 Precisely what is encompassed within the conception of an excise as a tax on goods can then be recapitulated before turning to the ZLEV Charge Act and finally to the characterisation of the ZLEV charge as a tax on goods.

The historical context

The illusion of etymological certainty

14 Needing to be recorded at the outset is the inconvenient and somewhat irritating reality that the word "excise" had no certain connotation or core meaning at the time of its adoption and enactment in the *Constitution*. "No absolute is to be discovered in a search for the meaning of 'duty of excise'; no ultimate truth lies concealed in the phrase 'duty of excise', there awaiting recognition by the judicial fossicker"[6].

15 The famously acerbic definition by Dr Samuel Johnson of an excise as a "hateful tax levied upon commodities"[7] reflected usage typical during the late eighteenth century. So too did the fuller description by Sir William Blackstone of an excise as "an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption"[8]. Writing during that period, Adam Smith explained[9]:

> "Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways. The consumer may either pay an annual sum on account of his using or consuming goods of a certain kind; or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods which last a considerable time before they are consumed altogether, are most properly taxed in the one way. Those of which the consumption is either immediate or more speedy, in the other. The coach-tax and plate-tax are examples of

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6 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 230.

7 Johnson, *A Dictionary of the English Language* (1755), "excise".

8 Blackstone, *Commentaries on the Laws of England* (1765), bk 1 at 308.

9 Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), vol 2, bk 5 at 490-491. The coach tax and the plate tax were also given as examples of duties of excise in Blackstone, *Commentaries on the Laws of England* (1765), bk 1 at 310.

the former method of imposing: The greater part of the other duties of excise and customs, of the latter."

16 However, that usage was to be overtaken in England during the nineteenth century by a usage which attributed the label of an excise to any of a miscellany of fees and charges which came to be administered by the Excise Commissioners[10].

17 An illusion of etymological certainty was fleetingly provided by supposing the English word to have had a Latin root which signified an amount "cut out" of the price[11], only to be debunked by the revelation upon the publication of the *Oxford English Dictionary* that the word appeared to have entered the English language through Middle Dutch, where it seemed to have derived from a different Latin root meaning nothing more precise than "to tax"[12]. Victoria's argument on the special case that "it is inherent in the etymological meaning of excise that the cost can be 'deducted' or 'excised' at the point of sale" would return to pursuing what was long ago revealed to be a chimera.

Pre-federation history

18 As was observed in *Ha*[13], pre-federation history sheds some light on the purpose of the inclusion of the reference to duties of excise in s 90 but little light on its intended meaning. Together with the principle that "trade and intercourse between the Federated Colonies ... shall be absolutely free", the principle that "the power and authority to impose Customs duties shall be exclusively lodged in the Federal Government and Parliament" was one of four principles proposed by Sir Henry Parkes and adopted by the National Australasian Convention in 1891 "in order to establish and secure an enduring foundation for the structure of a federal government"[14]. The draft of what was to become s 90 which emerged from the 1891 Convention referred to the Commonwealth Parliament having "the sole

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10 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

11 See Palgrave (ed), *Dictionary of Political Economy* (1894), vol 1 at 786-787, "excise".

12 See *A New English Dictionary* (which became the *Oxford English Dictionary*) (1897), vol 3, pt II at 379, "excise". See also *The Encyclopaedia Britannica*, 11th ed (1910), vol 10 at 58, "excise".

13 (1997) 189 CLR 465 at 493-494.

14 *Official Report of the National Australasian Convention Debates* (Sydney), 4 March 1891 at 23.

power and authority ... to impose Customs duties, and duties of Excise upon goods for the time being the subject of Customs duties, and to grant bounties upon the production or export of goods"[15]. The record of the proceedings of the 1891 Convention does little to illuminate the thinking behind the inclusion of those references to excise and bounties beyond revealing a consensus that, like duties of customs, duties of excise and bounties should be uniform throughout the Commonwealth and for that reason ought to be together within the exclusive province of the Commonwealth Parliament[16].

19 "That the exclusive power to impose and collect duties of Customs and Excise, and to give bounties, shall be vested in the Federal Parliament" was one of five "principal conditions" proposed by Edmund Barton and adopted by the National Australasian Convention in Adelaide in 1897 as the principles subject to which the "Federal Government", "in order to enlarge the powers of self-government of the people of Australasia", was to "exercise authority throughout the Federated Colonies"[17]. Consistently with the generality of that principle as then adopted, the draft of what was to become s 90 which emerged from the Adelaide Convention provided for the Commonwealth Parliament to "have the sole power and authority ... to impose customs duties, to impose duties of excise, and to grant bounties upon the production or export of goods"[18]. The 1897 draft differed from the 1891 draft in no longer confining the duties of excise which the Commonwealth Parliament was to have exclusive power to impose to those on goods for the time being the subject of duties of customs. When proposing deletion of the words which had that confining effect in the 1891 draft, Sir George Turner explained that

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15 "Draft of a Bill as adopted by the National Australasian Convention", April 1891 at 16, reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 452.

16 *Official Report of the National Australasian Convention Debates* (Sydney), 13 March 1891 at 346-349.

17 *Official Report of the National Australasian Convention Debates* (Adelaide), 23 March 1897 at 17; *Official Report of the National Australasian Convention Debates* (Adelaide), 31 March 1897 at 395.

18 "Draft Constitution of the Commonwealth of Australia as framed and approved by the Australasian Federal Convention, at Adelaide, in March and April, 1897, and amended at the adjourned Session of that Convention held at Sydney in September, 1897", Sydney, December 1897 at 21, reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 785.

"[i]f we leave these words in we limit the power of the Federal Government, but if we strike them out we enlarge their power"[19].

20 Chapter IV of the 1897 draft, including the draft of what was to become s 90, was the subject of a report to the Victorian Government in 1897 by a committee chaired by Dr Wollaston, who was then Secretary for Trade and Customs for Victoria and who would later become the first Comptroller-General of Customs of the Commonwealth. The authors of the report confessed to finding "some difficulty in determining what 'excise' includes" and opined that "the meaning is not sufficiently certain to allow of the word standing without a definition". The definition they recommended was that "Excise shall mean the duty chargeable on the manufacture and production of commodities"[20]. The report was drawn to the attention of the Australasian Federal Convention on its resumption in Sydney later in 1897 by Isaac Isaacs. The report engendered some discussion, but the discussion was inconclusive, and the recommendation was not taken up[21]. The significance of the report for present purposes is twofold: its content confirms the uncertainty as to the connotation of "excise" that existed at the time of the drafting and enactment of the *Constitution*; the failure to adopt its recommendation highlights the failure of the *Constitution* to provide a textual resolution of that uncertainty.

21 The final form of s 90, referring to "the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods" becoming "exclusive" upon the imposition of uniform duties of customs, involved no change of substance from the 1897 draft. The changes in wording were the product of technical drafting changes made during the final session of the Australasian Federal Convention in Melbourne in 1898[22].

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19 *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 835-836.

20 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

21 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1065.

22 "Bill as proposed to be further amended by the Drafting Committee", Melbourne, March 1898 at 23, reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 1103.

Contemporary constitutional references

22 References to duties of excise were at that time to be found both in the *Constitution of the United States* and in the *British North America Act 1867* (Imp). Neither reference was in a context completely analogous to s 90.

23 The reference in the *Constitution of the United States* was in the context of the conferral of power on the Congress to "lay and collect Taxes, Duties, Imposts and Excises" subject to the limitation that "all Duties, Imposts and Excises shall be uniform throughout the United States"[23] and to the further limitation that "[n]o Tax or Duty shall be laid on Articles exported from any State"[24]. Following the description by Blackstone[25], the Supreme Court of the United States had said of the reference in that context that "[e]xcise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor"[26]. Consistently with that definition, the description by Smith[27] had earlier been applied by the Supreme Court[28] to hold that a coach tax[29] was a duty of excise and was therefore within congressional power subject only to the requirement that it be uniform throughout the United States. That earlier decision was affirmed by the Supreme Court in 1895[30]. The discussion at the Australasian Federal Convention

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23 Article I, §8, cl 1 of the *Constitution of the United States*.

24 Article I, §9, cl 5 of the *Constitution of the United States*.

25 See [15] above.

26 *Pacific Insurance Company v Soule* (1868) 74 US 433 at 445. See also *Patton v Brady, Executrix* (1902) 184 US 608 at 617-618.

27 See [15] above.

28 *Hylton v United States* (1796) 3 US 171 at 180-181.

29 Levied by an Act of 5 June 1794 (1 Stat 373) annually at a rate of between one and ten dollars on each carriage "kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers". See Jensen, "The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?" (1997) 97 *Columbia Law Review* 2334 at 2351.

30 *Pollock v Farmers' Loan and Trust Company* (1895) 158 US 601 at 627. Insofar as it held that a tax on income derived from personal property contravened the distinct requirement of Art I, §9, cl 4 of the *Constitution of the United States* that "[n]o

in Sydney in 1897, of which mention has been made[31], revealed recognition by Isaac Isaacs and Edmund Barton that decisions of the Supreme Court of the United States would be relevant to the interpretation of the word "excise" in the *Constitution* but cannot be taken to indicate awareness on the part of either of them of the Supreme Court's earlier adoption of Blackstone and Smith.

24 The reference in the *British North America Act* appeared in an intricate context and, in the subsequent judicial interpretation of s 90, the deference appropriate to be afforded to the interpretation of that reference by the Privy Council would become problematic. Within the framework of the Parliament of Canada having "exclusive legislative authority" over "matters" which included "[t]he regulation of trade and commerce" and "[t]he raising of money by any mode or system of taxation"[32] and of each Provincial Legislature having authority to legislate within its Province in relation to "[d]irect taxation within the province, in order to the raising of a revenue for provincial purposes"[33], the *British North America Act* made transitional provision that "[t]he Customs and Excise laws of each province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada"[34].

25 That being the language and structure of the *British North America Act*, it was unsurprising that the Privy Council would end up adopting an interpretation of the Provincial legislative power which drew on John Stuart Mill's distinction between "direct" and "indirect" taxation[35] and would come to see customs and

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Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken", the holding in *Pollock* was overturned by ratification in 1913 of the 16th Amendment to the *Constitution of the United States*, which provides that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration". See *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services* (2012) 567 US 519 at 571.

31 See [20] above.

32 Section 91(2) and (3) of the *British North America Act 1867* (Imp).

33 Section 92(2) of the *British North America Act 1867* (Imp).

34 Section 122 of the *British North America Act 1867* (Imp).

35 Mill, *Principles of Political Economy* (1848), bk 5, ch 3, quoted in *Bank of Toronto v Lambe* (1887) 12 App Cas 575 at 582. See also *Canadian Industrial Gas & Oil*

excise each as a species of "indirect" taxation ordinarily outside the scope of the Provincial legislative power over "direct" taxation[36].

26 For so long as appeals would lie from the High Court to the Privy Council (albeit only with the leave of the High Court on questions concerning the "limits inter se" of the constitutional powers of the Commonwealth and the States[37]), it was hardly surprising that the High Court would show deference in its interpretation of "excise" in s 90 to the view of the Privy Council as to the meaning of the same word in the Canadian constitutional setting. With hindsight, however, it can be seen to have been inevitable that the complexities and uncertainties introduced by borrowing from the interpretation given to the word in that different constitutional context would be such as to lead more than one member of the High Court to lament that Mill's distinction between direct and indirect taxation was ever allowed to influence Australian constitutional analysis[38]. As will be seen, it would be an apparent misunderstanding of what had been said by the Privy Council as to the meaning of "excise" in the Canadian constitutional setting that would be the source of the notion taken up in *Dickenson's Arcade* that a tax on goods imposed at the stage of consumption did not answer the description of an excise in s 90.

Ltd v Government of Saskatchewan [1978] 2 SCR 545 at 581-582; *Minister of Finance of New Brunswick v Simpson-Sears Ltd* [1982] 1 SCR 144 at 161.

36 See *Bank of Toronto v Lambe* (1887) 12 App Cas 575 at 582; *Attorney-General for Manitoba v Attorney-General for Canada* [1925] AC 561 at 566; *City of Halifax v Estate of J P Fairbanks* [1928] AC 117 at 125; *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 176; *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45 at 59; *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 at 565.

37 Section 74 of the *Constitution*. See *Dennis Hotels Pty Ltd v Victoria* (1961) 104 CLR 621; [1962] AC 25; *Whitehouse v Queensland* (1961) 104 CLR 635; *Western Australia v Hamersley Iron Pty Ltd [No 2]* (1969) 120 CLR 74.

38 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 553-554; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 222-223; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 429, 435, 470-471.

The early understanding

27 The question "what are duties of excise?" was addressed by John Quick and Robert Garran in annotations to s 90 in their contemporaneously published commentaries on the *Constitution*. They wrote[39]:

> "The fundamental conception of the term is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury, as spirits, beer, tobacco, and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles produced or manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth. It was never intended to take from the States those miscellaneous sources of revenue, improperly designated as 'excise licenses' in British legislation."

28 In the first case to be decided on the meaning of "duties of excise" in s 90 of the *Constitution*, *Peterswald v Bartley*[40], Quick and Garran's explanation was quoted and applied to reject the widest of the potential meanings – that based on nineteenth century English practice. The holding in that case was that a flat fee for a periodic licence to produce goods (beer) did not answer the constitutional description. The correctness of that holding has never been doubted. To say in 1904 what an excise was not, was not difficult. To say at that time exactly what an excise was, was challenging, although the magnitude of the challenge was not then apparent.

29 Noting that the *Constitution* "was framed in Australia by Australians, and for the use of the Australian people", that "there were in the States many laws in force dealing with the subject" of excise, and that the word is used in s 93 of the *Constitution* in connection with the words "on goods produced or manufactured in" the States, Griffith CJ opined in *Peterswald* that "the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax"[41].

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39 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837.

40 (1904) 1 CLR 497.

41 (1904) 1 CLR 497 at 509.

30 Treated as an explanation of the State taxes which existed and answered the description of duties of excise at the time of federation and when *Peterswald* was decided, the *Peterswald* formulation (based as it was on the explanation in the Quick and Garran commentary) was undoubtedly correct[42]. Treated as the criterion by which to determine whether all State taxes that might thereafter be enacted would answer the description of duties of excise, the formulation would in time be found wanting. The formulation would be overtaken a quarter of a century later under the pressure of grappling with the application of s 90 to increasingly innovative forms of State taxation.

Commonwealth Oil Refineries and John Fairfax

31 The notion that a duty of excise is confined to a tax on goods imposed at the point of production or manufacture did not survive *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia*[43] and *John Fairfax & Sons Ltd and Smith's Newspapers Ltd v New South Wales*[44]. In each of those cases, an ad valorem State tax on the sale of goods produced in the State (motor spirit and newspapers respectively) was held invalid as a duty of excise. In *Commonwealth Oil Refineries*, one member of the Court appears also to have been prepared to hold that an ad valorem State tax on the "use" of goods (motor spirit) purchased or obtained outside the State was invalid as either a duty of customs or a duty of excise.

32 The range of views as to the meaning of excise by that time in play can be illustrated by contrasting the approaches of Higgins J and Rich J, each of whom was party to the decisions in *Commonwealth Oil Refineries* and *John Fairfax* holding that a tax on the sale of goods produced in a State was invalid as a duty of excise. Higgins J saw no need to "decide the outside boundary of the denotation of the term"[45]. He saw it as enough to accept that "whatever else the term may include, it certainly includes a duty paid on goods 'produced or manufactured in a State'"[46] and, looking to substance over form, to accept that "it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or

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42 See Mills, *Taxation in Australia* (1925) at 138, 157, 183.

43 (1926) 38 CLR 408.

44 (1927) 39 CLR 139.

45 (1927) 39 CLR 139 at 144.

46 (1927) 39 CLR 139 at 144-145.

consumption"[47]. His Honour's preference for substance over form appears also to have underlain his conclusion in *Commonwealth Oil Refineries* that not just the tax on the sale of goods produced in the State but also the tax on the use of goods purchased or obtained outside the State was invalid as "duties of customs and excise"[48].

33 To Rich J, the characterisation of a tax on the sale of goods produced in the State as a duty of excise was more straightforward. Drawing explicitly on the language of Blackstone, he said that the term "excise" encompassed "duties upon goods collected in respect of use, consumption or sale", and that that was so irrespective of the place of manufacture or production of those goods[49]. In his opinion, the *Constitution* "gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term 'customs and excise'"[50]. The constitutional scheme, as he saw it, was that "[o]ne authority should exercise the complementary powers of customs, excise and bounties without hindrance, limitation, conflict or danger of overlapping from the exercise of a concurrent power by another authority vested in the States"[51].

Matthews

34 The notion that a duty of excise is confined to a tax in relation to the quantity or value of goods did not survive *Matthews v Chicory Marketing Board (Vict)*[52]. There it was held by a majority of three to two that a State tax imposed on a producer of goods (chicory) by reference to the area of land planted for the purpose of the production of those goods constituted an excise. The separate reasons for judgment of Dixon J, as a member of the majority, were to become influential in later cases.

35 Taking the view that *Commonwealth Oil Refineries* and *John Fairfax* left "open for future decision" the question whether confinement of the constitutional conception of an excise to goods produced or manufactured in Australia is

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47 (1926) 38 CLR 408 at 435.

48 (1926) 38 CLR 408 at 435.

49 (1926) 38 CLR 408 at 437. See also (1927) 39 CLR 139 at 146-147.

50 (1926) 38 CLR 408 at 437.

51 (1926) 38 CLR 408 at 437.

52 (1938) 60 CLR 263.

justified[53], Dixon J commenced his reasoning in *Matthews* by demonstrating that the word itself had "never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application"[54]. It followed that "[a] definition which makes quantity and value the only basis of taxation which would satisfy the notion of 'excise' has no foundation either in history, economic or fiscal principle, nor in any accepted specialization"[55].

36 "The basal conception of an excise in the primary sense which the framers of the Constitution are regarded as having adopted", Dixon J said in *Matthews*, "is a tax directly affecting commodities"[56]. In a carefully crafted passage, which would often afterwards be quoted and applied, Dixon J continued[57]:

> "If the word 'excise' received a meaning which confined its application to taxes the relation of which to the commodity concerned was of some narrow and strictly defined nature, as, for instance, by an arithmetical relation to quantity, it would not only miss the principle contained in the use of the word 'excise,' but it would expose the constitutional provision made by sec 90 to evasion by easy subterfuges and the adoption of unreal distinctions. 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. But if the substantial effect is to impose a levy in respect of the commodity the fact that the basis of assessment is not strictly that of quantity or value will not prevent the tax falling within the description, duties of excise."

Parton

37 The reasoning of Dixon J in *Matthews* was revisited by him and reinforced, but in a material respect qualified, in *Parton v Milk Board (Vict)*[58]. There it was

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53 (1938) 60 CLR 263 at 299-300.

54 (1938) 60 CLR 263 at 293.

55 (1938) 60 CLR 263 at 303.

56 (1938) 60 CLR 263 at 303.

57 (1938) 60 CLR 263 at 304.

58 (1949) 80 CLR 229.

held, again by a majority of three to two, that an ad valorem State tax payable by the vendor on the retail sale or distribution of goods produced in the State (milk) constituted a duty of excise. Again, the separate reasons for judgment of Dixon J, as a member of the majority, were to become influential in later cases. Appreciation of those reasons is enhanced by contrasting them with those of Rich and Williams JJ, who, writing jointly, were also in the majority.

38 Despite Rich J having taken the view in *Commonwealth Oil Refineries* that a tax on goods in respect of use, consumption or sale of those goods answered the description of a duty of excise irrespective of the place of manufacture or production of those goods[59], Rich and Williams JJ in *Parton* were prepared to accept that a duty of excise "must be imposed so as to be a method of taxing the production or manufacture of goods"[60]. Like Higgins J in those earlier cases, however, they were prepared to look beyond the legal form of the taxing law to consider its practical operation. They took and acted on the view that "the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer"[61].

39 In contrast with Rich and Williams JJ, and consistently with the approach he had taken in *Matthews*, Dixon J in *Parton* did not limit the constitutional conception of a duty of excise by reference to the manufacture or production of goods. To the contrary, he characterised the tax in issue in *Parton* as a "tax upon goods"[62], borrowing from a description in the Privy Council[63] to refer to it as a "trading tax ... more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted". Dixon J said that "[o]nly if the conception of what is an excise is limited by the condition

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59 (1926) 38 CLR 408 at 437.

60 (1949) 80 CLR 229 at 252.

61 (1949) 80 CLR 229 at 252.

62 (1949) 80 CLR 229 at 259.

63 *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45 at 59.

that the tax must be levied on the manufacturer" could he "see any escape from the conclusion" that the tax was an excise[64].

40 Dixon J said that he could not accept the existence of any such limitation. The reason, as he explained it, was that[65]:

> "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. If the exclusive power of the Commonwealth with respect to excise did not go past manufacture and production it would with respect to many commodities have only a formal significance."

41 What Dixon J referred to in *Parton* as an assumption about the intention underlying the exclusivity given by s 90 to the Commonwealth Parliament with respect to imposition of duties of customs and of excise, he would later refer to as "its manifest object in confiding to the hands of the Federal Parliament the power to deal with the taxation of commodities entering or produced within Australia as a matter of essential economic policy"[66]. He would also later explain that "[d]uties of excise and of customs are denied to the States simply because of their effect on commodities" and would repeat the essential point he had made in *Matthews* that "[w]hether a tax is a duty of excise must be considered by reference to its relation to the commodity as an article of commerce"[67].

42 Notwithstanding his identification of that broad constitutional purpose, Dixon J in *Parton* qualified his earlier explanation of the nature of a duty of excise in *Matthews* in light of the intervening decision of the Privy Council in *Atlantic Smoke Shops Ltd v Conlon*[68]. The Privy Council's decision, he said, made it

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64 (1949) 80 CLR 229 at 259-260.

65 (1949) 80 CLR 229 at 260.

66 *Whitehouse v Queensland* (1960) 104 CLR 609 at 618.

67 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 547.

68 [1943] AC 550.

"probably a safe inference" that "a tax on consumers or upon consumption cannot be an excise", with the consequence that[69]:

> "This decision perhaps makes it necessary to that extent now to modify the statement: 'that so far there is no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production'. The modification is with respect to consumption."

43 The qualification to the explanation of the nature of a duty of excise by Dixon J in *Matthews*, so introduced by him in *Parton* in deference to *Atlantic Smoke Shops*, was eventually to provide the foundation for the holding of the majority in *Dickenson's Arcade* that a tax on goods imposed at the stage of consumption did not answer the description of an excise. The appropriateness of the *Parton* qualification and the correctness of that holding in *Dickenson's Arcade* will be examined separately in due course.

The rise and decline of Bolton v Madsen

44 What needs to be noted at this point in the historical narrative is the way Dixon J's statement of principle in *Matthews*, as qualified in *Parton*, was taken up and applied from the middle of the twentieth century to address a range of increasingly creative forms of State taxation. Two principal categories of State taxes were initially in issue: those framed as fees for periodic licences to engage in the commercial transportation of goods, and those framed as fees for periodic licences to engage in the wholesale or retail sale of tobacco or alcohol calculated by reference to sales of those goods during past periods.

45 Taxes framed as fees for periodic licences to engage in the commercial transportation of goods were held not to be taxes on the goods transported, and therefore not to constitute duties of excise, in *Hughes and Vale Pty Ltd v New South Wales*[70] and in *Browns Transport Pty Ltd v Kropp*[71]. Of the tax in issue in *Hughes and Vale*, Dixon CJ said it was "enough to say that the tonnage rate is not a tax directly affecting commodities" given that the amount of the tax was "calculated on the combined weight of the vehicle and weight of the load it is

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69 (1949) 80 CLR 229 at 261 (footnote omitted).

70 (1953) 87 CLR 49.

71 (1958) 100 CLR 117.

capable of carrying and is payable in respect of the employment of the vehicle upon a journey independently of the weight or quantity of the commodities carried"[72].

46 The tax in *Browns Transport* was differently structured. Its amount was fixed by reference to the gross revenue derived from the licensed service. Reaching the conclusion that the tax was not a duty of excise, the Court, presided over by Dixon CJ, unanimously adhered to the broad substantive approach which his Honour had articulated in *Matthews*. In particular, the Court said with reference to *Matthews*[73]:

> "If an exaction is to be classed as a duty of excise, it must, of course, be a tax. Its essential distinguishing feature is that it is a tax imposed 'upon' or 'in respect of' or 'in relation to' goods ... It would perhaps be going too far to say that it is an essential element of a duty of excise that it should be an 'indirect' tax. But a duty of excise will generally be an indirect tax, and, if a tax appears on its face to possess that character it will generally be because it is a tax upon goods rather than a tax upon persons."

Applying that approach to the licensing fee in issue, it said[74]:

> "While the licensing fee would no doubt normally enter, like any other outgoing, into the calculation of fares and freights to be charged, this does not mean that it is expected to be 'passed on' as such. But it is unnecessary to consider this matter, because whether it is expected to be 'passed on' or not, it is very clear, in our opinion, that the tax is not a tax 'upon' goods, or 'in respect of' goods, or 'in relation to' goods."

47 Taxes framed as fees for periodic licences to engage in the retail sale of alcohol were subsequently considered in *Dennis Hotels Pty Ltd v Victoria*[75]. There, the main fee in issue was calculated as a percentage of the amount paid for alcohol purchased by the licensee in a previous period. The fee was held by a majority of four to three not to amount to a duty of excise. Dixon CJ was in dissent. Of the reasoning of the members of the Court who comprised the majority, the most influential would turn out to be that of Kitto J. His Honour drew from what Dixon J had said in *Matthews*, as qualified by him in *Parton* and as applied in *Hughes and*

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72 (1953) 87 CLR 49 at 75.

73 (1958) 100 CLR 117 at 129.

74 (1958) 100 CLR 117 at 129.

75 (1960) 104 CLR 529.

Vale and *Browns Transport*, the proposition that "a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer"[76]. *Dennis Hotels* was immediately followed in *Whitehouse v Queensland*[77].

48 The formulation by Kitto J in *Dennis Hotels* was not long afterwards taken up and applied in unanimous reasons for judgment of Dixon CJ and five other members of the Court in *Bolton v Madsen*[78] in holding a fee for a periodic licence to engage in commercial transportation, calculated as an amount per ton per mile on the registered carrying capacity of the transport vehicle over the total distance carried, not to be a duty of excise.

49 The *Bolton v Madsen* formulation, as Brennan J would point out in *Philip Morris Ltd v Commissioner of Business Franchises (Vict)*[79], "divided into two propositions: one, that a tax on the taking of a step of the stated kind is a duty of excise; the second, that, to ascertain the character of a statutory impost, one looks exclusively to the statutory criterion of liability". The first proposition would continue to attract general assent, at least as a non-exhaustive description of the stages at which taxes on goods would amount to duties of excise, and for that reason would come to be seen as a "rock in the sea of uncertain principle"[80]. The second proposition would not.

50 The "criterion of liability" approach to the application of s 90 mirrored the "criterion of operation" approach which, at the time *Bolton v Madsen* was decided, prevailed in the application of s 92. Unfortunately, the criterion of liability approach suffered the same defects as those which resulted in the abandonment of the criterion of operation approach in *Cole v Whitfield*[81]. Each held out the false hope of legal certainty. The practical consequences of each were obscurity[82] and

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76 (1960) 104 CLR 529 at 559.

77 (1960) 104 CLR 609.

78 (1963) 110 CLR 264 at 273.

79 (1989) 167 CLR 399 at 444.

80 (1989) 167 CLR 399 at 445.

81 (1988) 165 CLR 360 at 384, 401-402.

82 See *Palmer v Western Australia* (2021) 272 CLR 505 at 554-555 [147]-[149].

the emboldening of legislative obfuscation. But it took some time for those defects to become apparent.

51 The *Bolton v Madsen* formulation was in the meantime applied in *Dickenson's Arcade* to a legislative scheme modelled on that upheld in *Dennis Hotels* to hold that a periodic retail licence fee calculated as a percentage of the licensee's turnover of tobacco in a previous period did not constitute a duty of excise. The combined outcomes in *Dennis Hotels* and in *Dickenson's Arcade* spawned over the next three decades a narrow but increasingly fiscally significant category of so-called "franchise cases"[83] in which taxes framed as fees for holding licences to sell goods in wholesale or retail contexts, calculated by reference to licensees' sales or purchases during previous periods, were accepted not to amount to duties of excise[84].

52 Outside that category of franchise cases, the criterion of liability approach was in practice either expressly rejected or tacitly ignored by majorities in a series of cases in which State taxes levied in different ways at different stages in the production, distribution or sale of goods were held to be duties of excise. Those cases notably included *Swift Australian Co (Pty) Ltd v Boyd Parkinson*[85], *M G Kailis (1962) Pty Ltd v Western Australia*[86] and *Gosford Meats Pty Ltd v New South Wales*[87] (in each of which a tax imposed on a producer of goods framed as a periodic fee calculated by reference to production in a previous period was held to be a duty of excise), *Western Australia v Chamberlain Industries Pty Ltd; Victoria v IAC (Wholesale) Pty Ltd*[88] and *Western Australia v Hamersley Iron Pty Ltd [No 1]*[89] (in each of which stamp duties calculated by reference to the purchase price of goods were held to be duties of excise) and *Hematite Petroleum Pty Ltd v*

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83 See *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 582.

84 See *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475; *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399; *Coastace Pty Ltd v New South Wales* (1989) 167 CLR 503.

85 (1962) 108 CLR 189.

86 (1974) 130 CLR 245.

87 (1985) 155 CLR 368.

88 (1970) 121 CLR 1.

89 (1969) 120 CLR 42.

Victoria[90] (in which a tax framed as a large lump-sum fee for the holding of a licence to operate hydrocarbon pipelines was held to be a duty of excise).

A proliferation of approaches

53 As the cases multiplied, discernibly different approaches became apparent. The differences were such that it was apparent by the time *Capital Duplicators [No 2]* came to be decided that there was simply "no judicial consensus as to the meaning or application of the expression 'duties of excise' in s 90"[91]. At the risk of oversimplification, and thereby of being taken to suggest that clearer and more consistent lines of demarcation existed than were in fact observable in practice, three broadly competing judicial approaches vied for acceptance.

54 Predominating other than in the franchise cases was the approach of those – prominently, Barwick CJ[92], Mason J[93] and Deane J[94] – who maintained that the purpose of s 90 was that identified by Dixon J in *Parton* and who accordingly favoured the broad substantive approach to the determination of whether a tax constituted a duty of excise articulated by Dixon J in *Matthews*. The predominance of that approach was exemplified by the majority outcomes in *Chamberlain Industries* and in *Hematite Petroleum*.

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90 (1983) 151 CLR 599.

91 See *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 582.

92 See *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 12-17.

93 See *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 631-632; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 426.

94 See *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 660-662; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 426.

55 By contrast, there were those – in particular, Fullagar J[95], Murphy J[96], Dawson J[97] and Toohey and Gaudron JJ[98] – who saw the purpose of the section as more narrowly confined to safeguarding Commonwealth tariff policy, and who would have confined its reference to excise accordingly to taxes which fell selectively on goods produced or manufactured in a State (or in Australia). Theirs was always a minority view and would remain the view of the minority comprising Dawson, Toohey and Gaudron JJ in each of *Capital Duplicators [No 2]*[99] and *Ha*[100].

56 Then there were those – including Gibbs CJ[101], Stephen J[102] and Jacobs J[103] – who either eschewed (as futile) or abandoned (as elusive) any quest to identify a meaningful constitutional purpose, and who were in varying degrees concerned about the practical effect of the prevailing view on the ability of States to raise revenue in an economically rational manner. These Justices sought to achieve a measure of consistency in the application of s 90 through close adherence

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95 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 554-555.

96 See *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 527; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84-85; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 638; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 387-388.

97 See *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 617. But see earlier *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 411-412; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 469-474.

98 See *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 478-480; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 630-631.

99 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 609, 617-618 (Dawson J), 627-628, 631 (Toohey and Gaudron JJ).

100 *Ha v New South Wales* (1997) 189 CLR 465 at 506-507, 512, 514 (Dawson, Toohey and Gaudron JJ).

101 See *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 616-618.

102 See *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 229-230; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 497.

103 See *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 522-524.

to precedent, and in so doing were prepared to adhere to a version of the criterion of liability approach even as that approach became increasingly strained.

57 Adding to the complexities attributable to those unresolved differences in judicial approach was another complication. The question whether the constitutional conception of an excise is confined to goods produced or manufactured in Australia remaining open[104], echoes of the approach of Rich and Williams JJ in *Parton* were from time to time heard in some explanations of how a tax on the sale or distribution of goods could be said to be a duty of excise. These explanations started with the notion that the basal conception of an excise was that of a tax which burdens the production or manufacture of goods. They went on to identify the reason why a tax on the sale or distribution of goods could amount to an excise as lying in the tendency of the tax to enter the price of the goods so as to decrease demand and in that way to have a commercial impact on their manufacture or production. A propensity to engage in explanations of that sort was apparent amongst some who maintained that the purpose of s 90 was as had been identified by Dixon J in *Parton* and who accordingly adhered to the *Matthews* methodology[105], just as it was apparent amongst some who were otherwise committed to the criterion of liability approach[106].

The resolution

58 Such was the multiplicity of judicial approaches and such was the complexity of constitutional doctrine when, in the aftermath of having revisited the case law on s 92 in *Cole v Whitfield* and in *Bath v Alston Holdings Pty Ltd*[107], the Court was called on to reconsider the case law on s 90 in *Capital Duplicators [No 2]*, and then again in *Ha* in the context of reconsidering and affirming *Capital*

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104 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 540, 598; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 12-13; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 469.

105 See *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 55-56; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 12-13; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 633-634; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 383.

106 *See Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 374; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 218, 223; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 411-413.

107 (1988) 165 CLR 411.

Duplicators [No 2] and reappraising and ultimately departing from the trajectory of the franchise cases.

59 For present purposes, what is important to recognise is that the denouement ultimately arrived at through the majority decisions in *Capital Duplicators [No 2]* and *Ha* entailed: (1) definitive resolution, in the affirmative, of the previously unresolved question of whether an inland tax on imported goods amounted to a duty of excise; (2) with that resolution, rejection of the approach of Rich and Williams JJ in *Parton* of confining a duty of excise to a tax on production or manufacture; (3) unequivocal acceptance of the constitutional purpose identified by Dixon J in *Parton*; and (4) with that acceptance, unequivocal commitment to the broad substantive approach to the determination of whether a tax is a duty of excise articulated by Dixon J in *Matthews*.

The purpose and scope of s 90

60 *Capital Duplicators [No 2]* and *Ha* need to be read with *Capital Duplicators Pty Ltd v Australian Capital Territory* ("*Capital Duplicators [No 1]*")[108].

61 *Capital Duplicators [No 1]* held that the exclusivity of the legislative powers of the Commonwealth Parliament to which s 90 refers is exclusivity of authority to legislate with respect to customs, excise and bounties for the whole of the geographic area of Australia, including such territory as might be surrendered by a State under s 111 so as to "become subject to the exclusive jurisdiction of the Commonwealth". The Commonwealth Parliament itself was held to lack capacity to deny that exclusivity by conferring power incompatible with it on the legislature of a self-governing Territory by a law enacted under s 122 "for the government" of that Territory[109].

62 The plurality in *Capital Duplicators [No 1]* tied that holding about the nature of the exclusivity to which s 90 refers to the nature of the Australia-wide "free trade area", creation of which *Cole v Whitfield* had shown to be "one of the objectives of ... federation"[110]. Explaining why it was "a mistake to regard s 90 as doing no more than allocating the legislative powers to which it refers as between the Commonwealth and the States", the plurality said of s 90 that "[i]t confined to the Parliament the power to impose duties of customs and excise and to grant

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108 (1992) 177 CLR 248.

109 (1992) 177 CLR 248 at 279, 290.

110 (1992) 177 CLR 248 at 274.

bounties as 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 and uniformity in duties of customs and excise and in bounties"[111].

63 The plurality in *Capital Duplicators [No 1]*[112] endorsed the following earlier observations of Deane J in *Hematite Petroleum*[113]:

> "[T]he provision of s 90 of the Constitution that the power of the Commonwealth Parliament to impose duties of excise shall be exclusive cannot properly be seen as part of a merely arbitrary division of legislative powers between the Commonwealth and the States. To the contrary, that provision – or some other means of ensuring uniformity of excise duties throughout Australia – was a necessary ingredient of any acceptable scheme for achieving the abolition of internal customs barriers which was an essential objective of the Federation and for ensuring that the people of the Commonwealth were guaranteed equality as regards the customs and excise duties which they were required to bear and the bounties which they were entitled to receive."

64 The plurality in *Capital Duplicators [No 1]* noted that "[d]uties of excise are taxes which are likely to be borne by the consumer" such that "[w]herever they be imposed, they are likely to be borne where the goods are acquired for consumption". "If s 90 is to play its part in achieving the 'essential objective' of abolishing internal customs barriers and in guaranteeing equality as regards the customs and excise duties which the people of the Commonwealth are to bear", the plurality said, "it must be construed as restricting to the Parliament the sole legislative power to impose duties of customs and excise and to grant bounties on the production or export of goods"[114].

65 Understood against the background of *Capital Duplicators [No 1]*, the overlapping majorities in *Capital Duplicators [No 2]* and *Ha* can be seen to have justified the "high constitutional purpose"[115] identified by Dixon J in *Parton* (and the concomitant methodological inquiry articulated by Dixon J in *Matthews*) by

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111 (1992) 177 CLR 248 at 277-278.

112 (1992) 177 CLR 248 at 278.

113 (1983) 151 CLR 599 at 661-662.

114 (1992) 177 CLR 248 at 278.

115 (1993) 178 CLR 561 at 586.

reference to the centrality of s 90 to the operation of three interlocking and complementary groups of constitutional provisions. The provisions combined, as would be put in *Betfair Pty Ltd v Western Australia*[116] with reference to *Ha*, to facilitate "[t]he creation and fostering of national markets [which] would further the plan of the *Constitution* for the creation of a new federal nation and would be expressive of national unity".

66 The first of those three groups of constitutional provisions comprises s 86, s 88, s 90 itself, and s 92. Section 86 operated automatically at federation to pass the collection and control of duties of customs and excise, and the control of the payment of bounties, to the Executive Government of the Commonwealth. Its immediate implementation was facilitated by provision within s 69 to the effect that "the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment". Section 88 required the Commonwealth Parliament to impose "[u]niform duties of customs" within two years of federation. That event, which in fact occurred with the commencement of the *Customs Act 1901* (Cth) in 1901[117], triggered the complementary operation of ss 90 and 92, which were from then on each to have enduring and unqualified operation.

67 As authoritatively interpreted in *Cole v Whitfield*, s 92 relevantly operates to prohibit State border taxes on goods and to prohibit State inland taxes which would discriminate against imported goods to the benefit of local producers or sellers[118]. However, s 92 standing alone would do nothing to counter distortions in the flow of interstate trade in goods which could arise from different States imposing different levels of taxation on the same goods. Worse than that, *Bath v Alston Holdings Pty Ltd* illustrates that s 92 would operate as an impediment to a State attempting to counter such a distortion. There, s 92 was held to prevent a State from imposing an "equalizing" tax upon its retailers in respect of their purchases of products from lower-taxed wholesalers in other States[119].

68 The second of the three groups of constitutional provisions comprises s 51(ii) and (iii) and s 99. Section 51(ii) empowers the Commonwealth Parliament to make laws with respect to "taxation". Section 51(iii) empowers the

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116 (2008) 234 CLR 418 at 452 [12].

117 *Customs Act 1901* (Cth), s 2; *Commonwealth of Australia Gazette*, No 50, 3 October 1901 at 165.

118 (1988) 165 CLR 360 at 391, 393, 395.

119 (1988) 165 CLR 411 at 427.

Commonwealth Parliament to make laws with respect to "bounties on the production or export of goods". Each is expressly qualified: a Commonwealth law imposing taxation is "not to discriminate between States or parts of States", and such bounties as might be conferred by or under a Commonwealth law "shall be uniform throughout the Commonwealth". Overlapping in its operation with those qualifications, s 99 provides that "[t]he Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof". Prohibited by each, in different ways, is geographic discrimination in the incidence of Commonwealth taxation within the territory of Australia.

69 The power conferred on the Commonwealth Parliament by s 51(ii) to make laws with respect to taxation has also been recognised to be subject to an inherent limitation. The limitation is inherent in the nature of the power as a power with respect to Commonwealth taxation: it "has never been, and, consistently with the federal character of the Constitution could not be, construed as a power over the whole subject of taxation throughout Australia, whatever parliament or other authority imposed taxation"[120]. The significance of that inherent limitation, as Professor Leslie Zines pointed out[121], appears on occasion to have been overlooked in dicta which have assumed unfettered capacity on the part of the Commonwealth Parliament to enact laws which would operate through s 109 to invalidate State laws which might frustrate Commonwealth policy concerning the taxation of goods[122].

70 The third group of constitutional provisions comprises ss 53 and 55. Section 53 is "a procedural provision governing the intra-mural activities" of the Commonwealth Parliament[123]. Relevantly, it restricts the Senate from initiating or amending, but not from rejecting, proposed laws "imposing taxation". Section 55 is designed to protect the Senate from possible abuses of that restriction in s 53. It relevantly provides that "[l]aws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only". The purpose of the

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120 *Victoria v The Commonwealth* (1957) 99 CLR 575 at 614.

121 Zines, *The High Court and the Constitution*, 5th ed (2008) at 479-481.

122 eg *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617, 631, 637.

123 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 409 [41], quoting *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 482.

section so providing is to "prevent the House of Representatives from sending to the Senate a single Bill containing a large number of unrelated taxing laws with the consequence that the Senate, being unable to amend the Bill, could reject the taxing provisions of which it did not approve only by also rejecting those of which it approved"[124].

71 The majority in *Capital Duplicators [No 2]*, comprising Mason CJ, Brennan, Deane and McHugh JJ, explained how a proper understanding of the relationship between the first two of those groups of constitutional provisions supports the constitutional purpose of s 90 identified by Dixon J in *Parton*. The majority said[125]:

> "[Sections] 90 and 92, taken together with the safeguards against Commonwealth discrimination in s 51(ii) and (iii) and s 88, created a Commonwealth economic union, not an association of States each with its own separate economy. Section 92 of the Constitution ensured that the domestic market of each State be opened equally to goods from interstate and goods of local production or manufacture, but that would not have been sufficient by itself to create a Commonwealth economic union. Differential taxes on goods, if permitted, could have distorted local markets within the Commonwealth. That possibility was averted by ss 51(ii) and (iii), 86, 88, 90 and 92 of the Constitution which created a single legislative authority to impose taxes on goods and to grant bounties and required those powers to be exercised uniformly. ... The purpose is not difficult to detect. It 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."

72 That reasoning led the majority to approve the statement of the constitutional purpose of s 90 made by Dixon J in *Parton* and then to amplify what Dixon J had added in *Parton* about the similarity in effect of a tax on manufacture or production and a tax on distribution by emphasising the similarity of their effects on purchasers. The majority then put it that "[a] tax on distribution, like a tax on production or manufacture, has a natural tendency to be passed on to purchasers

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124 *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 456.

125 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 585 (footnotes omitted).

down the line of distribution and thus to increase the price of, and to depress the demand for, the goods on which the tax is imposed"[126].

73 The majority in *Capital Duplicators [No 2]* went on to explain acceptance of the constitutional purpose of s 90 as identified by Dixon J in *Parton* to be the main reason for rejecting the view of the minority that a tax which imposes a duty indifferently on imported goods and locally produced or manufactured goods falls outside the scope of the section. The majority expressed its conclusion as follows[127]:

> "Adhering to that view of the purpose of s 90, the term 'duties of customs and of excise' in s 90 must be construed as exhausting the categories of taxes on goods. That leaves the question whether a tax on goods should be classified as a duty of customs to the extent to which it applies to imported goods and a duty of excise to the extent to which it applies to goods of local production or manufacture. Some support can be found for this distinction. However, once it is accepted that duties of excise are not limited to duties on production or manufacture, we think that it should be accepted that the preferable view is to regard the distinction between duties of customs and duties of excise as dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution – inland taxes – in the case of excise duties. It is unnecessary in this case to consider taxes on the consumption of goods."

74 In a footnote to the penultimate sentence of that expression of conclusion, the majority in *Capital Duplicators [No 2]* observed that the meaning so attributed to "excise" accorded with the view of Rich J in *Commonwealth Oil Refineries* and *John Fairfax*, adding with reference to *Matthews*, *Parton* and *Dennis Hotels* that it was "perhaps the preferred view of Dixon J"[128].

75 The differently constituted majority in *Ha*, comprising Brennan CJ, McHugh, Gummow and Kirby JJ, revisited and endorsed the conclusion and reasoning of the majority in *Capital Duplicators [No 2]*, including both its acceptance of the constitutional purpose of s 90 identified by Dixon J in *Parton*

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126 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 586.

127 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 590 (footnotes omitted).

128 (1993) 178 CLR 561 at 590, footnote 40.

and its recognition of the consequences of that acceptance for the respective meanings of "customs" and "excise"[129].

76 The majority in *Ha* also referred to three considerations supporting the conclusion in *Capital Duplicators [No 2]* which had not been specifically addressed by the majority in that case. First, they explained how the meanings attributed to the words in s 90 involved no inconsistency with the language and structure of s 93 (which together with s 95 made transitional provision for the sharing of revenue from the collection by the Commonwealth of duties of customs and excise during the first five years of federation)[130]. Second, they drew attention to the consistency of the constitutional purpose identified by Dixon J in *Parton* with the purpose of enlarging the powers of self-government of the people of Australia identified during the National Australasian Convention in Adelaide in 1897 as the reason for requiring the Commonwealth Parliament to have the sole power and authority to impose duties of customs and of excise and to grant bounties upon the production or export of goods[131].

77 Third, the majority in *Ha* explained how the meanings attributed to "customs" and "excise" in *Capital Duplicators [No 2]* best fit the use of the same words in s 55. The essential point made was that, for s 55 to operate, a tax on goods must be capable of being determined to be, or not to be, a duty of customs or a duty of excise at the time of enactment of the law which imposes it. The operation of the section therefore cannot depend on the provenance of the goods on which the incidence of the tax might later be shown in fact to fall[132].

78 Echoing the language in which the conclusion of the majority in *Capital Duplicators [No 2]* had been cast, the majority in *Ha*, having explained the conclusion to "accord with the *Parton* doctrine", said[133]:

> "Therefore we reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with

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129 *Ha v New South Wales* (1997) 189 CLR 465 at 488-490.

130 (1997) 189 CLR 465 at 491-493.

131 (1997) 189 CLR 465 at 495-496.

132 (1997) 189 CLR 465 at 496-497.

133 (1997) 189 CLR 465 at 499-500 (footnote omitted).

goods. In this case, as in *Capital Duplicators Case [No 2]*, it is unnecessary to consider whether a tax on the consumption of goods would be classified as a duty of excise."

79 Much energy was expended during argument on the special case parsing the terms in which the conclusions in *Capital Duplicators [No 2]* and *Ha* were expressed. The following things are clear. The conclusion in *Ha* was intended to be an unqualified reaffirmation of the conclusion in *Capital Duplicators [No 2]*. Each conclusion stated a duty of excise to be an "inland tax on goods". Each eschewed the description of a duty of excise as an "indirect tax" on goods. Each eschewed the description of a duty of excise as a "trading tax". Each specifically reserved for consideration on another occasion whether a tax on the consumption of goods could be classified as a duty of excise. That reservation means that the reference in each to duties of excise being taxes on the production, manufacture, sale or distribution of goods must be taken to be descriptive and not exhaustive: the description was of dealings in goods which had in the past been targeted for State duties which had in the past been held to have been duties of excise. The reservation also means that such acknowledgement as was given by the majorities in *Capital Duplicators [No 2]*[134] and *Ha*[135] to the continuing utility of the *Bolton v Madsen* formulation insofar as it described a duty of excise as a tax on "the taking of a step" in a process which ended at the point of receipt of goods by the consumer cannot be taken to have been an adoption of the *Bolton v Madsen* formulation as if it were a definition.

80 Most importantly, the conclusions in *Capital Duplicators [No 2]* and *Ha* were founded squarely on acceptance of the constitutional purpose of s 90 being that identified by Dixon J in *Parton*. That purpose, restated in light of *Capital Duplicators [No 1]*, is to give the Commonwealth Parliament exclusive control of the taxation of goods so as to ensure that the execution of whatever policy the Commonwealth Parliament might choose to implement through the enactment of uniform laws of trade, commerce or taxation could not be hampered or defeated by State or Territory taxation of goods.

81 The question put to one side by the majorities in *Capital Duplicators [No 2]* and *Ha* for consideration on another occasion now squarely arises and must now be determined.

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134 (1993) 178 CLR 561 at 583.

135 (1997) 189 CLR 465 at 490.

Taxes on consumption

A recapitulation

82 Turning now to address the question whether a tax on goods at the stage of consumption should continue to be regarded as outside the constitutional conception of excise, and in so doing to address the status of *Dickenson's Arcade*, it is appropriate to recall and elaborate on four matters in the historical narrative.

83 The first matter assumes contemporary significance having regard to the observation of the majority in *Capital Duplicators [No 2]* that the meaning of the constitutional term adopted there and later in *Ha* accorded with the view of Rich J in *Commonwealth Oil Refineries* and *John Fairfax*[136]. It is to be recalled that the view of Rich J, as he then expressed it, was that duties of excise encompassed "duties upon goods collected in respect of use, consumption or sale"[137]. His added expression of opinion that the *Constitution* "gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods" appears to have been an outworking of that broad conception rather than a confinement of it.

84 The second matter to recall is that the basal conception of a duty of excise as a tax on goods expounded by Dixon J in *Matthews* was explained by him in that case to encompass a duty on goods collected in respect of their consumption. To fall within the conception, Dixon J then said, "[t]he 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"[138].

85 The third matter to recall is that the modification to the explanation in *Matthews*, to remove the reference to a tax relating to the consumption of goods, was introduced by Dixon J in *Parton* solely in deference to the intervening decision of the Privy Council in *Atlantic Smoke Shops*. Exactly why Dixon J felt that *Atlantic Smoke Shops* created a need to introduce the modification in *Parton* was

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136 See [74] above.

137 See [33] above.

138 See [36] above.

not spelt out by him in that or any subsequent case. The question has puzzled judges[139] and commentators[140]. The nature of the puzzle calls for some elaboration.

86 The tentative language with which Dixon J introduced the modification is not irrelevant. The tentative language is understandable when regard is had to what was in issue in *Atlantic Smoke Shops* and to the passage in the reasoning of the Privy Council which his Honour appears to have had in mind.

87 In issue in *Atlantic Smoke Shops* was the validity of a retail tobacco tax imposed by the Legislature of the Province of New Brunswick at the rate of ten per cent of the retail price. The tax was imposed on anyone who purchased tobacco "for his own consumption or for the consumption of other persons at his expense" and was payable by the retailer, who was for that purpose constituted the agent of the purchaser. The Privy Council concluded that the tax was "direct" according to Mill's distinction between "direct" and "indirect" taxation by reason of it being paid and borne by the same person – the purchaser. The tax was therefore within the legislative power of New Brunswick.

88 The Privy Council continued[141]:

> "There remains, on this first head, the question whether, notwithstanding that the tax ... is 'direct' within Mill's test, it is none the less beyond the powers of the province to impose as being in the nature of 'excise' in the sense that the attempted imposition would be an alteration of the 'excise laws' of New Brunswick which the provincial legislature is debarred from affecting under ... the British North America Act. 'Excise' is a word of vague and somewhat ambiguous meaning. Dr Johnson's famous definition in his dictionary is distinguished by acerbity rather than precision. The word is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect. A further difficulty in the way of the precise application of

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139 See *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185, 204.

140 See Arndt, "Judicial Review under Section 90 of the Constitution: An Economist's View" (1952) 25 *Australian Law Journal* 667 at 676; Nicolee Dixon, "Section 90 – Ninety Years On" (1993) 21 *Federal Law Review* 228 at 231; Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 *Melbourne University Law Review* 296 at 301, 304.

141 [1943] AC 550 at 564-565, quoting *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45 at 55.

> the word is that many miscellaneous taxes, at any rate in this country, are classed as 'excise' merely because they are for convenience collected through the machinery of the Board of Excise – the tax on owning a dog, for example. Their Lordships do not find it necessary in the present case to determine whether this tobacco tax ... is for any purpose analogous to an excise duty, for it is enough to accept and apply the proposition laid down on behalf of this Board by Lord Thankerton in the *Kingcome* case, namely, 'that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax'".

89 When that passage is analysed, it is apparent that the Privy Council was saying nothing definitive about the word "excise". Quite the opposite. The Privy Council was stressing that the meaning of the word was "vague and somewhat ambiguous" and that, although the word was "usually" used "to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer", it was "by no means always" so used. The Privy Council did not need, and was not attempting, to define the word. That was because it did not need to decide, and was not deciding, whether the tobacco tax in issue was or was not a duty of excise. The point it was making was that whether the tobacco tax was or was not a duty of excise simply did not matter to its decision. The point was that, either way, the tobacco tax remained a direct tax.

90 From that tentative and inauspicious beginning, the first proposition drawn by Dixon J in *Parton* from *Atlantic Smoke Shops* – to the effect that it was "probably a safe inference" that "a tax on consumers" could not be a duty of excise – was not taken up in any subsequent case and therefore would go nowhere. As will be seen, that first proposition would end up being contradicted by the actual outcome in *Dickenson's Arcade*. Yet the second proposition drawn by his Honour in the same sentence in *Parton* from the same source – to the effect that a tax levied at the stage of consumption could not be a duty of excise – was to be taken up in the *Bolton v Madsen* formulation and would from there acquire a life of its own.

91 The fourth of the matters appropriate to be recalled from the historical narrative is the sequence of events by which that occurred. The description of a duty of excise given by Dixon J in *Matthews* as modified by him in *Parton* to delete the reference to consumption was picked up, without further analysis, by Kitto J in *Dennis Hotels*. There it fed into Kitto J's formulation of the proposition which was later adopted, again without analysis, in *Bolton v Madsen* that "a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process ...

which reaches from the earliest stage in production to the point of receipt by the consumer"[142].

Dickenson's Arcade

92 That brings us to *Dickenson's Arcade*. By the time *Dickenson's Arcade* came to be decided, *Bolton v Madsen* had stood for over a decade. The "criterion of liability" aspect of the formulation was by then under strain, having been questioned or implicitly departed from by a majority in *Chamberlain Industries*[143]. The question of the correctness of its description of the stages at which a tax on goods would constitute a duty of excise as terminating at the point of receipt by the consumer had not before then arisen for consideration.

93 The legislative context in which that question arose in *Dickenson's Arcade* was highly contrived[144]. The Tasmanian legislative provisions relevantly in issue had been designed, with the *Parton* qualification in mind, to take up aspects of the New Brunswick scheme upheld in *Atlantic Smoke Shops*. Those legislative provisions were expressed to impose a tax "on the consumption of tobacco", at the rate of seven and a half per cent of the value of the amount consumed calculated according to the price at which tobacco of that kind was ordinarily sold by retail, and to empower the making of regulations to provide for any convenient method of collecting the tax. Provisions of regulations, also in issue, set out an elaborate scheme the effect of which was to constitute tobacco retailers as collectors of the tax which would become payable on the consumption of the tobacco they sold and to incentivise them to collect the tax from the purchaser in advance of consumption at the time of retail sale. The obvious intent was that the amount of the tax would in practice simply be added to the retail price.

94 The Court in *Dickenson's Arcade* comprised Barwick CJ, McTiernan, Menzies, Gibbs, Stephen and Mason JJ. By a majority, comprising Menzies, Gibbs, Stephen and Mason JJ, it held the legislative provisions to be valid. By a differently constituted statutory majority[145], comprising Barwick CJ, McTiernan

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142 See [47] above.

143 See [54] above. See also *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365-366; *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 55, 69.

144 See Sawer, "The Future of State Taxes: Constitutional Issues", in Mathews (ed), *Fiscal Federalism: Retrospect and Prospect* (1974) 193 at 202-203.

145 See s 23(2)(b) of the *Judiciary Act 1903* (Cth).

and Mason JJ, it held the regulations to be invalid. Each member of the Court gave separate reasons for judgment.

95 Barwick CJ defined "consumption" in relation to goods to involve "the act of the person in possession of the goods in using them or in destroying them by use"[146]. The parties and interveners in the present case were content with that definition, which treats consumption as something which occurs in relation to goods after the point referred to in the *Bolton v Madsen* formulation as "the point of receipt by the consumer".

96 Barwick CJ opined that there was "no logical reason ... for ending at the point of entry into consumption the area which might yield a duty of excise"[147]. That said, on the authority of *Bolton v Madsen*, he was prepared to accept that "a tax upon the act of consuming goods, completely divorced from the manner or time of their acquisition by purchase", was to be "regarded as outside the scope of s 90 and within the competence of a State legislature"[148]. Having regard to the inherent unlikelihood of a smoker ever paying the tax at the time of smoking, however, he inferred the legislative intention to be that the tobacco tax would in practice be payable by a retail purchaser of tobacco and would be collected at the point of purchase. That led him to the conclusion that the tax, in substance, was not on the consumption of tobacco but on the movement of the tobacco into consumption. On that basis, it was a duty of excise[149]. The legislative provisions were therefore invalid, and with them the regulations.

97 McTiernan J alone was prepared to reject the *Bolton v Madsen* formulation and to return to the explanation of a duty of excise given by Dixon J in *Matthews* shorn of the modification in *Parton*[150].

98 Menzies J adhered to the *Bolton v Madsen* formulation, from which he drew the proposition that "[a] tax upon consumption is, therefore, not a duty of

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146 (1974) 130 CLR 177 at 187.

147 (1974) 130 CLR 177 at 185.

148 (1974) 130 CLR 177 at 186.

149 (1974) 130 CLR 177 at 193-194.

150 (1974) 130 CLR 177 at 204.

excise"[151]. He singled out for rejection the broad conception of s 90 first expounded by Rich J in *Commonwealth Oil Refineries*[152].

99 Gibbs J noted[153] the difference between the approaches in *Parton* of Rich and Williams JJ, on the one hand, and of Dixon J, on the other hand, to which attention has been drawn[154]. Gibbs J opined that there was no reason in principle why taxes on consumption should be excluded from the category of duties of excise on either of those approaches.

100 In relation to the approach of Rich and Williams JJ, Gibbs J said that "[i]f a tax on the sale of goods can be regarded as a method of taxing their production or manufacture, it is difficult to see why a tax on their consumption should not be similarly regarded"[155]. In relation to the approach of Dixon J, Gibbs J said[156]:

> "However, if it is permissible to consider the economic effect of the tax, it is impossible, in my opinion, to draw a line between the last retail sale and the act of consumption. A tax on consumption might produce exactly the same economic effect on production and manufacture as would a tax on the last retail sale. The power of the Commonwealth Parliament to tax commodities would be incomplete, and its fiscal policies possibly liable to some frustration, if the power did not extend to taxes on consumption."

101 Gibbs J noted that *Bolton v Madsen* was not binding as to what it had said about a tax on goods being a duty of excise only to the point of receipt by the consumer[157] and that the question whether a duty imposed on consumption is a duty of excise had not previously been the subject of direct decision of the Court[158]. Gibbs J nonetheless chose to adhere to the *Bolton v Madsen* formulation, giving

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151 (1974) 130 CLR 177 at 209.

152 (1974) 130 CLR 177 at 212.

153 (1974) 130 CLR 177 at 218-219.

154 See [38]-[39] above.

155 (1974) 130 CLR 177 at 218.

156 (1974) 130 CLR 177 at 219.

157 (1974) 130 CLR 177 at 221.

158 (1974) 130 CLR 177 at 220.

the unanimous decision "the very greatest weight"[159]. From it, he drew the proposition that "[u]pon its proper construction s 90 stops short of denying power to the States to impose taxes on consumption"[160].

102 Stephen J also adhered to the *Bolton v Madsen* formulation in the absence of "convincing reasons" for departing from it[161] and ventured two reasons of principle why a tax on consumption should not be regarded as a duty of excise. He expressed both in language drawn from decisions of the Privy Council concerning the *British North America Act*. One was that a tax on consumption is "a direct, not an indirect, tax". As a direct tax, a tax on consumption was said to be "inherently less closely related to goods" than an indirect tax[162]. The other was that "both customs and excise duties are duties imposed in respect of commercial dealings in commodities and are, in their essence, trading taxes; a tax on consumption is of its nature not such a tax"[163].

103 Mason J considered that *Bolton v Madsen* and the cases in which its formulation had been repeated "must ... be regarded as establishing at this time that a tax on consumption of goods is not an excise". He noted that "[t]he limitation which they place on the concept necessarily involves a restriction on the power of the Commonwealth to control the taxation of commodities" but also noted that "a tax on consumption which is not also a tax on sale of goods is a phenomenon infrequently encountered" so that "the restriction concedes to the Commonwealth a large measure of control"[164].

104 Looking to rationalise the limitation, Mason J echoed the approach of Rich and Williams JJ in *Parton* in saying that "[t]he justification for the restriction is evidently based on the notion that consumption is not sufficiently proximate to the production and manufacture of goods"[165]. Not attempting to defend the limitation in point of principle, however, his Honour did not engage with the scepticism

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159 (1974) 130 CLR 177 at 221.

160 (1974) 130 CLR 177 at 222.

161 (1974) 130 CLR 177 at 229-230.

162 (1974) 130 CLR 177 at 230-231.

163 (1974) 130 CLR 177 at 231.

164 (1974) 130 CLR 177 at 239.

165 (1974) 130 CLR 177 at 239.

expressed by Gibbs J[166] about the soundness of that justification according to that approach. There is no reason now to engage with that scepticism, given that the approach of confining a duty of excise as a tax which burdens the production or manufacture of goods has been overtaken by *Capital Duplicators [No 2]* and *Ha*.

105 Had the legislative provisions imposing the tobacco tax stood alone, Mason J would have concluded that they imposed "a tax on the consumption of goods and therefore not an excise"[167]. Taking the regulations into account, however, he concluded that the substantive effect of the tax was as an excise on the basis that it was "a levy on the sale of goods calculated by reference to their value and imposed before they pass[ed] into the hands of the consumer in circumstances where the amount of the tax [was] paid by the ultimate purchaser"[168].

106 What can be seen, therefore, is that although five of the six members of the Court in *Dickenson's Arcade* were prepared to accept the *Bolton v Madsen* formulation, insofar as that formulation treated a tax on goods as a duty of excise only to the point of receipt by the consumer, only one of them, Stephen J, sought to proffer a principled defence of that limitation. The other four included Barwick CJ and Mason J, who unequivocally rejected[169] the criterion of liability aspect of the *Bolton v Madsen* formulation and who formed part of the statutory majority which held the regulations invalid.

107 Ironically, having regard to the source of the limitation in the *Bolton v Madsen* formulation and to the provenance of the Tasmanian legislation in issue, the invalidity of the regulations meant that the outcome in *Dickenson's Arcade* turned out to be the opposite of the outcome in *Atlantic Smoke Shops*. The outcome in *Atlantic Smoke Shops* had been that a Provincial tax on goods payable by the retail purchaser at the time of retail purchase at an ad valorem rate on the retail price was valid, as a direct tax. The outcome in *Dickenson's Arcade* was that a State tax on goods payable by the retail purchaser at the time of retail purchase at an ad valorem rate on the retail price was invalid, as a duty of excise.

108 The consequence of the invalidity of the regulations in *Dickenson's Arcade* was that the tax legislatively imposed on the consumption of tobacco was for

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166 (1974) 130 CLR 177 at 218.

167 (1974) 130 CLR 177 at 242.

168 (1974) 130 CLR 177 at 243.

169 (1974) 130 CLR 177 at 186, 241.

practical purposes uncollectable. Collection of the tax was abandoned by the Tasmanian Government in 1974[170]. The legislative provisions imposing it were repealed by the Tasmanian Parliament in 1980[171]. They were not then, and have not since been, replicated in any other State or Territory.

Logan Downs

109 Three years after *Dickenson's Arcade*, a question concerning the characterisation of a tax on goods imposed at the stage of their consumption, in the broad sense in which that term had been defined by Barwick CJ, was touched on in *Logan Downs Pty Ltd v Queensland*[172]. The Queensland legislative provision there in issue empowered the levying of an annual assessment "on each and every owner of stock ... in respect of stock owned by him". The levy in issue was imposed on the plaintiff in respect of sheep, cattle and pigs, and a small number of stock horses. The sheep, cattle and pigs were to be sold for meat. The stock horses, in contrast, were kept for work.

110 The argument in *Logan Downs* was that the stock levy was a duty of excise, except insofar as it was imposed in respect of the plaintiff's stock horses, on the basis that the sheep, cattle and pigs were articles of commerce in the course of production[173]. The argument was rejected by Gibbs and Jacobs JJ (each adhering to the criterion of liability approach[174]) and by Murphy J. But it was accepted by a statutory majority comprising Barwick CJ, Stephen and Mason JJ.

111 Barwick CJ agreed with Mason J, who applied the substantive approach of Dixon J in *Matthews*. Mason J stressed that "a sufficiently direct relationship between the tax and the goods may be established in circumstances where it is not possible to demonstrate that the imposition has increased the cost of goods to a purchaser by a calculable amount"[175].

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170 Sawer, "The Future of State Taxes: Constitutional Issues", in Mathews (ed), *Fiscal Federalism: Retrospect and Prospect* (1974) 193 at 203-204.

171 Section 46 of the *Tobacco Business Franchise Licences Act 1980* (Tas).

172 (1977) 137 CLR 59.

173 (1977) 137 CLR 59 at 60.

174 (1977) 137 CLR 59 at 64-65, 80-82.

175 (1977) 137 CLR 59 at 76.

112 Stephen J concluded that the stock levy was a duty of excise, insofar as it was imposed in respect of the sheep, cattle and pigs. He expressed the basis for that conclusion to be that, unlike the stock horses, the sheep, cattle and pigs were goods "in the stream of production"[176]. Explaining that basis for the conclusion, Stephen J expanded on the reasons he had given in *Dickenson's Arcade* for supporting the *Bolton v Madsen* treatment of a tax on goods imposed after receipt by a consumer as outside the conception of a duty of excise. The expanded explanation was the subject of attention in argument on the special case and is therefore best reproduced in full.

113 Stephen J said in *Logan Downs*[177]:

> "It is not simply the taxing of goods that distinguishes the incidence of an excise duty from that of other taxes; it is rather the taxing of goods during the process by which they are first brought into existence and then ultimately pass to the consumer or user. A tax upon the ownership of goods after that process is at an end, the goods having come to the hands of the ultimate user, is no duty of excise. Once out of the stream of production and distribution, goods cease to be apt subject-matter for duties of excise and it is this that accounts for the character of an excise as an indirect tax; being imposed upon goods in the particular way it is, its incidence will tend to be passed on in the price of the goods, as they flow along the stream of production and distribution to the end user. But a tax upon goods which have reached the hands of the ultimate consumer will, on the contrary, impose a quite direct form of taxation upon their owner. The goods will not pass out of his hands, bearing with them, as a component of their price, the tax imposed upon them; instead the tax will lie where it falls, upon the owner. It will thus lack the quality of a duty of excise and be a direct tax upon the owner, the goods only providing the means of identifying the person to be taxed."

Subsequent consideration

114 Save for what was said in passing about consumption in *Capital Duplicators [No 2]* and *Ha*, nothing more has been said on that topic in any other substantive decision of the High Court. Three years after *Ha*, the *Bolton v Madsen* formulation as adopted in *Dickenson's Arcade* was applied by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Kithock*

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176 (1977) 137 CLR 59 at 70.

177 (1977) 137 CLR 59 at 69.

Pty Ltd[178] to hold that a stamp duty on the sale of second-hand motor vehicles did not constitute a duty of excise. The High Court, noting that the legislation imposing that stamp duty had been repealed and finding no close analogy in other State or Territory legislation, refused special leave to appeal[179].

115 Though put to one side by the majorities in *Capital Duplicators [No 2]* and *Ha*, the question of the conformity of the exclusion from the constitutional conception of a duty of excise of a tax on goods imposed at the stage of consumption with the broad constitutional purpose of s 90 identified by Dixon J in *Parton* and accepted by the majorities in those cases did not escape the attention of the minorities. In *Capital Duplicators [No 2]*[180], Toohey and Gaudron JJ reiterated the view they had expressed in *Philip Morris*[181], consistently with the view of Gibbs J in *Dickenson's Arcade*, that acceptance of that purpose made it "difficult to see any basis for distinction between taxes imposed during the course of production or manufacture and those imposed at any subsequent point, including the point of consumption". In *Ha*[182], Dawson, Toohey and Gaudron JJ referred to the "exception of a tax upon consumption" as having continued "somewhat illogically". They were right.

Dickenson's Arcade is indefensible

116 To the extent that Victoria and the Attorneys-General of the other States and Territories sought on the hearing of the special case to engage in a principled defence of the limitation in the *Bolton v Madsen* formulation adopted in *Dickenson's Arcade*, they advanced two main arguments. The first attempted to find textual support for the limitation in the language of s 93(i) of the *Constitution*. The second relied on the explanations given by Stephen J in *Dickenson's Arcade* and *Logan Downs* for confining duties of excise to taxes imposed on goods "in the stream of production and distribution" the tendency of which is to increase the prices of those goods to consumers.

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178 (2000) 102 FCR 42.

179 *Kithock Pty Ltd v Commissioner for Australian Capital Territory Revenue* [2001] HCATrans 506 (12 October 2001) at 13.

180 (1993) 178 CLR 561 at 628.

181 (1989) 167 CLR 399 at 480.

182 (1997) 189 CLR 465 at 510.

117 The first argument can be dealt with quite briefly. Section 93 of the *Constitution*, as was noted by the majority in *Ha*[183], set out the basis on which the Commonwealth was required to account to the respective States for the duties of customs and of excise which the Commonwealth collected during the transition period[184] of five years after the imposition of uniform duties of customs. During that period, it was known as the "book-keeping system"[185]. For the purpose of calculating the amount to be paid to each State under s 93(ii), s 93(i) provided that "the duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State".

118 The word "consumption" was not used in s 93(i) of the *Constitution* in the narrow sense of referring to goods which had been received by consumers. The word was used in the broad sense – familiar in references to goods entered or delivered "for home consumption" as distinct from goods entered or delivered "for exportation" in customs and excise legislation[186] at the time – to refer to goods which had passed into circulation within a territory[187] to become part of the "mass of vendible commodities"[188]. Quick and Garran reflected that broad sense in

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183 (1997) 189 CLR 465 at 492-493.

184 Deakin, "Imposition of Uniform Duties of Customs: Disposition of Revenues Before Imposition and During First Five Years Thereafter", 26 March 1902, in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (1981) at 65-68.

185 See *Official Year Book of the Commonwealth of Australia, 1901-1907* (1908) at 640; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 861.

186 See *Customs and Excise Duties Act 1890* (Vic), s 112, Sch 17; *Customs Duties Act 1895* (NSW), Sch A; *Customs Act 1901* (Cth), ss 30(a), 68, 90, 104-105, 127, 132, 152; *Excise Act 1901* (Cth), ss 58-59, 61, 160.

187 See *The King v Lyon* (1906) 3 CLR 770 at 784.

188 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 556.

commenting on s 93(i) that "[g]oods are 'for consumption' in a State if it is intended that they shall be retailed in that State"[189].

119 By contemplating that goods produced or manufactured in one State might attract the payment of duties of excise in that State and afterwards pass into circulation in another State, s 93 of the *Constitution* said nothing about the character of any further tax that might be imposed on those goods once they had passed into circulation in that other State.

120 The second argument, relying on the limitation by Stephen J of duties of excise to imposts imposed on goods in the stream of production and distribution which tend to increase the prices of those goods, admits of three responses.

121 The first response is to note that the limitation was said by Stephen J to have been founded principally on the proposition that a tax can be a duty of excise only if it is indirect. That proposition, as has been noted[190], was previously described as too absolute in *Browns Transport*[191]. By the time of *Dickenson's Arcade* and *Logan Downs*, it had been specifically and unanimously rejected in *Carmody v F C Lovelock Pty Ltd*[192] in the context of rejecting the equivalent proposition that a tax can be a duty of customs only if it is indirect. The holding in that case was that a dumping duty imposed on imported goods was a duty of customs even though the goods might be delivered into home consumption and consumed before liability to pay the duty was imposed. Put in the language of *Capital Duplicators [No 2]* and *Ha*, the quality of being an indirect tax is no more indispensable to an inland tax on goods – a duty of excise – than it is to a border tax on goods – a duty of customs.

122 The second response is to observe that the notion that goods are taken out of the stream of production and distribution at the point of receipt by a consumer – a person who alone or with others is to use them – assumes that those goods cannot be resold on a secondary market. The assumption may have been well-founded in relation to the tobacco products in *Dickenson's Arcade* and even in relation to the stock horses in *Logan Downs*. The assumption is unlikely to hold in relation to

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189 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 862.

190 See [46] above.

191 (1958) 100 CLR 117 at 129.

192 (1970) 123 CLR 1 at 7, 9-10, 12, 13, 16, 26-27.

many inorganic durable goods and certainly does not hold in relation to motor vehicles.

123 The third response is to emphasise that the limitation was postulated by Stephen J without reference to the purpose of s 90 identified by Dixon J in *Parton*. Its postulation in *Dickenson's Arcade* and *Logan Downs* needs to be understood in the context of his Honour's rejection, later to be made explicit in *H C Sleigh Ltd v South Australia*[193], of the proposition that "the exclusive nature of the federal Parliament's power to impose duties of excise can readily and with accuracy be explained by reference to constitutional purpose or historical reasons".

124 The limitation of duties of excise to imposts on goods in the stream of production and distribution is irreconcilable with the purpose of s 90, identified by Dixon J in *Parton* and adopted in *Capital Duplicators [No 2]* and *Ha*, being to ensure that execution of whatever policy the Commonwealth Parliament might choose to implement through the enactment of uniform laws of trade, commerce or taxation could not be hampered or defeated by State or Territory taxation of goods. The irreconcilability can be spelt out quite simply.

125 Plainly, a tax on goods imposed on the consumption of those goods will increase the cost of those goods to consumers. Because consumers, acting rationally, will tend to factor the cost of consumption into the price they are prepared to pay for goods to be consumed, a tax on the consumption of goods can tend to depress demand for those goods no less surely than can a tax on the production or distribution of those goods which increases the price of those goods to consumers. Not only are these tendencies intuitively obvious; they have been observed since the time of Smith. They are well documented in economic literature[194] and are referred to in economically literate legal texts[195].

126 Through its tendency to depress demand, a State or Territory tax on goods imposed on the consumption of those goods within that State or Territory can impact on the flow of trade in goods into and out of that State or Territory. By reason of its cross-border effects as well as by reason of its effect on demand within

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193 (1977) 136 CLR 475 at 497.

194 eg Kotlikoff and Summers, "Tax Incidence", in Auerbach and Feldstein (eds), *Handbook of Public Economics* (1987), vol 2, ch 16 esp at 1045-1047; Borck et al, "Tax Liability-Side Equivalence in Experimental Posted-Offer Markets" (2002) 68 *Southern Economic Journal* 672; Auerbach, "Tax Equivalences and Their Implications" (2019) 33 *Tax Policy and the Economy* 81.

195 eg Posner, *Economic Analysis of Law*, 9th ed (2014) at 668-669.

the State or Territory, such a State or Territory tax can interfere with the outworking of such policy with respect to national and international trade in those or other goods as might from time to time be adopted by the Commonwealth Parliament and implemented by means of the legislative choice of the Commonwealth Parliament to impose or not to impose nationally uniform inland taxes or uniform border taxes on those or other goods.

127 The description originally given by Dixon J in *Matthews* of a duty of excise – being a tax which bears a close relation to the production or manufacture, sale or consumption of goods and which is of such a nature as to affect those goods as the subjects of manufacture or production or as articles of commerce – accurately reflects the essence of a duty of excise as an inland tax on goods at any stage of the life cycle of those goods. The *Matthews* description gives fuller expression to the meaning Rich J appears earlier to have attributed to the word "excise" in *Commonwealth Oil Refineries* and *John Fairfax*.

Dickenson's Arcade is to be reopened and overruled

128 The modification to the *Matthews* description which Dixon J introduced in *Parton* – to remove the reference to consumption – was never soundly based on *Atlantic Smoke Shops* and was always in tension with the purpose of s 90 which his Honour identified in the same case. The vindication of the *Parton* purpose in *Capital Duplicators [No 2]* and *Ha* makes it appropriate that the error introduced by the *Parton* modification, as incorporated into the *Bolton v Madsen* formulation, and as instantiated in *Dickenson's Arcade*, should now be corrected.

129 Correction now is timely. The observation by Mason J in *Dickenson's Arcade* that "a tax on consumption which is not also a tax on sale of goods is a phenomenon infrequently encountered"[196] is almost as true as when it was made nearly 50 years ago. This case illustrates the current exceptionality of such a tax.

130 Around the same time as the enactment of the ZLEV Charge Act in Victoria in 2021, legislation equivalent to the ZLEV Charge Act was enacted in South Australia[197] and New South Wales[198]. The South Australian legislation was repealed this year[199]. The second reading speech for the repealing legislation explained that the repeal was "in order to provide certainty for those looking to

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196 (1974) 130 CLR 177 at 239.

197 *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA).

198 *Electric Vehicles (Revenue Arrangements) Act 2021* (NSW).

199 *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Act 2023* (SA).

purchase an electric vehicle, and to encourage the uptake of electric vehicles by reducing the cost of owning and operating an electric vehicle", and revealed that "[a] survey undertaken by the Australia Institute in 2021 showed that 7 in 10 South Australians would be less likely to purchase an electric vehicle if an electric vehicle levy were to be introduced"[200]. The New South Wales legislation is not yet operative. The charge for which it provides is not to be imposed until the earlier of 1 July 2027 or the date (to be prescribed by regulation) when the Minister is reasonably satisfied that sales of battery electric vehicles will be 30 per cent of new vehicle sales in New South Wales[201].

131 Pressed during argument to identify any existing tax on goods imposed at the stage of the consumption of those goods in reliance on the *Bolton v Madsen* formulation other than the ZLEV charge in issue, Victoria and the intervening State and Territory Attorneys-General were unable, or at least unwilling, to do more than submit that some categories of State and Territory taxation might be open to challenge were *Dickenson's Arcade* to be overruled. They went so far as to submit that, as it was the plaintiffs who were seeking to have *Dickenson's Arcade* overruled, the plaintiffs bore an onus to show that *Dickenson's Arcade* had not been legislatively relied on. The tactical posturing in the present case is to be contrasted with the forthright way in which the extent of State and Territory legislative reliance on the franchise cases was specifically identified in argument and quantified for the assistance of the Court in each of *Capital Duplicators [No 2]*[202] and *Ha*[203] so as to allow the Court to be able to weigh that reliance appropriately in considering whether then to depart from the holdings in the franchise cases. Absent an adequate basis for considering that *Dickenson's Arcade* has been independently acted on in a manner which militates against its reconsideration in the present case[204], the only responsible approach to be taken by the Court is to proceed on the basis that it has not.

132 Victoria and the Attorney-General of the Commonwealth were agreed, however, that recent and prospective changes in monitoring and billing technology

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200 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 November 2022 at 1413.

201 See the definition of "relevant date" in Sch 1 to the *Electric Vehicles (Revenue Arrangements) Act 2021* (NSW).

202 (1993) 178 CLR 561 at 574-575, 591-593.

203 (1997) 189 CLR 465 at 516-517.

204 See *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-352 [65]-[69].

are likely to increase the feasibility of imposing and recovering taxes on the consumption of goods. If States and Territories are constitutionally prohibited from doing so, that is best made plain now.

133 *Dickenson's Arcade* should be reopened and overruled. The *Bolton v Madsen* formulation should be recognised to be an incomplete description of a duty of excise. There should be a return to the more comprehensive descriptions of a duty of excise indicated by Rich J in *Commonwealth Oil Refineries* and *John Fairfax* and elaborated by Dixon J in *Matthews*.

134 A tax properly characterised as a tax on goods does not fall outside the constitutional conception of a duty of excise merely because it is imposed at the stage of consumption of those goods.

Taxes on goods

135 In *Bath v Alston Holdings Pty Ltd*[205] the majority observed:

> "The term 'tax on goods' is a generic one which is used to describe a wide variety of different taxes imposed on a person by reference to some activity or relationship involving 'goods'. The term is used metaphorically. A tax cannot literally be imposed on goods: persons not goods pay taxes."

136 The majority went on to observe that "[p]lainly enough, in the application of s 92, the description 'tax on goods' can be a cause of obscurity rather than of clarification if it covers a failure to identify the precise character of the impugned tax"[206]. The same observation is true of the metaphorical use of the description in the context of s 90 of the *Constitution*.

137 Unpacking what is meant when describing a duty of customs or a duty of excise as a "tax on goods" starts with being clear about what is meant by the term "goods". There is utility in recalling the sense in which the same term has been employed to explain the nature of a duty of customs or of excise in the context of s 55 of the *Constitution*.

138 In *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation*[207] Mason CJ, Brennan and McHugh JJ explained:

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205 (1988) 165 CLR 411 at 427-428.

206 (1988) 165 CLR 411 at 428.

207 (1992) 173 CLR 450 at 454 (footnotes omitted).

> "In the context of ss 55 and 90 of the Constitution, the reference to goods as the subject of the tax must be understood in its widest sense. An excise embraces a tax on commodities produced as well as a tax on manufactured articles, as the comprehensive discussion on the topic by Dixon J in *Matthews* ... so clearly demonstrates. In conformity with this understanding of the concept of excise, the word 'goods' is defined to include 'commodities'. In determining whether particular objects are properly described as 'goods' or 'commodities', it may be useful to consider whether they are saleable. Although many objects which are unsaleable are not properly described as 'goods' or 'commodities', some objects are properly so described even though they are not saleable."

139 Their Honours referred[208] to *Federal Commissioner of Taxation v Totalisator Administration Board (Q)*[209]. There it had been said that "[r]eferences in cases ... to the question whether particular objects are or are not saleable are properly to be understood as referring to a feature which in many cases (but not invariably) will indicate whether the objects are properly described as 'goods' or 'commodities'". Their Honours added[210]:

> "It may be that the constitutional conception of an excise extends to a tax on a step in the production, manufacture or distribution of items of tangible personal property that are not properly or accurately described as 'goods' or 'commodities'. However, that conception of an excise certainly does not extend to other well-known forms of taxation such as income tax, capital gains tax, payroll tax and, what is germane to the present case, land tax."

140 To similar effect, Dawson, Toohey and Gaudron JJ said in *Mutual Pools* that the word "goods", in the context of excise duties, "signifies articles of commerce or things which, even if not saleable or without any discernible sale value, may be the subject of trading or commercial transactions"[211].

141 When used in the constitutional context of describing a duty of customs or a duty of excise as a "tax on goods", "goods" can therefore be taken to include items of tangible personal property, and items of tangible personal property can be

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208 (1992) 173 CLR 450 at 454.

209 (1990) 170 CLR 508 at 511.

210 (1992) 173 CLR 450 at 454.

211 (1992) 173 CLR 450 at 467 (footnotes omitted).

taken to be "goods", at least if they are saleable. Nothing more should be drawn from occasional references in that context, including by Dixon J in *Parton*[212], to a duty of excise as a "trading tax".

142 The identity of meaning of "duties of excise" in s 55 and in s 90 also demonstrates the error in the submissions of those interveners who sought to categorise the question of whether a tax meets the description of a tax on goods, and is therefore a duty of excise, as a question of "constitutional fact". Obviously for the purposes of s 55, and equally for the purposes of s 90, the question is as to the characterisation of a tax that is imposed by law, which must be able to be asked and answered, once and for all, at the time of enactment of the law. The constitutional character of the tax at the time of enactment of the law might well be elucidated by events which occur after its enactment, but it cannot be altered by those events.

143 Modern doctrine posits that the characterisation of a tax as a tax on goods, and therefore as a duty of excise, turns not simply on the legal form (or criterion of operation) of the tax but on its substance (or practical operation)[213]. The intended practical operation of the law imposing the tax – its legislative purpose or legislative design[214] – is for that reason of central importance. But practical effects are not to be ignored merely because those effects are collateral to that legislative design.

144 The modern focus on substance or practical operation has largely overtaken concerns sometimes earlier expressed about the need for judicial vigilance when examining a tax the legal form of which could be seen to be a contrivance or device aimed at disguising its legislatively intended practical operation[215]. Artificiality in the legal form of a tax, such as was apparent in the legal form of the tax on the consumption of tobacco in issue in *Dickenson's Arcade*, might readily permit an inference to be drawn about the intended practical operation of that tax. But consideration of the practical operation of a tax does not depend on whether its legal form might be thought to disguise its legislative purpose.

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212 See [39] above.

213 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 583; *Ha v New South Wales* (1997) 189 CLR 465 at 498.

214 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 459 [72].

215 See *Ha v New South Wales* (1997) 189 CLR 465 at 498.

145 That modern focus on substance or practical operation entails acceptance that the determination of whether a tax is properly characterised as a tax on goods can be informed by an analysis of constitutional facts found or agreed. Determination by a court of whether a given tax does or does not meet the description of a tax on goods, and therefore is or is not a duty of excise, is nonetheless a determination of law. The determination once made having regard to constitutional facts found or agreed must be treated as a binding precedent to be followed in subsequent cases unless reopened and overruled[216].

146 The ultimate question of whether a tax is to be characterised as a tax on goods, so as in turn to be characterised as a duty of excise, turns on whether the tax meets the sometimes-overlapping elements of the seminal description given by Dixon J in *Matthews*[217] having regard to the legal form and to the substantive operation of the tax.

147 To meet the first element of the description of a duty of excise, using language of Dixon J in *Matthews*, the tax must bear a close relation to the production or manufacture, sale, distribution, or consumption of goods. That entails, using language endorsed in *Capital Duplicators [No 2]*[218] and *Ha*[219], that the tax is on a "step" – an activity or relationship – involving goods. In the language of Fullagar J in *Dennis Hotels*[220], it entails that "the person by whom the tax is payable is charged by reason of, and by reference to, some specific relation subsisting between [that person] and particular goods" such that "[a] tax will be rightly regarded as a tax upon goods if the person upon whom it is imposed is charged by reason of and by reference to the fact that [that person] is the owner, importer, exporter, manufacturer, producer, processor, seller, purchaser, hirer or consumer of particular goods". A tax which has the requisite close relation is in some contexts usefully contrasted with a tax, typically in the form of a periodic licence or registration fee, which has "no closer connexion" with the production or manufacture, sale, distribution, or consumption of goods than that "it is exacted for

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216 See *Breen v Sneddon* (1961) 106 CLR 406 at 410-412.

217 (1938) 60 CLR 263 at 304. See [36] above.

218 (1993) 178 CLR 561 at 590.

219 (1997) 189 CLR 465 at 499.

220 (1960) 104 CLR 529 at 554. See also *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 491.

the privilege of engaging in the relevant activity"[221] or that it is imposed as an element of a scheme for the regulation of the relevant activity in the public interest[222].

148 To meet the second element of the description of a duty of excise, again using language of Dixon J in *Matthews*, 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. Dixon J stressed in *Matthews* that "it is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity"[223].

149 Barwick CJ explained in *Anderson's Pty Ltd v Victoria*[224] that, in the assessment of the tendency of a tax, "[t]he 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax – all these are included in the relevant considerations". The majority in *Capital Duplicators [No 2]*[225] adopted that explanation. Barwick CJ also explained[226] that the considerations he so identified "may not be present in every case" and "may have different weight or emphasis in different cases". To repeat a point already made[227], the quality of indirectness is not essential to a duty of excise.

150 Highly significant for the assessment of the tendency of a tax is the recognition in the reasoning of the majority in *Capital Duplicators [No 2]*[228], to

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221 See *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 592; *Ha v New South Wales* (1997) 189 CLR 465 at 501-502, 504.

222 See *Ha v New South Wales* (1997) 189 CLR 465 at 502.

223 (1938) 60 CLR 263 at 300, quoting *City of Halifax v Estate of J P Fairbanks* [1928] AC 117 at 126. See *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 436.

224 (1964) 111 CLR 353 at 365.

225 (1993) 178 CLR 561 at 583.

226 (1964) 111 CLR 353 at 365.

227 See [121] above.

228 (1993) 178 CLR 561 at 586.

which attention has been drawn[229], that a tax will be of a nature which sufficiently affects goods as articles of commerce if the tendency of the tax is to depress demand for those goods.

151 To identify the precise incidence of any tax would necessitate engaging in an economic analysis informed by observed market behaviour including as quantified and expressed in the form of elasticities and cross-elasticities of supply and demand. Opinions of expert economists might assist a court to assess the tendency of some taxes in the same way as opinions of expert economists might assist a court in determining whether a given impost is properly characterised as a tax[230]. Several of the intervening State and Territory Attorneys-General went too far, however, when they submitted that a court cannot conclude that a tax tends to depress demand for goods absent expert economic evidence assisting it to draw conclusions about the predicted impact of the tax on the operation of markets in which those goods are bought and sold.

152 Part of the problem with the argument that expert evidence of market impact is necessary is that the argument paid insufficient attention to the constitutional context of the inquiry. It is important to bear in mind that the ultimate question of whether a tax is to be characterised as a tax on goods, so as in turn to be characterised as a duty of excise, and the incidental question of the tendency of the tax to affect demand for goods, are questions which arise at the level of maintaining the constitutional structure within which markets in goods are to exist in Australia. The answers to those questions cannot depend on the dynamics of such markets as might from time to time exist within that structure.

153 Another part of the problem with the argument is that it paid insufficient attention to the constitutional nature of the inquiry within that constitutional context. The tendency of a tax to affect demand is a question of constitutional fact. A court finding constitutional facts is not constrained by rules of evidence. The court performs its duty to find facts as to the tendency of the tax at a level of specificity no greater than is necessary to resolve the constitutional controversy before it. The court does so by drawing such inferences as are appropriate from such probative material as is available. The available material, as here, typically comprises not only the content of the legislation imposing the tax but also the legislative record. Both are to be understood in their historical context. Not uncommonly, as here, the legislative record contains material revelatory of the process of policy development which underlay the legislative choice to impose the

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229 See [72] above.

230 See *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133.

tax and of legislatively perceived consequences of the tax. Sometimes, the legislative record is supplemented by other probative material. Often, as here, it is not. In either event, the court draws inferences from the totality of the available material having regard to the arguments presented to it by the parties and the interveners[231]. The court "reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part, supplementing that knowledge by processes which do not readily lend themselves to the normal procedures for the reception of evidence"[232].

154 What is in each case required is the formation of a practical judgment. That is the stuff of constitutional adjudication[233].

The ZLEV Charge Act

Background to the ZLEV Charge Act

155 Two aspects of the historical setting within which the ZLEV Charge Act was enacted need to be recorded. They are relevant to understanding the purpose of the Victorian Parliament in enacting the ZLEV Charge Act. They are also relevant to appreciating the real potential for the ZLEV charge to distort the intended practical operation of such uniform laws of trade or commerce or taxation as the Commonwealth Parliament might choose to enact for the purpose of influencing the supply of and demand for ZLEVs within Australia.

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231 Compare *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 507, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 634-636, 666-669 and *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 596-597 (each drawing inferences of constitutional fact from the legislative structure) and *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 470-471, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 462-463 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 449-450 [6]-[8], 478-480 [106]-[116] (each drawing inferences of constitutional fact from the legislative record).

232 *Maloney v The Queen* (2013) 252 CLR 168 at 299 [351], quoting *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (internal quotation marks and alterations omitted), *Breen v Sneddon* (1961) 106 CLR 406 at 411-412 and *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622.

233 See *Palmer v Western Australia* (2021) 272 CLR 505 at 554-555 [147].

156 The first aspect of the historical setting to be noted is that the Commonwealth Parliament has for almost 100 years levied duties of customs in addition to duties of excise on the importation and production of fossil fuel for use in motor vehicles and continues to do so. Duties of excise on petrol were introduced in 1929[234]. Duties of excise on diesel were introduced in 1957[235]. Between 1931[236] and 1959[237], and again between 1982[238] and 1992[239], amounts calculated by reference to the revenue raised from those duties were automatically "hypothecated" to the States as grants by the Commonwealth Parliament to the States under s 96 of the *Constitution* for the purpose of building and maintaining roads. Hypothecation ceased in 1992. Since then, the Commonwealth has treated fuel excise revenue as part of its general revenue[240]. In the 2020-2021 financial year, Commonwealth cash receipts from customs and excise duties on petrol and

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234 *Excise Tariff Validation Act 1929* (Cth), read with Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 August 1929 at 244. See also *Excise Tariff Validation Act 1931* (Cth); *Excise Tariff 1933* (Cth), amending the *Excise Tariff 1921* (Cth).

235 *Excise Tariff 1957* (Cth).

236 *Federal Aid Roads Act 1931* (Cth), replacing the *Federal Aid Roads Act 1926* (Cth), considered in *Victoria v The Commonwealth* (1926) 38 CLR 399. See also *Commonwealth Aid Roads and Works Act 1947* (Cth); *Commonwealth Aid Roads Act 1950* (Cth); *Commonwealth Aid Roads Act 1954* (Cth).

237 *Commonwealth Aid Roads Act 1959* (Cth), contrast with the Schedule to the *Commonwealth Aid Roads Act 1954* (Cth).

238 *Australian Bicentennial Road Development Trust Fund Act 1982* (Cth); *Australian Land Transport (Financial Assistance) Act 1985* (Cth); *Australian Centennial Roads Development Act 1988* (Cth); *Australian Centennial Roads Development Amendment Act 1990* (Cth).

239 Section 10 of the *Australian Land Transport Development Act 1988* (Cth). See also House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform, *Planning Not Patching: An Inquiry into Federal Road Funding* (1997), ch 4 at 63-64 [4.93]-[4.98].

240 Fuel Taxation Inquiry Committee, *History of Fuel Taxation in Australia* (Background Paper) at 8 [2.3]; House of Representatives Standing Committee on Communications, Transport, and Microeconomic Reform, *Planning Not Patching: An Inquiry into Federal Road Funding* (1997), ch 4 at 64 [4.100].

diesel totalled about $16.8 billion, which was about 2.9 per cent of its total cash receipts[241].

157 The second aspect of the historical setting to be noted concerns the emergence, over the past 20 years, of differing and evolving Commonwealth and State policies on greenhouse gas emissions, on the role of electric vehicles in contributing to the reduction of greenhouse gas emissions, on measures appropriate to promote and support the uptake of electric vehicles, and on how to manage a projected reduction in revenue from fuel excise attributable to reduced consumption of petrol and diesel resulting from the uptake of electric vehicles.

158 The *Climate Change Act 2022* (Cth) ("the Commonwealth Climate Change Act") legislated targets of reducing Australia's net greenhouse gas emissions to 43 per cent below 2005 levels by 2030 and to zero by 2050[242]. Those targets are to be understood against the background of the Paris Agreement[243], to which Australia is a party, and Australia's nationally determined contribution communicated under the Paris Agreement[244].

159 The Commonwealth Climate Change Act commenced on 14 September 2022, the Bill which resulted in its enactment having been introduced into the House of Representatives in July 2022. The Minister for Climate Change and Energy referred in his second reading speech to the Act laying "the crucial foundation, upon which the policies and measures to come will be built". The Minister listed several policies, which included "Australia's first-ever electric vehicle strategy", as "all crucial building blocks for Australia's transition to net zero"[245].

160 That announcement by the Minister for Climate Change and Energy in July 2022 of a proposed national electric vehicle strategy was supported by two complementary steps taken contemporaneously by the Treasurer. The first was the

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241 Commonwealth, *Budget Strategy and Outlook*, Budget Paper No 1 2022-23 (25 October 2022) at 164.

242 Section 10(1) of the Commonwealth Climate Change Act.

243 [2016] ATS 24.

244 Section 10(2) of the Commonwealth Climate Change Act; Commonwealth, Department of Industry, Science, Energy and Resources, *Australia's Nationally Determined Contribution Communication 2022*.

245 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 July 2022 at 88.

introduction into the House of Representatives and second reading of the Bill which was to result in the enactment of the *Treasury Laws Amendment (Electric Car Discount) Act 2022* (Cth) ("the Electric Car Discount Act"). On its subsequent commencement, the Electric Car Discount Act amended the *Fringe Benefits Tax Assessment Act 1986* (Cth) with effect from 1 July 2022. The effect of the amendment was to create an exemption from fringe benefits tax for a fringe benefit provided by an employer to an employee in the form of use of a car if two conditions are met[246]. One is that the car is a zero or low emissions vehicle. The other is that its value at the first retail sale is below the luxury car tax threshold for fuel-efficient cars. The second of the steps taken by the Treasurer involved the foreshadowing and subsequent tabling of *Customs Tariff Proposal (No 5) 2022*, which, when given effect by the *Customs Tariff Amendment (Incorporation of Proposals) Act 2023* (Cth), amended the *Customs Tariff Act 1995* (Cth) with effect from 1 July 2022 to remove customs duty on the importation of a car that meets essentially the same eligibility requirements as apply to the fringe benefits tax exemption. The Electric Car Discount Act requires a review to be undertaken by July 2027 of the operation of the exemption from fringe benefits tax and of the removal of customs duty relating, "in particular", to "their effectiveness in encouraging the uptake of cars that are zero or low emissions vehicles"[247].

161 The Commonwealth Government issued a consultation paper concerning the proposed national electric vehicle strategy in September 2022[248] and went on to formulate and publish the National Electric Vehicle Strategy in April 2023[249]. The National Electric Vehicle Strategy identifies as one of its objectives encouraging increase in demand for electric vehicles. It states that "[m]aking EVs more affordable and reducing the costs to Australians of running their EVs is crucial to increasing demand for EVs in Australia" and records that the exemption from fringe benefits tax and removal of customs duty are directed to that end[250]. It states that "[o]ver the longer term, increasing EV uptake is expected to slow the growth in fuel excise receipts and result in a decline in the future, at the point where

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246 Item 1 of Sch 1 to the Electric Car Discount Act.

247 Item 8 of Sch 1 to the Electric Car Discount Act.

248 Commonwealth, Department of Climate Change, Energy, the Environment and Water, *National Electric Vehicle Strategy: Consultation Paper* (September 2022).

249 Commonwealth, Department of Climate Change, Energy, the Environment and Water, *National Electric Vehicle Strategy* (April 2023).

250 Commonwealth, Department of Climate Change, Energy, the Environment and Water, *National Electric Vehicle Strategy* (April 2023) at 30.

EVs make up a sufficient share of all vehicles". Noting that "[t]imeframes for any future decline in fuel excise are highly uncertain", it states that "[t]he Australian Government will continue to update and enhance modelling of the long-term impact of increased EV uptake on fuel excise in the context of regular Budget updates"[251].

162 The ZLEV Charge Act, the Bill for which was introduced into the Victorian Legislative Assembly in March 2021, and which commenced on 1 July 2021[252], pre-empted that Commonwealth policy development.

The origin and purpose of the ZLEV Charge Act

163 Prior to the enactment of the ZLEV Charge Act, the *Climate Change Act 2017* (Vic) had legislated the target of reducing Victoria's net greenhouse gas emissions to zero by 2050[253] and had established a framework for the development and implementation of policies designed with a view to ensuring achievement of that target. Developed within that framework and released by the Victorian Government in May 2021 was a document entitled "Victoria's Zero Emissions Vehicle Roadmap" which set out a range of measures directed to promoting and supporting the uptake of zero and low emissions vehicles. Included within that document was the statement that "[t]he introduction of a road user charge for low and zero emissions vehicles will more equitably fund roads and encourage optimisation of their usage in the absence of fuel excise raised on petroleum fuels"[254].

164 The Treasurer, Minister for Economic Development and Minister for Industrial Relations referred to the impending release of that document in his second reading speech for the Bill for the ZLEV Charge Act in March 2021. He explained the purpose of the ZLEV charge and the strategy behind the timing of the enactment of the Act in the following terms[255]:

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251 Commonwealth, Department of Climate Change, Energy, the Environment and Water, *National Electric Vehicle Strategy* (April 2023) at 33.

252 Section 2 of the ZLEV Charge Act.

253 Section 6 of the *Climate Change Act 2017* (Vic).

254 Victoria, Department of Environment, Land, Water and Planning, *Victoria's Zero Emissions Vehicle Roadmap* (May 2021) at 41.

255 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

> "Most Australian drivers pay fuel excise when they fill up their vehicle with petrol, diesel or liquified petroleum gas (LPG). Fuel excise is an important source of revenue that contributes to building and maintaining our roads as the Commonwealth redistributes some of this revenue to state and territory governments as infrastructure grants.
>
> In recent years, it has become clear that this funding mechanism is not financially sustainable in the long term. Commonwealth fuel excise revenue is in relative decline due to improvements in fuel efficiency of internal combustion engine vehicles (ICEVs) and the introduction and increasing uptake of alternative-powered vehicles, such as [electric vehicles (EVs)], plug-in hybrid-electric vehicles (PHEVs), and hydrogen vehicles (HVs).
>
> EVs, PHEVs and other alternative-powered vehicles currently face a lower tax burden relative to traditional ICEVs and do not contribute to the costs of road network provision commensurate with the costs they impose on the network. ZLEV owners pay little or no fuel excise but they still use the roads.
>
> The reforms introduced in this Bill ensure all motorists contribute their fair share to the cost of funding Victorian roads and road-related infrastructure. It will support the financial sustainability of Victoria's road network and ensure we can continue to invest in our transport networks into the future.
>
> While the number of ZLEVs in Australia is currently low, now is the right time to establish a framework that ensures all road users make a fair contribution to the Victorian Government's record investments in roads. Take-up of these vehicles is expected to increase in the next three to five years, as new ZLEV models enter the market, the purchase price of new ZLEVs falls and network infrastructure rolls out. EVs are destined to dominate our motorways in the future, given they'll always be more economical and environmentally friendly than petrol, diesel or LPG-powered vehicles.
>
> Introducing a road usage charge for ZLEVs now, before take-up increases substantially, ensures a fair and sustainable revenue base to fund investments in the road network and provides increased certainty to all drivers."

The Treasurer immediately added:

> "The Government has been keen to lead vital reforms in this policy area ahead of other jurisdictions in Australia. We have been working with the other states and territories to ensure, to the extent possible, a nationally

> consistent framework for road-user charges for ZLEVs across jurisdictions that choose to adopt them. The Victorian and South Australian Governments join international jurisdictions, including California, Utah, Oregon and Washington states in the United States, in implementing or trialling road-user charging systems that incorporate ZLEVs."

165 Turning specifically to explain the design of the ZLEV charge and the anticipated impact of the ZLEV charge on the uptake of ZLEVs in Victoria, the Treasurer said[256]:

> "Under the distance-based charge for ZLEVs registered in Victoria, ZLEV owners will continue to pay less in road-related taxes and charges than other drivers – around 40 to 50 per cent less than the per-kilometre equivalent that an average driver pays in fuel excise.
>
> Existing incentives to promote the take-up of ZLEVs will continue ...
>
> On balance, the Government anticipates the introduction of the distance-based charge will have a negligible impact on electric vehicle uptake in Victoria, particularly as the Government is investing the revenue raised from the first few years of the distance-based charge in vehicle-charging infrastructure that will help address a significant barrier to ZLEV uptake.
>
> The Government will continue to promote the take-up of ZLEVs by ensuring they pay less than conventional petrol and diesel vehicles. Indeed, we commit to review the per-kilometre rates periodically to ensure these more environmentally friendly vehicles continue to pay less in road-related taxes and charges than their fuel-based counterparts."

The terms of the ZLEV Charge Act

166 The ZLEV Charge Act states that its purpose is "to require registered operators of zero and low emission vehicles to pay a charge for use of the vehicles on certain roads"[257].

167 The central provision of the ZLEV Charge Act – the validity of which is challenged in the proceeding – is s 7(1). It provides that "[t]he registered operator of a ZLEV must pay a charge for use of the ZLEV on specified roads". The

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256 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

257 Section 1 of the ZLEV Charge Act.

provision needs to be read with the definitions of "registered operator", "ZLEV" and "specified road".

168 The definition of "ZLEV" in the Act brings within it any electric vehicle, hydrogen vehicle, or plug-in hybrid electric vehicle that is not expressly excluded by the Act or has not been determined by the Minister administering the Act to be an excluded vehicle[258].

169 The definition of "registered operator" in the ZLEV Charge Act looks to the person recorded, at the time of use of the ZLEV on a specified road, as the person responsible for the vehicle on the register of vehicles maintained in accordance with regulations made for the purposes of Pt 2 of the *Road Safety Act 1986* (Vic)[259]. Those regulations provide that a person is eligible to be the registered operator of a vehicle if the person (being either an adult individual or a corporation) owns or manages the vehicle[260], that the registration of a vehicle is to be renewed periodically (ordinarily annually)[261], that registration or renewal of registration is to attract a registration fee[262], and that the information to be recorded on the register is to include the name and residential or business address of the vehicle's registered operator as well as the vehicle's garage address[263].

170 Part 2 of the *Road Safety Act* has the consequence that no vehicle can be registered unless it is garaged in Victoria[264] and that, subject to presently irrelevant exceptions, no vehicle can be driven on a "highway" in Victoria unless it is registered[265]. A "highway" is defined in that Act to mean a "road or road related

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258 Section 3 of the ZLEV Charge Act (definitions of "ZLEV" and "excluded vehicle"). See also s 4 of the ZLEV Charge Act.

259 See s 3 of the ZLEV Charge Act (definition of "registered operator") read with s 3(1) of the *Road Safety Act 1986* (Vic) (definitions of "the register" and "registered operator").

260 Regulation 23 of the *Road Safety (Vehicles) Regulations 2021* (Vic).

261 See regs 58 and 82 of the *Road Safety (Vehicles) Regulations 2021* (Vic).

262 Regulation 46(b) of the *Road Safety (Vehicles) Regulations 2021* (Vic).

263 Regulation 52 of the *Road Safety (Vehicles) Regulations 2021* (Vic).

264 Section 6A of the *Road Safety Act 1986* (Vic).

265 Section 7 of the *Road Safety Act 1986* (Vic) read with s 3(1) of that Act (definition of "highway").

area"[266]. Subject to presently immaterial exceptions and additions, the term "road" is in turn defined to mean "an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles"[267], and the expression "road related area" is defined to mean "an area that divides a road", "a footpath or nature strip adjacent to a road", "an area that is open to the public and is designated for use by cyclists or animals", or "an area that is not a road and that is open to or used by the public for driving, riding or parking motor vehicles"[268].

171 The definition of "specified road" in the ZLEV Charge Act is as follows[269]:

"***specified road*** means –

(a) a public road within the meaning of the Road Management Act 2004; or

(b) a road related area within the meaning of the Road Safety Act 1986; or

(c) a highway at common law in Victoria that is not a public road or road related area referred to in paragraph (a) or (b); or

(d) a highway at common law outside Victoria; or

(e) a road within the meaning of the Road Management Act 2004, other than a private road, prescribed by the regulations".

172 Deconstructing the content of paras (a) and (e) of the definition requires reference to the elaborate definitions of "public road" and "road" in the *Road Management Act 2004* (Vic), which will be seen to overlap with the definitions of "road" and "road related area" in the *Road Safety Act*. The term "road" is defined in the *Road Management Act* to include any "public highway"[270], an expression which is in turn defined to mean "any area of land that is a highway for the purposes

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266 Section 3(1) of the *Road Safety Act 1986* (Vic) (definition of "highway").

267 Section 3(1) of the *Road Safety Act 1986* (Vic) (definition of "road").

268 Section 3(1) of the *Road Safety Act 1986* (Vic) (definition of "road related area").

269 Section 3(1) of the *Road Safety Act 1986* (Vic) (definition of "specified road") (bolding omitted).

270 Section 3(1) of the *Road Management Act 2004* (Vic) (definition of "road").

of the common law"[271]. Under the definition of "public road" in the *Road Management Act*, a road (as so defined) is a public road if declared to be a "freeway", an "arterial road", a "non-arterial State road" or a "municipal road", or if it meets another of a number of specific descriptions[272].

173 The term "highway at common law" is in paras (c) and (d) of the definition of "specified road" in the ZLEV Charge Act, and the term "highway for the purposes of the common law" in the definition of "public highway" in the *Road Management Act* feeds into the definitions of "road" and "public road" in that Act picked up in paras (a) and (e) of the definition of "specified road" in the ZLEV Charge Act. To understand those references, it is necessary to remember that the characteristic of a highway at common law "is simply that it is a way over which all members of the public are entitled to pass and repass on their lawful occasions"[273]. At common law, unlike in popular usage, a highway "need not be a main road, a high-way as distinct from a by-way" – it "need not be a thoroughfare at all: it may be a cul-de-sac"[274].

174 Paragraph (d) of the definition of "specified road" in the ZLEV Charge Act – in designating a highway at common law outside of Victoria to be a specified road within the meaning of the ZLEV Charge Act – needs also to be read with substantive provisions of the ZLEV Charge Act addressed to its extraterritorial operation. The ZLEV Charge Act is expressed to apply "within and outside Victoria to the full extent of the extraterritorial legislative power of the Parliament"[275] and to extend "to the use of ZLEVs outside Victoria"[276].

175 The essential point, as the plaintiffs correctly submit, is that once the various limbs of the definition of "specified road" are untangled, the ZLEV Charge Act can be seen, in effect, to identify as a "specified road" any area of land – public or private inside or outside Victoria – over which the public has a right of way.

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271 Section 3(1) of the *Road Management Act 2004* (Vic) (definition of "public highway").

272 Section 17 of the *Road Management Act 2004* (Vic) read with s 3(1) of that Act.

273 *City of Keilor v O'Donohue* (1971) 126 CLR 353 at 363. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 565 [119].

274 *City of Keilor v O'Donohue* (1971) 126 CLR 353 at 363.

275 Section 6(1) of the ZLEV Charge Act.

276 Section 6(2) of the ZLEV Charge Act.

176 The ZLEV charge imposed by s 7(1) of the ZLEV Charge Act is expressed by s 7(2) to be required to be determined and paid in accordance with that Act and regulations made under it.

177 The rate of the ZLEV charge is a stipulated amount for each kilometre travelled on specified roads during a financial year. During the 2021-2022 financial year, the stipulated amount was 2.5 cents for a ZLEV that was an electric vehicle or hydrogen vehicle and 2.0 cents for a ZLEV that was a plug-in hybrid electric vehicle[277]. As is apparent from the explanation given in the second reading speech for the Bill for the ZLEV Charge Act already quoted[278], that rate was deliberately set at around half the per-kilometre equivalent that an average driver then paid in fuel excise. During each subsequent financial year, the rate is varied by indexation for inflation[279].

178 Responsibility for the administration of the ZLEV charge is conferred on the Secretary of the Department of Transport[280]. To facilitate the discharge of that responsibility by the Secretary, the registered operator of a ZLEV is obliged to lodge with the Secretary an initial declaration[281] and thereafter a further declaration at the end of each registration period for the ZLEV, on the transfer or cancellation of the registration of the ZLEV, or otherwise on notice by the Secretary[282]. An initial declaration must set out the odometer reading of the ZLEV[283], and each further declaration must set out the then current odometer reading of the ZLEV and distance (if any) travelled by the ZLEV since the previous declaration that was not on specified roads, and must include evidence of those matters[284].

179 The Secretary is required to determine the amount of the ZLEV charge payable by the registered operator by deducting the distance (if any) travelled by the ZLEV that was not on specified roads in the period to which the determination

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277 Section 8(1)(a) of the ZLEV Charge Act.

278 See [164]-[165] above.

279 Sections 8(1)(b) and 9 of the ZLEV Charge Act.

280 See s 3 of the ZLEV Charge Act (definitions of "Secretary" and "Department").

281 Section 10 of the ZLEV Charge Act.

282 Section 11(1) of the ZLEV Charge Act.

283 Section 10(2)(a) of the ZLEV Charge Act.

284 Section 11(3) of the ZLEV Charge Act.

relates from the total distance travelled by the ZLEV in that period and multiplying the result by the applicable rate of the ZLEV charge[285]. In so doing, the Secretary is permitted to assume, in the absence of evidence to the contrary, that all distances travelled by the ZLEV were travelled on specified roads[286].

180 Having determined the amount of the ZLEV charge payable by the registered operator, the Secretary is required to issue an invoice[287], which the registered operator is obliged to pay[288]. Non-payment by the due date attracts interest[289].

181 The ZLEV charge and any interest payable are debts due to the State[290]. The Secretary is also empowered to suspend[291] and even to cancel[292] the registration of the ZLEV in the event of the registered operator failing to lodge a declaration or to pay an invoice.

182 Provision is made for the registered operator to object to an invoice[293] or to a decision to suspend or cancel registration[294]. An objection must be considered by the Secretary and either allowed or disallowed[295]. The Secretary's decision on the objection is subject to review by the Victorian Civil and Administrative Tribunal[296].

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285 Section 15(1) and (2) of the ZLEV Charge Act.

286 Section 15(3) of the ZLEV Charge Act.

287 Section 18 of the ZLEV Charge Act.

288 Section 19 of the ZLEV Charge Act.

289 Section 23 of the ZLEV Charge Act.

290 Section 58 of the ZLEV Charge Act.

291 Section 29 of the ZLEV Charge Act.

292 Section 35 of the ZLEV Charge Act.

293 Section 40 of the ZLEV Charge Act.

294 Section 43 of the ZLEV Charge Act.

295 Section 50 of the ZLEV Charge Act.

296 Section 54 of the ZLEV Charge Act.

The ZLEV charge is a tax on goods

183 There is, as was noted at the outset, no dispute that the ZLEV charge is a tax. Victoria has not argued that the ZLEV charge can be characterised as a fee for the provision of specified roads or that the rate of the ZLEV charge bears any discernible relationship to the cost of the construction or maintenance of specified roads[297].

184 Once it is accepted that a tax properly characterised as a tax on goods does not fall outside the constitutional conception of a duty of excise merely because it is imposed at the stage of consumption of those goods, the question whether the ZLEV charge is to be characterised as a duty of excise turns simply on whether the ZLEV charge bears the character of being on goods – the relevant goods being ZLEVs.

185 Informing the answer to that question are the answers to two subsidiary questions. Does the ZLEV charge bear a close relation to the use of ZLEVs? And does the ZLEV charge affect ZLEVs as articles of commerce? Neither subsidiary question is difficult. The answer to each is, yes.

186 Victoria's argument against characterisation of the ZLEV charge as a tax on ZLEVs focused on the first subsidiary question. The argument was that the ZLEV charge is not a tax on use of a ZLEV, but only a tax on the activity of driving a ZLEV on specified roads. That characterisation was said to follow from the ZLEV charge being: (1) only imposed when a ZLEV is driven on a specified road; (2) calculated by reference to the distance travelled by the ZLEV rather than to the value of the ZLEV; and (3) levied on a single ZLEV periodically.

187 The three factors on which Victoria relies do not, individually or cumulatively, support its characterisation of the ZLEV charge as nothing more than a tax on the activity of driving a ZLEV on specified roads.

188 The distinction sought to be drawn between use of a ZLEV and the activity of driving a ZLEV on specified roads is unsustainable having regard to the breadth of the definition of "specified road", extending as it does to any way anywhere in Australia over which members of the public have an entitlement to pass and repass. Accepting that some uses of most ZLEVs will not involve their use on specified roads, and even accepting that most uses of some ZLEVs will not involve their use

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297 Compare *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 176-179 [87]-[93], 189-192 [132]-[142], 230-237 [279]-[306], 278-283 [435]-[448].

on specified roads, the irresistible conclusion is that nearly all uses of nearly all ZLEVs will involve their use on specified roads and that exceptional uses will be minuscule.

189 The distinction sought to be drawn between taxing the use of a ZLEV and taxing the activity of driving a ZLEV is also unsustainable when regard is had to the ZLEV charge being levied not on the driver of the ZLEV (the person engaging in the activity) but on its registered operator, who is its owner or manager.

190 Leaving exceptional cases to one side, to tax the registered operator of a ZLEV by reference to the distance travelled by the ZLEV on specified roads must therefore be to tax the owner or manager of that ZLEV by reference to the predominant, if not sole, use of that vehicle.

191 The circumstance that the ZLEV charge is levied periodically for so long as a ZLEV continues to be driven on specified roads serves only to highlight its character as a tax which is payable by the owner or manager of the ZLEV for so long as the ZLEV continues to be used to perform its principal function. Not only is it payable by the current owner or manager, who is the registered operator of the ZLEV, but it will remain payable by any subsequent owner or manager to whom registration might be transferred. It is a tax which runs with goods, for so long as those goods retain utility.

192 Victoria's choice not to focus its argument on whether the ZLEV charge affects ZLEVs as articles of commerce was sound. Plainly it does. By increasing the cost of use of a ZLEV to whoever happens to be the owner or manager of that ZLEV at the time of use, its natural tendency is to dampen demand for ZLEVs. That is because potential purchasers of a ZLEV, acting rationally, can be expected to factor the ongoing cost of use into the prices they are prepared to pay for ZLEVs, in the same way as they can be expected to factor the ongoing costs of use into the prices they are prepared to pay for alternative petrol-powered or diesel-powered motor vehicles. Their preferences between ZLEVs and petrol-powered or diesel-powered motor vehicles can be expected to be affected by the existence and size of any differential.

193 The tendency of the ZLEV charge to dampen demand for ZLEVs in Victoria was implicitly acknowledged in passing in the second reading speech for the Bill for the ZLEV Charge Act, which has already been quoted[298]. The specific tendency of the ZLEV charge to be factored into the prices Victorians will be prepared to pay for ZLEVs, and thereby to influence their preferences between ZLEVs and petrol-powered or diesel-powered motor vehicles, was implicit in the

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298 See [165] above.

explanation of the rate of the ZLEV charge having been set at around half the per-kilometre equivalent that an average driver pays in fuel excise so as "to promote the take-up of ZLEVs by ensuring they pay less than conventional petrol and diesel vehicles" and in the commitment "to review the per-kilometre rates periodically to ensure these more environmentally friendly vehicles continue to pay less in road-related taxes and charges than their fuel-based counterparts". The overall tendency of the ZLEV charge to reduce demand for ZLEVs in Victoria in comparison with the demand that might be expected absent the ZLEV charge was likewise implicit in the explanation that the Victorian Government's assessment that the ZLEV charge would have a "negligible impact" on the uptake of ZLEVs in Victoria was reached "[o]n balance" having regard to the range of measures then being introduced to promote and support the uptake of ZLEVs.

194 And as has been seen, the tendency of a State charge in the nature of the ZLEV charge to dampen demand for ZLEVs in the State which imposes the charge was explicitly acknowledged and acted upon in the process of repealing the South Australian equivalent to the ZLEV Charge Act[299].

195 The ZLEV charge is, as its name suggests, a tax on ZLEVs. For that reason, it is a duty of excise.

Conclusion and formal answers to questions

196 Set against the background of the National Electric Vehicle Strategy and the Electric Car Discount Act, the present case is a paradigm illustration of the operation of s 90 of the *Constitution* to achieve the high constitutional purpose it was recognised to have in each of *Capital Duplicators [No 1]*, *Capital Duplicators [No 2]*, *Ha* and *Betfair*.

197 Sections 90 and 92 of the *Constitution* combine to create the constitutional imperative that such market or markets as might exist now or in the future in Australia for ZLEVs or any other goods must exist within a free trade area comprising the whole of the geographic area of Australia. Throughout that free trade area, the people of Australia are guaranteed equality in such taxes as they are required to bear as consumers of ZLEVs or of any other goods. To that end, any tax on ZLEVs or any other goods – whether imposed at the stage of their importation into Australia or production or manufacture in Australia or at any subsequent stage in their distribution, sale, ownership, control, use, resale, reuse or destruction in Australia or export from Australia – can be imposed only by uniform national legislation.

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299 See [130] above.

198 The exclusivity of the power of the Commonwealth Parliament to impose duties of excise ensures that such uniform laws of trade or commerce or taxation as the Commonwealth Parliament has chosen to enact (in the form of the exemption from fringe benefits tax and the removal of customs duty) or might afterwards choose to enact for the purpose of stimulating the demand for ZLEVs, so as to reduce greenhouse gas emissions and to fulfil Australia's international responsibilities under the Paris Agreement, cannot be distorted or impeded by State or Territory taxes on ZLEVs or on other goods. And if the projected diminution in revenue from the existing fuel excise attributable to the increasing take-up of ZLEVs is to be offset through the introduction of some other tax on ZLEVs or on other goods, that new tax on goods can only be imposed by the Commonwealth Parliament.

199 The questions formally stated by the parties for the opinion of the Full Court, and our answers, are as follows:

(1) Is s 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*?

Answer: Yes.

(2) Who should pay the costs of the proceeding?

Answer: The defendant.

200 GORDON J. The principle that an inland tax imposed on a step in the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin, is a duty of excise is long established[300] and fundamental[301] to the operation of the *Constitution* and, in particular, s 90. Taxes that meet this understanding of what is an excise have a natural tendency[302] to enter into the purchase price of goods and so affect them as the subjects of manufacture or production or as articles of

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300 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 587; see also 590, citing *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 437, *John Fairfax & Sons Ltd and Smith's Newspapers Ltd v New South Wales* (1927) 39 CLR 139 at 146-147, *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 297-300, *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 259-261 and *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 540-541.

Ha v New South Wales (1997) 189 CLR 465 at 499; see also 489-490, citing *Matthews* (1938) 60 CLR 263 at 277, 291-304, *Parton* (1949) 80 CLR 229 at 252-253, 260, 261, *Dennis Hotels* (1960) 104 CLR 529 at 559, *Bolton v Madsen* (1963) 110 CLR 264 at 273, *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 445 and *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 587, 590.

See also *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 364-365, 373, 377; *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 61-62, 64-65; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 12-13, 17, 25, 28, 35-36, 43-44; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185-186, 209, 213, 221-222, 229-230, 238-239; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 632.

301 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

302 "[N]ature and general tendency of the tax" first used in *City of Halifax v Fairbanks' Estate* [1928] AC 117 at 126, quoted in *Matthews* (1938) 60 CLR 263 at 300. See also *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357 at 362 ("such levies so imposed, have a tendency to enter into and to affect the price of the product"), quoted in *Matthews* (1938) 60 CLR 263 at 289-290; *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 176, cited in *Matthews* (1938) 60 CLR 263 at 290. See also *Matthews* (1938) 60 CLR 263 at 302-303.

commerce[303]. That principle reflects the essence of an excise as a trading tax[304] – a tax upon "inland dealings with goods *as integers of commerce*"[305].

201 The plaintiffs, supported by the Attorney-General of the Commonwealth, intervening ("the Commonwealth"), urged this Court now to hold that *any* inland tax on goods is a duty of excise. A majority of the Court has acceded to that request. What is a tax on goods is now said to be determined by answering two subsidiary questions[306]. The first question is whether the tax is closely related to an activity or relationship involving goods; that is, whether it is a tax imposed "at any stage of the life cycle of those goods", be it at the stage of production or manufacture in Australia or at any subsequent stage in their distribution, sale, ownership, control, use, resale, reuse or destruction in Australia. And the second question is whether the tax has a "natural tendency" to "dampen" or "depress demand" for the goods, or, in another formulation, to "impact" or "affect" "the supply and price of, or demand" for the goods.

202 The new rule marks a departure from long established and fundamental principle and authority. For more than a century, the Court has held that only *some* taxes on goods are duties of excise[307]. Those cases which held that particular taxes on goods were *not* a duty of excise must now be wrong[308]. The abandonment of past authority is obscured by the framing of the two subsidiary questions,

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303 *Matthews* (1938) 60 CLR 263 at 304.

304 *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45 at 59, quoted in *Parton* (1949) 80 CLR 229 at 259; *Dickenson's Arcade* (1974) 130 CLR 177 at 231. See also *Matthews* (1938) 60 CLR 263 at 284; *Chamberlain Industries* (1970) 121 CLR 1 at 29.

305 *Ha* (1997) 189 CLR 465 at 497 (emphasis added).

306 See Pt III(2) below.

307 See, eg, *Peterswald v Bartley* (1904) 1 CLR 497 at 509; *Parton* (1949) 80 CLR 229 at 259-261; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 554, 559-560, 573, 589-590; *Bolton* (1963) 110 CLR 264 at 271, 273; *Anderson's* (1964) 111 CLR 353 at 364, 368, 373-375, 376, 377, 379; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 520-521; *Philip Morris* (1989) 167 CLR 399 at 430-431, 436, 444-445, 488-492; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 453.

308 *Dickenson's Arcade* (1974) 130 CLR 177 at 221; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 61, 63, 69, 78, 80, 84-85. See also *Matthews* (1938) 60 CLR 263 at 298, referring to Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) and *Peterswald* (1904) 1 CLR 497; *Ha* (1997) 189 CLR 465 at 510.

which are said to be based on what is said in earlier cases. But, as will be seen, those subsidiary questions do not limit the breadth of "tax on goods" and admit of only one answer. Their asking and answer is irrelevant.

203 I cannot agree with the new rule or the approach taken to justify it – legally, logically or constitutionally. *Legally*, because it severs the definition of a duty of excise from the text, context, purpose and subject matter of s 90. *Logically*, because it is based on assertions and assumptions that are not established and are not right. At least three assertions or assumptions underpin the new rule. One is taken as a premise – that the past decisions of the Court establish that all taxes on goods are duties of excise. They do not. The second, taken without economic, evidentiary or logical warrant[309], is the assertion or assumption that all taxes on goods will have a tendency to dampen or depress, or affect, demand. The approach takes an observed economic consequence of a tax on the production, manufacture, sale or distribution of goods as articles of commerce – a natural tendency to enter the *purchase* price of goods – and reformulates and expands that economic consequence as a tendency to dampen, depress or affect demand. That is not the natural tendency of an excise long established in this Court. And it is not well based. The economic effects of taxes imposed on goods up to and including sale to a consumer are of a different nature to the economic effects of taxes imposed on goods at points *after* sale to a consumer. The economic effects of the latter taxes depend on so many variables that their effects on *demand* (or on supply, price or demand) for the goods are complex and uncertain. The third, taken as a premise and sometimes as an explanation, is that the purpose of s 90 is a "real control of the taxation of goods" simpliciter. The purpose of s 90 is narrower.

204 *Constitutionally*, I cannot agree with the new rule or the approach taken to justify it because it is not construing the text of the *Constitution*; instead it amends the *Constitution* and by that amendment arrogates to the Commonwealth an exclusive unbounded class of taxation. And the new rule is so broadly expressed, and applied in such a way, that it becomes unnecessary to determine the substance and practical operation of any law which imposes a tax on or in relation to goods.

205 These reasons are long. Their length reflects the number and nature of the steps that have been taken to justify departure from what is long established and fundamental principle. Almost all of those steps share a common characteristic – the assignment of meanings and significance to passages of past reasons for judgment that those reasons read in context do not bear. Words written and intended as defining and confining the concept of a duty of excise are treated as neither defining nor confining the concept but as supporting a new, unbounded rule of constitutional law. In so doing, the approach starts in the wrong place: by seeking first to make out the broad proposition that a duty of excise is any

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309 See [248]-[249], [268]-[272], [270] fn 541, [360]-[361], [391], [407]-[413], [422]-[424] below.

"tax on goods". As will be explained, that is not only contrary to principle and authority; it inverts the proper approach[310]. It is not surprising then that the approach leads to expression of conclusions at a level of generality beyond the issue raised in this case; formulating "a rule of constitutional law broader than is required by the precise facts to which it is to be applied"[311].

206 Long established and fundamental principle of what is a duty of excise properly accords with and reflects the text, context, purpose and subject matter of s 90 of the *Constitution*. *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[312] and *Ha v New South Wales*[313] are authority for the proposition that a duty of excise is a tax on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Leave to reopen both cases was rightly refused. That principle should not be abandoned. It is not incomplete, non-exhaustive or merely descriptive; nor was it developed in error or without analysis[314].

207 For many decades, this Court has held that a tax on the use of goods – a usage consumption tax – is *not* a duty of excise[315]. In *Dickenson's Arcade Pty Ltd v Tasmania*, Barwick CJ defined "consumption" – or what is referred to in these

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310 cf Pts I and III(1)-(2) below.

311 *Clubb v Edwards* (2019) 267 CLR 171 at 216 [135], quoting *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* (1885) 113 US 33 at 39. See also *Tajjour v New South Wales* (2014) 254 CLR 508 at 588 [175]; *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22].

312 (1993) 178 CLR 561.

313 (1997) 189 CLR 465.

314 See Pt III(1) below.

315 *Parton* (1949) 80 CLR 229 at 252, 259-261; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559-560, 573, 588-590; *Bolton* (1963) 110 CLR 264 at 271, 273; *Anderson's* (1964) 111 CLR 353 at 364, 368, 373-375, 376, 377, 379; *Hamersley Iron [No 1]* (1969) 120 CLR 42 at 55-56, 62, 64-65, 71; *Chamberlain Industries* (1970) 121 CLR 1 at 12-13, 17, 22, 25, 28, 35; *Dickenson's Arcade* (1974) 130 CLR 177 at 185-187, 193-194, 209, 218-222, 229-231, 238-239; *H C Sleigh* (1977) 136 CLR 475 at 520-521; *Logan Downs* (1977) 137 CLR 59 at 63-65, 69-70, 80; *Hematite* (1983) 151 CLR 599 at 615, 619-621, 628, 632, 644, 655, 657-658, 664-666; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 377-378, 400, 403, 412, 414; *Philip Morris* (1989) 167 CLR 399 at 430-431, 436, 444-445, 488-492; *Mutual Pools* (1992) 173 CLR 450 at 453. cf *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590; *Ha* (1997) 189 CLR 465 at 499-500.

reasons as "usage consumption" – as "the act of the person in possession of the goods in using them or in destroying them by use, irrespective of the manner or means by which that possession was obtained"[316]. Although often referred to as "consumption"[317] – which should be avoided – an act of usage consumption does not include "appropriation of goods for use" or "the act of a vendor in making delivery of goods sold or of the purchaser in receiving the goods and reducing them into [their] possession"[318]. In short, usage consumption is not sale or purchase. *Dickenson's Arcade*[319] correctly held that a tax on the usage consumption of goods is not a duty of excise within the meaning of s 90. *Dickenson's Arcade* should not be reopened and, in any event, should be affirmed.

208 These reasons are organised as follows:

Pt I – Identification of right constitutional question – the controversy			[209]-[214]
Pt II – What is a duty of excise within s 90 of the *Constitution*?			[215]-[273]
1	Long established and fundamental principle		[216]-[218]
2	Core or essential meaning of "duty of excise"		[219]-[236]
	(a)	Meaning of "excise" at Federation	[220]-[223]
	(b)	Need for a core or essential meaning?	[224]-[226]
	(c)	Context and purpose of s 90	[227]-[236]
3	Production, manufacture, sale or distribution		[237]-[264]
	(a)	Natural tendency of duties of excise to enter into purchase price of goods	[238]-[249]
	(b)	Goods as articles of commerce	[250]-[259]

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316 (1974) 130 CLR 177 at 187.

317 See, eg, *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 435, 437; *Matthews* (1938) 60 CLR 263 at 277, 300; *Parton* (1949) 80 CLR 229 at 261; *Dickenson's Arcade* (1974) 130 CLR 177 at 187, 194, 209, 218-222, 229-231, 238-239; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590; *Ha* (1997) 189 CLR 465 at 499-500. See also Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), Bk I, Ch 8 at 318, quoted in *Ha* (1997) 189 CLR 465 at 493; *Pacific Insurance Co v Soule* (1868) 74 US 433 at 445; *Patton v Brady, Executrix* (1902) 184 US 608 at 617-618.

318 *Dickenson's Arcade* (1974) 130 CLR 177 at 187.

319 (1974) 130 CLR 177.

(c) Trading tax [260]-[264]

4 Tax on usage consumption not a duty of excise [265]-[273]

Pt III – "Inland tax on goods" [274]-[424]

1 Premise – a duty of excise is any tax on goods – should not be accepted [275]-[384]

(a) *Capital Duplicators [No 2]* and *Ha* do not support premise [277]-[296]

(i) "Inland taxes on goods" [278]-[287]

(ii) "Exhaust the categories" [288]-[289]

(iii) "Unnecessary to consider" consumption [290]-[296]

(b) Reframing of purpose of s 90 [297]-[299]

(c) Duty of excise any "tax on goods" contrary to principle and authority [300]-[378]

(i) *Commonwealth Oil Refineries* and *John Fairfax* [304]-[309]

(ii) *Matthews* [310]-[315]

(iii) *Parton* [316]-[324]

(iv) *Dennis Hotels* and *Bolton* [325]-[328]

(v) *Anderson's* [329]-[331]

(vi) *Dickenson's Arcade* [332]-[362]

(vii) *Logan Downs* [363]-[374]

(viii) *Hematite*, *Philip Morris*, *Mutual Pools*, *Capital Duplicators [No 2]* and *Ha* [375]-[378]

(d) "Saleable" goods – "availability for commercial exploitation" [379]-[382]

(e) Premise leads to error [383]-[384]

2 Expression of new rule [385]-[391]

(a) Second "question" and first "subsidiary question" [388]-[389]

(b) Second "subsidiary question" [390]-[391]

3 Constitutional method [392]-[413]

(a) Not construing text of *Constitution*, rewriting it [392]-[397]

(b) Arrogating to Commonwealth an exclusive unbounded class of taxation [398]-[403]

(c) Constitutional facts and invalidity [404]-[413]

4 Other adverse consequences [414]-[416]

5 ZLEV charge not a duty of excise [417]-[424]

Pt IV – Overturning authority [425]-[439]

1 Leave to reopen principles [428]

2 Leave to reopen *Dickenson's Arcade* required and refused [429]-[439]

Pt V – Answers [440]

I Identification of right constitutional question – the controversy

209 Identification of the right question is important in any constitutional case[320]. Questions about the construction of the *Constitution* arise "in a live controversy between parties"[321]. It is inappropriate to abstract the question arising in any case to a higher level of generality than that raised by the facts and circumstances before the Court. "The task of the Court is not to describe the metes and bounds of any particular constitutional provision; it is to quell a particular controversy by deciding whether, in the circumstances presented in the matter, the relevant constitutional provisions do or do not have the consequence for which a party contends."[322] And that necessarily affects constitutional method.

210 What is the starting point? As the majority in *Ha* observed, when a constitutional limitation or restriction on power – like s 90 of the *Constitution* –

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320 See, eg, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 684; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82-83; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 228; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 99; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572; *Northern Territory v GPAO* (1999) 196 CLR 553 at 621 [177]; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 54 [113].

321 *Singh v The Commonwealth* (2004) 222 CLR 322 at 383 [152]. See also *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303, 318; *Clubb* (2019) 267 CLR 171 at 216-217 [136]; *Zhang* (2021) 273 CLR 216 at 231 [25]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248 [58].

322 *Singh* (2004) 222 CLR 322 at 383 [152].

"is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices"[323].

211 So, against that background, it is necessary to first consider the legal and practical operation of the law that is sought to be invalidated – s 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("the ZLEV Charge Act").

212 The terms of the ZLEV Charge Act are set out in the reasons of other members of the Court[324]. Section 7(1) imposes a tax upon a registered operator of a ZLEV for use of the ZLEV on specified roads – the ZLEV charge. The ZLEV charge is charged annually at the point of reregistration of the vehicle[325]. The amount of the ZLEV charge is calculated at specified rates per kilometre travelled on specified roads[326]. There is no imposition of a ZLEV charge unless the ZLEV is used on "specified roads". Relying on this fact, the defendant, the State of Victoria, sought to argue that the ZLEV charge was not a tax on goods but rather a tax on the activity of driving a ZLEV on specified roads. However, nearly all use of ZLEVs will be subject to the ZLEV charge: the definition of "specified roads" is very broad, extending in effect to any area of land, inside or outside Victoria, over which the public has a right of way[327]. And the tax falls selectively on the use of ZLEVs, not on the use of any other vehicles on specified roads. The ZLEV charge is not imposed on a step in the production, manufacture, sale or distribution of goods but on the use of a ZLEV substantially after the point of sale[328]. The legal terms of the ZLEV Charge Act and its practical operation mean that s 7(1) imposes a tax on use – usage consumption – of a ZLEV.

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323 (1997) 189 CLR 465 at 498, citing *Cole v Whitfield* (1988) 165 CLR 360 at 401, 408, *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 425, 432, *Philip Morris* (1989) 167 CLR 399 at 451, 492, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 524-525, 569, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 466-467 and *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 199. See also at 491, referring to *Philip Morris* (1989) 167 CLR 399.

324 Joint Reasons at [166]-[182]; Reasons of Edelman J at [679]-[681]; Reasons of Steward J at [714]-[722]; Reasons of Jagot J at [897]-[908].

325 ZLEV Charge Act, ss 11, 15, 18, 19.

326 ZLEV Charge Act, s 8.

327 ZLEV Charge Act, s 3 (definition of "specified road").

328 ZLEV Charge Act, ss 7(1), 11, 15, 18.

213 The controversy arises because the plaintiffs, both registered operators of ZLEVs, have declared their odometer readings and paid the ZLEV charge in accordance with the ZLEV Charge Act. The plaintiffs, supported by the Commonwealth, claim that s 7(1) of the ZLEV Charge Act is invalid. Section 7(1) is a law of Victoria. Victoria does not dispute that the ZLEV Charge Act imposes a tax.

214 In this case, the controversy – the question – is whether s 7(1) of the ZLEV Charge Act, which imposes a charge for use of a ZLEV on specified roads – usage consumption – is a "duty of excise" within the meaning of s 90 of the *Constitution*. Consistent with long established and fundamental principle, the answer is "no".

II What is a duty of excise within s 90 of the *Constitution*?

215 The plaintiffs, and the Commonwealth, ask this Court to depart from that long established and fundamental principle. Given that a majority of this Court have acceded to that request, it is necessary to state the long established and fundamental principle and examine and explain why that principle is both long established and fundamental and should remain so.

1 Long established and fundamental principle

216 In *Ha*, the majority (Brennan CJ, McHugh, Gummow and Kirby JJ) affirmed "the correctness of the doctrine" established by "the *Parton* line of cases"[329], holding that[330]:

> "[t]herefore we reaffirm that *duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin*. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. *Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods*. In this case, as in *Capital Duplicators Case [No 2]*[331], it is unnecessary to consider whether a tax on the consumption of goods would be classified as a duty of excise."

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329 (1997) 189 CLR 465 at 499; see also at 490. See *Parton* (1949) 80 CLR 229; *Dennis Hotels* (1960) 104 CLR 529; *Bolton* (1963) 110 CLR 264; *Hamersley Iron [No 1]* (1969) 120 CLR 42; *Chamberlain Industries* (1970) 121 CLR 1; *Dickenson's Arcade* (1974) 130 CLR 177; *Philip Morris* (1989) 167 CLR 399; *Capital Duplicators [No 2]* (1993) 178 CLR 561.

330 (1997) 189 CLR 465 at 499-500 (emphasis added).

331 (1993) 178 CLR 561 at 590.

217 Four years earlier, in 1993, in *Capital Duplicators [No 2]*[332], the same principle was stated. The majority in that case (Mason CJ, Brennan, Deane and McHugh JJ) held that[333]:

> "once it is accepted that duties of excise are not limited to duties on production or manufacture, we think that it should be accepted that the *preferable* view is to regard the distinction between duties of customs and duties of excise *as dependent on the step which attracts the tax*: importation or exportation in the case of customs duties; *production, manufacture, sale or distribution – inland taxes – in the case of excise duties*[334]. It is unnecessary in this case to consider taxes on the consumption of goods."

218 That is, in each case, the majority endorsed the "long established"[335] and "fundamental"[336] principle that a duty of excise is an inland tax on a step in the production, manufacture, sale or distribution of goods. As the majority in *Ha* observed[337], that principle was adopted in 1963 by a unanimous Court in *Bolton v Madsen*[338] from a statement of Kitto J three years earlier in *Dennis Hotels Pty Ltd v Victoria*[339]. And that principle can be traced back to 1949 to the judgments of Rich and Williams JJ[340] and Dixon J[341] in *Parton v Milk Board (Vict)*, and, ultimately, with some later modification in *Parton*[342], to 1938 to the reasons of

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332 (1993) 178 CLR 561.

333 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590 (emphasis added).

334 This was the view of Rich J in *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 437; *John Fairfax* (1927) 39 CLR 139 at 146-147; and perhaps the preferred view of Dixon J in *Matthews* (1938) 60 CLR 263 at 297-300; *Parton* (1949) 80 CLR 229 at 259-261; *Dennis Hotels* (1960) 104 CLR 529 at 540-541.

335 See fn 300 above.

336 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

337 (1997) 189 CLR 465 at 490.

338 (1963) 110 CLR 264 at 273.

339 (1960) 104 CLR 529 at 559.

340 (1949) 80 CLR 229 at 252-253.

341 (1949) 80 CLR 229 at 260-261.

342 (1949) 80 CLR 229 at 261.

Dixon J in *Matthews v Chicory Marketing Board (Vict)*[343]. As will be seen, that principle is not incomplete, non-exhaustive or merely descriptive, nor was it developed in error or without analysis[344].

2 Core or essential meaning of "duty of excise"

219 That long established and fundamental principle coheres with the core or essential meaning of "duty of excise" in s 90 of the *Constitution*[345]. To ascertain the core or essential meaning of that term, account must be taken of any ordinary meaning of the phrase at the time of Federation, its context and its purpose[346].

(a) Meaning of "excise" at Federation

220 The boundaries of the word "excise" at the time of Federation were elusive; by 1938 Dixon J was able to say in *Matthews* that the word "never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application"[347]. His Honour in that case traced the history of the use of the word in England, noting its confusing evolution, including that: in the mid-1600s it was used to refer to "inland taxes on commodities, whether imported or produced or manufactured in England"[348]; by the mid-1700s Blackstone would refer to it as "an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last

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343 (1938) 60 CLR 263 at 300, 304.

344 See Pt III(1) below. cf Joint Reasons at [49], [79], [85], [91], [128], [133]; Reasons of Jagot J at [936]-[937], [939].

345 See *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267; *Street* (1989) 168 CLR 461 at 537; *McGinty v Western Australia* (1996) 186 CLR 140 at 200-201; *Eastman v The Queen* (2000) 203 CLR 1 at 45 [142]-[144]; *Singh* (2004) 222 CLR 322 at 385 [159]-[160].

346 *Singh* (2004) 222 CLR 322 at 385 [159]-[160]; see also 332-333 [12], 335 [18], 340 [27]. See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368, quoted with approval in *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 314, *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 99, 128, 220-221 and *XYZ v The Commonwealth* (2006) 227 CLR 532 at 550-551 [43]; *Brownlee v The Queen* (2001) 207 CLR 278 at 285 [8].

347 (1938) 60 CLR 263 at 293. See also *Dickenson's Arcade* (1974) 130 CLR 177 at 230; *Hematite* (1983) 151 CLR 599 at 615-616; *Philip Morris* (1989) 167 CLR 399 at 425; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 606.

348 *Matthews* (1938) 60 CLR 263 at 294.

stage before the consumption"[349], yet it would also be extended to "wider" applications such as licence fees[350]; later that century, its meaning would be confined in other contexts only to taxes upon liquors[351]; whereas, by the mid-1800s, English economics writers would refer to the word "as the name for inland taxes upon home manufactures and products"[352]. Dixon J also quoted Sir Robert Giffen's article on taxation in *Encyclopaedia Britannica*, which stated that "[e]xcise duties are charges upon commodities produced at home *on their way to the consumer*, and customs duties in the United Kingdom are charges upon commodities brought into the country from abroad; and they are of essentially the same nature. Not only so, but excise duties and customs duties are in some cases supplementary to each other, like articles being produced at home and imported from abroad, so that for the sake of the revenue they have both to be taxed alike"[353].

221 In 1904, however, Griffith CJ (writing for the Court) in *Peterswald v Bartley* – the Court's very first decision on s 90 – held that at the time of Federation, the term "excise" had a distinct meaning in Australia "in the popular mind"[354]. Given that there were many laws in force in the States dealing with the subject and that s 93 includes the words "duties of excise paid on goods *produced or manufactured* in a State" (emphasis added), those matters were said to make it "almost inevitable" that the word "excise" was "intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when *produced or manufactured, and not in the sense of a direct tax or personal tax*"[355]. That conclusion was informed by a passage from Quick and Garran, which his

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349 *Matthews* (1938) 60 CLR 263 at 295, quoting Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), Bk I, Ch 8 at 318. See also *Ha* (1997) 189 CLR 465 at 493.

350 *Matthews* (1938) 60 CLR 263 at 295-297.

351 *Matthews* (1938) 60 CLR 263 at 297, quoting *R v Justices of Surrey* (1788) 2 TR 504 at 510 [100 ER 271 at 275].

352 *Matthews* (1938) 60 CLR 263 at 297-298, citing Mill, *Principles of Political Economy* (1848), vol II, bk V, c IV, §1.

353 *Matthews* (1938) 60 CLR 263 at 298 (emphasis added). The reference is from *Encyclopaedia Britannica*, 11th ed (1911), vol 26 at 460. See also at 298, quoting *McCulloch's Commercial Dictionary*, definition of "excise" and *Concise Oxford Dictionary*, definition of "excise". See also *Encyclopaedia Britannica*, 9th ed (1878), vol 8 at 797-798. The existing volumes of the ninth edition were incorporated unamended into *Encyclopaedia Britannica*, 10th ed (1902-1903).

354 (1904) 1 CLR 497 at 509.

355 *Peterswald* (1904) 1 CLR 497 at 509 (emphasis added).

Honour quoted[356], in which the authors said that "[t]he fundamental conception of the term is that of a tax on articles produced or manufactured in a country ... and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth"[357]. The Chief Justice said that that understanding was, "as far as we know, a correct historical statement of the use and growth of the term in England"[358].

222 Yet, in *Matthews*, Dixon J's survey of this history led his Honour to the conclusion that it did not "disclose any very solid ground for saying that, according to any established English meaning, an essential part of its connotation is, or at any time was, that the duty called by that name should be confined to goods of domestic manufacture or production"[359].

223 This potted history of the use of the word "excise" was reflected in the Convention Debates[360] – during which the meaning of the term was only substantively debated on three occasions[361] – such that the majority in *Ha* were able to say that there was "no common use" of the term in those debates "which might illuminate its meaning, save that it does not include the fees for a licence to carry on a business which, in England, were sometimes called excise licences"[362]. However, their Honours then went on to note that it was apparent at the time of Federation that "it was understood ... that in becoming States what had

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356 *Peterswald* (1904) 1 CLR 497 at 508-509.

357 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837.

358 (1904) 1 CLR 497 at 509.

359 (1938) 60 CLR 263 at 299.

360 See Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10; Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1 at 21.

361 *Official Report of the National Australasian Convention Debates* (Sydney), 13-16 March 1891 at 346-371; *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 835-843; *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1065-1068.

362 (1997) 189 CLR 465 at 493. See also *Philip Morris* (1989) 167 CLR 399 at 425.

been [the Colonies'] principal sources of revenue would be withdrawn"[363]. Their Honours observed that the withdrawal of the power to impose duties of excise "was, in practice, a withdrawal of the taxes the Colonies had imposed on the production or manufacture of beer, spirits and tobacco within the Colony"[364].

(b) Need for a core or essential meaning?

224 There may have been no single common or established meaning of the constitutional term – "duties ... of excise" – having "any certain connotation" or "any exact application" at the time of Federation[365]. But many constitutional terms and concepts recognised and provided for in the *Constitution* were in a state of flux at Federation, including "copyrights, patents of inventions and designs, and trade marks" in s 51(xviii)[366], "aliens" in s 51(xix)[367], "corporations" in s 51(xx)[368], "marriage" in s 51(xxi)[369], "external affairs" in s 51(xxix)[370],

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363 *Ha* (1997) 189 CLR 465 at 493-494, citing Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 530.

364 *Ha* (1997) 189 CLR 465 at 494.

365 *Matthews* (1938) 60 CLR 263 at 293; *Ha* (1997) 189 CLR 465 at 493. cf *Peterswald* (1904) 1 CLR 497 at 509; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837; Reasons of Steward J at [824].

366 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 495-496 [23], 501 [41].

367 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 42 [28]; *Singh* (2004) 222 CLR 322 at 340-341 [30], 384-385 [157]-[158], 395 [190], 413-414 [250]-[252]; *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 37 [9].

368 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171 at 183 [21]-[23], citing *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 90-98 [96]-[124].

369 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 456-458 [16]-[19].

370 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 482; see also 478-480, 483.

constitutional writs in s 75(v)[371], "matter" in Ch III[372], trial by jury in s 80[373], representative government and "chosen by the people" in ss 7 and 24[374] and territories "otherwise acquired by" the Commonwealth in s 122[375]. Many constitutional concepts were, around 1900: subject to "cross-currents and uncertainties"[376], "dynamism"[377] and "radical changes"[378]; "still evolving"[379]; "in a condition of continuing evolution"[380]; "in a state of development"[381]; "not immutable"[382]; "constantly changing"[383] and "not ... perfectly developed"[384].

225 That does not detract from the proposition that there is and must be a core or essential meaning or essence of a constitutional term. As Lane put it[385],

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371 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 97 [34]; see also 89 [5]. See also *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 269 [235].

372 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 629 [99]-[100].

373 *Brownlee* (2001) 207 CLR 278 at 284 [6], 286 [12], 287 [17], 300 [59]; cf *Cheatle v The Queen* (1993) 177 CLR 541 at 552, 560.

374 *McGinty* (1996) 186 CLR 140 at 200, 221, 286-287; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 46 [117], 48 [121]; see also 108-112 [333]-[347].

375 *Fishwick v Cleland* (1960) 106 CLR 186 at 197-198.

376 *Grain Pool* (2000) 202 CLR 479 at 501 [41].

377 *Grain Pool* (2000) 202 CLR 479 at 496 [23].

378 *Queensland Rail* (2015) 256 CLR 171 at 183 [21].

379 *Truth About Motorways* (2000) 200 CLR 591 at 629 [100].

380 *Industrial Relations Act Case* (1996) 187 CLR 416 at 482.

381 *Aala* (2000) 204 CLR 82 at 97 [34].

382 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 463 [37]; see also 456 [16].

383 *Brownlee* (2001) 207 CLR 278 at 286 [12].

384 *McGinty* (1996) 186 CLR 140 at 221.

385 Lane, *Lane's Commentary on the Australian Constitution*, 2nd ed (1997) at 912.

the *Constitution* "must have contemplated each of its terms as a term with some general content. But it is also true that the organic instrument of government" – the *Constitution* – "pinpoints the essence of things". The search for a core or essential meaning or the essence of a constitutional term as a constitutional method can be seen in a range of contexts; for example, in ascertaining the meaning of "discriminate between" in s 51(ii)[386], "telegraphic" and "telephonic ... services" referred to in s 51(v)[387], "aliens" in s 51(xix)[388], "corporations" in s 51(xx)[389], "judgments" in s 73[390], "courts" in Ch III[391], "judicial power" in Ch III[392] and "trial on indictment" in s 80[393].

226 The core or essential meaning of a constitutional term does not change, although its application may change with changing circumstances and

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386 See, eg, *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [118].

387 See, eg, *Jones v The Commonwealth [No 2]* (1965) 112 CLR 206 at 219.

388 See, eg, *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184, 189; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 426-427 [108]-[111], 428 [113]-[114], 435 [132]; *Singh* (2004) 222 CLR 322 at 335 [18], 341 [30], 343 [38], 351 [59], 385 [160], 395 [190]; *Love v The Commonwealth* (2020) 270 CLR 152 at 290 [399]; *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 635 [53]; *Thoms v The Commonwealth* (2022) 96 ALJR 635 at 648-649 [61]; 401 ALR 529 at 543-544.

389 See, eg, *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 266; *Queensland Rail* (2015) 256 CLR 171 at 183-184 [23].

390 See, eg, *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 277. See also *Mellifont* (1991) 173 CLR 289 at 317, 324.

391 See, eg, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [13], 208-209 [73]-[74].

392 See, eg, *Leeth* (1992) 174 CLR 455 at 502, citing *Harris v Caladine* (1991) 172 CLR 84 at 150, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 and *Polyukhovich* (1991) 172 CLR 501 at 703; see also *Polyukhovich* (1991) 172 CLR 501 at 607, 689.

393 See, eg, *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 583.

developments[394]. This is not a case where there is any suggestion of the application, or denotation, of the term "duty of excise" changing[395]; rather, the questions are: What is the core or essential meaning of a "duty of excise" in s 90 of the *Constitution*? And does the long established and fundamental principle, and the approach for determining whether a tax is a "duty of excise", cohere with that meaning?

(c) Context and purpose of s 90

227 The long established and fundamental meaning of the term "duty of excise" is not at large; it was and remains tethered to the purpose of s 90, as discerned from the context of Ch IV of the *Constitution.*

228 At Federation, duties of customs and duties of excise were the main forms of revenue for the Colonies[396], especially the former[397]. The political imperative for such duties to be uniform in the new Federation was born from a desire that persons and businesses who acquired goods from outside a Colony not suffer the

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394 *Andrews v Howell* (1941) 65 CLR 255 at 278; *Professional Engineers' Association* (1959) 107 CLR 208 at 267; *Lansell v Lansell* (1964) 110 CLR 353 at 366-367; *King v Jones* (1972) 128 CLR 221 at 229; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 212, 233-234; *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 35; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 254; *Nolan* (1988) 165 CLR 178 at 185-186; *Street* (1989) 168 CLR 461 at 537; *McGinty* (1996) 186 CLR 140 at 200; *Re Patterson* (2001) 207 CLR 391 at 426-427 [108]-[109]; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 342 [106]. See also Lane, *Lane's Commentary on the Australian Constitution*, 2nd ed (1997) at 912; Hanks, Gordon and Hill, *Constitutional Law in Australia*, 4th ed (2018) at 16 [1.50]; Kenny, "Evolution", in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 119 at 125.

395 See *Eastman* (2000) 203 CLR 1 at 45 [144]; cf *Sue v Hill* (1999) 199 CLR 462 at 487 [48]-[49], 496 [78], 523 [159], 524-525 [161]-[162], 526 [167].

396 *Ha* (1997) 189 CLR 465 at 491, 493-494. See also Twomey, *Public Money: Federal-State Financial Relations and the Constitutional Limits on Spending Public Money*, Report No 4, Constitutional Reform Unit, Sydney Law School (2014) at 10, citing Mathews and Jay, *Federal Finance: Intergovernmental Financial Relations in Australia Since Federation* (1972) at 24.

397 Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 21 *Sydney Law Review* 627 at 637.

imposition of customs duties inside that Colony[398]. And thus, as the majority in *Ha* explained, "one of the chief purposes of Ch IV was to provide for the financial transition of the Colonies into the States of the Commonwealth and for the revenues required by the Commonwealth"; that is, Ch IV set up a "transitional scheme of finance" for the newly established Commonwealth[399]. That transitional scheme of finance served the "paramount object of Federation", interstate free trade with uniform duties of customs[400].

229 Yet, that did not mean that the Commonwealth's exclusive power over the imposition of duties of excise was for the purpose *only* of protecting Commonwealth tariff policy[401]. In a passage of Dixon J's reasons in *Parton* – subsequently affirmed by members of the Court in *Western Australia v Chamberlain Industries Pty Ltd*[402], *Dickenson's Arcade*[403], *M G Kailis (1962) Pty Ltd v Western Australia*[404], *Hematite Petroleum Pty Ltd v Victoria*[405] and *Philip Morris Ltd v Commissioner of Business Franchises (Vict)*[406], and then endorsed by the majorities in *Capital Duplicators [No 2]*[407] and *Ha*[408] – his Honour stated that the purpose of s 90 was "to give the Parliament *a real control of the taxation of commodities* and to ensure that the execution of whatever policy it

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398 Twomey, *Public Money: Federal-State Financial Relations and the Constitutional Limits on Spending Public Money*, Report No 4, Constitutional Reform Unit, Sydney Law School (2014) at 5.

399 (1997) 189 CLR 465 at 491. See also Twomey, *Public Money: Federal-State Financial Relations and the Constitutional Limits on Spending Public Money*, Report No 4, Constitutional Reform Unit, Sydney Law School (2014) at 6-10.

400 *Ha* (1997) 189 CLR 465 at 492, quoting Mills, *Taxation in Australia* (1925) at 201. See also *Cole* (1988) 165 CLR 360 at 386, quoted in *Ha* (1997) 189 CLR 465 at 494.

401 *Ha* (1997) 189 CLR 465 at 496.

402 (1970) 121 CLR 1 at 17.

403 (1974) 130 CLR 177 at 185, 199, 219, 238.

404 (1974) 130 CLR 245 at 265.

405 (1983) 151 CLR 599 at 631-632; cf 616-617.

406 (1989) 167 CLR 399 at 426; see also 489.

407 (1993) 178 CLR 561 at 586.

408 (1997) 189 CLR 465 at 495.

adopted should not be hampered or defeated by State action"[409]. That articulation would come to be, and remains, the accepted purpose of s 90[410]. (And as will later be shown, Dixon J's reference to "commodities" rather than "goods" is important.)

230 That purpose – real control of the taxation of commodities – is evident from the place that s 90 serves within the scheme embodied in the provisions of Ch IV and in s 51(ii) and (iii), a scheme which "lay at the heart of the Federation"[411]. Thus, s 92, which requires freedom of trade, commerce and intercourse among the States, and s 90, were designed to combine with the requirement under s 88 to impose uniform duties of customs, the Commonwealth's concurrent and non-discriminatory power of taxation under s 51(ii), its concurrent power to impose uniform bounties under s 51(iii), and the prohibition under s 99 upon the Commonwealth giving preference to any State by any law or regulation of trade, commerce, or revenue, "to ensure equality of opportunity both for interstate trade and commerce and for local manufacture and goods and ordain that the Commonwealth be an economic union, not an association of States each with its own domestic economy"[412]. That is, s 90, in context, serves to protect the economic interests of all parts of the Commonwealth[413], and is "to play its part in achieving the 'essential objective' of abolishing internal customs barriers and in guaranteeing equality as regards the customs and excise duties which the people of the Commonwealth are to bear"[414].

231 It is in that context that it can be seen that the function of s 90 is to ensure that trade is not diverted and competition not distorted by differential taxes on

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409 (1949) 80 CLR 229 at 260 (emphasis added); see also 265. See also *Whitehouse v Queensland* (1960) 104 CLR 609 at 618.

410 *Whitehouse* (1960) 104 CLR 609 at 618; *Chamberlain Industries* (1970) 121 CLR 1 at 17; *Dickenson's Arcade* (1974) 130 CLR 177 at 185, 199, 219, 238; *M G Kailis* (1974) 130 CLR 245 at 265; *Hematite* (1983) 151 CLR 599 at 631-632; *Philip Morris* (1989) 167 CLR 399 at 426, 489; *Capital Duplicators Pty Ltd v Australian Capital Territory* ("*Capital Duplicators [No 1]*") (1992) 177 CLR 248 at 277; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586; *Ha* (1997) 189 CLR 465 at 495.

411 *Hematite* (1983) 151 CLR 599 at 660.

412 *Philip Morris* (1989) 167 CLR 399 at 426, cited in *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585. See also *Hematite* (1983) 151 CLR 599 at 631, 660-662; *Cole* (1988) 165 CLR 360 at 386-387; *Ha* (1997) 189 CLR 465 at 494-495; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452 [12]-[13].

413 *Capital Duplicators [No 1]* (1992) 177 CLR 248 at 276; see also 279.

414 *Capital Duplicators [No 1]* (1992) 177 CLR 248 at 278.

goods or differential bonuses on the production or export of goods[415]. With the aid of s 90, Commonwealth policies could therefore be designed and implemented so that the Commonwealth could exercise its exclusive power over customs and excise duties by imposing those duties at its desired levels to, for example, protect and stimulate Australian production, encourage Australian producers and manufacturers to become more competitive, or lower the overall level of domestic prices[416]. But the text, context, purpose, subject matter and history of s 90 also deny any necessary linkage between the Commonwealth's exclusive power to impose duties of excise and the protection of Commonwealth tariff policy[417]. Its purpose was broader, extending to the Commonwealth's "effective control over economic policy *affecting the supply and price of goods* throughout the Commonwealth"[418].

232 It is critical, however, to recognise that the "high constitutional purpose"[419] of s 90 giving the Commonwealth "real control of the taxation of commodities"[420] was not and is not unbounded. The production, manufacture, supply and purchase price of goods, and trade and competition in goods, may be affected by a variety of factors, including different forms of regulation and different forms of taxation – many of which are within State legislative power[421]. The Commonwealth's economic policy levers over which s 90 was intended to afford protection are those *taxes on goods* affecting the *supply and price of goods*[422]. And that was so in order

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415 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585.

416 *Hematite* (1983) 151 CLR 599 at 631, cited in *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586-587.

417 *Ha* (1997) 189 CLR 465 at 496, quoting *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 835-836.

418 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (emphasis added).

419 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586, referring to *Parton* (1949) 80 CLR 229 at 260.

420 *Parton* (1949) 80 CLR 229 at 260.

421 See *Peterswald* (1904) 1 CLR 497 at 507; *Hematite* (1983) 151 CLR 599 at 617; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585; *Ha* (1997) 189 CLR 465 at 497.

422 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

to aid in fulfilling an "essential objective of the federal compact: the creation and maintenance of a free trade area throughout the Commonwealth"[423].

233 That understanding of the purpose of s 90 is not only reinforced, but rendered necessary, by the text of s 90. It does not refer to taxes on goods. It refers to duties of customs and of excise: two categories of taxes on goods. And that is why in *Capital Duplicators [No 2]*[424], in a passage quoted with approval by the majority in *Ha*[425], the majority stated that "'duties of customs and of excise' in s 90 must be construed as exhausting the *categories* of taxes on goods". This form of analysis is not an error or unexplained[426]. The context of that statement, made as it was in rejection of an argument that excises are only concerned with taxes on locally produced or manufactured goods, reveals simply that s 90 is not to be interpreted as creating a lacuna whereby a tax that is imposed indifferently on all goods (that is, on the distribution or sale of goods irrespective of whether they are imported or locally produced or manufactured) cannot come within s 90. To so hold would frustrate the purpose of s 90. The text, context, purpose and subject matter of s 90 compel the conclusion that there can be no such lacuna.

234 It is at this point that it is important to recall that s 90 is a constitutional limitation – a restriction on State legislative power[427]. It is not a head of legislative power to be construed "with all the generality which the words used admit"[428]. And it is a restriction on State legislative power of a particular kind. The Commonwealth and the States both have legislative power to impose taxes, subject to Commonwealth laws prevailing over State laws to the extent of any inconsistency[429]. And "there can be no doubt that ... the raising of money by

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423 *Capital Duplicators [No 1]* (1992) 177 CLR 248 at 277, quoted in *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

424 (1993) 178 CLR 561 at 590 (emphasis added).

425 (1997) 189 CLR 465 at 488.

426 See Pt III(1)(a)(ii) below.

427 *Ha* (1997) 189 CLR 465 at 498.

428 cf *Grain Pool* (2000) 202 CLR 479 at 492 [16], quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225. See also *Work Choices Case* (2006) 229 CLR 1 at 103 [142]; *Spence v Queensland* (2019) 268 CLR 355 at 405 [57], 456 [197]; *Love* (2020) 270 CLR 152 at 209 [131], 218 [168], 236 [236], 239 [244].

429 *Constitution*, ss 51(ii), 107, 109.

taxation ... [is] essential to the very existence of a Government"[430]. Under s 90, the power of the Commonwealth to impose taxes that are "duties of customs and of excise" is exclusive. But that conferral of exclusive legislative powers on the federal polity was carefully limited by the *Constitution*[431]. So, for example, obligations were imposed on the Commonwealth to restore, for certain time periods following Federation, all surplus revenue to the States, and to apply not more than one quarter of the net revenue from duties of customs and excise towards Commonwealth expenditure[432].

235 It is also important to recognise that the process of ascertaining the core or essential meaning of a constitutional term "involves both inclusion *and exclusion*"[433]. That, in turn, identifies limitations *inherent in* the constitutional concept itself. For example, negative attributes are used to define what is *not* a "tax" for the purposes of s 51(ii); a tax is a "compulsory exaction of money by a public authority for public purposes, enforceable by law, and is *not* a payment for services rendered"[434].

236 The question then is what are the core or essential characteristics of a duty of excise as a *category* of tax on goods? What are the limitations inherent in the constitutional concept of an "excise"? Put in different terms, a tax on goods is necessary, but not sufficient, for a tax to be a duty of excise. What else is necessary?

3 Production, manufacture, sale or distribution

237 A core, or essential, aspect of the meaning – a limitation inherent in the constitutional concept – of "duty of excise" is that it is a tax on goods imposed, in substance, upon or in respect of a step in the *production, manufacture, sale or*

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430 *Melbourne Corporation* (1947) 74 CLR 31 at 52-53.

431 See Leeming, "Power", in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 759 at 769.

432 *Constitution*, ss 87 and 93.

433 *Singh* (2004) 222 CLR 322 at 332 [11] (emphasis added). See also *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 549.

434 *Matthews* (1938) 60 CLR 263 at 276 (emphasis added). See also *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467; *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 567.

distribution of goods[435]. That is, an excise is a tax imposed on goods at particular identified points on the *supply* side of a market for the sale of the goods. That limitation, again, is not incomplete, non-exhaustive or merely descriptive; nor was it developed in error or without analysis. The principled basis for the limitation can be examined by considering three separate but interrelated concepts that inform the meaning of the term "duty of excise": the natural tendency of duties of excise to enter into the purchase price of goods; the significance of goods being affected as articles of commerce; and the description of a duty of excise as a "trading tax".

(a) Natural tendency of duties of excise to enter into purchase price of goods

238 The proposition that a tax on any of the four steps – production, manufacture, sale or distribution of goods – is a duty of excise because of its tendency *to enter into the purchase price* of goods was articulated by Mason J in *Hematite*[436]. But that was not the first, or last, time that the core elements of the proposition were stated and explained. As a matter of general principle, a duty of excise is an impost "so closely connected with the manufacture, production, or distribution of *commercial* goods that it forms an element *naturally incorporated* in the price"[437]. Indeed, the steps might be better listed as production, manufacture, distribution or sale of goods – sale to the consumer being the last of the steps.

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435 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 587; see also 590, citing *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 437, *John Fairfax* (1927) 39 CLR 139 at 146-147, *Matthews* (1938) 60 CLR 263 at 297-300, *Parton* (1949) 80 CLR 229 at 259-261 and *Dennis Hotels* (1960) 104 CLR 529 at 540-541; *Ha* (1997) 189 CLR 465 at 499; see also 489-490, citing *Matthews* (1938) 60 CLR 263 at 277, 291-304, *Parton* (1949) 80 CLR 229 at 252-253, 260, 261, *Dennis Hotels* (1960) 104 CLR 529 at 559, *Bolton* (1963) 110 CLR 264 at 273, *Philip Morris* (1989) 167 CLR 399 at 445 and *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 587, 590. See also *Anderson's* (1964) 111 CLR 353 at 364-365, 373, 377; *Hamersley Iron [No 1]* (1969) 120 CLR 42 at 61-62, 64-65; *Chamberlain Industries* (1970) 121 CLR 1 at 12-13, 17, 25, 28, 35-36, 43-44; *Dickenson's Arcade* (1974) 130 CLR 177 at 185-186, 209, 213, 221-222, 229-230, 238-239; *Hematite* (1983) 151 CLR 599 at 632.

436 (1983) 151 CLR 599 at 632. See [376] below.

437 *Matthews* (1938) 60 CLR 263 at 301 (emphasis added); see also 303. See also *Hematite* (1983) 151 CLR 599 at 632-633.

239 In *Peterswald*, the Court held that the "fundamental conception" of a duty of excise was "a tax on articles produced or manufactured in a country"[438]. Griffith CJ explained that a tax imposed upon goods during the process of manufacture was "an indirect tax, ie that the person primarily liable, having paid it, adds it to the selling price and so passes it on to be ultimately paid by the consumer"[439].

240 Consistently with that principle, a duty of excise was extended from taxes on the production or manufacture of goods to taxes on goods during the process of sale or distribution. The reason for the extension – by reference to the natural tendency of a duty of excise to enter the purchase price of goods – was explained in the same substantive terms more than 40 years apart. In 1949 in *Parton*, Rich and Williams JJ explained that there is "no reason why a levy should not be a duty of excise within the meaning of s 90 of the Constitution although it is imposed at some subsequent stage" to production or manufacture[440]. Their Honours went on to say that the tax "must be imposed so as to be a method of taxing the production or manufacture of goods" but those steps will be taxed "whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax [themselves] but will indemnify [themselves] by passing it on to the purchaser or consumer"[441]. Similarly, Dixon J's statement of the purpose of s 90 in *Parton*[442] was immediately followed by his Honour's explanation that "[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"[443].

241 In 1993, the majority in *Capital Duplicators [No 2]* explained the reason for the extension and its effect in similar terms[444]:

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438 (1904) 1 CLR 497 at 508.

439 *Peterswald* (1904) 1 CLR 497 at 511-512.

440 (1949) 80 CLR 229 at 252.

441 *Parton* (1949) 80 CLR 229 at 252.

442 See [229] above.

443 (1949) 80 CLR 229 at 260 (emphasis added). See also *Dennis Hotels* (1960) 104 CLR 529 at 540.

444 (1993) 178 CLR 561 at 586 (emphasis added; footnote omitted). See also *Matthews* (1938) 60 CLR 263 at 290 (quoting *Lawson* [1931] SCR 357 at 362), 291 (quoting

> "The purpose attributed to s 90 by Dixon J and the similarity in *effect* of a tax on manufacture or production and a tax on distribution which he identified undermined the *Peterswald* view that an excise was a tax on manufacture or production and did not include a tax on mere sale or distribution. A tax on distribution, like a tax on production or manufacture, *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 on which the tax is imposed*."

242 This "effect" has, like in *Peterswald*, been consistently[445], but at times cautiously[446], explained by reference to the notion that one of the factors in determining the existence of a duty of excise is whether the impost is an "indirect" tax[447]. For example, in *Logan Downs Pty Ltd v Queensland*, a duty of excise was explained by Stephen J as a tax whose "incidence will tend to be passed on in the price of the goods, as they flow along the stream of production and distribution to the end user"[448]. And in *Capital Duplicators [No 2]*, the majority adopted[449] Barwick CJ's explanation in *Anderson's Pty Ltd v Victoria*[450] that the relevant factors in determining whether a tax is a duty of excise include the "indirectness" of the tax, its "immediate entry into the cost of the goods" and "the proximity of

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Lower Mainland Dairy Products [1933] AC 168 at 176), 300 (quoting *City of Halifax* [1928] AC 117 at 126); *Parton* (1949) 80 CLR 229 at 259; *Philip Morris* (1989) 167 CLR 399 at 436, 493. See also Posner, *Economic Analysis of Law*, 9th ed (2014) at 668 fn 1.

445 See, eg, *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 420, 435, 437, 438; *Matthews* (1938) 60 CLR 263 at 277-278, 290-291, 300-301; *Parton* (1949) 80 CLR 229 at 244, 259, 264, 268; *Dennis Hotels* (1960) 104 CLR 529 at 549, 559-560, 581; *Anderson's* (1964) 111 CLR 353 at 365; *Dickenson's Arcade* (1974) 130 CLR 177 at 218, 230-231, 241; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99.

446 See, eg, *Matthews* (1938) 60 CLR 263 at 284-285; *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129; *Dennis Hotels* (1960) 104 CLR 529 at 553-554, 583, 585, 590, 593-594; *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 26-27; *Dickenson's Arcade* (1974) 130 CLR 177 at 186, 213, 222-223; *Philip Morris* (1989) 167 CLR 399 at 429, 435, 470-471.

447 See [351]-[356] below.

448 (1977) 137 CLR 59 at 69.

449 (1993) 178 CLR 561 at 583 fn 99.

450 (1964) 111 CLR 353 at 365.

the transaction it taxes to the manufacture or production or movement of the goods into consumption"[451].

243 That is so because a tax on goods meeting the criteria of a duty of excise – a tax on a step in the production, manufacture, sale or distribution of goods (a commercial dealing[452]), whether of foreign or domestic origin – 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 on which the tax is imposed"[453]. This "effect" is the economic consequence or natural tendency of such a tax, although the extent to which the tax is in fact shifted to the purchaser in a given circumstance will depend on a number of factors[454].

244 The tendency is for the tax to be passed down the line of distribution in the ordinary course of business and, by *being passed on*, to increase the purchase price and depress demand for the goods. As Dixon CJ explained in *Dennis Hotels*, the tax "tends to be recovered by the person paying it in the price [they] charge[] for the goods which bear the imposition"[455]. That is why duties of excise have been regarded as "additions" to the purchase price of goods[456]. It is taxes of *this* kind that have the capacity to prejudice the Commonwealth's "real control"[457] over economic policy affecting the *supply and price* of goods[458]. What is critical is

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451 See also *Matthews* (1938) 60 CLR 263 at 291.

452 *Matthews* (1938) 60 CLR 263 at 301, referring to *Kingcome Navigation Co* [1934] AC 45 at 59.

453 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (emphasis added). See also *Matthews* (1938) 60 CLR 263 at 290 (quoting *Lawson* [1931] SCR 357 at 362), 291 (quoting *Lower Mainland Dairy Products* [1933] AC 168 at 176), 300 (quoting *City of Halifax* [1928] AC 117 at 126); *Parton* (1949) 80 CLR 229 at 259; *Philip Morris* (1989) 167 CLR 399 at 436, 493.

454 See, eg, Seligman, *The Shifting and Incidence of Taxation*, 3rd ed (1910) at 219-220, 372; Gamble, "Excise Taxes and the Price Elasticity of Demand" (1989) 20 *Journal of Economic Education* 379 at 379; Barron, Blanchard and Umbeck, "An Economic Analysis of a Change in an Excise Tax" (2004) 35 *Journal of Economic Education* 184 at 185, 188; Posner, *Economic Analysis of Law*, 9th ed (2014) at 668-669; Stewart, *Tax and Government in the Twenty-First Century* (2022) at 19-21.

455 (1960) 104 CLR 529 at 540.

456 *Matthews* (1938) 60 CLR 263 at 277.

457 *Parton* (1949) 80 CLR 229 at 260.

458 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

whether the tax is an impost on the relevant step – production, manufacture, sale or distribution – in connection with the goods and thus is "a burden on manufacture or production"[459] in relation to those goods. That is, the imposts are proximate to those steps[460]; "any such tax places a burden on production"[461] and affects the goods as subjects of manufacture or production or as articles of commerce[462] – as subjects of commercial dealings[463].

245 Properly understood, this "effect" is a relevant factor in determining whether a tax is a duty of excise[464]. As has been stated, in *Capital Duplicators [No 2]* the majority adopted Barwick CJ's explanation in *Anderson's* that the relevant factors include the "indirectness" of the tax and "its immediate entry into the cost of the goods"[465]. A tax having such a consequence, however, "cannot constitute any *conclusive* determinant of the character of a tax as an excise" or *not* a duty of excise[466]. That a tax can be seen to increase the cost of goods as they pass through the steps from production to distribution to sale may be of assistance in determining whether a tax is a duty of excise, and that a tax can be seen not to do so may aid in coming to the opposite conclusion. But these are

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459 *Anderson's* (1964) 111 CLR 353 at 365. See also *Parton* (1949) 80 CLR 229 at 252, 260; *Dickenson's Arcade* (1974) 130 CLR 177 at 239; *Hematite* (1983) 151 CLR 599 at 632; *Ha* (1997) 189 CLR 465 at 498-499; cf *Gosford Meats* (1985) 155 CLR 368 at 399.

460 *Dickenson's Arcade* (1974) 130 CLR 177 at 239.

461 *Hematite* (1983) 151 CLR 599 at 632. See also *Parton* (1949) 80 CLR 229 at 252, 260; *Dickenson's Arcade* (1974) 130 CLR 177 at 239; *Ha* (1997) 189 CLR 465 at 498-499; cf *Gosford Meats* (1985) 155 CLR 368 at 399.

462 *Matthews* (1938) 60 CLR 263 at 304. See also *Parton* (1949) 80 CLR 229 at 253; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559, 574, 588-590; *Bolton* (1963) 110 CLR 264 at 273; *Ha* (1997) 189 CLR 465 at 497.

463 See Pt II(3)(b)-(c) below.

464 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99, quoting *Anderson's* (1964) 111 CLR 353 at 365.

465 *Anderson's* (1964) 111 CLR 353 at 365, endorsed in *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99. See also *Matthews* (1938) 60 CLR 263 at 291.

466 *Dickenson's Arcade* (1974) 130 CLR 177 at 230 (emphasis added); cf *Philip Morris* (1989) 167 CLR 399 at 436.

not criteria[467]. It is to invert the inquiry to hold that the economic consequence of a tax is to constitute its character.

246 Statements to the effect that the *reason* why a tax on a relevant step in the *commercial* life cycle of a good – production, manufacture, sale or distribution – is a duty of excise is that taxes on those steps have the tendency to have that economic consequence should therefore be read with caution[468]. It does not follow that because a tax has the tendency to have that consequence, it must necessarily be a duty of excise. For example, in *Ha*, the majority acknowledged that the States legitimately "retain taxing and other powers the exercise of which might affect the overall costs of production, sale or distribution of goods and ultimately be shared by consumers"[469]. For that proposition their Honours cited *Browns Transport Pty Ltd v Kropp*[470], a case in which it was relevantly held that a carriage licence fee was not a duty of excise as it was a tax imposed "without mention of, and without regard to, any commodity or class of commodities", notwithstanding that the fee would "no doubt normally enter, like any other outgoing, into the calculation of fares and freights to be charged". Dawson J in *Capital Duplicators [No 2]* similarly observed that "every tax paid by a producer or distributor of goods has a tendency to be passed on to the extent that market forces allow and to increase the price of the goods", referring to payroll tax as one example[471].

247 Similarly, it does not follow that a tax is *not* a duty of excise where the burden of the tax is not able to be passed on or where the tax does not in fact increase the purchase price of the good. Although a duty of excise will ordinarily be an indirect tax, "[i]t would perhaps be going too far to say that it is an essential element of a duty of excise that it should be an 'indirect' tax"[472]. A businessperson may or may not be able to pass the cost of a tax on to another depending on the commercial constraints under which they operate[473]; and, of course, a tax imposed on the sale of goods is a duty of excise, including where it is levied on the ultimate purchaser (and is in that sense a direct tax).

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467 *Anderson's* (1964) 111 CLR 353 at 365.

468 See, eg, *Philip Morris* (1989) 167 CLR 399 at 436.

469 (1997) 189 CLR 465 at 497.

470 (1958) 100 CLR 117 at 129.

471 (1993) 178 CLR 561 at 610, referring to New South Wales Tax Task Force, *Review of the State Tax System* (1988) at 75-76.

472 *Browns Transport* (1958) 100 CLR 117 at 129.

473 See [243] fn 454 above.

248 In sum, since at least Federation, duties of excise have been taxes on goods "of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce"[474] which have a tendency to "*enter at once into* the price of the taxed commodity"[475]. The last step where such an impost enters at once into the price of the taxed commodity is the sale of the commodity.

249 There is no basis in principle or authority to extend the term "duty of excise" to include a tax on goods that does not have this natural tendency *and* is not concerned with, is untethered from, or is independent of, the purchase price of a taxed good. In particular, and as will be further explained[476], there is no basis for the proposition that a tax will be a duty of excise where its effect on purchase price is said to arise only from its possible impact on demand from consumers factoring anticipated ongoing costs of use or ownership into the price they are willing to pay for the good. As Victoria submitted, to the extent that some authorities refer to the concept of demand, they do so in the specific context of the impost's tendency to increase the *purchase price* of a good and so to affect demand (not the other way around)[477].

(b) Goods as articles of commerce

250 When the purpose of s 90 is properly understood, it can also be seen why Dixon J in *Matthews* spoke of a duty of excise being a tax on goods "of such a nature as to affect them as the subjects of manufacture or production *or* as *articles of commerce*"[478] and why Dixon J in *Parton* described a duty of excise as "[a] tax

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474 *Matthews* (1938) 60 CLR 263 at 304; see also 299. See also *Parton* (1949) 80 CLR 229 at 253; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559, 574, 588-590; *Bolton* (1963) 110 CLR 264 at 273; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583; *Ha* (1997) 189 CLR 465 at 497.

475 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 435 (emphasis added), citing *Bank of Toronto v Lambe* (1887) 12 App Cas 575 at 582-583.

476 See Pt II(4) below.

477 *Hematite* (1983) 151 CLR 599 at 632; *Philip Morris* (1989) 167 CLR 399 at 436; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

478 (1938) 60 CLR 263 at 304 (emphasis added).

upon a *commodity*"[479]. A duty of excise has long been understood to be a tax on goods as articles or integers of commerce[480].

251 "Articles of commerce" is not a term of art with a specialised meaning. It is not a constitutional term. The phrase, however, carries with it the basic notion of a good that is the subject of commercial dealings. It also recognises that there are goods that fall *outside* the reach of the phrase – goods that are not the subject of commercial dealings; that are *not* articles of commerce. The phrase "articles of commerce" and the basic notion that it conveys – goods the subject of commercial dealings – were not new when Dixon J used it in *Matthews*[481] or later when his Honour, Rich and Williams JJ and McTiernan J used it in *Parton*[482].

252 Prior to *Matthews*, the phrase had been used by this Court in a variety of contexts to refer to, or describe, goods the subject of commercial dealings: in cases involving the trade or commerce power in s 51(i)[483]; the trade marks power in s 51(xviii)[484]; freedom of interstate trade and commerce under s 92[485]; industrial disputes under s 51(xxxv)[486]; and sales tax legislation[487]. In sum, the phrase was used to refer to goods which were, at the relevant time, within the

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479 (1949) 80 CLR 229 at 260 (emphasis added).

480 *Parton* (1949) 80 CLR 229 at 253, 260; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559, 574, 588-590; *Bolton* (1963) 110 CLR 264 at 273; *Dickenson's Arcade* (1974) 130 CLR 177 at 198, 202; *Philip Morris* (1989) 167 CLR 399 at 430; *Ha* (1997) 189 CLR 465 at 497.

481 (1938) 60 CLR 263 at 304.

482 (1949) 80 CLR 229 at 253, 260, 267.

483 *R v Sutton* (1908) 5 CLR 789 at 809-810.

484 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 508.

485 *Duncan v Queensland* (1916) 22 CLR 556 at 596-598, 619, 630; *Ex parte Nelson [No 1]* (1928) 42 CLR 209 at 224; *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189 at 209; *Hartley v Walsh* (1937) 57 CLR 372 at 383, 397.

486 *Proprietors of the Daily News Ltd v Australian Journalists' Association* (1920) 27 CLR 532 at 540.

487 *Herbert Adams Pty Ltd v Federal Commissioner of Taxation* (1932) 47 CLR 222 at 228.

stream of production and distribution to a market. The following examples are sufficient for present purposes.

253 The term was first used by Isaacs J in 1908 in *R v Sutton*[488], a case concerning whether the *Customs Act 1901* (Cth) bound the State of New South Wales such that an agent of the State was liable to penalties for not paying customs duties on goods imported to Sydney on behalf of the New South Wales Government. His Honour held that the States were not the King's agents "to exercise his sovereign jurisdiction with regard to the introduction of *articles of commerce* into this continent contrary to the declared will of the Federal Parliament" under a law passed pursuant to s 51(i)[489].

254 In 1916, in *Duncan v Queensland*[490], this Court upheld the validity of certain war time legislation in Queensland, impugned under s 92 of the *Constitution*, by which all livestock and meat in that State intended or available for export was required to be kept for the disposal of the Imperial Government in aid of supplies for the war and was prohibited from being sold or exported except pursuant to the directions of the Chief Secretary. The Court relevantly held that although an effect of the Act was that the stock and meat in question could not become the subject matter of trade and commerce[491], the Act did not touch that subject in the sense in which it was used in s 92[492]. Instead, the Act legitimately made the goods – being "a subject matter of trade and commerce"[493], "subjects of commerce"[494] or "articles of commerce"[495] – subject to Queensland law as to rights of property, by depriving the owner of the capacity of free disposition[496]. They were thus not "vendible" and had been "removed from the scope of commerce" such that the law did not contravene s 92[497]. The terms "subject of

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488 (1908) 5 CLR 789.

489 *Sutton* (1908) 5 CLR 789 at 810 (emphasis added).

490 (1916) 22 CLR 556.

491 *Duncan* (1916) 22 CLR 556 at 580.

492 *Duncan* (1916) 22 CLR 556 at 578; see also 630, 641.

493 *Duncan* (1916) 22 CLR 556 at 579.

494 *Duncan* (1916) 22 CLR 556 at 598, 630.

495 *Duncan* (1916) 22 CLR 556 at 596-597, 619.

496 *Duncan* (1916) 22 CLR 556 at 580; see also 630-631, 641, 651-652.

497 *Duncan* (1916) 22 CLR 556 at 630; see also 579-580, 651.

commerce" and "articles of commerce" were used in *Duncan* in connection with goods which the legislation in issue expressly referred to as being "intended for export or may be made available for export"[498]; that is, until the legislation came into operation, they were goods the subject of current or anticipated commercial dealings[499].

255 And in the 1938 decision of *Maeder v Busch*[500], decided earlier in the same year as *Matthews*, the Court held that a patent claim for the use of certain chemical solutions for the purpose of producing permanent waves in human hair was invalid due to it being within prior common knowledge. Dixon J also considered, apart from that ground of invalidity, that the process of chemical treatment on human hair was not patentable, because its object was "not to produce or aid the production of any *article of commerce*. No substance or thing forming a possible subject of commerce or a contribution to the productive arts is to be brought into existence" by the process[501].

256 As can be seen, in this Court's use of the term "articles of commerce", leading up to Dixon J's famous use of it in *Matthews*[502], the term carried with it the basic notion of goods the subject of commercial dealings. And inherent in that notion was the recognition of the converse – the existence of goods that were *not* the subject of commercial dealings.

257 Indeed, its use in that manner can be seen from the legislation in *Matthews* itself. In that case, the statute defined a product as "(a) any product (other than wool fresh fruit not being pears or apples or citrus fruit and hay) of agriculture horticulture viticulture grazing poultry-farming bee-keeping or fishing operations and any dairy produce (including bacon and pork); and (b) any other article of commerce prepared (otherwise than by process of manufacture) from the produce of agriculture horticulture viticulture grazing poultry-farming bee-keeping or fishing operations"[503]. In short, as Dixon J would summarise it, a product under the Act was a "commodity [which] may be a primary product or an article of commerce prepared otherwise than by a process of manufacture from the produce

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498 (1916) 22 CLR 556 at 576.

499 See also *Logan Downs* (1977) 137 CLR 59 at 61, 70, 78.

500 (1938) 59 CLR 684.

501 *Maeder* (1938) 59 CLR 684 at 706 (emphasis added).

502 (1938) 60 CLR 263 at 304.

503 *Matthews* (1938) 60 CLR 263 at 285-286.

of the primary industries concerned"[504]. It is in that context that his Honour referred to goods both as the "subjects of manufacture or production" and as "articles of commerce"[505]. Goods within the latter description are finished articles prepared for sale and distribution in a market.

258 Similarly, in *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation*[506], Dawson, Toohey and Gaudron JJ, with whom Mason CJ, Brennan and McHugh JJ agreed[507], held that the word "goods", in the context of excise duties, "signifies articles of commerce *or* things which, even if not saleable or without any discernible sale value, *may be* the subject of trading or commercial transactions"[508]. In the footnote for the latter proposition, their Honours quoted *Matthews*[509], where Dixon J said that "to be an excise the tax must be imposed in respect of commodities", and Kitto J in *Anderson's*[510] and *Western Australia v Hamersley Iron Pty Ltd [No 1]*[511], where his Honour described "goods" as "subjects of commerce" and as "the subjects of manufacture or production or ... articles of commerce", respectively. That is, their Honours appear to have been using the term "articles of commerce" to describe goods currently the subject of commercial dealings, while also recognising goods that, even if not saleable, are the subject of manufacture or production and may *become* the subject of commercial dealings. But goods are not articles of commerce, and are not in the process of becoming articles of commerce, when they are out of the stream of production, manufacture, sale and distribution. Once in the hands of a consumer, they cease to be articles of commerce *at that time*.

259 Accordingly, an article, or integer, of commerce is not merely any good with a market. To so hold would be to remove the need for those descriptors at all – almost all goods have a market, whether they are in the stream of production, manufacture, sale and distribution, or in the idle ownership, possession or use of a person. What is critical is that duties of excise are constrained to the time at which the relevant goods are affected by the tax *as* "the *subjects of manufacture or*

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504 *Matthews* (1938) 60 CLR 263 at 287.

505 *Matthews* (1938) 60 CLR 263 at 304.

506 (1992) 173 CLR 450.

507 (1992) 173 CLR 450 at 453.

508 (1992) 173 CLR 450 at 467 (emphasis added; footnotes omitted).

509 (1938) 60 CLR 263 at 300.

510 (1964) 111 CLR 353 at 374.

511 (1969) 120 CLR 42 at 63.

production or *as articles of commerce*"[512] – production, manufacture, sale or distribution. And thus, for example, a tax on ownership of goods simpliciter is not a duty of excise[513]. Where a tax is on a good which is an "article[] of commerce in the stream of production" or the good, itself, is a "productive unit[]" which produces an article of commerce, then it will be a duty of excise[514]. In sum, a duty of excise is a tax imposed on a dealing with goods that are, or are in the process of becoming, articles of commerce – in other words, it is a tax on a step in the production, manufacture, sale or distribution of such goods.

(c) Trading tax

260 The long established and fundamental principle – and its limitation to taxes on the production, manufacture, sale or distribution of goods – reflects the basic understanding of duties of excise as "trading taxes" levied "in respect of commercial dealings in commodities"[515]. As the majority observed in *Ha*, the question is whether the impost is "an inland tax on a step in the distribution" of goods[516]. The relevant discrimen is not just that the impost is an "inland tax on some dealing with goods"[517], but rather that it is a tax upon "inland dealings with goods *as integers of commerce*"[518]. "Dealing", in this connection, is a commercial dealing – related to or in respect of transactions in goods[519]. This can be seen to be in contradistinction to a personal dealing or relationship with a good. And the

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512 *Matthews* (1938) 60 CLR 263 at 304 (emphasis added). See also *Parton* (1949) 80 CLR 229 at 253; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559, 574, 588-590; *Bolton* (1963) 110 CLR 264 at 273; *Ha* (1997) 189 CLR 465 at 497.

513 See discussion of *Logan Downs* (1977) 137 CLR 59 in Pt III(1)(c)(vii) below. No application was made to reopen *Logan Downs*.

514 *Logan Downs* (1977) 137 CLR 59 at 70; see also 61, 78.

515 *Dickenson's Arcade* (1974) 130 CLR 177 at 231; see also *Kingcome Navigation Co* [1934] AC 45 at 59, quoted in *Matthews* (1938) 60 CLR 263 at 284, 301 and *Parton* (1949) 80 CLR 229 at 259; *Chamberlain Industries* (1970) 121 CLR 1 at 29.

516 (1997) 189 CLR 465 at 499.

517 cf *Ha* (1997) 189 CLR 465 at 496.

518 *Ha* (1997) 189 CLR 465 at 497 (emphasis added).

519 *Chamberlain Industries* (1970) 121 CLR 1 at 29.

reference in both *Ha*[520] and *Capital Duplicators [No 2]*[521] to the "step" upon which the tax is imposed is merely another word for such a commercial dealing; both words direct attention to stages in the commercial process of bringing a good to market.

261 This distinction between commercial and personal dealings with goods gives effect to the purpose of s 90 – the section is concerned to ensure the Commonwealth retains effective control over its economic policies affecting the supply and price of goods[522]. Any tax which is imposed upon a step in bringing a good to market will have the potential to frustrate that purpose. And so, as Stephen J said in *Logan Downs*, "it is not every tax upon goods which will be an excise. It is not simply the taxing of goods that distinguishes the incidence of an excise duty from that of other taxes; it is rather the taxing of goods *during the process by which they are first brought into existence and then ultimately pass to the consumer or user*" and "[o]nce out of the stream of production and distribution, goods cease to be apt subject-matter for duties of excise"[523].

262 In *Dickenson's Arcade*, Mason J explained that the justification for why a tax on the consumption of goods is not a duty of excise "is evidently based on the notion that consumption is not sufficiently proximate to the production and manufacture of goods"[524]. Similarly, in *Dennis Hotels*, in passages endorsed by the majority in *Ha*[525], Kitto J said that to be an excise, instead of a fee for a privilege, there needs to be a "connexion" with production or distribution[526] and that that is to be determined by reference to the relation of the tax to "particular act[s] done in the course of the business"[527]. Although his Honour's observations were made in the context of distinguishing what was in truth a mere licence fee from a duty of excise, the observations are of general application.

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520 (1997) 189 CLR 465 at 499.

521 (1993) 178 CLR 561 at 590.

522 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586. See Pt II(2)(c) above.

523 (1977) 137 CLR 59 at 69 (emphasis added); see also 80.

524 (1974) 130 CLR 177 at 239.

525 (1997) 189 CLR 465 at 501, 503.

526 (1960) 104 CLR 529 at 560.

527 (1960) 104 CLR 529 at 563.

263 It can therefore be seen why this Court has endorsed the "long established"[528] and "fundamental"[529] principle stated by a unanimous Court in *Bolton*[530], which had adopted the words of Kitto J in *Dennis Hotels* that "a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer"[531].

264 In sum, a duty of excise is a tax on production, manufacture, sale or distribution – "inland dealings with goods as integers of commerce"[532] – because such a tax directly affects those goods as the subjects of manufacture or production or as articles of commerce by having a natural tendency to enter the purchase price of the goods.

4 Tax on usage consumption not a duty of excise

265 The immediately preceding parts of these reasons show that, consistent with the text, context, purpose and subject matter of s 90 of the *Constitution*, a duty of excise is a tax imposed on a step in the production, manufacture, sale or distribution of goods. They show that a tax on those steps has a natural tendency to enter the purchase price of goods and so affect the goods as the subject of commercial dealings – as articles of commerce. And such a tax is a tax on goods in the stream of production and distribution and a trading tax – a tax on commercial dealings comprising one or more of the steps in bringing a good to market.

266 A tax on personal relations or dealings with goods *after* those steps is not a duty of excise, being: after the good has been sold to the consumer and is no longer the subject of commercial dealings; after the good is no longer an article of commerce; after the point at which a tax has a natural tendency to enter the purchase price of that good; and at a point which is not consonant with the text, context, purpose and subject matter of s 90. Such an impost cannot relevantly affect the supply and price of goods. The goods have ceased to be in the stream of production and distribution.

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528 *Ha* (1997) 189 CLR 465 at 490.

529 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

530 (1963) 110 CLR 264 at 273.

531 (1960) 104 CLR 529 at 559. In relation to the term "criterion of liability", see *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, discussed at [292] below.

532 *Ha* (1997) 189 CLR 465 at 497.

267 A tax on usage consumption, like a tax on possession or ownership[533], is not a duty of excise. As Gibbs J recognised in *Dickenson's Arcade*[534], since *Parton*[535] "no member of the Court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise". That statement was accurate then, and, apart from McTiernan J in *Dickenson's Arcade*[536], has remained accurate until this day[537]. And for good reason.

268 A tax on a step in the production, manufacture, sale or distribution of goods is conceptually distinct from a tax on usage consumption of goods. A tax on production, manufacture, sale or distribution is a tax on dealings with the goods on the *supply* side of the market for the sale of the goods. A tax on any of those steps has a natural and general tendency to enter the purchase price of a good, in a manner that, as a general proposition, is readily identified and identifiable as an addition to the purchase price, even if the precise increase in the purchase price is not identifiable[538].

269 In contrast, a tax on usage consumption may affect the overall financial burden of owning and using a good but it is not, and cannot be conceived of as, an addition to or component of the purchase price of the good. It is incurred after the point of sale and indeed, in this case, well after the point of sale. It is not capable of being "deducted", "subtracted" or "excised" from the purchase price paid for a

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533 See discussion of *Logan Downs* (1977) 137 CLR 59 in Pt III(1)(c)(vii) below. No application was made to reopen *Logan Downs*.

534 (1974) 130 CLR 177 at 221.

535 (1949) 80 CLR 229.

536 (1974) 130 CLR 177 at 202.

537 *Parton* (1949) 80 CLR 229 at 252, 259-261; *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559-560, 573, 588-590; *Bolton* (1963) 110 CLR 264 at 271, 273; *Anderson's* (1964) 111 CLR 353 at 364, 368, 373-375, 376, 377, 379; *Hamersley Iron [No 1]* (1969) 120 CLR 42 at 55-56, 64-65, 71; *Chamberlain Industries* (1970) 121 CLR 1 at 12-13, 17, 22, 25, 28, 35; *Dickenson's Arcade* (1974) 130 CLR 177 at 185-187, 193-194, 209, 218-222, 229-231, 238-239; *H C Sleigh* (1977) 136 CLR 475 at 520-521; *Logan Downs* (1977) 137 CLR 59 at 63-65, 69-70, 80; *Hematite* (1983) 151 CLR 599 at 615, 619-621, 628, 632, 644, 655, 657-658, 665-666; *Gosford Meats* (1985) 155 CLR 368 at 377-378, 400, 403, 412, 414; *Philip Morris* (1989) 167 CLR 399 at 430-431, 436, 444-445, 488-492; *Mutual Pools* (1992) 173 CLR 450 at 453; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583; *Ha* (1997) 189 CLR 465 at 490.

538 See Pt II(3)(a) above and [356], [360]-[361] below.

good[539]. It is neither a tax that has a general tendency to be passed on down the line of distribution in the usual course of business, nor a tax that will otherwise directly factor into the purchase price of a good (such as a sales tax imposed on the purchaser of goods).

270 Predicting any economic effect of a usage consumption tax is inherently complex and uncertain. It is not plain that a tax on *usage* consumption of goods will tend to depress the demand for those goods "no less surely" than a tax on production or distribution[540]. Neither the materials regarding the tax liability-side equivalence principle[541], nor Posner's discussion of the equivalent effects of taxes imposed on producers and retailers[542], support that proposition. The point being made by those authors is no more than to say that a formal change in the point of collection of a sales tax should not make an economic difference. But, in legal terms, the tax remains a sales tax, not a usage consumption tax. A usage consumption tax is *not* a sales tax levied on a purchaser that will be naturally or directly factored into the price the purchaser is willing to pay for the goods at the time of purchase. Rather, such a tax will be levied *after* the good has been purchased and by reference to variable *use* of the good over time.

271 What effect a tax on the use of goods has on demand or the market for goods will depend on numerous factors including the size of the tax, the purchase price

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539 *Matthews* (1938) 60 CLR 263 at 277; see also 301, 303; *Parton* (1949) 80 CLR 229 at 251, 252, 253. See also *Peterswald* (1904) 1 CLR 497 at 511-512; *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 435, citing *Bank of Toronto* (1887) 12 App Cas 575 at 582-583; *Hematite* (1983) 151 CLR 599 at 632-633.

540 cf Joint Reasons at [125]; see also Reasons of Jagot J at [925].

541 This principle posits that a tax imposed on *transactions* in a market should have the same impact whether it is formally levied on the consumer (buyer) or the producer (seller): Auerbach, "Tax Equivalences and Their Implications" (2019) 33 *Tax Policy and the Economy* 81 at 82. The relevance or applicability of the principle to a tax on usage consumption (or ownership or possession) is not demonstrated. cf Joint Reasons at [125], citing Kotlikoff and Summers, "Tax Incidence", in Auerbach and Feldstein (eds), *Handbook of Public Economics* (1987), vol 2, ch 16 esp at 1045-1047, Borck et al, "Tax Liability-Side Equivalence in Experimental Posted-Offer Markets" (2002) 68 *Southern Economic Journal* 672, Auerbach, "Tax Equivalences and Their Implications" (2019) 33 *Tax Policy and the Economy* 81 and Posner, *Economic Analysis of Law*, 9th ed (2014) at 668-669. cf Reasons of Jagot J at [923], citing Musgrave, *The Theory of Public Finance: A Study in Public Economy* (1959) at 351 and Kotlikoff and Summers, "Tax Incidence", in Auerbach and Feldstein (eds), *Handbook of Public Economics* (1987), vol 2, 1043.

542 Posner, *Economic Analysis of Law*, 9th ed (2014) at 668 fn 1.

of the goods, future supply of the goods, consumer preferences, the regulatory environment, the nature of the goods (including their price elasticity), the relationship with any complementary goods, what other goods are substitutable, the purchase price of those substitutable goods, and the overall financial burden of owning and using those substitutable goods, including whether those goods are subject to similar taxation[543]. Such a tax will be only one of a number of different factors affecting the overall financial burden of owning and using a good. That is, the economic effect is not straightforward and the economic effect is not static. It will vary over time. It would pose significant difficulties for fundamental constitutional principle to suggest that the constitutional validity of a law will change according to variations in economic consequences[544].

272 All this being so, it is neither possible nor appropriate to assume what the economic effect will be. It cannot be assumed that one particular economic consequence is universal and intuitively right[545]. There is no one economic consequence. The potential for a usage consumption tax to depress or affect demand for goods cannot be described or relied upon as the *natural* tendency of the tax[546]. This case is a stark example. The demand for ZLEVs depends in part on, among other factors, the degree of cross-elasticity of demand within the market for ZLEVs, which would include consideration of the imposts on petrol and also the cost of electricity and the extent to which other kinds of transport are substitutable for ZLEVs[547].

273 And that brings us back to where we started – the proposition that a tax on usage consumption is an excise is contrary to the text, context, purpose and subject

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543 See, eg, Samuelson and Nordhaus, *Economics*, 19th ed (2010) at 92-93; Stiglitz and Walsh, *Principles of Economics*, 2nd Aust ed (2016) at 43.

544 See *XYZ* (2006) 227 CLR 532 at 608 [218]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 55 [42], 92-93 [196]-[199]; cf *Armstrong v Victoria [No 2]* (1957) 99 CLR 28 at 48-49, 73-74. See *Clubb* (2019) 267 CLR 171 at 334 [471].

545 See Pt III(3)(c) below, esp [410]-[413].

546 See, eg, *Dennis Hotels* (1960) 104 CLR 529 at 560; *Philip Morris* (1989) 167 CLR 399 at 436, see also 493; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586. See also *Lawson* [1931] SCR 357 at 362; *Matthews* (1938) 60 CLR 263 at 301, see also 303; *Parton* (1949) 80 CLR 229 at 259; *Hematite* (1983) 151 CLR 599 at 632-633.

547 See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 187-188, 199, 210; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 455 [250].

matter of s 90 of the *Constitution* and to long established and fundamental principle.

III "Inland tax on goods"

274 As noted at the start of these reasons, a majority of this Court, in acceding to the request of the plaintiffs and the Commonwealth, now hold that any inland tax on goods is a duty of excise[548]. It is proper to deal at considerable length with the earlier decisions because the approach taken to justify the new rule places so much reliance upon them. The words of a judgment, as every word of every judgment, must be read according to their subject matter: "[t]hey were appropriate to their context and must be read in their context"[549]. As will be demonstrated, the earlier decisions, read in context, do not support the proposition that any inland tax on goods is an excise. The earlier decisions are contrary to that proposition.

1 Premise – a duty of excise is any tax on goods – should not be accepted

275 The approach taken to justify the new rule begins from, or at least is directed towards, a question begging premise: that a duty of excise is an inland tax on goods[550], where "goods" are defined as including items of tangible property, *at least* if they are "saleable"[551] or "availab[le] for commercial exploitation"[552].

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548 See [201] above.

549 *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 638; [1950] AC 235 at 308; *Producers' and Citizens' Co-operative Assurance Co Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 26 at 33; *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 329. See also *Quinn v Leathem* [1901] AC 495 at 506; *Francis v Commissioner of Stamp Duties (NSW)* (1954) 91 CLR 368 at 391; *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628 at 633, 643; [1971] AC 793 at 802, 809; *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* (1981) 150 CLR 225 at 234, 240; *Shepherd v The Queen* (1990) 170 CLR 573 at 593; *Garlett v Western Australia* (2022) 96 ALJR 888 at 920 [154]; 404 ALR 182 at 217, quoting *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 94 [137], in turn quoting Friendly, "The Bill of Rights as a Code of Criminal Procedure" (1965) 53 *California Law Review* 929 at 950; see also *Garlett* (2022) 96 ALJR 888 at 928-929 [186]; 404 ALR 182 at 227, quoting *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 292 [188] and citing 277-278 [146] and *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 138-139 [152].

550 Joint Reasons at [5], [9]; see also [79], [127], [197]; Reasons of Jagot J at [833]-[834]; see also [846], [920], [943], [949].

551 Joint Reasons at [138]-[141].

552 Reasons of Jagot J at [930].

Taking those two propositions together, as they must be, the premise becomes that a duty of excise is any tax on any good, from the time a step is taken in the manufacture or production of the good, until the good is destroyed, at least if the good is saleable or available for commercial exploitation.

276 The premise should not be accepted.

(a) *Capital Duplicators [No 2]* and *Ha* do not support premise

277 Duties of excise are now said to be "inland taxes on goods"[553] and duties of excise and customs are said to exhaust the categories of taxes on goods[554]. Neither *Capital Duplicators [No 2]* nor *Ha* establishes or supports either proposition. It is necessary to take each proposition in turn.

(i) "Inland taxes on goods"

278 First, *Capital Duplicators [No 2]* and *Ha* are not authority for[555], and did not settle[556], the proposition that duties of excise are "inland taxes on goods" simpliciter. Neither *Capital Duplicators [No 2]* nor *Ha* uses the phrase "inland taxes on goods" in an unqualified way. The phrase is not used or treated as some separate and sufficient indicium of a duty of excise. The phrase is used only once in *Capital Duplicators [No 2]*[557] by Mason CJ, Brennan, Deane and McHugh JJ as follows:

> "[O]nce it is accepted that duties of excise are not limited to duties on production or manufacture, we think that it should be accepted that the *preferable view* is to *regard* the distinction between duties of customs and *duties of excise as dependent on the step which attracts the tax*: importation or exportation in the case of customs duties; ***production, manufacture, sale or distribution – inland taxes – in the case of excise duties*** (40)."

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553 Joint Reasons at [5], [9], [79], [121], [127], [143]; Reasons of Jagot J at [846], [861], [886], [890], [920].

554 Joint Reasons at [5]; Reasons of Jagot J at [846], [861], [886], [890], [920], [930], [937].

555 cf Joint Reasons at [9]; Reasons of Jagot J at [846], [920].

556 cf Joint Reasons at [9].

557 (1993) 178 CLR 561 at 590 (emphasis added).

279 That "preferable view" was, as footnote 40 recorded, the view of Rich J in *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia*[558] and *John Fairfax & Sons Ltd and Smith's Newspapers Ltd v New South Wales*[559], and "perhaps the preferred view" of Dixon J in *Matthews*[560], *Parton*[561] and *Dennis Hotels*[562]. As is evident, the phrase – inland taxes – was used by the majority in *Capital Duplicators [No 2]* not simpliciter but as a description of the "step which attracts the tax" in relation to a duty of excise and those steps were expressly stated to be "production, manufacture, sale or distribution". It was not being used to refer to an inland tax on any good at any point in its life cycle.

280 In *Ha*, that view – the preferable and preferred view of Mason CJ, Brennan, Deane and McHugh JJ in *Capital Duplicators [No 2]* – was adopted numerous times. A duty of excise as an inland tax on goods simpliciter was *not* adopted by the majority in *Ha*. To make good those propositions it is necessary to address the reasons of the majority in *Ha* in some detail.

281 After quoting the above passage from *Capital Duplicators [No 2]*, the majority in *Ha*[563] then immediately used the phrase "inland tax" in the same terms to hold that "[t]he principle that an inland tax on a step in production, manufacture, sale or distribution of goods is a duty of excise has been long established". And to support the proposition that that principle – "a criterion of a duty of excise" – was not new but long established, the majority stated[564] it to have been expressed by "Kitto J in *Dennis Hotels*[565] and adopted by a unanimous Court in *Bolton v Madsen*[566]. It can be traced back to the judgments in *Parton*[567] and, before that, to the judgment of Dixon J in *Matthews v Chicory Marketing Board*

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558 (1926) 38 CLR 408 at 437.

559 (1927) 39 CLR 139 at 146-147.

560 (1938) 60 CLR 263 at 297-300.

561 (1949) 80 CLR 229 at 259-261.

562 (1960) 104 CLR 529 at 540-541.

563 (1997) 189 CLR 465 at 490.

564 *Ha* (1997) 189 CLR 465 at 490.

565 (1960) 104 CLR 529 at 559.

566 (1963) 110 CLR 264 at 273.

567 (1949) 80 CLR 229 at 252-253, 260, 261.

(Vict)[568]." The very next sentence[569] put the matter beyond doubt by their Honours not only quoting but adopting directly what Brennan J had said in *Philip Morris*[570]:

> "If there be any rock in the sea of uncertain principle, it is that *a tax on a step in the production or distribution of goods to the point of receipt by the consumer is a duty of excise*."

That is, the rock in the sea – the bedrock of the reasons of the majority in *Ha* – is that a duty of excise is a tax on a step in the production or distribution of goods to the point of receipt by the consumer; *not* that a duty of excise is an inland tax on goods simpliciter.

282 Several further passages in the majority's reasons in *Ha* reinforce that conclusion and are instructive. In addressing the dichotomy between laws imposing duties of customs and laws imposing duties of excise in s 55 of the *Constitution*, the majority stated that that dichotomy is "between laws imposing a tax on the importation of goods and laws imposing an *inland tax on some dealing with goods*"[571]. The majority then rejected the defendants' contention, which propounded a different dichotomy – between taxes on goods of foreign production or manufacture and taxes on goods of Australian production or manufacture – for the reason that it would "offer[] no clear criterion for the application of s 55 of the Constitution"[572]. And, thus, the statement in the last sentence of the same paragraph[573] that "[t]he criterion of inland taxes on goods serves to identify clearly duties of excise for the purposes of s 55", read in the context of that which preceded it, is not freestanding or unbounded.

283 Those conclusions are then reinforced by the majority in *Ha* in the next paragraph when addressing the purpose of s 90. The majority there rejected a submission that the purpose of s 90 is only to ensure Commonwealth fiscal control over imports, exports and domestic production, "but not over inland sale and distribution", and in so doing said the following: "the imposition of State taxes upon other *inland dealings with goods as integers of commerce*, even if those taxes were not protectionist, would have created impediments to free trade throughout the Commonwealth. Why should s 90 be construed so as to subvert an objective

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568 (1938) 60 CLR 263 at 291-304; see also 277.

569 *Ha* (1997) 189 CLR 465 at 490.

570 (1989) 167 CLR 399 at 445 (emphasis added).

571 *Ha* (1997) 189 CLR 465 at 496 (emphasis added).

572 *Ha* (1997) 189 CLR 465 at 496.

573 *Ha* (1997) 189 CLR 465 at 497.

which Federation was designed to achieve?"[574] Again, "inland" is qualified by reference to taxes on inland dealings with goods as integers of commerce, being goods within the stream of production, manufacture, sale and distribution[575] – goods the subject of commercial dealings.

284 The same can be seen, in the next paragraph, in the majority's rejection[576] of the defendants' argument that "a State taxing statute [that] taxes the sale or distribution of imported goods and goods of local production or manufacture indifferently and equally" is not a duty of excise[577]. In rejecting such an approach by reference to established authority[578], and recognising that that approach would lead to s 90 being "circumvented by mere drafting devices", the majority restated the proposition – that in considering the validity of the law in that case under s 90, it being necessary to look at the substance and the practical operation of the law, the question was "whether the imposts are an inland tax on a *step in the distribution* of tobacco products"[579]. Again, an important qualification – a step in "distribution".

285 Next, critically, the majority in *Ha*[580] "reaffirm[ed]" the correctness of the "*Parton* doctrine": "duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods." Again, "inland taxes ... on goods" is not unbounded, it is qualified by the steps set out in that passage, which "reaffirm[s]" the *Parton* doctrine.

286 There are two further passages in the reasons of the majority in *Ha* that use the phrase "inland taxes on goods". In the context of holding that the licence fee in that case was a revenue raising tax imposed on the sale of tobacco during the relevant period, the majority stated that "[t]he revenue to be derived from inland taxes on goods was ceded by the States to the Commonwealth under the

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574 *Ha* (1997) 189 CLR 465 at 497 (emphasis added; footnote omitted), citing *Capital Duplicators [No 1]* (1992) 177 CLR 248 at 276, 279.

575 See *Logan Downs* (1977) 137 CLR 59 at 69. See generally Pt II(3) above.

576 *Ha* (1997) 189 CLR 465 at 497-498.

577 *Ha* (1997) 189 CLR 465 at 497.

578 *Ha* (1997) 189 CLR 465 at 497-498, quoting *Peterswald* (1904) 1 CLR 497 at 511 and *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 423.

579 *Ha* (1997) 189 CLR 465 at 498-499 (emphasis added).

580 (1997) 189 CLR 465 at 499.

Constitution"[581]. And in the context of approving and emphasising[582] Kitto J's statement in *Dennis Hotels*[583] that a licence fee will not be a duty of excise if it is "not in respect of any particular act done in the course of the business" – which statement the majority said was an "important qualification"[584] on the "*Dennis Hotels* formula"[585] – the majority held that "[t]he maintenance of constitutional principle evokes a declaration that the *Dennis Hotels* formula cannot support what is, on any realistic view of form and of 'substantial result', a revenue-raising inland tax on goods"[586]. Their Honours then held that the imposts levied by the challenged provisions of the Act in *Ha* could not be properly characterised as fees for a licence to carry on a business; they were "manifestly duties of excise on the tobacco *sold* during the relevant periods"[587].

287 Each use of "inland tax on goods" cannot be read in isolation from the particular context in which it was used or the judgment more generally. The majority's use of that phrase throughout their reasons in *Ha* was not unbounded.

(ii) "Exhaust the categories"

288 There are three other aspects of the reasoning in *Capital Duplicators [No 2]* and *Ha* relied upon by the majority in this case for the premise that a duty of excise is any inland tax on goods. First, there is the statement of the majority in *Capital Duplicators [No 2]*[588], as quoted with approval (but without analysis) by the majority in *Ha*[589], that "the term 'duties of customs and of excise' in s 90 must be construed as *exhausting the categories of taxes on goods*". That statement must be read and understood in context. The context in *Capital Duplicators [No 2]* was the

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581 *Ha* (1997) 189 CLR 465 at 502.

582 *Ha* (1997) 189 CLR 465 at 502-503.

583 (1960) 104 CLR 529 at 563.

584 *Ha* (1997) 189 CLR 465 at 502.

585 Being the theory that a fee would not be an excise if it was for a licence to carry on a business quantified by reference to the value of the quantity of the commodity sold during a period preceding the licence period.

586 *Ha* (1997) 189 CLR 465 at 503 (footnote omitted).

587 (1997) 189 CLR 465 at 503 (emphasis added).

588 (1993) 178 CLR 561 at 590 (emphasis added).

589 (1997) 189 CLR 465 at 488.

majority's holding that s 90 is not to be interpreted, as the defendants in that case submitted, as creating a lacuna whereby a tax that is imposed indifferently on all goods (whether imported or locally produced or manufactured) is not within the scope of s 90[590].

289 The "exhausting the categories of taxes on goods" statement was made in rejection of the argument that a duty of excise is concerned only with taxes on locally produced or manufactured goods. Indeed, it was said[591] that such an interpretation was "rejected expressly and, in our respectful opinion, rightly by Dixon CJ and Windeyer J in *Dennis Hotels*[592]". When read in context, and in particular with the statements in *Capital Duplicators [No 2]*[593] and *Ha*[594] that a duty of excise is a tax on the steps of production, manufacture, sale or distribution, the statement "exhausting the categories of taxes on goods" does not mean or lead to the conclusion that any tax on goods is a duty of excise. Why would the majorities in those cases have needed to mention those steps if every tax on goods is a duty of excise? Rather, the majorities were making the point that there is no third category of taxes that are brought outside the scope of s 90 merely because they are imposed on goods indifferently as to their place of production or manufacture.

(iii) "Unnecessary to consider" consumption

290 The second aspect of *Capital Duplicators [No 2]*[595] and *Ha*[596] on which the majority in this case rely is the fact that in each case the majorities determined it unnecessary to consider whether a tax on consumption of goods would be classified as a duty of excise. That fact does not support the premise that a duty of excise is any inland tax on goods. The fact that that question was "expressly left undecided"[597] does not mean that the reference to duties of excise being taxes on the production, manufacture, sale or distribution of goods "must be taken to be

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590 (1993) 178 CLR 561 at 589-590.

591 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590, quoted in *Ha* (1997) 189 CLR 465 at 488.

592 (1960) 104 CLR 529 at 540, 600-601.

593 (1993) 178 CLR 561 at 590.

594 (1997) 189 CLR 465 at 499.

595 (1993) 178 CLR 561 at 590.

596 (1997) 189 CLR 465 at 499-500.

597 Joint Reasons at [6]; see also Reasons of Jagot J at [857]-[858], [890].

descriptive and not exhaustive". Nor does it mean that the acknowledgement in those cases of the "continuing utility of the *Bolton v Madsen* formulation insofar as it described a duty of excise as a tax on 'the taking of a step' in a process which ended at the point of receipt of goods by the consumer"[598] could be taken as an acceptance that those steps are not exhaustive. Nor does it mean that that exclusion, in terms of both the purpose and scope of s 90 as established in the majority reasons in those cases, was "obviously anomalous"[599].

291 *Capital Duplicators [No 2]* and *Ha* do not support either conclusion. The "reservation" of consumption was consistent with constitutional method[600]; the Commonwealth intervening in *Capital Duplicators [No 2]* made submissions that a tax on consumption is an excise, but that question did not need to be determined. And, in any event, each case affirmed the steps and the formulation in *Bolton*.

292 In *Capital Duplicators [No 2]*[601], the reference to *Bolton* was made in the context of the "principal argument" advanced in favour of reconsidering *Dennis Hotels* and *Dickenson's Arcade*[602], which was that there was no judicial consensus on the meaning or application of duties of excise. The majority then acknowledged[603], in the context of that argument, the difficulty experienced by the Court in reconciling the decisions in the licence fee cases[604] with the "fundamental proposition" unanimously accepted in *Bolton* that 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"[605]. That proposition was contrasted with Kitto J's formulation in *Dennis Hotels*, which excluded as a duty of excise "a tax which has no closer connexion with production or distribution than that it is exacted for the privilege of engaging in the process at all"[606].

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598 Joint Reasons at [79].

599 cf Reasons of Jagot J at [890]; see also [937].

600 See Pt I above and [295] and Pt III(3) below.

601 (1993) 178 CLR 561 at 583.

602 (1993) 178 CLR 561 at 582.

603 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 582.

604 *Dennis Hotels* (1960) 104 CLR 529; *Dickenson's Arcade* (1974) 130 CLR 177; *H C Sleigh* (1977) 136 CLR 475. See [262] above and Pt III(1)(c)(iv) below.

605 (1963) 110 CLR 264 at 271.

606 (1960) 104 CLR 529 at 560.

Their Honours observed that the distinction between a duty of excise under the *Bolton* formulation and a mere licence fee had constantly arisen for decision, but that since *Bolton* and *Dennis Hotels* the "criterion of liability" approach, whereby the character of an impost was determined solely by reference to the terms of the legislation, had been rejected[607]. But the majority then stated[608] that "[t]he rejection of the criterion of liability as an exclusive test has not disturbed general acceptance" of the "fundamental proposition for which *Bolton v Madsen* stands as authority, subject only to the qualification that it speaks of taxes 'directly related to goods'". That fundamental proposition was that "a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise"[609]. That fundamental proposition cannot be ignored.

293 Then, in the course of reasoning to a rejection of the twin interpretations that "the immediate purpose of s 90 was to prevent States from imposing duties on producers or granting bounties on the production or export of goods" and more broadly "to give the Commonwealth control over tariff policy and to ensure equality of trade between the States"[610], the majority in *Capital Duplicators [No 2]* restated the *Bolton* formulation and held that to accept either of those interpretations would require the overruling of "no less than five previous decisions"[611]. The majority then summarised[612] examples of the "very substantial weight of judicial opinion since *Parton*"[613] – being various judgments in *Hematite*[614], *Gosford Meats Pty Ltd v New South Wales*[615] and *Philip Morris*[616] – which "[r]anged against" expressions favouring a return to a narrow definition of

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607 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 582-583.

608 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

609 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

610 (1993) 178 CLR 561 at 584.

611 (1993) 178 CLR 561 at 587, citing *Parton* (1949) 80 CLR 229, *Dennis Hotels* (1960) 104 CLR 529, *Hamersley Iron [No 1]* (1969) 120 CLR 42, *Chamberlain Industries* (1970) 121 CLR 1 and *Dickenson's Arcade* (1974) 130 CLR 177.

612 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 588-589.

613 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 588.

614 (1983) 151 CLR 599.

615 (1985) 155 CLR 368.

616 (1989) 167 CLR 399.

excise[617], and which show that a majority in each case agreed with the steps set out in *Bolton* – steps up to receipt by a consumer[618]. It was then immediately after that summary that the defendants' submissions as to s 90 not encompassing taxes imposed indifferently on all goods (whether imported or locally produced or manufactured) were rejected[619]. And so, it was in that context that the majority then made the statement that duties of customs and of excise "exhaust[] the categories of taxes on goods"[620]. And that statement was followed, only three sentences later in the same paragraph, by the majority's statement of principle which *Ha* went on to reaffirm – duties of excise are inland taxes on the steps of production, manufacture, sale or distribution.

294 The relevant passage in *Ha*[621] is clear: the *Bolton* principle was referred to[622] immediately after the majority in *Ha* set out the main statement of principle from *Capital Duplicators [No 2]*[623] and which principle the majority in *Ha* said is "long established"[624], citing *Dennis Hotels*[625], *Bolton*[626], *Parton*[627], *Matthews*[628] and *Philip Morris*[629]. Immediately after that statement of principle, the argument of the defendants was set out, as being an argument in support of "the overturning

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617 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 588.

618 *Hematite* (1983) 151 CLR 599 at 615, 644-646, 657, 665; *Gosford Meats* (1985) 155 CLR 368 at 377-378, 400, 404, 407, 409, 411, 414-416; *Philip Morris* (1989) 167 CLR 399 at 430-431, 436, 445, 473, 488, 492.

619 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

620 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

621 (1997) 189 CLR 465 at 490. See [281] above.

622 (1997) 189 CLR 465 at 490.

623 (1993) 178 CLR 561 at 590.

624 (1997) 189 CLR 465 at 490.

625 (1960) 104 CLR 529 at 559.

626 (1963) 110 CLR 264 at 273.

627 (1949) 80 CLR 229 at 252-253, 260, 261.

628 (1938) 60 CLR 263 at 291-304; see also 277.

629 (1989) 167 CLR 399 at 445.

of such a long and consistent line of authority"[630]. The defendants' argument was relevantly that *Parton* had been an unwarranted departure from the narrow view of duties of excise established in *Peterswald*[631]. What then follows is the majority's rejection of that argument by reference to: the structure of Ch IV[632]; s 93 of the *Constitution*[633]; the fact that duties of excise had no established meaning at Federation[634]; the purpose of s 90[635]; the debates pre-Federation which established that s 90 would be a freestanding power[636]; s 55 of the *Constitution*[637]; rejection of the argument that the focus of s 90 is solely on production, not sale and distribution[638]; and reaffirmation that the focus in determining the validity of a law under s 90 is on substance, not form[639]. It was at the conclusion of that analysis where the majority in *Ha* stated that "the correctness of the doctrine [that the *Parton* line of cases] establish must now be affirmed", and then held that they "reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin"[640].

295 The steps outlined in *Bolton* were repeatedly affirmed and justified by the majorities in each of *Capital Duplicators [No 2]* and *Ha*. And, even if the cases did not explicitly say that the *Bolton* formulation is exhaustive, that does not lead to the conclusion that those steps are the opposite of exhaustive, that any tax on goods is a duty of excise. On the contrary, each of those decisions shows why that is not so. Indeed, the fact that the majorities in each case affirmed the steps in *Bolton* and then stated that in those cases it was "unnecessary to consider" a tax on

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630 *Ha* (1997) 189 CLR 465 at 491.

631 *Ha* (1997) 189 CLR 465 at 491, citing *Peterswald* (1904) 1 CLR 497 at 509.

632 *Ha* (1997) 189 CLR 465 at 491-492.

633 *Ha* (1997) 189 CLR 465 at 492-493.

634 *Ha* (1997) 189 CLR 465 at 493-494.

635 *Ha* (1997) 189 CLR 465 at 494-495.

636 *Ha* (1997) 189 CLR 465 at 495-496.

637 *Ha* (1997) 189 CLR 465 at 496-497.

638 *Ha* (1997) 189 CLR 465 at 497.

639 *Ha* (1997) 189 CLR 465 at 497-498.

640 (1997) 189 CLR 465 at 499.

the consumption of goods demonstrates that they did not endorse the view that any inland tax on goods was an excise, still less settle that proposition[641].

296 The third aspect of *Capital Duplicators [No 2]* and *Ha* relied on by the majority in this case should be noted. The minority judgments in *Capital Duplicators [No 2]* and *Ha* did refer to the exclusion of consumption from the scope of s 90 as "illogical[]"[642] and said that it was "difficult to see any basis for distinction between taxes imposed during the course of production or manufacture and those imposed at any subsequent point, including the point of consumption"[643]. Two points must be made. In *Capital Duplicators [No 2]*, the points subsequent to production and manufacture were, of course, sale and distribution. In *Ha*, the minority's observation is telling. It was made in the course of explaining that the criterion of liability test "was abandoned as the exclusive determinant of an excise duty, although the later cases [had] failed to reveal the nature of the substance which was sought"[644]. What then immediately follows[645] cannot be ignored:

> "Excise duties were no longer confined to taxes upon local manufacture or production. They no longer needed to be calculated by reference to the quantity or value of the goods involved. The distinction between direct and indirect taxes was recognised as unsustainable, but the notion persisted that duties of excise must somehow affect production or manufacture and the exception of a tax upon consumption was, somewhat illogically, continued. *What remained was that an excise duty must be a tax upon goods but that provided no distinguishing feature because not all taxes upon goods – a tax upon ownership, for example – would, even on the broadest view of the term, constitute excise duties*."

The minority in *Ha* expressly rejected that a duty of excise is any inland tax on goods. *Capital Duplicators [No 2]* and *Ha* do not support the premise that a duty of excise is simply an "inland tax on goods" or that that premise is supported by the notion that duties of customs and of excise exhaust the categories of taxes on goods.

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641 cf Joint Reasons at [9].

642 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 602, see also 610, 628; *Ha* (1997) 189 CLR 465 at 510.

643 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 628, quoting *Philip Morris* (1989) 167 CLR 399 at 480.

644 *Ha* (1997) 189 CLR 465 at 510 (footnote omitted).

645 *Ha* (1997) 189 CLR 465 at 510 (emphasis added).

(b) Reframing of purpose of s 90

297 The false premise that excises are "inland taxes on goods" simpliciter reflects and reinforces a reframing of the purpose of s 90 as being for the "real control of the taxation of goods". The approach taken by the majorities in *Capital Duplicators [No 2]* and *Ha*, in light of statements made in *Capital Duplicators [No 1]*[646] as to the free trade objective of Federation[647], does not support the purpose of s 90 as being "to give the Commonwealth Parliament exclusive control of the *taxation of goods* so as to ensure that the execution of whatever policy the Commonwealth Parliament might choose to implement through the enactment of uniform laws of trade, commerce or taxation could not be hampered or defeated by State or Territory *taxation of goods*"[648]. Reframing the purpose of s 90 as a purpose about the taxation of goods simpliciter should not be accepted. Nor should the purpose be reframed as one of effective control over economic policy affecting *demand* for goods. Neither *Capital Duplicators [No 2]* nor *Ha* states the purpose of s 90 in those terms[649].

298 As has been seen[650], the purpose of s 90 is narrower: it is directed to giving the Commonwealth "a real control of the taxation of *commodities*"[651], and "effective control over economic policy *affecting the supply and price of goods* throughout the Commonwealth"[652]. Any tax which is imposed upon a step in the stream of bringing a good to market will have the potential to frustrate that purpose. That is, s 90 is not directed to taxation of goods simpliciter. Duties of excise are trading taxes, concerned with goods the subject of commercial dealings – articles of commerce. By reframing the purpose of s 90, the conclusion – that duties of excise are all "inland taxes on goods" – is assumed.

299 The reframing is a departure from accepted principle. And the departure is fundamental.

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646 (1992) 177 CLR 248 at 274, 277-278.

647 Joint Reasons at [62]-[63].

648 Joint Reasons at [80] (emphasis added). See also Reasons of Jagot J at [850]-[851], [886]; see also [854], citing *Cole* (1988) 165 CLR 360 at 391 and *Betfair* (2008) 234 CLR 418 at 452 [12].

649 cf Reasons of Jagot J at [886]; see also [892].

650 See Pt II(2)(c) above.

651 *Parton* (1949) 80 CLR 229 at 260 (emphasis added).

652 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (emphasis added).

(c) Duty of excise any "tax on goods" contrary to principle and authority

300 No decision of this Court in the last 120 years has extended the term "duty of excise" to any tax on goods. As Barwick CJ said in 1964 in *Anderson's*[653]:

> "From the earliest times of this Commonwealth it has been plain that the expression 'duty of excise' in s 90 of the Constitution is *used in a more precise sense than that of an inland duty* and that it refers to the essential nature of the tax, not to the manner of its collection. But the judicial formulation of the nature of a duty of excise within the meaning of the Constitution has progressed over the intervening years. It has now, however, in my opinion, received *definitive exposition* by this Court, and, however much other views might have been possible at an earlier stage, it ought now to be taken as settled that *the essence of a duty of excise is that it is a tax upon the taking of a step in a process of bringing goods into existence or to a consumable state, or of passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer*."

301 Two aspects of that passage cannot be ignored: first, that a duty of excise in s 90 is used in a more precise sense than that of an inland tax; and, second, "the essence of a duty of excise is that it is a tax upon the taking of a step in a process of bringing goods into existence or to a consumable state, or of passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer". It is this formulation – with its inherent limitation being the point of receipt by the consumer – that has been endorsed repeatedly by members of this Court in *Parton*[654], *Dennis Hotels*[655], *Bolton*[656], *Anderson's*[657], *Hamersley Iron [No 1]*[658], *Chamberlain Industries*[659], *Dickenson's Arcade*[660],

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653 (1964) 111 CLR 353 at 364 (emphasis added).

654 (1949) 80 CLR 229 at 252, 259-261.

655 (1960) 104 CLR 529 at 540-541, 559-560, 573, 589-590.

656 (1963) 110 CLR 264 at 271, 273.

657 (1964) 111 CLR 353 at 364, 368, 373-375, 376, 377, 379.

658 (1969) 120 CLR 42 at 55-56, 64-65, 71.

659 (1970) 121 CLR 1 at 12-13, 17, 22, 25, 28, 35.

660 (1974) 130 CLR 177 at 185-187, 193-194, 209, 218-222, 229-231, 238-239.

H C Sleigh Ltd v South Australia[661], *Logan Downs*[662], *Hematite*[663], *Gosford Meats*[664], *Philip Morris*[665], *Mutual Pools*[666], *Capital Duplicators [No 2]*[667] and *Ha*[668]. And there is good reason for taking what Barwick CJ said as the "definitive exposition" of what is the essence of a duty of excise[669].

302 As the Joint Reasons identify[670], the phrase "tax on goods" is generic and, in the context of ss 90 and 92, "the description 'tax on goods' can be a cause of obscurity rather than of clarification if it covers a failure to identify the precise character of the impugned tax". And yet the majority in this case adopt that generic term. The precise character of a duty of excise is that identified in the preceding paragraph. Only then is there no confusion.

303 It is next necessary to address, in some detail, many of the authorities preceding *Capital Duplicators [No 2]* and *Ha* to demonstrate that the premise that a duty of excise is a "tax on goods" simpliciter is contrary to long established authority.

(i) *Commonwealth Oil Refineries* and *John Fairfax*

304 As we have seen[671], the majority in *Ha*[672] adopted the reasoning of the majority in *Capital Duplicators [No 2]*[673], including the observation that the

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661 (1977) 136 CLR 475 at 520-521.

662 (1977) 137 CLR 59 at 63-65, 69-70, 80.

663 (1983) 151 CLR 599 at 615, 619-621, 628, 632, 644, 649, 655, 657-658, 665-666.

664 (1985) 155 CLR 368 at 377-378, 400, 403, 412, 414.

665 (1989) 167 CLR 399 at 430-431, 436, 444-445, 488-492.

666 (1992) 173 CLR 450 at 453.

667 (1993) 178 CLR 561 at 583.

668 (1997) 189 CLR 465 at 490.

669 See Pt II above.

670 Joint Reasons at [135]-[136], quoting *Bath* (1988) 165 CLR 411 at 427-428.

671 See [216]-[218], [294] above.

672 (1997) 189 CLR 465 at 490 fn 92.

673 (1993) 178 CLR 561 at 590 fn 40.

meaning of duty of excise adopted in *Capital Duplicators [No 2]* accorded with the view of Rich J in *Commonwealth Oil Refineries*[674] and *John Fairfax*[675]. Rich J's reasons in *Commonwealth Oil Refineries*, in particular his statement at the page cited in *Capital Duplicators [No 2]*[676] and *Ha*[677] that duties of excise encompassed "duties upon goods collected in respect of use, consumption or sale"[678], must be read in context.

305 Rich J's statement does not support the conclusion that a duty of excise is simply a "tax on goods". First, the meaning of excise adopted by the majorities in *Capital Duplicators [No 2]* and *Ha* was that stated above[679], not any wider principle. Second, when Rich J in *Commonwealth Oil Refineries* said that "there is no authority, so far as I am aware, which explicitly denies the correctness of the application of [the] term ['duties of excise'] to duties *upon goods collected* in respect of use, consumption or sale because the duty is not confined to goods of home manufacture"[680] his Honour was dealing with a particular point – whether *home* manufacture was a necessary element of a duty of excise. That statement was immediately followed by his Honour saying that[681], in his opinion, "the Constitution gives exclusive power to the Commonwealth over all *indirect taxation* imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term 'customs and excise'". As has been seen[682], this notion of a duty of excise being "indirect" has been explained by reference to the incidence of the tax tending "to be passed on in the price of the goods, as they flow along the stream of production and distribution to the end user"[683]. Given that context, Rich J's statement in *Commonwealth Oil Refineries*

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674 (1926) 38 CLR 408 at 437.

675 (1927) 39 CLR 139 at 146-147.

676 (1993) 178 CLR 561 at 590 fn 40.

677 (1997) 189 CLR 465 at 490 fn 92.

678 (1926) 38 CLR 408 at 437.

679 See [216]-[218] and Pt III(1)(a) above.

680 (1926) 38 CLR 408 at 437 (emphasis added).

681 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 437 (emphasis added).

682 See Pt II(3)(a) above.

683 *Logan Downs* (1977) 137 CLR 59 at 69. See also *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 420, 435, 438; *Matthews* (1938) 60 CLR 263 at 277-278,

cannot be relied on as holding that any tax on goods – including on usage consumption – is a duty of excise. When the majority in *Capital Duplicators [No 2]* referred to Rich J's view in *Commonwealth Oil Refineries*[684], they were dealing with the same point as Rich J, namely that duties of excise are not limited to taxes only on goods locally produced or manufactured.

306 Nothing said by Higgins J in *Commonwealth Oil Refineries* supports any different or wider conclusion[685]. Similarly to Rich J, Higgins J said[686] that "'customs and excise' are correlative words for indirect taxes, such taxes *as enter at once into the price of the taxed commodity*" and that where the tax is imposed ("at the moment of actual sale or not, or sale and delivery, or consumption") does not matter. The critical point made is that the tax enters *at once* into the *price* of the taxed commodity. Given that context, Higgins J's reference to "consumption" must be understood as not referring to continued usage *after* sale but consumption *on sale* – for example, sale of gas burnt on delivery. Consumption was not being used to embrace continuing *use* of a durable good; it was being used to refer to destruction of the good on *sale or delivery*.

307 In any event, what Rich J said in *Commonwealth Oil Refineries* must also be read in light of what he said, four months later, in *John Fairfax*[687]. In *John Fairfax*, Rich J said that although he was of the opinion in *Commonwealth Oil Refineries* that the expression "duties of excise" in ss 86, 90 and 93 was "without any precise connotation" and "comprised inland duties upon or in respect of goods wherever produced"[688], that was because he "thought that confusion would arise in the future if the States were allowed to impose a tax immediately upon commodities imported from abroad"[689].

290-291, 300-301; *Parton* (1949) 80 CLR 229 at 244, 259, 264, 268; *Dennis Hotels* (1960) 104 CLR 529 at 549, 559-560, 581; *Anderson's* (1964) 111 CLR 353 at 365; *Dickenson's Arcade* (1974) 130 CLR 177 at 218, 230-231, 241; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99.

684 (1993) 178 CLR 561 at 590 fn 40.

685 cf Joint Reasons at [31]-[32].

686 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 435 (emphasis added), citing *Bank of Toronto* (1887) 12 App Cas 575 at 582-583.

687 (1927) 39 CLR 139.

688 (1927) 39 CLR 139 at 146.

689 (1927) 39 CLR 139 at 147.

308 In *Commonwealth Oil Refineries* his Honour was responding to, and adopting, an argument put by counsel for the plaintiff[690] alleging that the South Australian Act was invalid and that the word "excise" was to be given the "original wider significance" it had developed in the United Kingdom[691] such that duties of excise did not include local production as a necessary element. As has been explained[692], s 90 of the *Constitution* did not adopt the "original wider significance" the term had taken on in the United Kingdom, which included among the very long list of duties of excise what were described as "excise licences"[693]. Thus, in *John Fairfax*, the point Rich J was seeking to make was that a duty of excise is an inland tax on goods *wherever* produced and is imposed "sometimes on the manufacturer or dealer, sometimes on the commodity itself, or the retail sale"[694]. Notably absent from that list is any reference to consumption, usage consumption, or any step after "retail sale".

309 Finally, Higgins J should not be read as appearing to be prepared to hold that the taxes in issue in *Commonwealth Oil Refineries* were taxes on use and *therefore* invalid as duties of excise[695]. There were two provisions in issue in that case under the *Taxation (Motor Spirit Vendors) Act 1925* (SA): s 4, which imposed a tax upon retailers who sold motor spirit to persons within South Australia (a sales tax); and s 7, which imposed a tax upon consumers of motor spirit in South Australia which was purchased outside the State (a usage consumption tax)[696]. Rich J expressly held that the usage consumption tax was invalid *under s 92*, and that the sales tax was invalid as a duty of excise under s 90 as it was imposed upon the *sale* of the commodity in question[697]. By contrast, Higgins J held that "the duties which sec 4 ... and sec 7 impose, are duties *of customs* and

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690 (1926) 38 CLR 408 at 415-416.

691 By reference to works such as the *Imperial Dictionary* (1854), vol I at 695, Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), Bk I, Ch 8 at 318 and the *Encyclopaedia of the Laws of England* (1898), vol V at 106 et seqq.

692 See Pt II(2)(a) above.

693 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837, cited in *Matthews* (1938) 60 CLR 263 at 276. See also *Matthews* (1938) 60 CLR 263 at 295-299; *Ha* (1997) 189 CLR 465 at 493.

694 (1927) 39 CLR 139 at 146, quoting Chitty, *Burn's Justice of the Peace and Parish Officer*, 29th ed (1845), vol II at 478.

695 cf Joint Reasons at [32].

696 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 418.

697 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 437.

excise"[698]. Given that s 7 – the usage consumption tax – was imposed on imported goods, to the extent that his Honour considered either of those sections to be a duty of excise, that must have been in respect of s 4, the sales tax.

(ii) *Matthews*

310 Dixon J's reasons in *Matthews* did not accurately "reflect[] the essence of a duty of excise as an inland tax on goods at any stage of the life cycle of those goods" and did not give "fuller expression to the meaning Rich J appears earlier to have attributed to the word 'excise' in *Commonwealth Oil Refineries* and *John Fairfax*"[699]. As has just been explained, that meaning of duty of excise cannot be attributed to Rich J in *Commonwealth Oil Refineries* or *John Fairfax*.

311 Dixon J's statement[700] was that a duty of excise is a tax which "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*"; and, that "to be an excise the tax must be imposed in respect of commodities"[701]. The qualification – that the impost *must be of such a nature* as to affect the goods as the subjects of manufacture or production or as articles of commerce – cannot be ignored[702].

312 Immediately preceding that qualifying statement, Dixon J explained multiple times that a duty of excise is a tax which affects goods as the subjects of manufacture or production *or* as articles of commerce and explained why that is so. First, his Honour observed that there was a distinction between a tax imposed in respect of commodities and a tax imposed upon a person filling a particular description or engaged in a given pursuit (the latter not being a duty of excise), and that this distinction resembled that required under the *British North America Act 1867* (Imp) with respect to direct and indirect taxes[703]. In the course of addressing the distinction between direct and indirect taxes[704], Dixon J quoted[705]

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698 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 435 (emphasis added).

699 cf Joint Reasons at [127]; see also [31]-[36], [83].

700 *Matthews* (1938) 60 CLR 263 at 304 (emphasis added).

701 *Matthews* (1938) 60 CLR 263 at 300.

702 See also Pt II(3) above.

703 *Matthews* (1938) 60 CLR 263 at 300.

704 *Matthews* (1938) 60 CLR 263 at 300-301.

705 *Matthews* (1938) 60 CLR 263 at 300.

Lord Haldane in *Attorney-General for Manitoba v Attorney-General for Canada*[706] for the proposition that an indirect tax, of which duties of customs and excise were said to be types, "is that which is demanded from one person in the expectation and with the intention that [they] shall indemnify [themselves] at the expense of another". That can only be a reference to a duty of excise being a tax which affects goods as the subjects of manufacture or production *or* as articles of commerce.

313 His Honour then explained that Lord Thankerton in *Attorney-General for British Columbia v Kingcome Navigation Co*, speaking for the Privy Council, had said that customs and excise duties are ordinarily regarded as indirect taxes – "duties which are imposed in respect of commercial dealings in commodities"[707] – and, quoting Lord Thankerton, "are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted"[708]. Dixon J then observed[709] that "[i]t is evident that, in the application of this distinction to manufacturing or trading businesses or productive enterprises, it may be difficult to say where a licence fee or duty ceases to be a tax imposed upon the person expected to bear the burden so that it is a direct tax and *when it is so closely connected with the manufacture, production, or distribution of commercial goods that it forms an element naturally incorporated in the price of every article and constitutes an indirect tax*".

314 Significantly, his Honour then explained[710] *why* he had undertaken that analysis: "[t]he chief purpose of the foregoing discussion of the considerations governing the connotation of the word 'excise' is to show that, although, as it is used in the Commonwealth Constitution, it describes *a tax on or connected with commodities*, there is no ground for restricting the application of the word to duties calculated directly on the quantity or value of the goods ... *The basal conception of an excise* in the primary sense which the framers of the Constitution are regarded as having adopted *is a tax directly affecting commodities*." Then, in characterising the impost in issue in *Matthews*, his Honour described[711] the provision as having placed an impost "upon an essential step in production".

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706 [1925] AC 561 at 566.

707 *Matthews* (1938) 60 CLR 263 at 301.

708 *Matthews* (1938) 60 CLR 263 at 301, quoting [1934] AC 45 at 59.

709 *Matthews* (1938) 60 CLR 263 at 301 (emphasis added).

710 *Matthews* (1938) 60 CLR 263 at 302-303 (emphasis added).

711 (1938) 60 CLR 263 at 303.

315 None of that can be ignored. The premise – that Dixon J really meant an inland "tax on goods" simpliciter at any stage of the life cycle of goods[712] – cannot be accepted. It is not what his Honour said. And if that is what Dixon J meant, then there would have been no reason for his Honour to state that the tax had to bear a close relation to certain dealings with goods and add that it must be of such a nature as to affect the goods as the subjects of manufacture or production or as articles of commerce.

(iii) *Parton*

316 The reasoning of the Joint Reasons[713] in relation to *Parton*[714] proceeds from the preceding premise[715] – that a duty of excise is any "tax upon goods", by reference to what was said by Dixon J in *Matthews* – and asserts that that reasoning "was revisited by him and reinforced, but in a material respect qualified", in *Parton*[716].

317 The analysis of *Parton* commences by quoting[717] Rich and Williams JJ as being "prepared to accept that a duty of excise 'must be imposed so as to be a method of taxing the production or manufacture of goods'" and then observes that "[t]hey took and acted on the view that 'the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, *provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer*'".

318 The Joint Reasons then state[718] that "[i]n contrast with Rich and Williams JJ, and consistently with the approach he had taken in *Matthews*, Dixon J in *Parton* did not limit the constitutional conception of a duty of excise by reference to the manufacture or production of goods. To the contrary, he characterised the tax in issue in *Parton* as a 'tax upon goods', borrowing from a

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712 cf Joint Reasons at [127].

713 Joint Reasons at [37]-[43].

714 (1949) 80 CLR 229.

715 Joint Reasons at [39].

716 Joint Reasons at [37].

717 Joint Reasons at [38], quoting *Parton* (1949) 80 CLR 229 at 252 (emphasis added).

718 Joint Reasons at [39], quoting *Parton* (1949) 80 CLR 229 at 259-260 (footnotes omitted).

description in the Privy Council to refer to it as a 'trading tax ... more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted'. Dixon J said that '[o]nly if the conception of what is an excise is limited by the condition that the tax must be levied on the manufacturer' could he 'see any escape from the conclusion' that the tax was an excise".

319 But Rich and Williams JJ in *Parton* did *not* "limit the constitutional conception of a duty of excise by reference to the manufacture or production of goods"[719]. Their Honours said that the tax needed to be imposed so as to be a "method" of taxing those steps – "provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax [themselves] but will indemnify [themselves] by passing it on to the purchaser or consumer"[720]. Their Honours rejected the proposition that a levy could not be a duty of excise where it is imposed at a subsequent stage to production or manufacture and went on to accept "the definition reached by Dixon J in *Matthews*" that "to be an excise the tax must be levied 'upon goods'" and that its imposition at a subsequent stage "must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce"[721].

320 Significantly, their Honours then immediately applied that approach to the case before them, holding[722] that each of the taxes in issue "fulfils these requirements" because, as a tax imposed for every gallon of milk sold or distributed during a certain period, it "affects the goods, that is the milk sold or distributed by these taxpayers *as articles of commerce* ... and it is a levy against which it is expected and intended that the taxpayer should indemnify [themselves] at the expense of the persons to whom the milk is sold or distributed".

321 Dixon J adopted a similar approach. His Honour did not accept or identify a duty of excise as a "tax upon goods" simpliciter[723]. That phrase was used by his Honour in the course of characterising the tax before him as a duty of excise, during which he identified six indicia of the tax which made it so, being that it was:

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719 cf Joint Reasons at [39].

720 *Parton* (1949) 80 CLR 229 at 252.

721 *Parton* (1949) 80 CLR 229 at 252-253.

722 *Parton* (1949) 80 CLR 229 at 253 (emphasis added).

723 cf Joint Reasons at [39], quoting *Parton* (1949) 80 CLR 229 at 259-260.

a tax[724]; a "tax upon goods"[725]; a "trading tax"[726]; an "indirect tax"[727]; a "sales tax"[728]; and, finally, "a tax upon goods before they reach the consumer"[729]. It was in the context of classifying the tax in issue as a "trading tax" that Dixon J said[730]:

> "the exaction is not a tax imposed upon the dairyman and owner of a milk depot because they are selected as the parties to the trading who should bear a particular contribution but on the contrary it is imposed on them as the persons to pay, it being a matter of indifference which of the parties ultimately bears the burden *and the tax having from its nature a tendency to enter into the price* obtained for the milk".

He then said that "[i]t is a sales tax and as I understand it that is generally regarded as an excise"[731]. Only then did Dixon J say the following: "[o]nly if the conception of what is an excise is limited by the condition that the tax must be levied on the manufacturer, that is to say upon the goods while they are still in his hands, can I see any escape from the conclusion that the levy of the contribution is an excise"[732].

322 Then, immediately after setting out the purpose of s 90 (which was subsequently adopted in *Capital Duplicators [No 2]* and *Ha*[733]), Dixon J said[734] that "[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". As has been seen, these steps were what the majorities in *Ha* and

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724 *Parton* (1949) 80 CLR 229 at 258-259.

725 *Parton* (1949) 80 CLR 229 at 259.

726 *Parton* (1949) 80 CLR 229 at 259.

727 *Parton* (1949) 80 CLR 229 at 259.

728 *Parton* (1949) 80 CLR 229 at 259.

729 *Parton* (1949) 80 CLR 229 at 260; see also 259.

730 *Parton* (1949) 80 CLR 229 at 259 (emphasis added).

731 *Parton* (1949) 80 CLR 229 at 259.

732 cf Joint Reasons at [39].

733 See [229] above.

734 *Parton* (1949) 80 CLR 229 at 260 (emphasis added).

Capital Duplicators [No 2] described as the "long established" principle[735] and the "fundamental proposition"[736] – "a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise"[737]. As is evident, Rich and Williams JJ and Dixon J adopted a similar approach[738] – while those judges were concerned with the substantive effect of an excise on manufacture or production, none of them limited duties of excise to taxes imposed on the manufacture or production of goods.

323 What then to make of Dixon J's modification in *Parton*[739] to his reasons in *Matthews*[740] to exclude a tax upon "consumption" from what is a duty of excise? Debates[741] about whether Dixon J in *Parton* removed the reference to a tax relating to consumption "solely in deference to the intervening decision"[742] in *Atlantic Smoke Shops Ltd v Conlon*[743] and if so, why, are unhelpful. Dixon J was right to modify his view in *Parton* and that it was right to do so was explained in subsequent cases.

324 And, as will be explained, the assertion[744] that, following *Parton*, there was a lack of analysis in later cases as to the adoption of Dixon J's modified view which excluded taxes on consumption cannot be accepted.

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735 *Ha* (1997) 189 CLR 465 at 490.

736 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

737 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

738 cf Joint Reasons at [39].

739 (1949) 80 CLR 229 at 261.

740 (1938) 60 CLR 263 at 300.

741 See *Dickenson's Arcade* (1974) 130 CLR 177 at 185-186, 202; Joint Reasons at [85]-[90], [128]; Reasons of Edelman J at [565]-[571]; Reasons of Steward J at [738], [755]-[756]; Reasons of Jagot J at [935].

742 Joint Reasons at [85].

743 [1943] AC 550.

744 Joint Reasons at [91]; Reasons of Jagot J at [936].

(iv) *Dennis Hotels* and *Bolton*

325 The significance of the statements of principle made by Kitto J in *Dennis Hotels*[745] and by the unanimous Court in *Bolton*[746] should not be downplayed. The contention[747] that the description of a duty of excise given by Dixon J in *Matthews* as modified by him in *Parton* to remove the reference to consumption "was picked up, *without further analysis*, by Kitto J in *Dennis Hotels*" where it then "fed into Kitto J's formulation of the proposition which was later adopted, again *without analysis*, in *Bolton v Madsen* that 'a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process ... which reaches from the earliest stage in production to the point of receipt by the consumer'" should not be accepted.

326 It may be arguable that the unanimous Court in *Bolton* adopted Kitto J's formulation in *Dennis Hotels* without analysis, but that overlooks that the Court in *Bolton* did refer[748] to Kitto J having come to that conclusion "based upon what Dixon J ... said in *Matthews*[749]" and "upon what Dixon CJ said in the passage already quoted from *Hughes and Vale Pty Ltd v State of New South Wales*[750]". And, critically, Kitto J's statement in *Dennis Hotels* was not without analysis.

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745 (1960) 104 CLR 529 at 559.

746 (1963) 110 CLR 264 at 273.

747 Joint Reasons at [91] (emphasis added), quoting *Dennis Hotels* (1960) 104 CLR 529 at 559; see also [47]-[48]. See also Reasons of Jagot J at [936].

748 (1963) 110 CLR 264 at 273.

749 Quoting *Matthews* (1938) 60 CLR 263 at 304 (emphasis added): "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*."

750 The quotation referred to appears at (1963) 110 CLR 264 at 271, where Dixon CJ is quoted as follows: "Finally the point was taken that the levy of the tonnage rates amounted to an excise duty placed beyond the power of the State by s 90 of the Constitution. In answer to this contention it is, I think, enough to say that the tonnage rate is not a tax *directly affecting commodities*. It is calculated on the combined weight of the vehicle and weight of the load it is capable of carrying and is payable in respect of the employment of the vehicle upon a journey independently of the weight or quantity of the commodities carried. It is a tax on the carrier because he carries goods by motor vehicle": *Hughes and Vale* (1953) 87 CLR 49 at 75 (emphasis added).

Immediately after setting out what Dixon J had said in *Matthews*[751], Kitto J said that, with the qualification Dixon J had made in *Parton*, "the correctness of the proposition seems to me to be demonstrated by his Honour's examination of the subject"[752]. That is, he incorporated into his reasons Dixon J's own justifications in *Matthews* for that position, which justifications, as we have seen[753], included an "examination of the subject" by reference to duties of excise being taxes "imposed in respect of commercial dealings in commodities"[754] which "are, in their essence, trading taxes"[755], and that the "basal conception of an excise ... is a tax directly affecting commodities"[756]. Further, Kitto J said that the cases he relied upon exhibited a "contrast which ... is not simply between a tax which is and a tax which is not imposed by reference to commodities, or even by reference to a specified mass of commodities"[757]. Then Kitto J set out[758] his statement which was adopted by the Court in *Bolton*[759]:

> "What is insisted upon may, I think, be expressed by saying that a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer."

327 His Honour then immediately stated that, "[i]ndeed, the fact which in general justifies the description of an excise duty as an indirect tax, in the sense of John Stuart Mill's dichotomy, is that when, in the ordinary case, excise duty becomes payable, it amounts to a statutory addition to the cost of a particular act or operation in the process of producing or distributing goods, so that in the costing of the goods in relation to which the act or operation is done, for the purpose of arriving at a selling price to be charged to the next recipient in the chain that leads to the ultimate consumer, the duty paid in respect of those goods may enter –

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751 See [311] above.

752 *Dennis Hotels* (1960) 104 CLR 529 at 559.

753 See Pt III(1)(c)(ii) above.

754 (1938) 60 CLR 263 at 301.

755 (1938) 60 CLR 263 at 301, quoting *Kingcome Navigation Co* [1934] AC 45 at 59.

756 (1938) 60 CLR 263 at 303.

757 *Dennis Hotels* (1960) 104 CLR 529 at 559.

758 *Dennis Hotels* (1960) 104 CLR 529 at 559.

759 (1963) 110 CLR 264 at 273.

and therefore, according to the natural course of business affairs, will enter – as a charge relating to those goods specifically"[760]. It was this which led his Honour to state[761] that that is what he apprehended was meant by Higgins J in *Commonwealth Oil Refineries*[762] and by the Privy Council in *Bank of Toronto v Lambe*[763] when it was said that an indirect tax "enters *at once* ... into the price of the taxed commodity". The emphasis was added by Kitto J.

328 Taking the words of Kitto J and reading them in context – words which were adopted in *Bolton* (the Court having read them in context) – the unanimous Court in *Bolton* (and Kitto J in *Dennis Hotels*) can be taken as saying that the discrimen of whether a tax is a duty of excise is not simply whether it is a tax on goods. Not all taxes on goods are duties of excise. It cannot be said that Dixon J, Kitto J and the Court in *Bolton* adopted the principle without analysis[764].

(v) *Anderson's*

329 Barwick CJ said in *Anderson's*[765] that in the assessment of the tendency of a tax, "[t]he 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax – all these are included in the relevant considerations". The Joint Reasons observe that the majority in *Capital Duplicators [No 2]* adopted that explanation[766]. The latter is true. Barwick CJ's explanation, however, was more extensive.

330 As has been noted[767], Barwick CJ had earlier observed[768], as his starting point, that throughout Australian history "the expression 'duty of excise' in s 90 of

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760 *Dennis Hotels* (1960) 104 CLR 529 at 559-560.

761 *Dennis Hotels* (1960) 104 CLR 529 at 560.

762 (1926) 38 CLR 408 at 435, citing *Bank of Toronto* (1887) 12 App Cas 575 at 582-583.

763 (1887) 12 App Cas 575 at 583.

764 cf Joint Reasons at [85], [91]; Reasons of Jagot J at [936].

765 (1964) 111 CLR 353 at 365.

766 Joint Reasons at [149]; see also Reasons of Jagot J at [849].

767 See [300]-[301] above.

768 *Anderson's* (1964) 111 CLR 353 at 364.

the Constitution is used in a more precise sense than that of an inland duty and that it refers to the essential nature of the tax, not to the manner of its collection". His Honour then immediately proceeded to explain[769] that the "definitive exposition by this Court" was that "the essence of a duty of excise is that it is a tax upon the taking of a step in a process of bringing goods into existence or to a consumable state, or of passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer".

331 And Barwick CJ's justification for this formulation was[770] that it was, "in substance", the formulation of Kitto J in *Dennis Hotels*, endorsed by the unanimous Court in *Bolton*. His Honour said that the formulation "commends itself to me" and he would merely add expressly what was implicit, namely that "the step which puts the goods into consumption is still in the line, albeit at the end of the line"[771]. It was in this context that Barwick CJ said that questions as to whether or not the tax was indirect, or whether its amount entered into the price of the commodity, may assist in determining whether the tax is a tax on a step in the process of bringing the goods to the consumer, but are not conclusive: "in the end what must be decided is that the tax is in substance a tax upon the relevant step" – that is *the* "central question"[772]. And, as we have seen, this central question was what Brennan J in *Philip Morris* described as the "rock in the sea of uncertain principle"[773]: "*a tax on a step in the production or distribution of goods to the point of receipt by the consumer is a duty of excise*".

(vi) *Dickenson's Arcade*

332 It is necessary to address this decision in some detail before turning to how it is dealt with by the majority.

333 *Dickenson's Arcade* relevantly concerned Pt II of the *Tobacco Act 1972* (Tas), and the regulations made under that Act. Part II imposed a tax "on the consumption of tobacco", which was defined to mean "the smoking or chewing of tobacco by any person"[774]. The tax was seven and a half per cent of the value of the consumed tobacco, calculated on the amount consumed according to the price

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769 *Anderson's* (1964) 111 CLR 353 at 364.

770 *Anderson's* (1964) 111 CLR 353 at 364.

771 *Anderson's* (1964) 111 CLR 353 at 364-365.

772 *Anderson's* (1964) 111 CLR 353 at 365.

773 (1989) 167 CLR 399 at 445 (emphasis added). See Pt III(1)(a) above and Pt III(1)(c)(viii) below.

774 *Dickenson's Arcade* (1974) 130 CLR 177 at 189-190.

at which tobacco of that kind was ordinarily sold by retail[775]. Further, the tax was not payable on consumption if it had already been paid; however, the Act otherwise, in its terms, did not provide for payment of or in respect of the tax at any time before consumption. Failure to pay the tax within seven days of consumption amounted to an offence[776].

334 The Act permitted the making of regulations to provide for any convenient method for the collection of the tax. Regulations were made under the Act which allowed consumers to pay the tax to retailers, who were then to collect the tax from consumers and remit it to the Commissioner[777]. The regulations provided, relevantly, that retailer licensees were to pay the tax to a collector where it was paid at the time of purchase, and were to make arrangements with the Commissioner for the appointment of a collector, who could be the retailer licensee, to receive the "tax payable in respect of the consumption of tobacco that is sold on [the retail] premises"[778]. A challenge was mounted to the validity of Pt II and the regulations[779]. The Court was constituted by six Justices, each of whom wrote separate reasons.

335 Four Justices (Menzies, Gibbs, Stephen and Mason JJ) held that Pt II of the Act was valid because, first, the tax imposed by Pt II was a tax on consumption after sale – usage consumption – and, second, following the authorities including and since *Parton* such a tax is not a duty of excise[780].

336 The other two Justices (Barwick CJ and McTiernan J) would have held Pt II invalid, but for different reasons. Barwick CJ would have held Pt II invalid on the basis that the tax imposed by Pt II was, properly construed, not a tax on usage consumption but a tax intended to be collected at the point of purchase and thus, in his Honour's view, it was a duty of excise within the scope of s 90[781]. His Honour also expressly deferred to the views of Menzies, Gibbs, Stephen and Mason JJ and "accepted the limitation" from *Parton* that a usage consumption tax is not a duty

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775 *Dickenson's Arcade* (1974) 130 CLR 177 at 190.

776 *Dickenson's Arcade* (1974) 130 CLR 177 at 190.

777 *Dickenson's Arcade* (1974) 130 CLR 177 at 192-193.

778 *Dickenson's Arcade* (1974) 130 CLR 177 at 193.

779 The Court also considered a challenge to Pt III, which concerned a "licence fee". It is not necessary to consider the challenge to that Part.

780 *Dickenson's Arcade* (1974) 130 CLR 177 at 209, 221-222, 224, 229-232, 238-239, 242.

781 *Dickenson's Arcade* (1974) 130 CLR 177 at 194.

of excise, notwithstanding the disquiet he felt about that conclusion[782]. McTiernan J, although agreeing with the majority that Pt II imposed a tax on consumption, was alone in holding that taxes on consumption are duties of excise[783]. Accordingly, in coming to their conclusions on Pt II of the Act, five of the six Justices held that a tax on consumption (consumption being understood as usage consumption – something which occurs *after* the good reaches the hands of the ultimate consumer) is *not* a duty of excise.

337 The regulations were held to be invalid by a statutory majority (Barwick CJ, McTiernan and Mason JJ)[784]. Of the three Justices in the statutory majority on this point, Barwick CJ and McTiernan J were each of the view that the regulations were inoperative because of their earlier view that Pt II was invalid[785]. Mason J, who had been in the majority in holding that Pt II was valid, held that the regulations were invalid because they operated such that the tax was levied in respect of the tobacco before it passed into the hands of the consumer – that is, *upon the sale* of the tobacco – and the regulation-making power did not extend to provisions that would have the effect of making the tax imposed by the Act a duty of excise[786]. Menzies, Gibbs and Stephen JJ, the three Justices in the minority on the regulations, each held that the regulations did not convert the tax from being a tax on consumption into a tax on sale, and, as a tax on consumption is not a duty of excise, the regulations were valid[787].

338 In sum, the Court held Pt II to be valid, but the regulations invalid. Five of the six Justices (Barwick CJ, Menzies, Gibbs, Stephen and Mason JJ) affirmed the principle derived from *Parton* that a tax on usage consumption is not a duty of excise (all except Barwick CJ holding that Pt II was valid on that basis)[788]. It may be accepted that three of those Justices (Barwick CJ, Gibbs and Mason JJ) expressed some disquiet about that principle. However, it is necessary to identify the nature and extent of that disquiet. It must be read in context.

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782 *Dickenson's Arcade* (1974) 130 CLR 177 at 185-186. See [339] below.

783 *Dickenson's Arcade* (1974) 130 CLR 177 at 204-205.

784 *Judiciary Act 1903* (Cth), s 23(2)(b).

785 *Dickenson's Arcade* (1974) 130 CLR 177 at 195, 204-205.

786 *Dickenson's Arcade* (1974) 130 CLR 177 at 243.

787 *Dickenson's Arcade* (1974) 130 CLR 177 at 210, 224, 233-234.

788 cf Joint Reasons at [7].

339 Barwick CJ, immediately prior to deferring to the other Justices, expressed the view[789] that there was "no logical reason ... for ending at the point of entry into consumption the area which might yield a duty of excise", and observed that the "area has been so limited", "seemingly under what was considered to be the constraint" of *Atlantic Smoke Shops*, notwithstanding that it "may well have been open to argument" whether that decision "really required this limitation".

340 Gibbs J, after setting out Dixon J's statement from *Parton* as to the purpose of s 90[790], observed[791] that "[t]he power of the Commonwealth Parliament to tax commodities would be incomplete, and its fiscal policies possibly liable to some frustration, if the power did not extend to taxes on consumption". However, after then referring to judgments which had affirmed Dixon J's position in *Parton*[792] – including *Bolton*, of which his Honour said that the unanimity reached in that case should be given "the very greatest weight ... after a fluctuation of judicial opinion"[793] – Gibbs J went on to reason that although holding that a State tax on consumption is not a duty of excise might render incomplete the Commonwealth's control of the taxation of goods, or hamper its fiscal policies, that was "not decisive" against the view that a tax on consumption is not a duty of excise[794]. That was because, his Honour held[795], as part of a federal Constitution, s 90 could not be construed by reference to the Commonwealth's position alone given that it was "intended to effect a distribution of the power to impose taxation between the Commonwealth and the States". Accordingly, Gibbs J held that "[u]pon its proper construction s 90 stops short of denying power to the States to impose taxes on consumption"[796].

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789 *Dickenson's Arcade* (1974) 130 CLR 177 at 185.

790 See [229] above.

791 *Dickenson's Arcade* (1974) 130 CLR 177 at 219.

792 *Dickenson's Arcade* (1974) 130 CLR 177 at 221, referring to *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 559, 573, 588-590, *Bolton* (1963) 110 CLR 264 at 273, *Anderson's* (1964) 111 CLR 353 at 364-365 and *Chamberlain Industries* (1970) 121 CLR 1 at 13, 28, 35.

793 *Dickenson's Arcade* (1974) 130 CLR 177 at 221.

794 *Dickenson's Arcade* (1974) 130 CLR 177 at 222.

795 *Dickenson's Arcade* (1974) 130 CLR 177 at 222.

796 *Dickenson's Arcade* (1974) 130 CLR 177 at 222; see also 223-224. See also [366] below.

341 Mason J expressed the view that, given the purpose of s 90 as articulated by Dixon J in *Parton*, "the absence of a power to control taxes on the consumption of goods might be thought perhaps to constitute an unacceptable limitation on the power of control which it was the purpose of [s 90] to repose in the Parliament"[797]. However, his Honour then noted that the authorities in the Court since *Parton*[798] "must, I think, be regarded as establishing at this time that a tax on consumption of goods is not an excise"[799]. Furthermore, and critically, his Honour held[800] that the justification for that "restriction" on the power of the Commonwealth "to control the taxation of commodities" was "evidently based on the notion that consumption *is not sufficiently proximate to the production and manufacture of goods* – a concept of proximity which it derives from the reference in s 93 to 'taxes paid on the production and manufacture of goods' and from the circumstance that s 90 deals with bounties on production as well as duties of excise".

342 McTiernan J supported[801] his (sole dissentient) view that a tax on consumption *is* a duty of excise relevantly on two bases. First, on the basis that, in his Honour's view, the Court in *Browns Transport*[802] "gave a judgment definitive of the term 'duties of excise'"[803] and that a passage of that judgment[804], when read with its citations to *Matthews*, "settl[ed] that s 90 does extend to a tax on the consumption of goods which has the characteristics of excise"[805]. There is nothing in the reasons of *Browns Transport*, let alone the passage relied upon by McTiernan J, to suggest that the Court there considered that duties of excise encompass taxes on usage consumption. His Honour placed particular emphasis[806]

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797 *Dickenson's Arcade* (1974) 130 CLR 177 at 238-239.

798 Citing *Bolton* (1963) 110 CLR 264 at 271, *Anderson's* (1964) 111 CLR 353, *Hamersley Iron [No 1]* (1969) 120 CLR 42 and *Chamberlain Industries* (1970) 121 CLR 1.

799 *Dickenson's Arcade* (1974) 130 CLR 177 at 239.

800 *Dickenson's Arcade* (1974) 130 CLR 177 at 239 (emphasis added).

801 *Dickenson's Arcade* (1974) 130 CLR 177 at 204.

802 (1958) 100 CLR 117.

803 *Dickenson's Arcade* (1974) 130 CLR 177 at 202; see also 203.

804 *Browns Transport* (1958) 100 CLR 117 at 128-129.

805 *Dickenson's Arcade* (1974) 130 CLR 177 at 204.

806 *Dickenson's Arcade* (1974) 130 CLR 177 at 203-204.

on the citations in *Browns Transport* to the reasons of Latham CJ[807] and Dixon J[808] in *Matthews* for that proposition. This is misplaced. Although the cited pages of the reasons of those judges do refer to the consumption of goods, the Court in *Browns Transport* did not cite those pages as support for any proposition concerning consumption. Latham CJ's reasons were cited[809] for the proposition that duties of excise do not include many types of tax which were regarded as excises in England[810], and Dixon J's reasons were cited[811] for his Honour's "general discussion of the history and scope" of the term "excise", and for the proposition that a duty of excise must be a tax "imposed 'upon' or 'in respect of' or 'in relation to' goods". In any event, *Browns Transport* was decided five years before *Bolton*, which, as has been explained, unanimously concluded that a duty of excise is a tax on a step *before* goods reach the hands of consumers. McTiernan J's second basis[812] for his view that a tax on consumption is a duty of excise was that, in *Bolton*[813], the Court had adopted the "formulation" as to the meaning of excise made by Kitto J in *Dennis Hotels*[814], which itself was based upon what Dixon J said in *Matthews* (which his Honour noted "clearly included consumption"). His Honour pointed out that Kitto J's formulation had not, in terms, referred to Dixon J's modification in *Parton* of the *Matthews* view, and that, in any event, Dixon J's modification in *Parton* "was not cogently expressed"[815]. As has been explained[816], that reasoning is inaccurate.

343 The other two judges, Menzies and Stephen JJ, did not express any disquiet about the conclusion that a tax upon consumption is not a duty of excise. Menzies J

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807 (1938) 60 CLR 263 at 277.

808 (1938) 60 CLR 263 at 304.

809 *Browns Transport* (1958) 100 CLR 117 at 129, citing *Matthews* (1938) 60 CLR 263 at 276, 277.

810 See [220], [223] above.

811 *Browns Transport* (1958) 100 CLR 117 at 129, citing *Matthews* (1938) 60 CLR 263 at 292-299, 304.

812 *Dickenson's Arcade* (1974) 130 CLR 177 at 204.

813 (1963) 110 CLR 264 at 273.

814 (1960) 104 CLR 529 at 559.

815 *Dickenson's Arcade* (1974) 130 CLR 177 at 204.

816 See Pt III(1)(c)(iv) above.

commenced his reasoning on this point by holding[817] that *Bolton* had "established quite definitely that 'for 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'". Further, his Honour reasoned[818] that the "wide conception of what is a duty on production" – which word his Honour associated with the word "excise" – was "confined to a tax directly related to goods imposed at some step of their *production or distribution*", and that a tax falling within the formulation stated by Kitto J in *Dennis Hotels*, as adopted in *Bolton*, was a duty of excise.

344 Finally, Stephen J acknowledged[819], by reference to Dixon J's reasons in *Matthews*[820], that the term "duty of excise" had "never possessed ... any certain connotation" or "exact application", such that "no ultimate truth lies concealed in the phrase ... there awaiting recognition by the judicial fossicker". Nevertheless, his Honour held[821] that the "hard won" certainty conferred on the phrase by the unanimous judgment in *Bolton* "in relation to that point on the journey of goods from producer to consumer beyond which a tax is no longer viewed as an excise ... should not lightly be disturbed", and his Honour had not seen any "convincing reasons" to displace that principle. Importantly, Stephen J held[822] that although it was true that the "economic effect" of a tax upon consumption is "reflected back upon the manufacturer or producer", such an economic effect, in his Honour's view, "cannot constitute any conclusive determinant of the character of a tax as an excise". Further, after considering the distinction between direct and indirect taxes, his Honour held[823] that, as a tax on consumption cannot be "passed on", it "therefore lacks that common feature of an excise", and that, given that both customs and excise duties are "duties imposed in respect of commercial dealings in commodities and are, in their essence, trading taxes", a tax on consumption is not such a tax.

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817 *Dickenson's Arcade* (1974) 130 CLR 177 at 209, quoting *Bolton* (1963) 110 CLR 264 at 271.

818 *Dickenson's Arcade* (1974) 130 CLR 177 at 213 (emphasis added).

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

820 (1938) 60 CLR 263 at 293.

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

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

823 *Dickenson's Arcade* (1974) 130 CLR 177 at 231.

345 As can be seen, then, it was not just Stephen J in *Dickenson's Arcade* who sought to proffer a principled defence of the limitation upon consumption, it was four of the six Justices – Menzies, Gibbs, Stephen and Mason JJ.

346 The majority's conclusion in this case that *Dickenson's Arcade* must be reopened and overruled[824] must be considered by reference to what is said, and what is not said. It is contended[825] that Victoria and the Attorneys-General of the other States and Territories advanced two main arguments in defence of the correctness of the limitation in the *Bolton* formulation adopted in *Dickenson's Arcade*: textual support from the word "consumption" in s 93(i) of the *Constitution*; and the explanations given by Stephen J in *Dickenson's Arcade* and *Logan Downs*[826] for confining duties of excise to taxes imposed on goods "in the stream of production and distribution", the tendency of which is to increase the price of those goods.

347 In response to the first argument – textual support from the word "consumption" in s 93(i) of the *Constitution* – reliance is placed[827] upon a passage in *Ha*[828] in which the majority in that case said that "s 93 throws no light on the connotation of the term 'duties of excise' in s 90". In particular, it is said[829] that the first argument can be dealt with quite briefly because the word "consumption" was not used in s 93(i) in the "narrow sense" of referring to goods which had been received by consumers but in the "broad sense ... to refer to goods which had passed into circulation within a territory to become part of the '*mass of vendible commodities*'"[830]. It is then said that Quick and Garran "reflected that broad sense in commenting on s 93(i) that '[g]oods are "for consumption" in a State if it is intended that they shall be retailed in that State'"[831]. Each statement must be read

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824 Joint Reasons at [10], [133]; Reasons of Jagot J at [940], [948].

825 Joint Reasons at [116].

826 See [371]-[373] below.

827 Joint Reasons at [117]; Reasons of Jagot J at [852], [946].

828 (1997) 189 CLR 465 at 493.

829 Joint Reasons at [117].

830 Joint Reasons at [118], citing *Dennis Hotels* (1960) 104 CLR 529 at 556 (emphasis added).

831 Joint Reasons at [118], quoting Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 862 §393 (footnote omitted).

in context. The first statement was used by Fullagar J in *Dennis Hotels* as follows[832]:

> "The duties of customs and duties of excise contemplated by the Constitution are, I think, alike duties which are *imposed as a condition of the entry of particular goods into general circulation in the community – of their introduction into the mass of vendible commodities in a State. When once they have passed into that general mass, they cease, I think, to be proper subject-matter for either duties of customs or duties of excise*."

348 Similarly, Quick and Garran did not reflect a "broad sense" of consumption in the context of s 93. It is appropriate to set out the passage from Quick and Garran in its entirety[833]:

> "'Consumption' is a term of Economics, applied to denote the absorption, by use, of all kinds of wealth. It is the converse of production; production having reference to the creation of wealth, and consumption to its utilization. 'As production is the first stage in economics, consumption is the last. Consumption is the chief end of industry, for everything that is produced and exchanged is intended in some way to be consumed.' (Chambers' Encycl. *sub tit.* 'Consumption.')
>
> The process of consumption, in the case of many articles, may be a very prolonged one. The consumption of food or fuel is immediate; but the consumption of a waggon, or a steam-engine, or a work of art, or a jewel, may extend over many years, or indefinitely. *The expression 'passing into another State for consumption' is not intended to imply that complete consumption within the State should be contemplated, but merely that distribution to consumers within the State is contemplated. Goods are 'for consumption' in a State if it is intended that they shall be retailed in that State*."

349 Two aspects of that passage should be noted. First, the phrase "for consumption" is broad but, in the context of s 93(i), means for retail sale – that is, to consumers. Second, and accordingly, although s 93 does contemplate that goods produced or manufactured in one State might attract the payment of a duty of excise on those steps in that State and afterwards pass into another State for consumption – that is, into circulation – it cannot be said that "consumption" in s 93 of the *Constitution* says "nothing about the character of any further tax that might be imposed on those goods once they ha[ve] passed into circulation in that

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832 (1960) 104 CLR 529 at 556 (emphasis added).

833 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 862 §393 (emphasis added).

other State"[834]. After all, consumption of goods, once retailed, denotes "absorption, *by use*"[835] – usage consumption. In any event, the majority's statement in *Ha* that s 93 "throws no light" on the meaning of "duties of excise" in s 90 was made in the context of s 93's use of the words "produced or manufactured". The concept of "consumption" in s 93 was not the subject of analysis in *Ha*[836].

350 Three responses are then provided[837] to Victoria's second argument, that duties of excise are limited to "imposts imposed on goods in the stream of production and distribution which tend to increase the prices of those goods", being the long established and correct principle fundamental to the operation of s 90 of the *Constitution*[838].

351 The first response contends[839] that "the limitation was said by Stephen J to have been founded principally on the proposition that a tax can be a duty of excise *only* if it is indirect" but that that proposition had been "described as too absolute in *Browns Transport*[840]" and had been rejected (by the time *Dickenson's Arcade* and *Logan Downs* were decided) "specifically and unanimously" in *Carmody v F C Lovelock Pty Ltd*[841]. Elsewhere, while acknowledging that the majority in *Capital Duplicators [No 2]*[842] "accepted the indirectness of the tax to be one relevant circumstance", emphasis is placed[843] on statements in numerous other cases[844] as to the inaptness of the concept of indirectness to the characterisation of

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834 cf Joint Reasons at [119]; see also Reasons of Jagot J at [852], [946].

835 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 862 §393 (emphasis added).

836 See (1997) 189 CLR 465 at 491-493.

837 Joint Reasons at [120].

838 See Pt II above.

839 Joint Reasons at [121] (emphasis added).

840 (1958) 100 CLR 117 at 129.

841 (1970) 123 CLR 1 at 26-27.

842 (1993) 178 CLR 561 at 583 fn 99.

843 Reasons of Jagot J at [921]-[922].

844 *Matthews* (1938) 60 CLR 263 at 285; *Browns Transport* (1958) 100 CLR 117 at 129; *Dennis Hotels* (1960) 104 CLR 529 at 553; *Anderson's* (1964) 111 CLR 353 at

a duty of excise. Again, the judgments in all of these cases, and the words used, must be read in context.

352 It may be accepted that in *Logan Downs* Stephen J said[845] that, once out of the stream of production and distribution, goods "cease to be apt subject-matter for duties of excise and it is this that accounts for the character of an excise as an indirect tax", and thus the incidence of the tax "will tend to be passed on in the price of the goods, as they flow along the stream of production and distribution to the end user". However, in *Dickenson's Arcade* his Honour did not endorse, or premise his reasoning on, the proposition that a tax can be a duty of excise *only* if it is indirect[846]. Rather, his Honour observed that a consumption tax is a direct, not an indirect, tax, and stated that "*[w]hatever may now be thought to be the relevance, for the purposes of s 90, of this distinction* ... it remains true that indirect taxes tend to be more concerned with the commodity and less with the particular taxpayer than are direct taxes; hence direct taxes are inherently less closely related to goods than are indirect taxes *and are to that extent* less likely to be found to be duties of excise"[847].

353 Further, it is true that in *Browns Transport* this Court said (correctly[848]) that it would "perhaps be going too far" to say indirectness is an essential element of a duty of excise. However, the Court immediately stated that "a duty of excise will *generally* be an indirect tax, and, if a tax appears on its face to possess that character it will *generally* be because it is a tax upon goods rather than a tax upon persons"[849].

354 The Court in *Carmody* did not "specifically and unanimously" reject the distinction between direct and indirect taxes. It held that a tax upon importation of goods which have been delivered for home consumption and consumed before liability to pay arose is a duty of customs[850]. Unsurprisingly, the test was whether the tax was imposed upon the importation of goods and, as this was clearly satisfied

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365; *Dickenson's Arcade* (1974) 130 CLR 177 at 222, 223; *Ha* (1997) 189 CLR 465 at 509.

845 (1977) 137 CLR 59 at 69.

846 cf Joint Reasons at [121].

847 *Dickenson's Arcade* (1974) 130 CLR 177 at 230-231 (emphasis added; citation omitted).

848 See [245]-[247] above.

849 *Browns Transport* (1958) 100 CLR 117 at 129 (emphasis added).

850 *Carmody* (1970) 123 CLR 1 at 7, 13, 16, 26-27.

in that case, it was of no assistance to embark on consideration of the further "subsidiary question" of whether the tax was direct or indirect[851]. As Gibbs J recorded, it was submitted in *Carmody* that "a customs duty must be an indirect tax, which can be passed on to the ultimate consumer of the goods, and that it must, therefore, be imposed on goods while they are still in existence ... or in other words before they have passed into the hands of the ultimate consumer and have been consumed"[852]. Gibbs J (Barwick CJ, Windeyer, Owen and Walsh JJ agreeing) held that these submissions could not be maintained[853]:

> "It is clear that a tax imposed on the importation of goods into Australia is a duty of customs within the ordinary meaning of that expression and within the meaning it bears in the constitutional provisions ... [The tax in question] is in reality what it purports to be – a tax imposed on the importation of goods ... [T]he fact that the tax was retrospective in operation did not prevent it from being a duty of customs.
>
> Notwithstanding the many statements that duties of customs and duties of excise are indirect taxes, I do not find it necessary to consider whether the present impost ... can be said to be an indirect tax ... *To inquire whether a tax has a tendency to enter into the price of the goods, so as to be borne by the ultimate consumer, may assist in determining whether the tax is imposed in respect of the importation of the goods but will not be decisive of that question*. The test to be applied is whether the tax is imposed on the importation of goods into Australia, and where it is clear that the tax is so imposed it is of no assistance to embark upon the consideration of what is only a subsidiary question [of whether the tax is direct or indirect]."

355 Barwick CJ relevantly agreed with Gibbs J's reasons[854]. His Honour said[855] that "the dumping duty ... is a duty of Customs within the meaning of s 90 of the Constitution: it is a tax imposed upon the importation of goods into Australia whenever that event occurred. It is nonetheless so though when imposed the importation is complete, the goods have moved into consumption or for that matter

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851 *Carmody* (1970) 123 CLR 1 at 27; see also 7, 13, 16.

852 (1970) 123 CLR 1 at 26.

853 *Carmody* (1970) 123 CLR 1 at 26-27 (emphasis added; citations omitted); see also 7, 13, 16.

854 *Carmody* (1970) 123 CLR 1 at 7.

855 *Carmody* (1970) 123 CLR 1 at 7-8.

consumed. It is a tax which no State may impose." McTiernan J[856] and Menzies J[857] came to similar conclusions.

356 The conclusion that the quality of being an indirect tax is no more indispensable to a duty of excise than it is to a duty of customs is not supported by long established fundamental principle or by the specific references relied upon[858]. A tax does not need to be indirect to be a duty of excise. That is not the decisive question – it is not a "test" to be applied. But equally it is not possible to ignore the "many statements"[859] that duties of excise are *generally* indirect taxes; because they are imposed on commercial dealings with goods and have the tendency to enter into the purchase price of those goods. It is the natural tendency of the tax to enter into the *purchase price* for which goods are sold that is important.

357 The second response[860] to Victoria's arguments defending the correctness of the limitation in the *Bolton* formulation adopted in *Dickenson's Arcade* contends that "the notion that goods are taken out of the stream of production and distribution at the point of receipt by a consumer – a person who alone or with others is to use them – *assumes* that those goods cannot be resold on a secondary market". This is not an assumption; it is an irrelevance to whether a tax on usage consumption is an excise. Consistent with long established and fundamental principle, a duty of excise is a tax on commercial dealings comprising one or more of the steps – production, manufacture, sale and distribution – in bringing a good to market; that is, before the goods are *consumed*, being "the act of the person in possession of the goods in using them or in destroying them by use, irrespective of the manner or means by which that possession was obtained"[861]. What happens or

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856 *Carmody* (1970) 123 CLR 1 at 9.

857 *Carmody* (1970) 123 CLR 1 at 12.

858 cf Joint Reasons at [121].

859 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 420, 435, 437, 438; *Matthews* (1938) 60 CLR 263 at 277-278, 290-291, 300-301; *Parton* (1949) 80 CLR 229 at 244, 259, 264, 268; *Dennis Hotels* (1960) 104 CLR 529 at 549, 559-560, 581; *Anderson's* (1964) 111 CLR 353 at 365; *Dickenson's Arcade* (1974) 130 CLR 177 at 218, 230-231, 241; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99.

860 Joint Reasons at [122] (emphasis added).

861 *Dickenson's Arcade* (1974) 130 CLR 177 at 187.

might later happen when goods are in the hands of a consumer is not relevant in determining what is a duty of excise[862].

358 The third response to Victoria's arguments defending the correctness of the limitation in the *Bolton* formulation adopted in *Dickenson's Arcade* contends[863] that Stephen J in *Dickenson's Arcade* and *Logan Downs* postulated the limitation "without reference to the purpose of s 90 identified by Dixon J in *Parton*", and, further, that those remarks must be understood in the context of Stephen J's explicit rejection in *H C Sleigh*[864] of the proposition that "the exclusive nature of the federal Parliament's power to impose duties of excise can readily and with accuracy be explained by reference to constitutional purpose or historical reasons".

359 The limitation of duties of excise to taxes on a step in the process from production to receipt by a consumer is not irreconcilable with the purpose of s 90, as identified by Dixon J in *Parton* and adopted in *Capital Duplicators [No 2]* and *Ha*. As has been explained[865], s 90 is not directed at giving[866] the Commonwealth "exclusive control of the taxation of goods so as to ensure that the execution of *whatever policy* the Commonwealth Parliament might choose to implement through the enactment of *uniform laws of trade, commerce or taxation* could not be hampered or defeated by State or Territory *taxation of goods*". Rather it is concerned with taxation of commodities and articles of commerce, and control over policies affecting the supply and price of such goods. The purpose of s 90 is not unbounded; s 90 seeks to achieve its purpose in a particular way[867]. And, as has been explained[868], by incorrectly reframing the purpose of s 90 as directed to the taxation of goods, the conclusion is assumed.

360 Next, it is asserted that a tax on consumption is a burden that will depress or affect the demand for a good. First, that "[p]lainly, a tax on goods imposed on the consumption of those goods will increase the *cost* of those goods to consumers. Because consumers, acting rationally, will tend to factor the cost of consumption into the price they are prepared to pay for goods to be consumed, a tax on the consumption of goods *can tend to depress demand* for those goods *no less surely*

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862 See [382] below.

863 Joint Reasons at [123].

864 (1977) 136 CLR 475 at 497.

865 See Pts II(2)(c) and III(1)(b) above.

866 cf Joint Reasons at [80] (emphasis added).

867 See Pt II(2)(c) above.

868 See Pt III(1)(b) above.

than can a tax on the production or distribution of those goods which increases the price of those goods to consumers."[869] Second, that "[i]t is within the ordinary human experience of members of a modern liberal capitalist democracy that if a good within a general class of discretionary purchases is subject to some non-trivial financial burden not imposed on some other good or goods within that class, the existence of that burden is inherently likely to be relevant to the price of or demand for the good ... The point is that the burden, of its nature, tends to affect the supply and price of, or demand for, a ZLEV."[870]

361 But duties of excise have a natural and general tendency to enter into the *purchase price* of a good, in a manner that is readily identified and identifiable as an addition to the purchase price even if the precise increase in the purchase price is not identifiable[871]. Taxes on usage consumption are incurred after the point of sale, and thus do not have such a tendency. As has been explained[872], it cannot be predicted how, or whether, an increase in the costs to consumers associated with owning or using a good will depress or affect the demand or market for those goods. The demand or market for goods will vary over time, and so will the effect of a tax on usage consumption. Likewise, it cannot be predicted how or whether an effect on demand or the market for goods will influence the purchase price or supply of those goods. In any event, the economic consequence of a tax is not the definition of a tax; the economic effect is not conclusive[873].

362 For those reasons, I cannot accept the majority's conclusions[874]. In particular, I do not accept that Dixon J's description in *Matthews* "accurately reflects the essence of a duty of excise as an inland tax on goods at any stage of the life cycle of those goods" or that the *Matthews* description "gives fuller expression to the meaning Rich J appears earlier to have attributed to the word 'excise' in *Commonwealth Oil Refineries* and *John Fairfax*".

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869 Joint Reasons at [125] (emphasis added).

870 Reasons of Jagot J at [925]; see also [921], [923]-[924], [944].

871 See Pt II(3)(a) and [268]-[272] above.

872 See Pt II(4) above.

873 *Anderson's* (1964) 111 CLR 353 at 365; *Dickenson's Arcade* (1974) 130 CLR 177 at 230.

874 Joint Reasons at [127], [133]; Reasons of Jagot J at [940], [943]-[945], [948].

(vii) *Logan Downs*

363 Next, *Logan Downs*[875], a decision handed down three years after *Dickenson's Arcade*. It is necessary to give a complete account of the application of the Queensland legislative provision in issue in *Logan Downs*. The levy in issue empowered the Minister to annually "make and levy an assessment, at rates to be fixed by him, on each and every owner of stock and, subject as hereinafter provided, each and every such owner shall in each year pay, in respect of stock owned by him, that assessment"[876]. Stock was relevantly defined to include "horses, cattle, sheep [and] swine"[877]. That levy was imposed on the plaintiff in respect of its cattle, sheep and pigs, and a small number of stock horses; but the cattle and pigs were to be kept for fattening and sale for meat *or breeding*, and the sheep were kept *for their wool* and sooner or later for sale for meat[878]. The stock horses, in contrast, were kept for working the plaintiff's properties[879]. The distinction – between the purposes of sale for meat, the purposes of breeding and wool, and the purposes of working the properties – was and remains important.

364 The plaintiff in *Logan Downs* argued that the impost – a stock levy – was a duty of excise, apart from its imposition upon the plaintiff's stock horses, on the basis that the sheep, cattle and pigs were held for the purpose of ultimate sale, or for breeding or wool and ultimate sale, and thus they were articles of commerce in the course of production at the time the tax was imposed[880]. More particularly, the argument was that the ownership of the stock was "a step in the process of bringing goods into existence or into a consumable state"[881] – the "growth and fattening of livestock [were] essential steps in the production of meat"[882].

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875 (1977) 137 CLR 59.

876 *Logan Downs* (1977) 137 CLR 59 at 61.

877 *Logan Downs* (1977) 137 CLR 59 at 62.

878 *Logan Downs* (1977) 137 CLR 59 at 70.

879 *Logan Downs* (1977) 137 CLR 59 at 70.

880 (1977) 137 CLR 59 at 60; cf Joint Reasons at [110].

881 *Logan Downs* (1977) 137 CLR 59 at 60, citing *Bolton* (1963) 110 CLR 264.

882 *Logan Downs* (1977) 137 CLR 59 at 60, citing *Matthews* (1938) 60 CLR 263, *Dickenson's Arcade* (1974) 130 CLR 177 and *M G Kailis* (1974) 130 CLR 245.

365 That argument was rejected by Gibbs, Jacobs and Murphy JJ but accepted by a statutory majority of Barwick CJ, Stephen and Mason JJ. Again it is necessary to explain their Honours' reasoning in some detail.

366 Gibbs J did not[883] reject the argument "adhering to the criterion of liability approach". It is true that Gibbs J said[884] that he "accept[ed]" the view that "the criterion of liability under the statute imposing the tax ... is determinative of the question whether the tax is a duty of excise". He immediately noted, however, that that did not mean that the name of the tax or the form of the statute's provisions was "decisive", saying that "it is still necessary to determine the legal effect of those provisions according to their proper construction". Nevertheless, his Honour held[885] that, although the criterion of liability approach would have concluded the case in favour of the validity of the statute, it was "not necessary to decide the matter on that ground". Critically, Gibbs J held[886] that, notwithstanding the "difference of opinion" as to the criterion of liability approach, that difference had "not extended to the other statements made in *Bolton v Madsen*", as to the "nature of an excise", which, his Honour said, had since been regarded as authoritative, citing the reasons of himself[887], Barwick CJ[888], Menzies J[889] and Stephen J[890] in *Dickenson's Arcade*. And, as has been shown[891], the passages of those reasons cited by Gibbs J each approved the *Bolton* formulation that a tax on a step in the process from production to receipt by the consumer is a duty of excise. Moreover, Gibbs J held[892] that just as "mere ownership" could not be described as a step in the production or distribution of goods, so too a tax on "ownership of goods used for the purpose of the production of articles of commerce, but not themselves intended to be passed on to consumers, would not be an excise". As his

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883 cf Joint Reasons at [110].

884 *Logan Downs* (1977) 137 CLR 59 at 64.

885 *Logan Downs* (1977) 137 CLR 59 at 64.

886 *Logan Downs* (1977) 137 CLR 59 at 64.

887 (1974) 130 CLR 177 at 223.

888 (1974) 130 CLR 177 at 185.

889 (1974) 130 CLR 177 at 209, 213.

890 (1974) 130 CLR 177 at 229-230, 235.

891 See [335]-[336], [339]-[340], [343]-[344] above.

892 *Logan Downs* (1977) 137 CLR 59 at 65.

Honour said[893], it was "obvious enough that a tax on the ownership of goods not held for commercial purposes would not be a duty of excise", giving the example of a tax on domestic furniture owned by a taxpayer.

367 On the question of what is a duty of excise, Jacobs J said[894]:

> "Although every excise duty is a tax on or in respect of goods, *it does not follow that every tax on or in respect of goods is an excise duty. Something more is required.* In order that a tax on or in respect of goods can be characterized as an excise duty *the tax must be imposed at a stage, or in the course of the movement of the goods as merchandise or commodities from production or manufacture to ultimate consumption.* I use the latter word to cover not only physical consumption but also consumption by continuing use of chattels privately or in business."

368 Then, when addressing the criterion of liability, Jacobs J said[895] that "[t]he livestock of a pastoral company is not, generally speaking, a commodity in the course of movement to ultimate consumption. It is the stock of the property, as also is the dead stock – the machinery, plant and equipment." Nevertheless, he observed that there will be animals on a property at a particular time of both classes: "animals which are part of the stock", and "animals which are being 'produced', that is to say, grown and fattened in their course to ultimate consumption"[896]. His Honour then held in respect of the tax in issue as follows[897]:

> "If the levy under s 7 of the *Stock Act*, when its operation is examined, *can be characterized in its substance* not as a tax on the animals but as a tax on their produce – wool, milk or progeny – then the tax will be an excise duty ... I can see nothing in the *Stock Act*, to suggest that the tax imposed by s 7 on the animals is in substance a tax on their produce ...
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> An annual tax on the live stock owned on a particular day, at least so much as is breeding or wool producing stock ... no doubt adds a component to the price at which the produce can be sold if a net profit is to be gained in the conduct of the business. *But this alone is not sufficient to make the tax an excise duty. Any tax on capital equipment has that effect*. For a tax to be a duty of excise it must be in substance a tax on the commodity produced,

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893 *Logan Downs* (1977) 137 CLR 59 at 65.

894 *Logan Downs* (1977) 137 CLR 59 at 80 (emphasis added).

895 *Logan Downs* (1977) 137 CLR 59 at 81.

896 *Logan Downs* (1977) 137 CLR 59 at 81.

897 *Logan Downs* (1977) 137 CLR 59 at 81-82 (emphasis added).

> and not merely a tax on the equipment, live or dead, used to produce the commodity.
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> *Even though the levy cannot be characterized generally as a tax on the produce of the stock, the fact remains that some of the animals were 'commodities' in the sense that they were being grown for sale*."

In applying the criterion of liability approach, Jacobs J held[898] that the fact that some of those livestock were or may have become commodities was not, under the Act, made the basis of the liability to pay the tax. In particular, he emphasised that the tax was imposed indifferently on the stock owned, whether or not the particular items of stock were in the course of becoming commodities[899]. Murphy J, the remaining judge in the minority, held[900] that the tax was not a duty of excise because it was imposed without regard to the place of production or manufacture.

369 Mason J (Barwick CJ agreeing[901]) held that the levy was a duty of excise because it was a tax on the production of goods. It is true[902] that Mason J said[903] that "a sufficiently direct relationship between the tax and the goods may be established in circumstances where it is not possible to demonstrate that the imposition has increased the cost of goods to a purchaser by a calculable amount". But that statement must be understood in its context. Immediately prior to making that statement, Mason J had said[904] that "the criterion of liability formulated in *Bolton v Madsen* has *a limited application*". And immediately following that statement, Mason J said[905] that "[i]n particular this is the case where it appears that the tax may be characterized on other grounds as a tax imposed on production or

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898 *Logan Downs* (1977) 137 CLR 59 at 82.

899 *Logan Downs* (1977) 137 CLR 59 at 82-83.

900 *Logan Downs* (1977) 137 CLR 59 at 84-85.

901 *Logan Downs* (1977) 137 CLR 59 at 61.

902 Joint Reasons at [111].

903 *Logan Downs* (1977) 137 CLR 59 at 76.

904 *Logan Downs* (1977) 137 CLR 59 at 76 (emphasis added; footnote omitted).

905 *Logan Downs* (1977) 137 CLR 59 at 76.

on an essential step in production". For Mason J, the question was whether the decision in *Matthews* governed the case before him[906]. His Honour held[907]:

> "In this case the tax is imposed on the 'owner' and 'in respect of stock owned by him'. A tax on the ownership of livestock is a tax on livestock and *at least to the extent that it is a tax on livestock used for their product*, that is, for the production of meat, milk, wool and other commodities and for breeding purposes, it is, in my opinion, a tax on production itself *for it is an addition to the cost of production* and it has a natural, though not a necessary, relation to the quantity or value of what is produced."

370 After holding[908] that the tax before him, although not shown to result in "a calculable increase in the cost or value *of a particular commodity*", had "a natural relation to the quantity or value of the commodity ultimately produced" and that therefore *Matthews* governed the case, Mason J held[909]:

> "The fact that the statutory definition of 'stock' in s 5A includes some animals, e.g. horses and foals, which are not usually used or kept for production, is of no relevance. If the tax otherwise has the character of an excise in its application to stock used for production, *it does not lose this character merely because in its application to other animals it may not constitute an excise*."

371 It is finally necessary to address the reasoning of Stephen J. His Honour concluded[910] that the stock levy was a duty of excise, insofar as it was imposed in respect of the sheep, cattle and pigs. His Honour expressed[911] the basis for that conclusion to be that, unlike the stock horses, the sheep, cattle and pigs were "articles of commerce in the stream of production", and the sheep were also themselves "productive units" for their production of wool, an article of commerce. That is, like Mason J (Barwick CJ agreeing), Stephen J distinguished between animals used for production and animals not used for production.

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906 *Logan Downs* (1977) 137 CLR 59 at 77.

907 *Logan Downs* (1977) 137 CLR 59 at 78 (emphasis added).

908 *Logan Downs* (1977) 137 CLR 59 at 78 (emphasis added).

909 *Logan Downs* (1977) 137 CLR 59 at 78 (emphasis added).

910 *Logan Downs* (1977) 137 CLR 59 at 72.

911 *Logan Downs* (1977) 137 CLR 59 at 70.

372 The Joint Reasons in this case say[912] that Stephen J, in explaining the basis for his Honour's conclusion, "expanded on the reasons he had given in *Dickenson's Arcade* for supporting the *Bolton v Madsen* treatment of a tax on goods imposed after receipt by a consumer as outside the conception of a duty of excise" and that the "expanded explanation" is best reproduced in full. The Joint Reasons do not do so. The first and critical line of the explanation has been omitted – namely that "*it is not every tax upon goods which will be an excise*"[913]. The questions (and answers) that then followed – where Stephen J applied the explanation he had given – have also been omitted. Stephen J asked[914]:

> "What then of the livestock in the present case? Are they goods in the stream of production and distribution so that to tax them is to impose an excise, or have they reached the hands of the ultimate consumer so as no longer to be capable of being the subject of a duty of excise? Or, again, are they such as never to become articles of commerce capable of being the subject-matter of duties of excise?"

373 Stephen J's response was and remains instructive. In the course of explaining that livestock "are not easily fitted into this concept of the stream of production and distribution" because livestock have a variety of uses – meat, leather, work as beasts of burden, milk, wool – Stephen J stated[915] that it is not easy to answer the question "[w]hat is it which is being taxed, what is the subject of the excise?" "without knowing much more of individual cases, what, if any, goods it is which, in the stream of production and distribution, are being subjected to a duty of excise". His Honour then said[916]:

> "The present exaction cannot be an excise so far as it relates to the plaintiff's stock horses; they are in no sense themselves goods in the stream of production and distribution; since they do not appear to be used for breeding purposes it cannot be argued that to tax them is to tax, as articles of commerce, their progeny in the course of production.
>
> Of the remaining stock all will ultimately be converted into beef, pork, mutton and all the products of the tannery and fell-mongery; in that

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912 Joint Reasons at [112].

913 *Logan Downs* (1977) 137 CLR 59 at 69 (emphasis added).

914 *Logan Downs* (1977) 137 CLR 59 at 69.

915 *Logan Downs* (1977) 137 CLR 59 at 69.

916 *Logan Downs* (1977) 137 CLR 59 at 70.

sense they are themselves articles of commerce in the stream of production."

374 *Logan Downs* cannot be read as support for the proposition that all inland taxes on goods are duties of excise. Indeed, to the contrary, each member of the majority rejected the notion that a tax on mere ownership of goods was an excise[917], and each member of the minority held that although the tax was a "tax on goods" this was not sufficient for it to be an excise[918]. Leave to reopen *Logan Downs*[919] was neither sought nor granted.

(viii) *Hematite*, *Philip Morris*, *Mutual Pools*, *Capital Duplicators [No 2]* and *Ha*

375 None of *Hematite*[920], *Philip Morris*[921], *Mutual Pools*[922], *Capital Duplicators [No 2]*[923] or *Ha*[924] is authority for the proposition that any inland tax on goods is a duty of excise. Each is contrary to that proposition.

376 In *Hematite* the proposition that a duty of excise is a tax on the taking of a step in the production, manufacture, sale or distribution of goods before they reach the hands of the consumer was affirmed[925]. In particular, Mason J held[926] that, given that the purpose of s 90 is as Dixon J articulated it in *Parton*[927], a broad view of duties of excise was warranted, "one which embraces all taxes upon or in respect

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917 *Logan Downs* (1977) 137 CLR 59 at 61, 69, 78-79.

918 *Logan Downs* (1977) 137 CLR 59 at 63, 80, 84-85.

919 cf Joint Reasons at [197]; Reasons of Jagot J at [949].

920 (1983) 151 CLR 599. See [238], [293], [301] above and [376], [395]-[397], [402] below.

921 (1989) 167 CLR 399. See [281], [293], [301] above and [377]-[378] below.

922 (1992) 173 CLR 450. See [258], [301] above and [381]-[382] below.

923 (1993) 178 CLR 561. See Pt III(1)(a) above. See also [206], [216]-[218], [229]-[233], [241]-[245], [260]-[264], [301], [305] above.

924 (1997) 189 CLR 465. See Pt III(1)(a) above. See also [206], [216]-[218], [229]-[233], [260]-[264], [301], [305] above.

925 (1983) 151 CLR 599 at 615, 619-621, 628, 632, 644, 649, 655, 657-658, 665-666.

926 *Hematite* (1983) 151 CLR 599 at 632.

927 See [229] above.

of a step in the production, manufacture, sale or distribution of goods, for any such tax places a burden on production". His Honour further held that a tax on goods sold[928]:

> "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 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."

377 Only two further points need to be made about *Philip Morris*[929]. First, as Mason CJ and Deane J said[930]:

> "In the end the reason why *a tax upon any step in the production, manufacture, sale or distribution of goods is held to be a duty of excise* is that such a tax has a *general tendency to be passed on to persons down the line to the consumer and will prejudice the demand for the goods burdened by the imposition of the tax.* 'It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity'".

378 Second, Dawson J in *Philip Morris*[931] recognised that a duty of excise "must be a tax upon goods" but rightly said that to state it in those terms was "merely to restate the problem for it means that there must be a relationship between the tax and goods". That is, to adopt such a broad test simply begs the question.

(d) "Saleable" goods – "availability for commercial exploitation"

379 The majority in this case hold[932] that any tax is a duty of excise if it is a tax on goods, at least if the goods are saleable. Different bases are proffered in each of

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928 *Hematite* (1983) 151 CLR 599 at 632 (emphasis added).

929 Brennan J's position, which was adopted in *Ha* (1997) 189 CLR 465 at 490, has been addressed: see [281] above.

930 *Philip Morris* (1989) 167 CLR 399 at 436, quoting *City of Halifax* [1928] AC 117 at 126, in turn quoted in *Matthews* (1938) 60 CLR 263 at 300 (emphasis added). But see [246] above.

931 (1989) 167 CLR 399 at 473.

932 Joint Reasons at [137]-[141]; Reasons of Jagot J at [930].

the reasons for that conclusion. First, it is said[933] that because "s 90 exhausts kinds of taxes on goods, conceptual coherency demands that the essence of a good as an article of commerce for the purpose of s 90 must be its availability for commercial exploitation in some form and manner as and when the owner might require or desire it, but irrespective of any particular owner's need or wish to do so". Second, it is said[934], by reference to *Mutual Pools*[935], that given that a duty of excise is a "tax on goods", goods include items of tangible personal property, and such property "can be taken to be 'goods', at least if they are saleable". It is then said[936] that nothing more should be drawn from "occasional references" to a duty of excise as a "trading tax".

380 For reasons already given[937], the reliance on the statement "exhausting the categories of taxes on goods" as the premise for the conclusion is misplaced. That statement does not mean that any tax on goods is a duty of excise. Second, for reasons already given[938], the "essence of a good as an article of commerce" is not the mere availability of a good for commercial exploitation. Articles of commerce are goods the subject of commercial dealings – goods in the stream of production and distribution to the end user[939]. That is why the descriptor of an excise as a "trading tax" by Dixon J in *Parton*[940] is apt.

381 The reliance on *Mutual Pools* is also misplaced. The issue in *Mutual Pools* was whether a Commonwealth tax on swimming pools built in situ was a duty of excise: was it a tax on goods – pools? That issue arose because the ultimate question was whether the tax was invalid under s 55 of the *Constitution* for the reason that, if that tax was *not* a duty of excise, the taxing statute would have imposed both taxes which were, and taxes which were not, duties of excise.

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933 Reasons of Jagot J at [930].

934 Joint Reasons at [140]-[141].

935 (1992) 173 CLR 450 at 454, 467.

936 Joint Reasons at [141]. See also [39], citing *Kingcome Navigation Co* [1934] AC 45 at 59, cited in *Parton* (1949) 80 CLR 229 at 259.

937 See Pt III(1)(a)(ii) above.

938 See Pt II(3)(b)-(c) above.

939 See Pt II(3)(b) and [357] above.

940 (1949) 80 CLR 229 at 259. See also *Matthews* (1938) 60 CLR 263 at 301; *Dennis Hotels* (1960) 104 CLR 529 at 541; *Chamberlain Industries* (1970) 121 CLR 1 at 29; *Dickenson's Arcade* (1974) 130 CLR 177 at 231. See also Pt II(3)(c) above.

That ultimate question was answered in the affirmative[941] because the Court held that the impost was not a tax on goods but a tax on land, and was therefore not a duty of excise[942]. A swimming pool built in situ "forms part of the land and is denied the character of goods"[943]; it is "never of itself an article of commerce separate from the land of which it forms part"[944].

382 Dawson, Toohey and Gaudron JJ (with whom Mason CJ, Brennan and McHugh JJ expressly agreed[945]) held that the word "goods", in the context of duties of excise, "signifies articles of commerce *or* things which, even if not saleable or without any discernible sale value, *may be* the subject of trading or commercial transactions"[946]. But, as has been explained[947], that was said upon an acceptance of the long established principle that a duty of excise is a tax imposed in respect of commodities, a tax which affects goods *as the subjects of manufacture or production* or as articles of commerce[948]. Mason CJ, Brennan and McHugh JJ (agreeing with Dawson, Toohey and Gaudron JJ's reasons, and writing to add further comments[949]) observed that, in the context of ss 55 and 90 of the *Constitution*, "goods as the subject of the tax must be understood in its widest sense" and that this would include some objects even though they are not saleable[950]. Tellingly, the example given by their Honours for a tax on a good that was not saleable on the market was a *sales tax* on reinforced concrete piles manufactured under a bridge-building contract for incorporation into the structure of a particular bridge[951]. Their Honours endorsed the established principle that a duty of excise must be a tax imposed on some step in the production or distribution

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941 *Mutual Pools* (1992) 173 CLR 450 at 453, 471-472.

942 *Mutual Pools* (1992) 173 CLR 450 at 453, 467-468.

943 *Mutual Pools* (1992) 173 CLR 450 at 467; see also 453, 455.

944 *Mutual Pools* (1992) 173 CLR 450 at 470; see also 453, 455.

945 *Mutual Pools* (1992) 173 CLR 450 at 453.

946 *Mutual Pools* (1992) 173 CLR 450 at 467 (emphasis added; footnotes omitted).

947 See [258] above.

948 *Mutual Pools* (1992) 173 CLR 450 at 467 fn 47.

949 *Mutual Pools* (1992) 173 CLR 450 at 453.

950 *Mutual Pools* (1992) 173 CLR 450 at 454.

951 *Mutual Pools* (1992) 173 CLR 450 at 454, citing *M R Hornibrook (Pty) Ltd v Federal Commissioner of Taxation* (1939) 62 CLR 272 at 279.

of goods before they reach the consumer[952]; as the tax in question in *Mutual Pools* was a sales tax, the determinative question was whether it was a tax on goods. The Court did not hold[953] that *any* tax on goods is a duty of excise *if* the good on which the tax is imposed is saleable. Nothing in *Mutual Pools* supports that conclusion. To take the *possibility* of sale (as, for example, in a secondary market for used goods) as sufficient to bring a tax on usage consumption of goods within the meaning of duty of excise is contrary to principle.

(e) Premise leads to error

383 Adoption of the premise – the essence of a duty of excise is an inland tax on goods at any stage of the life cycle of the goods[954] – is contrary not only to principle and authority but also to constitutional method[955]. The adoption of that premise shapes the approach to, and the framing of, the "ultimate question" for decision of whether the ZLEV charge is a duty of excise as turning on the answers to two questions[956]: "(1) Does the imposition of the ZLEV charge at the stage of consumption take it *outside* the scope of a duty of excise as a tax on goods? (2) If not, is the ZLEV charge properly characterised as a tax on goods?" But these are not the right constitutional questions[957].

384 It inverts the correct approach. Instead of searching for the core or essential meaning of the constitutional term "duties ... of excise" and asking whether a tax on usage consumption falls within that meaning, the new approach assumes the broadest possible formulation of the essential meaning as the starting point, then treats usage consumption as a possible "exception". The result is that by adopting the premise – the essence of a duty of excise is an inland tax on goods at any stage of the life cycle of the goods – the answer to the first question is assumed: as any tax on goods is a duty of excise, and a tax on consumption is a tax on goods, a tax on consumption is a duty of excise. The reasoning is circular. It is not surprising that the conclusion that then follows is that the exclusion of taxes on usage consumption from the scope of the meaning of duty of excise – a tax on goods –

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952 *Mutual Pools* (1992) 173 CLR 450 at 453.

953 cf Joint Reasons at [138]-[141].

954 Joint Reasons at [127], see also [197]; Reasons of Jagot J at [920], [943], [949].

955 See Pt I above.

956 Joint Reasons at [9] (emphasis added).

957 See Pt I above and Pt III(3) below.

is an anomaly[958]. As has been explained[959], the understanding of the scope and operation of s 90 of the *Constitution* adopted in *Capital Duplicators [No 2]* and *Ha* does not support the premise that a duty of excise is any inland tax on goods.

2 Expression of new rule

385 Having dealt with why that starting premise should not be accepted, it is necessary to deal with the expression of the new rule to be applied.

386 Once the answer to the first question – does the imposition of the ZLEV charge at the stage of consumption take it outside the scope of a duty of excise as a tax on goods? – is explicitly given as "no"[960], the second question – is the ZLEV charge properly characterised as a tax on goods? – is developed by reference to what are then further termed as two "subsidiary questions"[961]: "Does the ZLEV charge bear a close relation to the use of ZLEVs? And does the ZLEV charge affect ZLEVs as articles of commerce?" Those subsidiary questions are first introduced – as "elements" – earlier in the reasons[962]. They are said to be founded on the reasons of Dixon J in *Matthews*: a tax on goods is to bear a close relation to production, manufacture, sale, distribution, or consumption of goods[963], and be of such a nature as to affect the goods as the subjects of manufacture or production or as articles of commerce[964].

387 However, the second "question" – is the ZLEV charge properly characterised as a tax on goods? – and the "subsidiary questions", as they are reframed and then applied, are inconsistent with the reasons of Dixon J in *Matthews*[965].

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958 Joint Reasons at [10]; Reasons of Jagot J at [890], see also [937].

959 See Pt III(1)(a) above.

960 Joint Reasons at [134]; see also [127], [152], [184].

961 Joint Reasons at [185]. See also Reasons of Jagot J at [923], [949].

962 Joint Reasons at [146].

963 Joint Reasons at [147].

964 Joint Reasons at [148].

965 See Pt III(1)(c)(ii) above.

(a) Second "question" and first "subsidiary question"

388 The second "question" – is the ZLEV charge properly characterised as a tax on goods? – is subsequently reframed[966]. The question becomes whether the tax is "imposed [on the goods] at the stage of ... production or manufacture in Australia or at any subsequent stage in their distribution, sale, ownership, control, use, resale, reuse or destruction in Australia".

389 That question does not limit the breadth of a "tax on goods" – it covers all things you can do with a good. Under the first "subsidiary question", that the tax must "bear a *close* relation to the production or manufacture, sale, distribution, or consumption of goods [and] [t]hat entails, using language endorsed in *Capital Duplicators [No 2]* and *Ha*, that the tax is on a *'step' – an activity or relationship – involving goods*"[967] does not assist to resolve the uncertainty. As we have seen[968], neither *Capital Duplicators [No 2]* nor *Ha* adopts such generic language that a duty of excise need merely be a tax on any "activity or relationship involving goods". Although it is true[969] that Fullagar J in *Dennis Hotels* said[970] that "the person by whom the tax is payable is charged by reason of, and by reference to, some specific relation subsisting between [that person] and particular goods" and that such a tax will be a tax on goods "if the person upon whom it is imposed is charged by reason of and by reference to the fact that [that person] is the owner, importer, exporter, manufacturer, producer, processor, seller, purchaser, hirer or consumer of particular goods", his Honour went on to explain that duties of customs and duties of excise "are *particular classes* of taxes 'upon goods'"[971] and that for duties of excise "the taxpayer is taxed by reason of, and by reference to, [their] production or manufacture of goods"[972]. Not all taxes on goods are duties of excise.

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966 Joint Reasons at [197]. See also Reasons of Jagot J at [949].

967 Joint Reasons at [147] (emphasis added; footnotes omitted); see also [127]. See also Reasons of Jagot J at [892], [920], [943], [945].

968 See Pt III(1)(a) above.

969 Joint Reasons at [147]; Reasons of Jagot J at [865].

970 (1960) 104 CLR 529 at 554.

971 (1960) 104 CLR 529 at 554 (emphasis added).

972 (1960) 104 CLR 529 at 555.

(b) Second "subsidiary question"

390 The second "subsidiary question" – does the ZLEV charge affect ZLEVs as articles of commerce? – is also reframed. One formulation is whether the tax has a tendency to "dampen" or "depress" demand for the goods[973]. The other formulation is whether the tax has a tendency to "impact" or "affect" "supply and price of, or demand for" the goods[974], which would appear also to encompass increases in demand. This reframing of the second "subsidiary question" – in both its formulations – is a departure from what Dixon J said in *Matthews*, and from what his Honour later said in *Parton*. It is not founded on or supported by any of the earlier decisions of this Court.

391 The reframed second "subsidiary question" is dictated by the underlying premise that any tax on goods is a duty of excise. It is rarely, if ever, difficult to conclude that a duty of excise (as it has been understood until now) has a natural tendency to enter the *purchase price* for a good as an article of commerce, being a good in the stream of production and distribution. The new rule reformulates and expands that economic consequence to become any tendency to depress or affect *demand* for goods. Such an economic consequence cannot be assumed. As has been explained[975], whether and when imposing a tax on goods after they are in the hands of consumers will depress or affect the *demand* for those goods is a much more complex inquiry, requiring consideration of issues about the nature of the relevant market and product substitutability in that market[976]. So, for example, whether the ZLEV charge has a tendency to dampen demand, or impact or affect demand, for electric vehicles would in part depend upon how costly it is to operate similar vehicles powered by internal combustion engines. And, of course, such costs will change over time and those changes will affect the operation and application of this new constitutional criterion[977].

3 Constitutional method

(a) Not construing text of *Constitution*, rewriting it

392 Section 90 of the *Constitution* does not refer to "taxes on goods". It refers to particular categories of taxes on goods – duties of customs and of excise. It does

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973 Joint Reasons at [150]; see also [125]-[126], [151]-[152], [192].

974 Reasons of Jagot J at [925]; see also [921], [923]-[924], [928]-[929], [944].

975 See [268]-[272] above.

976 See *Queensland Wire Industries* (1989) 167 CLR 177 at 187-188, 199, 210; *Boral Besser Masonry* (2003) 215 CLR 374 at 455 [250].

977 See [411]-[413] below.

not refer to, and cannot be read as dealing with, imposts with particular kinds of economic consequence. That is not what s 90 says. As Gibbs J said in *Dickenson's Arcade*[978]:

> "To say that the control by the Commonwealth Parliament of the taxation of goods will not be complete, or that its fiscal policy may be hampered, if the States can impose a tax at the point of consumption, is in my opinion not decisive against th[e] view [that a tax on consumption of goods is not an excise]. The question cannot be answered by having regard to the position of the Commonwealth alone. The Constitution is a federal constitution, and s 90 is intended to effect a distribution of the power to impose taxation between the Commonwealth and the States. Of course, the section confers no power on the Commonwealth, which derives its power to impose taxation from s 51(ii), but it denies power to the States. The extent of the denial must be found in the words of the section themselves rather than in economic, social or political theory. *Section 90 does not refer to taxes on goods but to duties of customs and of excise*. Upon its proper construction s 90 stops short of denying power to the States to impose taxes on consumption."

This passage identifies and reinforces a number of fundamental constitutional principles which cannot be ignored.

393 First, the distinction between amending the *Constitution* and the Court's role in interpreting it is fundamental and long standing[979]. What is now proposed as a "duty of excise" – any inland tax on goods – amends the *Constitution*. The new rule is not a footnote to that which has preceded it; it is rewriting s 90 of the *Constitution* as if it read "[o]n the imposition of uniform duties of customs the power of the Parliament to impose duties [on goods] ... shall become exclusive". The new rule gives no work to "duties of excise" and "duties of customs", or to the separate identity of the two categories[980].

394 Next, as a result, s 51(ii) is also rewritten as an *exclusive* Commonwealth legislative power, rather than a concurrent power, in relation to taxes on goods,

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978 (1974) 130 CLR 177 at 222 (emphasis added).

979 *Singh* (2004) 222 CLR 322 at 334-335 [16]-[18], quoting Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10965, 10967-10968. See also *Brewery Employes Union of NSW* (1908) 6 CLR 469 at 521-522; *R v Registrar of Titles (Vict); Ex parte The Commonwealth* (1915) 20 CLR 379 at 388; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 271; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592 [68], 593 [70].

980 cf *Constitution*, s 55.

by reference to the incorrectly restated purpose of the "Commonwealth Parliament [having] exclusive control of the *taxation of goods*" to ensure that State and Territory "taxation of goods" could not hamper or defeat "the execution of whatever policy the Commonwealth Parliament might choose to implement through the enactment of uniform laws of trade, commerce or taxation"[981]. Once again, the premise dictates the conclusion. Reference in the Joint Reasons to Commonwealth "policy" concerning the "taxation of goods"[982] assumes that *only* the Commonwealth may have such a policy. That the Commonwealth should have exclusive power with respect to *all* taxes on goods was never intended[983].

395 As the Joint Reasons identify[984], by reference to Dixon CJ's reasons in *Victoria v The Commonwealth* ("the *Second Uniform Tax Case*")[985], the power conferred by s 51(ii) to make laws with respect to taxation has been recognised to be subject to an inherent limitation – it "has never been, and, consistently with the federal character of the Constitution could not be, construed as a power over the whole subject of taxation throughout Australia, whatever parliament or other authority imposed taxation". But Gibbs CJ and Mason J in *Hematite*[986] did not "overlook[]" that inherent limitation by assuming that the Commonwealth has "unfettered capacity ... to enact laws which would operate through s 109 to invalidate State laws which might frustrate Commonwealth policy concerning the taxation of goods"[987].

396 Neither Gibbs CJ nor Mason J equated a concurrent power to tax (s 51(ii)) with a limitation (s 90). Their Honours did not expand the power in s 51(ii) or the limitation in s 90 by reference to the alleged "frustrat[ion of] Commonwealth policy concerning the taxation of goods". As Gibbs J said in *Dickenson's Arcade*[988], s 90 "is intended to effect a distribution" between the Commonwealth and the States of the power to impose taxation – it is a *denial* of State taxation power, not a conferral of power on the Commonwealth, whose concurrent taxation power is

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981 Joint Reasons at [80] (emphasis added). See also Reasons of Jagot J at [850]-[851], [854]. See Pt III(1)(b) above.

982 See, eg, Joint Reasons at [69], [80].

983 See Pt III(3)(b) below.

984 Joint Reasons at [69].

985 (1957) 99 CLR 575 at 614.

986 (1983) 151 CLR 599 at 631-632; see also 617; cf 637.

987 cf Joint Reasons at [69] fn 122.

988 (1974) 130 CLR 177 at 222 (emphasis added). See [340], [392] above.

sourced in s 51(ii): "*The extent of the denial must be found in the words of the section themselves rather than in economic, social or political theory*."

397 Zines' *The High Court and the Constitution*[989] does not support the suggestion that Gibbs CJ and Mason J (and Murphy J) overlooked the inherent limitation in s 51(ii)[990]. Professor Zines says that "[t]oo much should not be read into [the] unexplained dicta" of Gibbs CJ and Mason J in *Hematite*, noting that neither judge manifested any consciousness that their views were contrary to the *Second Uniform Tax Case* "and the assumptions that underlay all the cases relating to exemption from State taxes"[991]. Instead, as the analysis of Professor Zines demonstrates: the scope of the taxation power in s 51(ii) does not extend to all taxation in Australia; the power to tax is an essential State function; and State taxation powers are concurrent with, and independent of, that of the Commonwealth[992]. In any event, the Australian Constitutional Commission of 1988 rejected[993] the recommendations of the Australian Constitutional Convention in 1985 to amend s 51(ii) to add the words "by the Commonwealth" after "taxation", for reasons including that the dicta of Gibbs CJ and Mason J in *Hematite*[994] were peripheral and not based on arguments rejecting existing authority, and that such an amendment was unnecessary given "the broader interpretation could produce a 'ludicrous result', that is a Commonwealth power to impose State taxation". That analysis identifies why it is unlikely that the inherent limitation was overlooked by Gibbs CJ and Mason J; as Professor Zines said – "[t]oo much should not be read into [the] unexplained dicta"[995].

(b) Arrogating to Commonwealth an exclusive unbounded class of taxation

398 The fundamental principle upon which federalism depends is the allocation of the powers of government between individual polities[996]. "A federal constitution

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989 5th ed (2008) at 479-481.

990 cf Joint Reasons at [69].

991 Zines, *The High Court and the Constitution*, 5th ed (2008) at 480; see also 481.

992 Zines, *The High Court and the Constitution*, 5th ed (2008) at 481-483.

993 Zines, *The High Court and the Constitution*, 5th ed (2008) at 483, quoting Australia, Constitutional Commission, *Final Report of the Constitutional Commission* (1988), vol 2 at 819.

994 (1983) 151 CLR 599 at 617, 631.

995 cf Joint Reasons at [69] fn 122.

996 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276.

must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature."[997]

399 The States are not the subjects of the Commonwealth[998]. "The Constitution is based upon and provides for the continued *co-existence of Commonwealth and States* as separate Governments, each independent of the other within its own sphere."[999]

400 What is now proposed as a "duty of excise" – any tax on goods – not only amends the *Constitution*[1000], but further entrenches what has been described as the "'extraordinarily' unbalanced [fiscal] relationship between the states and federal governments to 'exacerbate a bad system and make it worse'"[1001]. By adopting this new rule, the Court alters and affects the structural, political and constitutional balance of the relationship between the State and federal governments[1002]. The new rule goes beyond that which was recognised by Latham CJ in *South Australia v The Commonwealth* ("the *First Uniform Tax Case*")[1003], and reinforced by the *Second Uniform Tax Case*, that the Commonwealth's concurrent taxing power in s 51(ii) might be exercised in such a way as to practically preclude States from, or bring about the abandonment of the States, imposing certain taxes[1004].

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997 *Boilermakers* (1956) 94 CLR 254 at 267-268.

998 *Melbourne Corporation* (1947) 74 CLR 31 at 55.

999 *Melbourne Corporation* (1947) 74 CLR 31 at 55 (emphasis added). See also *Spence* (2019) 268 CLR 355 at 386 [6].

1000 See Pt III(3)(a) above.

1001 See "EV Owners' Fight Signals Change down the Road", *Sunday Age*, 19 February 2023 at 24, quoting Professor Anne Twomey.

1002 This reasoning also applies to self-governing Territories: *Capital Duplicators [No 1]* (1992) 177 CLR 248.

1003 (1942) 65 CLR 373 at 429.

1004 See Twomey, *Public Money: Federal-State Financial Relations and the Constitutional Limits on Spending Public Money*, Report No 4, Constitutional Reform Unit, Sydney Law School (2014) at 15-16.

401 The legal and practical outcomes are stark – it is about the Commonwealth polity having most of the power to tax, but the States having most of the responsibility to spend; it is about the Commonwealth polity having most of the power to tax and the power to decide how that money is spent, but the States knowing what spending is needed, when and how; it is about the Commonwealth polity having most of the power to tax, but the States having to ask the Commonwealth for increasingly more money and in competition with the other polities. In short, this new rule will radically affect the scope of the States' ability to raise taxation revenue. It will affect the dynamism of the States to respond to issues – and that dynamism is not limited to the power to tax, it extends to the ability of the States to respond to specific issues in a timely fashion, flexibly and with confidence in their ability to tax[1005].

402 This concern is not simply political; nor is it new. In 1983, in *Hematite*, Gibbs CJ explained the issue in these terms[1006]:

> "The power conferred on the Commonwealth by s 51(ii) to make laws with respect to taxation is unaffected by s 90. The Parliament may impose a tax whether it is an excise or not. On the other hand, s 90 seriously restricts the taxing power of the States; it narrows, artificially, the field of taxation open to them. The inability of the States to impose duties of excise has created greater difficulties for the States since the uniform tax arrangements have virtually prevented them from imposing income taxes. One view of experts in the field of public finance is that the wide extension made by this Court to the definition of 'excise' is 'one of the greatest impediments preventing the achievement of a rational and lasting division of financial powers in the Australian federal system': Mathews and Jay, *Federal Finance* (1972), p 318. One result must surely tend to be that the States will impose some forms of taxation which, although constitutionally permissible, are less economically desirable than taxes now categorized as duties of excise."

403 It must now follow from the new rule of what is a duty of excise that any taxes imposed by States may be even less economically desirable[1007]. It must also

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1005 See, eg, Twomey, *Public Money: Federal-State Financial Relations and the Constitutional Limits on Spending Public Money*, Report No 4, Constitutional Reform Unit, Sydney Law School (2014) at 14-19; Saunders, "The National Implied Power and Implied Restrictions on Commonwealth Power" (1984) 14 *Federal Law Review* 267 at 275.

1006 (1983) 151 CLR 599 at 617.

1007 See Stewart, *Tax and Government in the Twenty-First Century* (2022) at 16-18, referring to OECD, *Revenue Statistics 2020*, Tables 3.3 and 3.4.

follow that *only* the Commonwealth can have any taxation policy that depresses or affects (or may depress or affect) demand for any kind of good at *any* stage of its life cycle.

(c) Constitutional facts and invalidity

404 The Court over the last 120 years has not adopted an economic test of what is a duty of excise, but a legal test. That legal test identifies a particular kind of impost at particular identified points on the *supply* side. The Court has properly shied away from a more complex economic basis or analysis[1008]. What is now sought to be imposed is an economic test, not a legal test.

405 The ambit of the exclusive power of the Commonwealth and consequent constraint on State legislative power is now to be determined according to the potential economic consequence of the State law imposing a tax without any evidence of what that consequence is likely to be. Apparently, where the law may depress or affect demand for goods, however slight that effect may be over any period of reference (short, medium or long term) and irrespective of whether the effect is temporary, transient or permanent, the law is beyond the legislative power of the State. Not only that, the potential effect on demand for goods is to be determined without evidence, let alone expert evidence of economists.

406 Constitutional facts are facts upon which constitutional validity may depend[1009]. Constitutional facts may be relevant whenever a constitutional issue requires consideration of the "substance and actual operation" of a law[1010]. As was

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1008 See, eg, *Peterswald* (1904) 1 CLR 497 at 511-512; *Matthews* (1938) 60 CLR 263 at 290-291, 300-301, 303; *Parton* (1949) 80 CLR 229 at 252, 259-260; *Dennis Hotels* (1960) 104 CLR 529 at 540; *Anderson's* (1964) 111 CLR 353 at 365; *Logan Downs* (1977) 137 CLR 59 at 69; *Hematite* (1983) 151 CLR 599 at 632; *Philip Morris* (1989) 167 CLR 399 at 436, 493; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586. See, eg, Mason, "Law and Economics" (1991) 17 *Monash University Law Review* 167, esp at 174-177. cf McGuinness, "Law and Economics – A Reply to Sir Anthony Mason CJ Aust" (1994) 1 *Deakin Law Review* 117.

1009 *Breen v Sneddon* (1961) 106 CLR 406 at 411. See also Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 108; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 294, citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222, *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 165 and *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 307.

1010 *Austin* (2003) 215 CLR 185 at 249 [124], quoting *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 240.

said in *Australian Communist Party v The Commonwealth*[1011], "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation". Why? Because this Court "has ultimate responsibility for the enforcement of the *Constitution*, it has ultimate responsibility for the resolution of challenges to the constitutional validity of legislation, one way or the other, and cannot allow the validity of challenged statutes to remain in limbo. It therefore has the ultimate responsibility for the determination of constitutional facts which are crucial to validity. That determination 'is a central concern of the exercise of the judicial power of the Commonwealth'"[1012], however "[h]ighly inconvenient"[1013] that may be.

407 Even though the Court adopts a flexible approach to, and strict evidentiary rules and ordinary notions of onus and burden of proof are inapposite in, ascertaining constitutional facts[1014], the Court must find constitutional facts "as best it can"[1015]. That does not mean that a laissez-faire attitude or approach can or should be adopted. Constitutional validity cannot depend upon the conduct of parties to private litigation[1016]. The present case is a paradigm example of what not to do. The question of whether the ZLEV charge has a tendency to dampen or depress demand, or impact or affect demand, for ZLEVs at large was not in issue in the proceedings and was not the subject of any, let alone appropriate and sufficient, constitutional facts placed before the Court for the proper determination

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1011 (1951) 83 CLR 1 at 222.

1012 *Thomas v Mowbray* (2007) 233 CLR 307 at 516 [626], quoting *Sue v Hill* (1999) 199 CLR 462 at 484 [38]. See also *Gerhardy v Brown* (1985) 159 CLR 70 at 142; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 631-632 [94]-[95].

1013 *Commonwealth Freighters* (1959) 102 CLR 280 at 292.

1014 *Clubb* (2019) 267 CLR 171 at 222 [152], 292 [347]. See also *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622; *South Australia v Tanner* (1989) 166 CLR 161 at 179; *Maloney v The Queen* (2013) 252 CLR 168 at 193 [45], 298-300 [349]-[355].

1015 *Commonwealth Freighters* (1959) 102 CLR 280 at 292.

1016 See, eg, *Commonwealth Freighters* (1959) 102 CLR 280 at 292; *Breen* (1961) 106 CLR 406 at 411-412; *Gerhardy* (1985) 159 CLR 70 at 141-142; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 478-479 [65]; *Thomas* (2007) 233 CLR 307 at 481-484 [523]-[529], 512 [614], 513 [618], 516 [626]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 146-147 [427]; *Maloney* (2013) 252 CLR 168 at 193 [45], 298-299 [351]-[353]; *Re Day* (2017) 91 ALJR 262 at 268-269 [21]-[24]; 340 ALR 368 at 374-375; *Clubb* (2019) 267 CLR 171 at 222 [152].

of the constitutional validity of the ZLEV charge *on that basis*. In this case, it was not even an afterthought at the eleventh hour by the plaintiffs and the Commonwealth[1017]; it was not addressed.

408 The Court, as custodian of the *Constitution*, has a duty to enforce the *Constitution*, and fulfilment of that duty (and, therefore, determining the validity of a law or Executive conduct) cannot be made to depend on which litigant is better prepared or better resourced[1018]. The duty of the Court in constitutional cases "necessarily goes beyond the interests and submissions of the particular parties to litigation"[1019]. Indeed, "once litigating parties put the meaning of the Constitution in issue", in a sense "the matter is no longer the exclusive concern of the litigating parties"[1020]; the interpretation of the *Constitution* affects all people in Australia. In the present case, there was less of the usual imbalance between parties to constitutional litigation. The plaintiffs were supported by the Commonwealth. Even if the plaintiffs lacked the necessary resources or access to relevant information that could have been put before the Court to ascertain constitutional facts, the Commonwealth did not.

409 It is undesirable for the Court to "embark on an attempt to illuminate with a flickering lamp constitutional facts only discernible from shadowy materials"[1021]. As will be seen, the materials referred to and relied upon in relation to the validity of the ZLEV charge are in the shadows and, in that dim light, are misunderstood and misapplied[1022]. The Court's reticence to decide constitutional issues that do not properly arise on the facts of the particular case reflects concerns, among other things, of "premature interpretation of statutes on the basis of inadequate appreciation of their practical operation"[1023]. Precisely the same concerns apply where the Court has an incomplete understanding of the constitutional facts that

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1017 See, eg, *Unions NSW* (2019) 264 CLR 595 at 648-651 [145]-[153].

1018 See *Thomas* (2007) 233 CLR 307 at 515 [622]. See also *Gerhardy* (1985) 159 CLR 70 at 141-142, quoted with approval in *Thomas* (2007) 233 CLR 307 at 515 [621].

1019 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 313. See also *Re Aird* (2004) 220 CLR 308 at 335 [83].

1020 Willheim, "Amici Curiae and Access to Constitutional Justice in the High Court of Australia" (2010) 22(3) *Bond Law Review* 126 at 126.

1021 *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 275 [70].

1022 See Pt III(5) below.

1023 *Zhang* (2021) 273 CLR 216 at 230 [22], quoting *Tajjour* (2014) 254 CLR 508 at 588 [174].

may be relevant to validity; it is undesirable to decide constitutional cases "where large issues of legal principle and legal policy are at stake"[1024], and where the issues have profound significance for the Australian polity. Bad facts – absent facts – can make bad law.

410 Part of the rule (the second "subsidiary question")[1025] now to be adopted asks whether the tax on goods has a natural tendency to "dampen" or "depress" demand for those goods, or, in another formulation, to "impact" or "affect" "the supply and price of, or demand" for the goods. But that is not the correct question: the relevant "effect" of a duty of excise – its economic consequence, which is only a relevant factor, not a conclusive determinant – is its natural tendency to enter into the purchase price of the goods, not any *freestanding* notion of demand or effect on the market.

411 As has been explained[1026], the potential effect of a usage consumption tax on demand or the market for goods is complex and uncertain. The economic consequence may be affected by a number of factors related to the overall financial burden of owning and using a good, including what other goods are substitutable for the goods the subject of the impost and whether those substitutable goods are subject to identical taxation. Other factors will also be relevant. That economic effect is not static; it will vary with economic conditions. And conditions vary over time.

412 As a consequence, it appears that the constitutional validity of a law impugned under s 90 will now change, or wax and wane, according to its potential economic consequences. That would pose significant difficulties for fundamental constitutional principle[1027].

413 To overcome such speculation in this case, and to avoid the validity of laws under s 90 being dependent upon variable economic consequences, it becomes

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1024 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 134 [104]. See also *Levy v Victoria* (1997) 189 CLR 579 at 651.

1025 See Pt III(2)(b) above.

1026 See [268]-[272], [390]-[391] above.

1027 See *XYZ* (2006) 227 CLR 532 at 608 [218]; *Murphy* (2016) 261 CLR 28 at 55 [42], 92-93 [196]-[199]; cf *Armstrong* (1957) 99 CLR 28 at 73-74. See *Clubb* (2019) 267 CLR 171 at 334 [471].

necessary to assume[1028], by reference to scant materials[1029], that any tax on usage consumption will have a natural tendency to dampen or depress, or affect, demand for the goods and so affect the goods as articles of commerce. That is, in the purported pursuit of certainty without "depend[ing] on the dynamics of such markets as might from time to time exist"[1030], it becomes necessary to hold that a tax with *any* assumed effect on the demand for goods – however slight that assumed effect may be over any period of reference (short, medium or long term) and whether the effect is temporary, transient or permanent – is beyond the legislative power of the States[1031]. The result is that any such tax, however small the impost, is invalid[1032]. Assumptions and assertions are not sufficient. If any possibly perceived phenomenon (eg a possible economic consequence) can be raised to the level of constitutional fact by mere assertion that it forms part of the "knowledge of the society", the pursuit of constitutional facts becomes otiose[1033]. The second "subsidiary question" serves no logical or practical purpose. Its answer is assumed; it leads, inevitably, to a conclusion that a duty of excise is any tax on any goods. That approach is contrary to principle. It is an approach that, as will be explained[1034], is apparent in the majority's application of the second "subsidiary question" to the ZLEV charge.

4 Other adverse consequences

414 Various adverse consequences of the new rule for what is a duty of excise have been addressed[1035]. But there are others. The following is not exhaustive.

415 First, the change "would have widespread practical ramifications and generate extraordinary confusion" given that federal financial arrangements have been designed and implemented on the basis of the interpretation given by the

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1028 See Pt III(5) below.

1029 cf *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 166 [52], 167 [55], 220-221 [246]-[247], 227 [270], 274 [420].

1030 Joint Reasons at [152].

1031 cf Joint Reasons at [193].

1032 Joint Reasons at [195]; Reasons of Jagot J at [925].

1033 cf Joint Reasons at [153]; Reasons of Jagot J at [924], [926].

1034 See [424] below.

1035 See Pt III(3) above.

Court to s 90 for many decades[1036]. And the practical ramifications and extraordinary confusion are likely to be felt at various levels.

416 For States, in addition to the diminution of their dynamism because a "duty of excise" is, in substance, now to be any tax on goods, the legal and practical operation of any subsequent State law imposing a tax that may have a potential effect on the demand or market for goods is likely to be the subject of years of litigation as the courts seek to determine how the new rule is to operate and, no less importantly, the manner of determining the legal and practical operation of a "tax on goods". This case will not be a footnote; it will be like an "anthill[], swarming with [unnecessary] constructive and combative activity"[1037]. I say unnecessary constructive and combative activity because the plaintiffs and the Commonwealth were unable to identify with any precision the factors that might be considered in any or all cases, or which are determinative, in undertaking such an inquiry[1038] other than, as the Commonwealth submitted, that there is a "sufficient connection between the tax and the goods". As Victoria submitted, that broad conception of a duty of excise must now encompass other types of taxes that are not a duty of excise on the current state of the law[1039]. We just do not know whether there are limits and how any such limits are to be applied[1040] – uncertainty is the default and it is likely to remain the default for many years.

5 ZLEV charge not a duty of excise

417 The ZLEV charge is a tax on the usage consumption of goods – ZLEVs. But it is not a tax on a step in the production, manufacture, sale or distribution of ZLEVs. The ZLEV charge is not imposed on ZLEVs so as to affect them as the subjects of manufacture or production or as articles of commerce. The ZLEV charge is not a trading tax; it is not a tax on a commercial dealing with a good. It is not a duty of excise under s 90 of the *Constitution*. The different conclusion now reached reflects the steps earlier identified, including the reframing of the purpose of s 90 – steps which necessarily infect the construction

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1036 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590-591.

1037 Grafton, *The Footnote: A Curious History* (1997) at 9.

1038 cf *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99, quoting *Anderson's* (1964) 111 CLR 353 at 365.

1039 See *Matthews* (1938) 60 CLR 263 at 298, referring to Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) and *Peterswald* (1904) 1 CLR 497; *Logan Downs* (1977) 137 CLR 59 at 65, 69, 78, 80-82; *Ha* (1997) 189 CLR 465 at 510.

1040 See Pt III(2) above.

of the ZLEV Charge Act. But it is necessary to address additional aspects of the approach.

418 First, "[t]wo aspects of the historical setting" are considered relevant "to appreciating the real potential for the ZLEV charge to distort the intended practical operation of such uniform laws of trade or commerce or taxation as the Commonwealth Parliament might choose to enact for the purpose of influencing the supply of and demand for ZLEVs within Australia"[1041]. One of those aspects is "the emergence, over the past 20 years, of differing and evolving Commonwealth and State policies on greenhouse gas emissions" and the role and uptake of electric vehicles[1042]. It can be accepted that Commonwealth policies on greenhouse gas emissions and the role of electric vehicles in reducing those emissions, and the enactment of the *Climate Change Act 2022* (Cth) and the *Treasury Laws Amendment (Electric Car Discount) Act 2022* (Cth)[1043], are legitimate political means by which that polity has sought to address climate change and encourage uptake of ZLEVs. One difficulty in relying on such policies, however, is that the *Climate Change Act*, the *Treasury Laws Amendment (Electric Car Discount) Act* and the National Electric Vehicle Strategy came after the ZLEV Charge Act. As the Joint Reasons recognise, Victoria by enacting the ZLEV Charge Act (and, it should be said, the *Climate Change Act 2017* (Vic)) "pre-empted" Commonwealth policy development in that respect.

419 Is it that no State could fill that policy vacuum? The unstated assumption is that it is the Commonwealth, not the States, which has the responsibility to address climate change and to regulate ZLEVs. That unstated assumption is wrong. It is equally the responsibility of the States. Commonwealth policy does not and cannot dictate the answer to the constitutional validity of a provision. If the Commonwealth wishes to enter a policy area within its legislative power, then it can[1044]. Any inconsistency between the Commonwealth and State laws is then addressed by s 109 of the *Constitution*.

420 Indeed, the chronology of the development of policy and the early legislative response by Victoria when compared with the Commonwealth and then the subsequent invalidity of the ZLEV charge (because it is a duty of excise according to the test propounded by the majority) might be tendered as the best evidence of how this new rule for what is a duty of excise will affect the dynamism of States to respond to issues – and, as has been said, dynamism that is not limited

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1041 Joint Reasons at [155].

1042 Joint Reasons at [157].

1043 Joint Reasons at [157]-[162].

1044 See also [395] above.

to the power to tax but extends to the ability of States to respond to specific issues in a timely fashion, flexibly and with confidence in their ability to tax. Or, as in this case, to respond to a timely issue at all if the Commonwealth chose not to respond or at least in a less economically efficient way. And the lack of dynamism would have been real. Here, Victoria (and its approach to an aspect of climate change) would have been curtailed by time and approach – for more than four years and by its inability to enact the ZLEV Charge Act.

421 Second, Victoria's argument has been mischaracterised[1045]. It is said that Victoria's argument "focused on the first subsidiary question"[1046] – being whether "the ZLEV charge bear[s] a close relation to the use of ZLEVs" – and that it chose "not to focus" its argument on the second "subsidiary question" – whether "the ZLEV charge affects ZLEVs as articles of commerce" – and that Victoria's choice was "sound"[1047]. Victoria contested that the ZLEV charge affects ZLEVs as "articles of commerce" on the established meaning of that term as summarised in Pt II(3)(b) above as goods within the stream of production and distribution. Victoria did not accept the premise inherent in the meaning adopted by the majority of a tax affecting goods "as articles of commerce", being the natural tendency of the tax to "dampen" or "depress" demand for the goods, or to "impact" or "affect" "the supply and price of, or demand" for the goods. And Victoria challenged the contention that the ZLEV charge affects the demand or market for ZLEVs. Victoria's challenges were addressed in written submissions[1048] and elaborated on in oral submissions, which explained the concept of an article of commerce[1049] and the way in which the ZLEV charge affects ZLEVs[1050].

422 It is also said that the tendency of the ZLEV charge to affect demand for ZLEVs was "implicitly acknowledged" in the second reading speech for the ZLEV Charge Act and, in particular, by the Treasurer stating that the ZLEV charge

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1045 Joint Reasons at [186]-[193].

1046 Joint Reasons at [186].

1047 Joint Reasons at [192]-[193].

1048 Written Submissions of Victoria at 10 [32]-[33]; Supplementary Submissions of Victoria at 6-7 [12]-[13], 17-19 [39]-[42]; see esp at 18 [40] fn 85.

1049 *Vanderstock v Victoria* [2023] HCATrans 010 at 199-201 lines 8942-9029, 201-203 lines 9053-9146 (in response to 201 lines 9031-9036), 204-206 lines 9150-9249; [2023] HCATrans 011 at 209-210 lines 9338-9359, 211 lines 9409-9444, 212 lines 9454-9476, 213 lines 9496-9501, 214-215 lines 9559-9625, 217 lines 9676-9680.

1050 *Vanderstock v Victoria* [2023] HCATrans 010 at 201-202 lines 9056-9066; [2023] HCATrans 011 at 215-216 lines 9595-9664.

would "[o]n balance" have a "negligible impact" on the uptake of ZLEVs having regard to the range of measures being introduced to promote and support the uptake of ZLEVs[1051]. That speech is also relied on as evidence that "depressing demand" for ZLEVs was the "very anticipated effect" that Victoria "was keen to mitigate"[1052]. Effect on demand or the market is not the correct test[1053] and, in any event, the second reading speech cannot sensibly be read in the way suggested[1054]. The Treasurer stated that the Victorian Government was committed to ensuring that ZLEVs "continue to pay less in road-related taxes and charges than their fuel-based counterparts"[1055].

423 No assistance[1056] can be derived from statements made by a South Australian Minister in 2022 in relation to the *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Bill 2022* (SA), which, when enacted, repealed the *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA)[1057], and, in particular, from a survey referred to by that Minister which found that a majority of those surveyed would be less likely to buy an electric vehicle if there was a ZLEV charge. If effect on demand for goods is the correct test, and it is not, that effect is not established by these materials[1058].

424 Finally, the smallness[1059] of the ZLEV charge – between 2 and 2.5 cents per kilometre – which is said to be sufficient to have a "natural tendency" to "dampen demand" for ZLEVs, or "impact" or "affect" "the supply and price of,

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1051 Joint Reasons at [193]-[194].

1052 Reasons of Jagot J at [926]; see also [919].

1053 See Pt II(3) above.

1054 Joint Reasons at [164]-[165], [193]; Reasons of Jagot J at [896], [919], [926].

1055 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

1056 cf Joint Reasons at [130], [194]; Reasons of Jagot J at [926].

1057 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 November 2022 at 1413.

1058 See Pt III(3)(c) above.

1059 cf *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 592-593, referring to *Philip Morris* (1989) 167 CLR 399 at 500. See also *Hematite* (1983) 151 CLR 599 at 623, 634, 647.

or demand for" ZLEVs – is telling[1060]. Its smallness – it not being "substantial"[1061] – demonstrates that asking whether the ZLEV charge is sufficient to have a "tendency" to "dampen demand" for ZLEVs serves no logical or practical purpose because any charge is likely to be sufficient.

IV Overturning authority

425 This Court is not bound by its own decisions[1062]. However, because "the law is taken to be and to have been in accordance with the principle which informs the ... decision: the ratio decidendi" and thus other courts are bound by that law, the practice of requiring leave to reopen a previous decision of this Court has been adopted "in order to preserve an appropriate balance between the desirability of certainty in law and the exigencies of change"[1063]. Leave to reopen is therefore required in order to contend that a previous decision of this Court should not be followed[1064].

426 A "strongly conservative cautionary" approach is to be adopted in deciding whether to overturn an earlier decision of this Court[1065]. As Kitto J observed 70 years ago, "[e]ven in constitutional cases ... it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without

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1060 See [413] above.

1061 cf *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 592-593, 597.

1062 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316.

1063 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267.

1064 *O'Toole* (1990) 171 CLR 232 at 267; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 673; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* ("*NAAJA*") (2015) 256 CLR 569 at 614 [108].

1065 *Wurridjal* (2009) 237 CLR 309 at 352 [70]. See also *Lange* (1997) 189 CLR 520 at 554; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 569 [246]; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 191 [527]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 372 [148], 382 [192]; *Alqudsi v The Queen* (2016) 258 CLR 203 at 235-236 [67].

grave reason"[1066]. As has been seen, there is no reason, let alone a grave reason, to reopen *Dickenson's Arcade*.

427 What is said by the majority[1067] as to why leave to reopen *Capital Duplicators [No 2]* and *Ha* was unanimously refused during the hearing equally supports, if not compels, the view that the application to reopen *Dickenson's Arcade* should also be refused. No consideration has been advanced which was not advanced and fully taken into account in *Dickenson's Arcade*. Adopting and adapting what the Joint Reasons say in this case, the "prudential considerations repeatedly identified as appropriate to be considered on an application to reopen a decision of the Court[1068] could not justify now taking the momentous step of unsettling the resultant constitutional doctrine" that is the bedrock of *Dickenson's Arcade* (representing as it did the affirmation of many earlier decisions of this Court), as well as *Capital Duplicators [No 2]* and *Ha* – that an inland tax imposed on a step in the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin, is a duty of excise[1069]. That long established and fundamental principle does not extend to a tax on usage consumption.

1 Leave to reopen principles

428 Although there is "no very definite rule"[1070] as to the circumstances in which this Court will grant leave to reopen, four matters may justify departure from an earlier decision, as identified by Gibbs CJ[1071] (Stephen J[1072] and Aickin J[1073] agreeing) in *The Commonwealth v Hospital Contribution Fund*, and as endorsed by Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ in *John v Federal*

1066 *Hughes and Vale* (1953) 87 CLR 49 at 102. See also *Baker v Campbell* (1983) 153 CLR 52 at 103; *Chandler v State of Trinidad and Tobago* [2023] AC 285 at 324 [57]-[58].

1067 Joint Reasons at [8]; Reasons of Jagot J at [886]-[887].

1068 See *Wurridjal* (2009) 237 CLR 309 at 350-353 [65]-[71].

1069 See fn 300 above.

1070 *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 243-244, quoted in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

1071 (1982) 150 CLR 49 at 56-58.

1072 (1982) 150 CLR 49 at 59.

1073 (1982) 150 CLR 49 at 66.

Commissioner of Taxation[1074]: the earlier decision does not rest upon a principle carefully worked out in a significant succession of cases; there is a difference between the reasons of the Justices constituting the majority; the earlier decision has achieved no useful result but on the contrary has led to considerable inconvenience; and the earlier decision has not been independently acted upon in a manner which militates against reconsideration.

2 Leave to reopen Dickenson's Arcade required and refused

429 The plaintiffs' and the Commonwealth's submission that leave to reopen *Dickenson's Arcade* was not required, on the basis that *Capital Duplicators [No 2]* and *Ha* are not reconcilable with *Dickenson's Arcade*, is wrong[1075] and must be rejected. Leave is required.

430 The ratio decidendi of a case "is the general rule of law that the court propounded as its reason for the decision"[1076]; it is "any rule of law expressly or impliedly treated by the judge as a *necessary step* in reaching [their] conclusion, having regard to the line of reasoning adopted by [the judge]"[1077]. In the context of multi-judgment decisions, the ratio decidendi is any rule of law "expressed in or necessarily implied by reasons for judgment to which a majority of the participating judges assent" as a necessary step in reaching their conclusion[1078]. The reasoning of the judges that support the general rule of law does not have to be, and often is not, uniform – lack of uniformity does not necessarily mean

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1074 (1989) 166 CLR 417 at 438-439.

1075 See Pts III(1)(a) and III(1)(c)(vi) above; see esp at [345].

1076 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 542 [59]. See also Montrose, *Precedent in English Law and other Essays* (1968) at 152; Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) at 123; see esp fn 2; Garner et al, *The Law of Judicial Precedent* (2016) at 803.

1077 Cross, *Precedent in English Law* (1961) at 75 (emphasis added). See also Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) at 123; Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 72.

1078 *O'Toole* (1990) 171 CLR 232 at 267. See also *Dickenson's Arcade* (1974) 130 CLR 177 at 188; *NAAJA* (2015) 256 CLR 569 at 613-614 [107]-[108]; Bell, "Precedent", in Cane and Conaghan (eds), *The New Oxford Companion to Law* (2008) 923 at 923.

divergence and not everything a judge says in their reasons is part of the ratio decidendi[1079].

431 It is against that background that it is necessary to consider *Dickenson's Arcade*. The decision has been addressed[1080]. The orders made in *Dickenson's Arcade* relevantly concerned two claimed declarations: a declaration that the relevant provisions of Pt II of the Act were duties of excise and therefore invalid, and a separate declaration that certain of the regulations were invalid on the same basis[1081]. The defendants demurred to the whole of the statement of claim on the ground that it did not show a cause of action to which the Court could give effect because all of the impugned provisions were validly made and none of them imposed a duty of excise[1082]. The orders of the Court were that the demurrer was allowed except in so far as it related to the impugned regulations[1083]. That is, the Court held that the relevant provisions of the Act were valid and that the relevant provisions of the regulations were invalid. Although the Court's decision on the issue of the invalidity of the regulations was one of a statutory majority under s 23(2)(b) of the *Judiciary Act 1903* (Cth), and is therefore not binding[1084], the Court's decision on Pt II of the Act was of four of the six Justices.

432 As has been explained[1085], there was a clear ratio for the majority's decision on Pt II: as a tax on consumption is not a duty of excise, and as the tax imposed by Pt II was such a tax, it was not a duty of excise and was thus validly imposed. Although their Honours delivered separate reasons for their decisions on that issue,

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1079 See generally *Dickenson's Arcade* (1974) 130 CLR 177 at 188; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 79-80 [243]-[245]; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1207 [86]; 235 ALR 609 at 630-631. See also *NAAJA* (2015) 256 CLR 569 at 615 [110]; MacAdam and Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) at 203 [10.22]; Bell, "Precedent", in Cane and Conaghan (eds), *The New Oxford Companion to Law* (2008) 923 at 923.

1080 See Pt III(1)(c)(vi) above.

1081 (1974) 130 CLR 177 at 178.

1082 *Dickenson's Arcade* (1974) 130 CLR 177 at 179.

1083 *Dickenson's Arcade* (1974) 130 CLR 177 at 244.

1084 *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 348, 354-355. See also *Tasmania v Victoria* (1935) 52 CLR 157 at 183; *Milne v Federal Commissioner of Taxation* (1976) 133 CLR 526 at 533.

1085 See Pt III(1)(c)(vi); see esp at [335].

that was the ratio of their decision on Pt II. Accordingly, *Dickenson's Arcade* is binding authority for that proposition and leave to reopen is required.

433 The *John* factors for leave to reopen have not been and cannot be met. The majority's conclusion in *Dickenson's Arcade* that a tax on usage consumption is not a duty of excise rested on a principle carefully worked out in a succession of cases. That principle was the definition of a duty of excise set out by Dixon J in *Parton*, and as endorsed on multiple occasions in this Court up until and including *Dickenson's Arcade*. In particular, Dixon J's view that a tax on consumption was not a duty of excise was adopted by a majority in *Dennis Hotels*[1086] and, in particular, Kitto J's formulation in that case was part of the unanimous decision in *Bolton*[1087]. Further, *Bolton* was subsequently accepted as correct in decisions up to and including four years prior to *Dickenson's Arcade*[1088]. Hence Mason J in *Dickenson's Arcade* itself was able to say that the authorities in the Court since *Parton* "*must*, I think, be regarded as establishing at this time that a tax on consumption of goods is not an excise"[1089].

434 Even if there might be said to be some ambiguity in the basis upon which Dixon J in *Parton* sought to exclude consumption[1090] and even though none of the cases, prior to *Dickenson's Arcade*, which had adopted Dixon J's formulation had to deal directly with a challenge to the validity of a usage consumption tax, neither consideration outweighs the fact that the principle had been, at the time of *Dickenson's Arcade*, repeatedly affirmed by this Court[1091]. It is, at best, a neutral consideration[1092].

435 And although it might be accepted that the reasoning of the Justices forming the majority in *Dickenson's Arcade* differed in some respects, all regarded the position as settled by the overwhelming state of the authorities at the time[1093]. As Victoria submitted, in *Capital Duplicators [No 2]* consideration was given to

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1086 (1960) 104 CLR 529 at 540-541, 559-560, 573, 589-590.

1087 (1963) 110 CLR 264 at 273; see also 271.

1088 *Anderson's* (1964) 111 CLR 353 at 364-365, 373, 376, 377; *Chamberlain Industries* (1970) 121 CLR 1 at 13, 25, 28, 35-36.

1089 (1974) 130 CLR 177 at 239 (emphasis added); see also 209, 213, 221, 230.

1090 cf [323] above.

1091 See [267] fn 537 above.

1092 cf *John* (1989) 166 CLR 417 at 438.

1093 (1974) 130 CLR 177 at 209, 221-222, 224, 229-232, 238-239, 242.

whether to overrule *Dickenson's Arcade* and *Dennis Hotels*, and, in respect of earlier decisions which themselves had refused to overrule those decisions, the majority said that "[t]he diversity in the reasons given for not disturbing [those] earlier decisions is *not an adequate ground* for now disregarding the significance of the Court's repeated refusal to depart from *Dennis Hotels* and *Dickenson's Arcade*"[1094]. What has changed?

436 It also cannot be said that *Dickenson's Arcade* has achieved no useful result or that it has led to considerable inconvenience. No argument was put forward by the plaintiffs or the Commonwealth in support of this ground other than that the exclusion of consumption taxes from s 90 is an "anomaly". No inconvenience is asserted, and none can be supported. And, as has been shown, the position now adopted will lead to more than considerable inconvenience[1095].

437 The plaintiffs bore the onus of satisfying this Court that *Dickenson's Arcade* has *not* been independently acted upon[1096]. It is not to the point to assert, as the plaintiffs did, that "there is no material before the Court that suggests the decision in *Dickenson's Arcade has been* independently acted on" (emphasis added) and that the amended special case does not contain any material "relating to any inconvenience that may occur if *Dickenson's Arcade* were to be overruled in so far as it concerns taxes on consumption". It was incumbent upon the *plaintiffs*, not Victoria, to place material before the Court to *negative* that *Dickenson's Arcade* has been independently acted upon. They did not. And that they did not do so is not surprising. *Dickenson's Arcade* has been acted upon. In *Commissioner for Australian Capital Territory Revenue v Kithock Pty Ltd*, for example, the Full Court of the Federal Court of Australia rejected a challenge to a Territory stamp duty on the sale of used cars, holding[1097] that *Bolton*, *Anderson's* and *Dickenson's Arcade* "determine[] that a tax on goods after they have reached the hands of consumers is not an excise". Victoria also pointed to other State taxes which may be affected by overruling *Dickenson's Arcade*, and which have been imposed on the understanding of the law as held in that case, including "duties on the transfer or conveyance of goods as part of dutiable transactions, motor vehicle duties and vehicle registration charges, commercial passenger vehicle levies, gaming machine levies and 'point of consumption' betting taxes, and waste disposal levies".

1094 (1993) 178 CLR 561 at 593 (emphasis added).

1095 See Pt III(4) above.

1096 *John* (1989) 166 CLR 417 at 438-439.

1097 (2000) 102 FCR 42 at 50 [31].

438 Finally, as Mason J said in *H C Sleigh*[1098], "since *Dickenson's Arcade* States have relied on tobacco licensing fees, similarly calculated, as an additional source of government revenue. It would, I think, lead to great uncertainty in government and commerce if the Court were now to hold that *Dennis Hotels* or *Dickenson's Arcade* was wrongly decided. Such a course would disturb legislative and financial arrangements made on the faith of the existing decisions of this Court." Again, what has changed?

439 The current definition of a duty of excise is neither uncertain nor vague, and it has not been shown to work any mischief. No systemic difficulty or structural damage to our constitutional framework was identified by the plaintiffs or the Commonwealth[1099]. For those reasons, leave to reopen *Dickenson's Arcade* should be refused. And, in any event, that decision should be affirmed[1100].

V Answers

440 The questions stated by the parties in the amended special case for the opinion of the Full Court of this Court should be answered as follows:

Question 1: Is s 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*?

Answer: No.

Question 2: Who should pay the costs of the proceeding?

Answer: The plaintiffs.

1098 (1977) 136 CLR 475 at 501 (footnote omitted).

1099 cf *John* (1989) 166 CLR 417 at 438-439.

1100 See Pt II(4) above.

EDELMAN J.

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I. Introduction

(i) Judicial method

441 Section 90 of the *Constitution* confers exclusive power upon the Commonwealth Parliament to grant bounties and to impose duties of customs and of excise. There has not been great dispute since Federation about the content of the exclusive Commonwealth power over bounties on the production and export of goods and duties of customs, concerning imported and exported goods[1101]. But there has been a century of dispute about the content of the exclusive Commonwealth power over duties of excise. The wider the exclusive power that the Commonwealth has, the narrower the ability of the States (and Territories[1102])

1101 See *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 430, 435, 438; *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 264-265; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 540, 554-555, 581-582; *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 12, 26; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615-616, 631, 638; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 590. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837.

1102 These reasons focus on the effect on the States, consistently with the language of decisions prior to *Capital Duplicators Pty Ltd v Australian Capital Territory*

to raise revenue to fund their expenditure and the greater the threat to the proper functioning of a federal system of distribution of powers.

442 During this century of dispute, this Court has consistently recognised three basic constraints contained in the essential meaning or application of an excise, limiting the inland taxes which can be regarded as excises. The language in this Court's decisions has not always been consistent, and the three constraints have not always been expressly considered, but the pattern of judicial decisions and many statements supporting each constraint demonstrate their firm foundation. The economic principles underlying the reasoning of many of these judgments have also not always been fully articulated. But these economic principles are so elementary that they have repeatedly been the subject of judicial notice.

443 The three constraints are as follows. First, to be an excise a tax must be reasonably anticipated at the time the legislation is enacted to have a real and substantial economic effect in a market for the sale of goods (as articles or subjects of commerce). Secondly, that economic effect must, as a matter of substance, be an effect (or be equivalent to an effect) on the supply-side of that market. It will be necessary later in these reasons to explain what is meant by the supply-side of a market but for present purposes it suffices to describe it as an economic effect that, independently of demand, changes the price at which any supply will be made[1103]. Thirdly, the economic effect on the supply-side of a market must also be a direct effect in *that* market rather than an effect that arises indirectly as a consequence of an economic effect in a different market.

444 There will be hard cases at the boundaries of each of these three constraints. First, whether the reasonably anticipated effect of a tax in a market for the sale of goods is real and substantial can sometimes be a matter upon which reasonable minds might differ. Secondly, an economic effect can be treated as occurring on the supply-side of the market when, in exceptional cases described by economists in terms of "equivalence", the legal incidence of the tax is formally imposed on the demand-side of the market but the economic effect is, or is nearly, identical to the effect of the same tax if it had been formally imposed on the supply-side. Hence, a sales tax which has liability imposed on the seller (supply-side) is equivalent to a sales tax which has liability imposed a moment later on the buyer (demand-side) and then collected by the seller. Thirdly, there are cases where the distinction will be very fine between a tax that has a direct effect on the supply-side of a market for the sale of goods and one that has an indirect effect. But the existence of hard cases at the margins in law cannot be avoided. The difficulties should be confronted, not disguised. The principles being applied should be recognised, not

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(1992) 177 CLR 248. But the reasoning applies in the same manner to laws of self-governing Territories of the Commonwealth.

1103 See below at [637]-[638] (Diagram 1).

ignored. The existence of hard cases at the margins of the three constraints could no more justify concealing or ignoring the constraints than the existence of twilight could justify ignoring or abolishing the difference between night and day[1104].

445 It is, of course, possible to imagine a constitutional scheme in which none of these three constraints was essential. In a different constitutional scheme, which was unconcerned with a Commonwealth that operated as a federation of States and Territories, s 90 of the *Constitution* might have been drafted to make all taxes exclusive to the Commonwealth, denying to the Parliaments of the States and Territories any ability to raise revenue for their expenditures through any taxation. Only slightly less broadly, s 90 might have been drafted to make all taxes exclusive to the Commonwealth if they had any economic effect on any market involving goods. But that was not the choice that was made for our *Constitution.* Since Federation, these three constraints, although expressed in various terms and with differences in application at the margins, have operated to constrain the extent of the exclusivity of Commonwealth taxation power and to support a functioning federation. As recently as 2022, a leading constitutional scholar reiterated the view that "[i]t is, of course, easy to argue that some power to tax is an essential feature of being a government and, therefore, the continued existence of the States necessarily implies a power to tax for State purposes"[1105].

446 With genuine and great respect to my colleagues as authors of the engaging, innovative, and detailed reasons that combine to form the majority decision of this Court today, but with considerable regret, it is necessary to say that in this single case the constitutional federalism reflected in the three constraints has been substantially impaired. The first constraint is effectively ignored and the latter two are effectively abolished. The essential meaning of an excise is said now to be an elegantly simple "tax on goods", with the only constraint being that there must be some metaphorical impact of the tax, directly or indirectly, "on goods", through the liberal and generous application of a preposition.

447 The first constraint, requiring the tax to have a real and substantial effect in a market, is ignored in this special case by treating a small tax concerned with the sale of hydrogen or electricity, and mimicking a tax concerned with the sale of fuel, as though it had a real and substantial economic effect in the different market for the sale of expensive hybrid and electric vehicles. With genuine respect and esteem to my colleagues who adopt this view, such treatment is unsupported in this special case by any relevant expert or empirical evidence. And it is counterintuitive. Thirty years ago, this Court unanimously held that a fee of $600 per year calculated by reference to the quantity and value of cheap videotapes sold

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1104 Gleeson, "Judicial Legitimacy" (2000) 20 *Australian Bar Review* 4 at 11.

1105 Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 560. See also Zines, *The High Court and the Constitution*, 5th ed (2008) at 481.

by small business suppliers was not an excise, in part because it had an economic effect that was too insubstantial. It took the principal joint judgment in that case only one sentence to reach that conclusion[1106]. Despite thirty years of inflation, and without any empirical or economic evidence, the majority of this Court today concludes that a tax of around half that amount is reasonably anticipated to have a real and substantial economic effect in the market for the sale of goods worth up to $300,000 each. Certainly such an effect was not reasonably anticipated by the Parliament of Victoria, where it was confidently asserted that the tax was anticipated to "have a negligible impact" on the sale of such goods[1107].

448 As to the supply-side constraint, prior to today's decision an excise was confined to a tax that was reasonably anticipated to increase the price of goods through its economic effect on the production, manufacture, sale, or distribution of goods (the supply-side of a market for the sale of those goods). The reasonably anticipated effect of a duty of excise was to change the pattern of supply of the goods (the supply curve). There would generally be a reduced supply of the goods offered at any particular price. The overall pattern of demand for the goods at any particular price (the demand curve) would remain the same, although a consequential effect of the reduction in supply would be an increase in the equilibrium price and therefore a reduction in demand at that higher price. The supply-side constraint was put beyond doubt almost fifty years ago in *Dickenson's Arcade Pty Ltd v Tasmania*[1108]. As Steward J observes in his reasons, on nine occasions over the last fifty years this Court has either affirmed or declined to overrule that decision[1109].

449 The abolition today of the supply-side constraint means that, unlike a duty of customs, an excise now extends also to a tax whose only anticipated effect is to alter the pattern of demand for a good. An excise is treated as extending to a tax that is not reasonably anticipated to have any effect on the pattern of supply by any party involved in the chain of supply of goods. It is now said to be sufficient for an excise that a tax is anticipated to affect only the demand-side of a market for

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1106 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 597. See also at 619, 631-632. See below at [697].

1107 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

1108 (1974) 130 CLR 177.

1109 Reasons of Steward J at [748].

the sale of goods by affecting the cost of ownership, possession, use, or destruction of goods[1110].

450 As to the directness constraint, prior to today a tax was only an excise if it were reasonably anticipated to have a direct economic effect in the market for the sale of a good. It was not sufficient for the economic effect to arise indirectly as a consequence of a direct effect in some other market. A tax might have such a direct economic effect in a market for the sale of a business, in a market for labour, in a market for services, in a market for land, or in a market for something else. The direct effect in any of those markets might have a consequential, or indirect, economic effect on a different market for the sale of the relevant good. That consequential, or indirect, effect might occur if the direct effect of the tax was to increase the price in the principal market which, indirectly, led to a decrease in the demand in the separate market for the sale of the relevant good. But, despite that indirect effect, the tax would not be an excise.

451 Until today, the directness constraint meant that none of the following could have been excises: a payroll tax directly affecting a market for the sale of labour; an industrial tax directly affecting a market for the sale of industrial land; a tax directly affecting a market for the sale of a business; or a tax directly affecting a market for the sale of services. Such taxes were not excises, even though the labour, land, business or services might be a complement to goods so that an increase in price in a market for labour, land, business or services might have indirectly affected a market for the sale of goods by a decrease in demand for the goods. By treating as "direct"[1111] a tax whose effect in a market for goods is only consequential or by ignoring the directness constraint[1112], the directness constraint is effectively removed. This has occurred without any argument on the issue.

452 By ignoring the need for a real and substantial economic effect in the relevant market, and by removing the supply-side and directness constraints, a majority of this Court today expands the essential meaning and application of an excise in s 90 so that it could potentially include taxes that the first three Justices of this Court, echoing the views of the founders of the *Constitution*, described as having "never [been] spoken of as excise duties"[1113]. The diminution or removal of the three constraints leaves the essential meaning of an excise as no more than the

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1110 See, eg, Joint Reasons at [184], [192], [197]; Reasons of Jagot J at [928], [937], [943], [949].

1111 See Reasons of Jagot J at [949].

1112 See, eg, Joint Reasons at [184]-[185], [192].

1113 *Peterswald v Bartley* (1904) 1 CLR 497 at 509.

amorphous metaphor of a "tax on goods"[1114]. At best, the application of that essential meaning, and the test for whether a State tax is an excise, is reduced to the evaluative judgment of four or more members of this Court about the scope of the unconstrained preposition—"on"—in that metaphor.

453 Although the essential meaning and application of an excise has long been a matter of great controversy, one basis for the long-standing constraints that are now rejected, and the decisions that are now overruled, has been to support a functioning federation in which State spending powers are supported by State revenue-raising powers. The effect on the Australian federation might be mitigated in future by ad hoc restrictive applications of the amorphous metaphor of a "tax on goods", insisting (albeit by little more than unarticulated intuition) that the metaphorical relationship between a tax and goods is not close in ad hoc cases. But the result of this case (where the tax has no reasonably anticipated real and substantial effect in the market for the sale of goods, operates on the demand-side of the market for the sale of goods, and does so only indirectly following a direct effect in a different market) might suggest that it will be rare for an application of unarticulated intuition to constrain today's expansion of the concept of an excise. Further, without attention to the factors that will constrain the scope of application of s 90, the legal test for whether a tax is "on" goods may become little more than whether a future majority of this Court says that it is. To "evade the responsibility of choice ... is to devalue the process of constitutional decision-making"[1115].

(ii) In a nutshell: the background to today's decision

454 The essential meaning of an excise in s 90 of the *Constitution*, its "basal conception ... which the framers of the Constitution are regarded as having adopted"[1116], has been loosely expressed at various levels of generality by members of this Court. For many years after Federation, the essential meaning of an excise was expressed at a lower level of generality, such as a tax on goods with some connection to home production or manufacture which forms part of the price paid by a consumer for the goods[1117]. The focus in such cases was upon the reasonably anticipated direct economic effect of the tax on the production or manufacture of the good (ie, as a tax directly on the supply-side of a market for the sale of goods).

1114 Joint Reasons at [121], [126]-[127], [145]-[146], [152], [184]; Reasons of Jagot J at [920], [943].

1115 Hanks, "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?" (1986) 10 *Adelaide Law Review* 365 at 385.

1116 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 303.

1117 See especially *Peterswald v Bartley* (1904) 1 CLR 497 at 508, 512.

455 That focus conformed with, and was applied consistently with, the traditionally recognised purpose of s 90. That purpose was to support the integrity of Commonwealth overseas trade or tariff policy embodied in Commonwealth customs taxes on overseas goods and local bounties on domestic goods. This approach to duties of excise corresponded with that taken to duties of customs. It also corresponded with the approach taken to bounties.

456 Over time, a number of members of this Court, particularly Dixon J, appeared to abandon the central focus on local production or manufacture as part of the essential meaning of an excise. The essential meaning of an excise was sometimes expressed as no more than a "tax on goods" or a "tax upon goods"[1118]. That expression of the essential meaning was not uncommon, but it never achieved overwhelming acceptance. That essential meaning was expressed at such a high level of generality that it was little more than a vague metaphor. Taxes are not imposed "on" goods at all. They are imposed on people. "Goods as such cannot pay taxes: there must be a person to pay them."[1119] The metaphor of a tax "on" goods merely indicated that some connection or relationship was required between the tax and the goods[1120]. The required connection involved some reasonably anticipated economic effect that the tax would have in relation to the market for the sale of the goods.

457 Those members of this Court who appeared to adopt the essential meaning of an excise at this extremely high level of generality as a "tax on goods" faced the difficulty that the metaphor of a "tax on goods" said nothing about the nature or degree of the required anticipated economic effect between the tax (on people) and the market for the sale of goods. If the essential meaning were really no more than the broad metaphor of a "tax on goods" then an excise could potentially have extended to exclude State revenue-raising power relied upon over the course of a century in levying swathes of taxes that had never been doubted (including payroll taxes, industrial land taxes, inheritance taxes, or fees for licences that amount to taxes). In other words, if s 90 were to extend to any tax where a real and substantial

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1118 See, eg, *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 259; *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 539-540, 554; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 473.

1119 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 554. See also *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 467.

1120 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 427-428; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 467.

economic effect in a market for the sale of goods was anticipated then it would go further than ever contemplated, potentially undermining federalism itself.

458 Those Justices who appeared to treat the essential meaning of an excise as no more than a "tax on goods" avoided such extreme results by incorporating the three constraints in their application of this broad essential meaning of an excise. The practical outcome of that reasoning could lead to broadly the same results as would arise from a narrower essential meaning: an excise was (i) any tax which was reasonably expected to have a real and substantial economic effect in a market for the sale of goods, where (ii) the reasonably anticipated economic effect of the tax was on the supply-side of the market for the sale of goods, and where (iii) the tax had a *direct* economic effect in a market for the sale of the goods rather than a direct economic effect in a market for complements to the goods: business generally, labour, services, land, or different (complementary) things.

459 These constraints were finally entrenched by a settlement achieved in the two most significant recent decisions of this Court concerning s 90: *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* ("*Capital Duplicators [No 2]*")[1121] and *Ha v New South Wales*[1122]. These decisions adopted an approach to the essential meaning of an excise which incorporated all constraints: an excise was said to be "a tax on the taking of a step in the process of the production[, manufacture, sale,] or distribution of goods before they reach consumers"[1123]. The reference to "the process of the production or distribution of goods before they reach consumers" limited an excise to taxes with an economic effect on the supply-side of that market for goods (the supply-side constraint). The reference to a "tax on the taking of a step" was explained, by reference to an earlier case, as requiring "a sufficiently close connexion between the duty imposed and a sale of the goods"[1124]. That close connection was not merely a requirement that there be a reasonably anticipated real and substantial effect of the tax in the market for the sale of the goods but also a requirement that the effect would arise directly, and not merely indirectly via another market (the directness constraint).

1121 (1993) 178 CLR 561.

1122 (1997) 189 CLR 465.

1123 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 587. See also *Ha v New South Wales* (1997) 189 CLR 465 at 490.

1124 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 446, quoting *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 30. Approved in *Ha v New South Wales* (1997) 189 CLR 465 at 504.

460 Despite incorporating these constraints into the essential meaning of an excise, the decision in *Ha* nevertheless "create[d] a severe vertical fiscal imbalance" with an immediate effect on State budgets of $5 billion and which resulted in "excessive reliance by the states on Commonwealth grants"[1125]. Prior to *Capital Duplicators [No 2]* and *Ha*, some decisions of this Court had preserved State revenue-raising power by adopting a formalistic technique of application that focused only upon the terms of the taxing legislation. This Court in *Ha* unanimously abandoned that formalistic approach, without exception, but was divided upon whether a further constraint should be recognised, requiring an excise also to be a tax that discriminated in effect between local and imported goods.

461 The divide in this Court on this point turned upon the purpose of s 90. The majority in *Ha* recognised an additional purpose beyond the traditional purpose of s 90. The majority recognised this additional purpose by drawing from the terms and purpose of s 92—namely, protection of free trade. The correctness of this step was in issue in this special case but need not be resolved today. The central focus of the defendant, the State of Victoria, was instead upon the further fiscal imbalance that would be created by a broad approach such as that which was urged by the plaintiffs and the Attorney-General of the Commonwealth ("the Commonwealth"). With great respect, but great regret, it is necessary to say that the broad approach adopted by today's majority involves the diminution, disregard, or abolition of the three, century-old, constraints that were an integral part of the settlement in *Capital Duplicators [No 2]* and *Ha*.

(iii) The problematic assumptions and the way this case was argued

462 The plaintiffs are registered operators of Zero and Low Emission Vehicles ("ZLEVs"). The first plaintiff is the registered operator of an electric vehicle, and the second plaintiff is the registered operator of a plug-in hybrid electric vehicle. Under the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("the ZLEV Act"), the registered operator of a ZLEV must pay a charge for the use of the ZLEV on specified roads[1126]. ZLEVs are defined as any electric vehicle, hydrogen vehicle or plug-in hybrid electric vehicle that is not an excluded

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1125 Grewal and Mathews, "Economy, impact of Court's decisions on", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 230 at 231.

1126 ZLEV Act, s 7(1).

vehicle[1127]. Based on the distance each ZLEV travelled on specified roads[1128], the plaintiffs incurred ZLEV Act taxes ranging between 50 cents and 90 cents per day.

463 The plaintiffs, supported by the Commonwealth, submitted that the application of s 90 of the *Constitution* should extend to treat the ZLEV Act tax as an excise and therefore to require the recognition of the ZLEV Act as invalid. The acceptance of those submissions, and the expansion of the essential meaning and application of an excise, is achieved today on the back of several problematic assumptions.

464 Those problematic assumptions arose partly due to the manner in which the special case was argued. As explained later in these reasons, the reasonably anticipated economic effect of the ZLEV Act tax is to change the price of hydrogen or electricity for use in ZLEVs in the markets for the sale of hydrogen or electricity for use in ZLEVs. This effect was not argued by any party or intervener but it must be addressed in order to explain properly the substantive operation and economic consequences of the ZLEV Act tax. It is only as a consequence of the direct effect in this market that the ZLEV Act tax may affect, indirectly if at all, the pattern of demand in the market for the sale of ZLEVs themselves.

465 As a matter of substance, the very purpose of the ZLEV Act was to introduce a tax that would mimic a tax with a direct economic effect in the market for the sale of conventional fuel[1129]. As a tax with a reasonably anticipated direct effect in the markets for the sale of hydrogen or electricity for use in ZLEVs, and on the basis of the settlement reached in *Capital Duplicators [No 2]* and *Ha*, the plaintiffs and the Commonwealth might have chosen to argue that the ZLEV Act tax is an excise in the same way that a tax with a direct economic effect in the market for the sale of petrol is treated as an excise.

466 If the plaintiffs and the Commonwealth had made this argument in support of their assertion that the ZLEV Act tax is an excise then there would have been other issues to consider, such as whether hydrogen and electricity were goods. But such an argument would not have involved any radical change to the settled essential meaning of an excise.

467 The plaintiffs and the Commonwealth did not embrace such a narrow argument, which would have cleaved closely to existing precedent. Instead, they

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1127 ZLEV Act, s 3 definitions of "ZLEV", "electric vehicle", "hydrogen vehicle", and "plug-in hybrid electric vehicle".

1128 ZLEV Act, s 8(1).

1129 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183-1184.

adopted a much wider argument that had the potential vastly to expand the exclusivity of Commonwealth taxation powers at the expense of the revenue-raising powers of the States. They argued that it was sufficient for a tax to be an excise if it has a tendency to affect demand in a market for the sale of goods. They argued that the ZLEV Act tax had such an effect. In order to illustrate the problematic assumptions that underlie the way that this case was argued, and the way it is decided today, it is necessary in these reasons to address the market in which any reasonably anticipated direct economic effect of the ZLEV Act tax would occur.

468 Building upon statements or assumptions that were made by the plaintiffs and the Commonwealth, the decision today either: (i) treats the ZLEV Act tax as having a direct economic effect in the market for the sale of ZLEVs[1130], or (ii) assumes that no such direct economic effect is required because there is no necessary distinction between a direct economic effect and an indirect economic effect[1131]. Such treatment or such an assumption is wrong.

469 One way to illustrate the error in the suggestion that the ZLEV Act tax could have a direct economic effect in the market for the sale of ZLEVs is by considering its effect on one class of people who will pay the tax: existing ZLEV owners who are not presently contemplating replacing their ZLEV or purchasing another ZLEV. The ZLEV Act tax could not have any economic effect on their demand for the purchase of ZLEVs because they are not participants in that market. But, for them, the ZLEV Act tax could, nevertheless, have a direct economic effect in a different market. It could change the pattern of supply of hydrogen or electricity by increasing the price in the markets for the sale of hydrogen or electricity for use in ZLEVs, in the same way as a petrol tax would increase the sale price of petrol for use in non-ZLEVs. That increase in price could consequentially affect the demand by these existing ZLEV owners in the markets for the sale of hydrogen or electricity for use in ZLEVs. The extent of the change in demand by these existing ZLEV owners would depend upon the elasticity of demand and the ease with which these owners can switch to alternative transport. The short point is that for such existing ZLEV owners, not only could the ZLEV Act tax have no direct effect in the market for the sale of ZLEVs, but it also could not even have an indirect effect.

470 The same process of reasoning must be applied when considering the reasonably anticipated effect upon the class of people presently contemplating the purchase of a ZLEV. Any possible effect upon those people would only arise because the ZLEV Act tax increases the price of hydrogen or electricity for use in ZLEVs and therefore increases the price of those sources of energy for ZLEVs. It is only the effect of the ZLEV Act tax on the price for the sale of hydrogen or

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1130 See, eg, Reasons of Jagot J at [949].

1131 See, eg, Joint Reasons at [192].

electricity for use in ZLEVs that might indirectly affect the demand by prospective purchasers for the purchase of a ZLEV, in the different market for the sale of ZLEVs. In other words, a direct economic effect of the ZLEV Act tax in the markets for the sale of hydrogen or electricity might have a consequential and indirect effect in the market for the sale of ZLEVs.

471 The indirectness of the effect on demand is further illustrated by the fact that any indirect effect is, at best, a matter of speculation or further assumption rather than something which could be anticipated by a reasonable person[1132]. This point of speculation or assumption made by the plaintiffs and the Commonwealth, accepted by today's majority, was of a reasonably anticipated, real and substantial, reduction in demand for ZLEVs as a consequence of the relatively tiny ZLEV Act tax. Such a surprising point of speculation or assumption is unsupported by any empirical or economic analysis.

472 As an absolute proposition an assumption that a ZLEV Act tax of any amount would affect demand for ZLEVs would have the surprising consequence that demand for ZLEVs, costing between around $40,000 and $300,000, would be "naturally" reduced by a ZLEV Act tax amounting to, say, $10 annually. Of course, at the other extreme, it might not require much economic or empirical analysis to conclude that a ZLEV Act tax would have a natural tendency to reduce demand for the purchase of ZLEVs if the tax increased the price of hydrogen or electricity for use in ZLEVs by, say, $5,000 annually[1133]. But the amount of the tax, estimated to be between $260 and $330 per year[1134], is nowhere near that extreme. Even if it were permissible to engage in constitutional adjudication of uncertain facts by a judicial guess[1135], common sense might suggest that a tax of this size, indeed possibly even one of twice this size[1136], would have no real and substantial effect in the market for the sale of ZLEVs, where purchasing a ZLEV involves a capital cost of up to 1,100 times the amount of that tax and where the tax, tiny in comparison, is not even incurred at the time of purchase.

473 The ingenuity of the submission of the plaintiffs and the Commonwealth was that, by rolling up these assumptions into the neat euphemism of a "tax on ZLEVs", they concealed the necessary economic connection that must be

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1132 cf Joint Reasons at [192]-[194]; Reasons of Jagot J at [919], [923]-[925].

1133 See, eg, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

1134 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

1135 cf Joint Reasons at [151]-[154].

1136 See *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 597 ($50 per month, $600 annual, basic fee is "not a substantial fee").

reasonably anticipated between the tax and a market, such that they were able to ignore the relevant market. The submissions therefore concealed the extent of the expansion of the essential meaning of an excise from its present boundaries as a tax which is reasonably anticipated to have a direct economic effect on the supply-side of the market for the sale of goods. Silently, the test for an excise has now morphed, potentially to extend to a tax that is reasonably anticipated to have its direct economic effect in a market for business generally, labour, services, land, or other things. Provided that any of those matters are complements to a good, there will likely be a reasonable expectation of an indirect economic effect in the market for the sale of the complementary good. For the first time in the history of this Court that effect might be sufficient for a tax to be characterised as an excise.

474 In the course of seeking these proposed expansions, the submission of the plaintiffs and the Commonwealth was that this Court should apply this expanded essential meaning of an excise without the support of any empirical or economic analysis. But the language of economics and the economic assumptions of this Court have always been present, such as in the inquiry whether a tax has a "natural tendency" to affect the price of, or the demand for, goods. Suppressing the economic concepts that are inherent in the language spoken by the Court can lead to the adoption of reasoning that would, at the very least, raise the eyebrows of any competent economist. An example is the basis relied upon in support of the submission that the demand for ZLEVs costing between $40,000 and $300,000 would be affected by the relatively tiny annual ZLEV Act tax, whose effect is in a different market. That basis, considered below in these reasons at [698]-[699], was a second-hand reference to what may be a survey produced by reference to a statistically insignificant sample and conducted without any economically relevant questions[1137].

475 This Court today accepts that economics can assist in determining the reasonably anticipated impact of a tax, assessed at the time the tax is created. I join enthusiastically in the goal of explicit recognition of principles that have sometimes been silently applied or intuited. But the application of economic principles has never before been based only upon the broad essential meaning of an amorphous metaphor. Now, with one constraint ignored and two others removed, there will be great challenges in the process of identifying the new role of those economic principles.

(iv) The uncertain future

476 Against a background of a century of conflict, the desire for an apparently simple test for an excise is immediately understandable. But the siren call of simplicity comes at a high price. Today's decision has the effect that the test for an

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1137 See South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 November 2022 at 1413.

excise has shifted from one that involved substantial constraint—a tax with a reasonably anticipated, real and substantial, direct economic effect on the supply-side of a market for the sale of goods—to a simple-sounding test (a "tax on goods") in which the unbounded scope of a single preposition will considerably expand the concept of an excise and introduce uncertainty that will generate years of litigation.

477 The application of that simple-sounding test in this special case demonstrates the difficulties inherent in abandoning two of the central constraints previously contained within the settled essential meaning of an excise. The supply-side constraint is expressly abandoned by recognising that a consumption tax can be an excise[1138]. As explained further below, the label "consumption tax" in the context of s 90 does not bear its common meaning of a tax that is imposed at the point of purchase of a good. Rather than describing a tax whose effect is to increase the sale price of a good, it describes a tax whose effect, at any price at which the good is offered for sale, is upon the demand for the purchase of the good due to the cost of ownership, possession, use, or destruction of the good. The effect of a consumption tax is to change the pattern of demand on the demand-side of a market for the good, decreasing the equilibrium price. By abandoning the supply-side constraint, the range of taxes that are potentially excises is considerably expanded.

478 The directness constraint is also implicitly abandoned by treating an excise as extending beyond the market in which the direct effect of the tax is reasonably anticipated—namely, the increase of the sale price of hydrogen or electricity for use in ZLEVs—to a market where the effect is indirect, namely the market for the sale of ZLEVs themselves. The directness constraint is significant. If any tax that is reasonably anticipated to have an indirect effect on demand in a market for the sale of goods could be an excise, then almost any tax could potentially be an excise.

479 The expansion of the essential meaning and application of an excise to taxes whose reasonably anticipated direct economic effect is in a market for a complement to a good might not have mattered much if that complement was itself a good. For example, consider a fuel excise. It may not have mattered much to treat a large tax that is imposed by reference to the amount of petrol purchased as an excise, including (erroneously) by reason of its reasonably anticipated, but indirect, economic effect on the demand for cars in the market for the sale of cars. The reason the error of ignoring the supply-side and directness constraints might not have mattered much is that, applying the authority of *Ha*[1139], the direct effect of the large tax on the supply-side of the market for the sale of petrol would lead to the same conclusion that the tax was an excise. In other words, the result would be correct even if the reasoning were not.

1138 See Joint Reasons at [10], [134], [184], [192]; Reasons of Jagot J at [943], [949].

1139 (1997) 189 CLR 465.

480 But the error of ignoring or abolishing the supply-side and directness constraints can matter greatly in other circumstances. An example is a payroll tax with a direct economic effect in the market for the sale of labour that is used to produce goods. A payroll tax with a reasonably anticipated direct effect in the market for the sale of labour, rather than goods, has never been an excise[1140]. But if a reasonably anticipated *indirect* economic effect is sufficient then the payroll tax could be an excise, at least in some of its applications, merely because of its anticipated indirect effect in the separate market for the sale of the goods produced with that labour.

481 Other examples include taxes with a direct economic effect in the market for the sale of a business that uses goods, or a market for a service that uses goods. In those examples, a tax that increases the cost of conducting the business or service, with a reasonably anticipated increase in the price of sale of the business or service, could now be treated as an excise because the tax may also have a reasonably anticipated indirect effect in the market for the sale of the goods produced by that business, or the sale of the goods used by the service (respectively). A further example is industrial land taxes which have a direct economic effect in the market for the sale of land on which goods may be used or produced. Such taxes could now be treated as excises because they have an indirect economic effect in the separate market for the sale of those goods.

482 The expansion of the essential meaning of an excise has real implications for our federation. As the ability of the States to legislate in order to raise revenue is reduced, so too is the autonomy of the States. Forty years ago, in the context of the doctrine in *Melbourne Corporation v The Commonwealth*[1141] that a presupposition of the *Constitution* is the continued existence of the States as bodies politic, Professor Saunders presciently remarked[1142]:

> "What is the utility of a principle which protects the formal existence of States in a federation, or that nebulous concept of their capacity to function, while enabling them to be deprived of an unlimited and unpredictable range of functions or of the revenue resources to meet those functions?"

1140 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617, 651; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 381; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454. See also *Victoria v The Commonwealth* (1971) 122 CLR 353 at 369.

1141 (1947) 74 CLR 31 at 82.

1142 Saunders, "The National Implied Power and Implied Restrictions on Commonwealth Power" (1984) 14 *Federal Law Review* 267 at 275.

(v) The authority of today's decision

483 The extension of an excise to include taxes with a reasonably anticipated economic effect, whether direct or indirect, in a market for the sale of goods, whether on the supply-side or the demand-side of that market, is based on several assumptions that were not the subject of any argument. The lack of argument concerning these assumptions is unsurprising given the novelty of the approach proposed by the plaintiffs and the Commonwealth. The incremental nature of legal development, by small steps, usually eschews large assumptions. Large steps often conceal large assumptions.

484 It is necessary to address these assumptions in some detail, despite the lack of argument on some of those propositions, in order to show how the flaws in the assumptions call into question the authority of today's decision. A "proposition of law [that] is incorporated into the reasoning of a particular court ... even if it forms part of the ratio decidendi, is not binding on later courts if the particular court merely assumed its correctness without argument"[1143].

485 There was no argument about the reasonably anticipated direct effect of the ZLEV Act tax in the markets for the sale of hydrogen or electricity for use in ZLEVs. For instance, there was no argument concerning the contours of that market: the manner in which hydrogen or electricity for use in ZLEVs is purchased and the manner in which, and extent to which, the ZLEV Act tax might be expected to affect that market. Consequently, there was no argument concerning the assumption that a tax with a reasonably anticipated direct effect in one market (such as the direct effect of the ZLEV Act tax on demand in the markets for the sale of hydrogen or electricity for use in ZLEVs) can be an excise due to its reasonably anticipated indirect effect on demand in a different market for the sale of a good (such as a speculative indirect effect on demand for ZLEVs in the market for the sale of ZLEVs, due to the increase in the price of hydrogen or electricity for use in ZLEVs). For the reasons explained below, that assumption is incorrect as a matter of law.

486 Nor was there any argument concerning whether hydrogen and electricity are goods. The joint reasons assert, without argument on the point and without reference to any case in which the point was argued, that a "good" that is the subject of s 90 must be a tangible chattel[1144]. This could have large consequences for a

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1143 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]. See also *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *Felton v Mulligan* (1971) 124 CLR 367 at 413; *Spence v Queensland* (2019) 268 CLR 355 at 486 [294]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346 [28].

1144 Joint Reasons at [141]; cf *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 467.

digital future, including, for example, that a digital newspaper would not be a good and would instead be the provision of a service[1145]. It might also raise doubt about whether electricity would fall within that definition of a good[1146]. In this special case itself, had there been a focus upon the correct market, namely the market in which the ZLEV Act tax had its direct economic effect, that might have arguably resulted in the recognition that the market concerned the provision of a service. But there was also no argument concerning whether, even if an excise could arise as a result of the indirect effect of a tax on demand in a market for the sale of goods, that indirect effect could suffice where the direct effect of a tax was in the market for the provision of a service.

487 There was also no substantive argument concerning the test to be applied, or even any precision as to the relevant factors to be considered, if the essential meaning of an excise were to be extended to include taxes with an effect on the demand-side, rather than the supply-side, in a market for the sale of goods. Indeed, the factors upon which today's majority focuses[1147] are factors that concern the effect on the supply-side, not the demand-side, of the market for the sale of goods (the "immediate entry [of the tax] 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"[1148]).

488 A focus on the proper factors to be applied may reveal that the excises which arise due to what is thought to be a real and substantial effect on the demand-side of a market for the sale of goods are, in reality, taxes whose direct effect is on the supply-side of that market, or in a different market, with demand for those goods being reduced only consequentially.

489 For instance, an example given by the Solicitor-General of the Commonwealth in oral submissions in this case was the licence fee required to be paid to the British Broadcasting Corporation—the BBC—for the installation or use of a television receiver in the United Kingdom[1149]. A "television receiver" is

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1145 See *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2023] 2 WLR 513; [2023] 3 All ER 447.

1146 See, eg, *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 350 [85]. Compare *State Electricity Commission of Victoria v Commissioner of Taxation* (1999) 96 FCR 22 at 29 [22]-[23], 33 [54].

1147 Joint Reasons at [149]-[150]; Reasons of Jagot J at [849].

1148 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 492; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, fn 99.

1149 *Communications Act 2003* (UK), s 363.

defined as any apparatus "installed or used for the purpose of receiving (whether by means of wireless telegraphy or otherwise) any television programme service, whether or not it is installed or used for any other purpose"[1150]. It includes televisions, computers, laptops, mobile phones, tablets, and games consoles. Assuming this licence fee to be a tax, and assuming the legislation to have been passed by an Australian State requiring payment to a company that provided television services, the effect of the submission of the Commonwealth was that the fee would be an excise because it is a tax "on" televisions, computers, laptops, mobile phones, tablets, and games consoles. But any economic evidence that established that a reduction in demand for those goods in each different market could reasonably be anticipated would show that such a reduction in demand would be a consequence of the increase in the price in the different market for the service of the provision of television programmes. Any direct economic effect of the tax would be in the market for the provision of that service.

490 That example can be contrasted with a tax that is imposed upon a person immediately upon ownership of a television set, collectable by the supplier. Although such a tax is formally imposed on the consumer, the tax is, in substance, a deferred sales tax. Its effect is, in substance, to increase the price of a television set. As explained later in these reasons, the tax would be one whose reasonably anticipated direct effect is treated as equivalent to being on the supply-side of the market for the sale of television sets.

(vi) The approach adopted in these reasons

491 The approach to deciding this special case should have been to preserve the settlement achieved in *Capital Duplicators [No 2]* and *Ha*[1151]. The defendant only sought to have those decisions re-visited if this case were to be decided adversely to it by re-opening *Dickenson's Arcade*[1152] and overruling the result in that case. Since neither the result nor the essential reasoning in *Dickenson's Arcade* should be re-opened, it should not have been necessary in this case to depart from any aspect of the essential reasoning of *Capital Duplicators [No 2]* or *Ha*.

492 It might have been sufficient for these reasons simply to explain the considerations that militate against re-opening *Dickenson's Arcade*: constitutional structure; constitutional text; contemporary understanding; history; political choice; economics; precedent; authority; and a coherent future. But, since the

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1150 See *Communications Act 2003* (UK), s 368 and *Communications (Television Licensing) Regulations 2004* (UK), reg 9.

1151 See at [603]-[605].

1152 (1974) 130 CLR 177.

majority takes a different view[1153], and since submissions have been provided concerning the correctness of *Capital Duplicators [No 2]* and *Ha*, it is appropriate also to consider the correctness of those decisions even if no conclusion needs to be reached.

493 Ultimately, the conclusion in these reasons is that, on the way that this case was argued, the ZLEV Act tax cannot be treated as an excise because it does not have any direct effect on the supply-side of a market for the sale of goods. The only market for the sale of goods which was the subject of argument was the market for the sale of ZLEVs. Any reasonably anticipated effect of the ZLEV Act tax in that market would be indirect. Any reasonably anticipated effect of the ZLEV Act tax in that market would be on the demand-side of the market. And it was not shown that the ZLEV Act tax would have any reasonably anticipated effect that is real and substantial.

II. Section 90 and its purpose

(i) Section 90

494 Section 90 of the *Constitution* provides:

> "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
>
> On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise."

495 Section 90 is not a conferral of power. The conferral of a Commonwealth power to levy taxes, which does not purport to be exclusive, is contained in s 51(ii), not s 90[1154]. The conferral of a Commonwealth power to grant bounties on the production or export of goods, which does not purport to be exclusive, is contained in s 51(iii), not s 90. The conferral of a Commonwealth power to impose customs duties is contained in ss 88 and 89. To the extent that s 90 makes exclusive the Commonwealth powers to levy taxes (including customs duties) and to grant

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1153 Joint Reasons at [10], [133]; Reasons of Jagot J at [940].

1154 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 368.

bounties, s 90 is a restriction on State legislative power[1155]. As such, s 90 is not a head of legislative power to be construed "with all the generality which the words used admit"[1156].

(ii) The traditionally recognised purpose of s 90

496 As the majority of this Court recognised in *Ha*[1157], the original purpose of an exclusive Commonwealth power to impose duties of excise was to support the integrity of Commonwealth overseas trade or tariff policy. At a banquet in celebration of the 1890 Melbourne Conference, the tariff question was described by a former Premier of Victoria as "the lion in the path" of a "United Australasia"[1158]. Strong views were held in different ways by different States: "[i]n Victoria, South Australia and Tasmania, protectionism was urban and free trade rural. In New South Wales, free trade was urban and protectionism rural. In Western Australia, free trade was universal."[1159] The centralisation of excise duties supported a uniform customs policy. The history of s 90 provides powerful support for the notion that this was the purpose for making the power to impose excise duties exclusive to the Commonwealth Parliament.

497 At the 1891 Constitutional Convention in Sydney, Sir Henry Parkes proposed a resolution that relevantly provided that the "power and authority to impose customs duties shall be exclusively lodged in the federal government and parliament"[1160]. A motion by Mr Deakin proposed adding, after "customs duties",

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1155 *Ha v New South Wales* (1997) 189 CLR 465 at 498.

1156 cf *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16], quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225. See also *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 103 [142]; *Spence v Queensland* (2019) 268 CLR 355 at 405 [57], 456 [197]; *Love v The Commonwealth* (2020) 270 CLR 152 at 209 [131], 218 [168], 236 [236], 239 [244].

1157 (1997) 189 CLR 465 at 495.

1158 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 119.

1159 Sawer, *Australian Federal Politics and Law 1901-1929* (1956) at 14. See also *Cole v Whitfield* (1988) 165 CLR 360 at 386.

1160 *Official Report of the National Australasian Convention Debates* (Sydney), 13 March 1891 at 346. See also at 345.

the words "and duties of excise upon goods the subject of customs duties"[1161]. Sir Henry described the amendment as "implied in the resolution as it now stands"[1162]. But Mr Barton, assuming that the resolution would be a source of power for the Commonwealth Parliament, explained that the amendment was necessary to avoid the suggestion that "in giving to the federal government the power to deal with customs duties we did not include the power to deal with excise on articles subject to those customs duties"[1163]. Likewise, an amendment was proposed to add the words "and to offer bounties" after the words "customs duties" to avoid "subject[ing] the manufacturer in other less favoured districts to serious disadvantages"[1164].

498 The 1891 draft of the provision that became s 90 thus provided that the Commonwealth Parliament "shall have the sole power and authority ... to impose Customs duties, and duties of Excise upon goods for the time being the subject of Customs duties, and to grant bounties upon the production or export of goods"[1165]. By confining the exclusivity of excise duties to goods that were the subject of customs duties, the purpose of the provision was plain. That purpose was to support the integrity of Commonwealth overseas trade or tariff policy. As Professor Coper has observed, even without discussion this was the "obvious reason" for giving the Commonwealth exclusive control over tariff policy and "was perhaps taken for granted by some of the delegates"[1166].

1161 *Official Report of the National Australasian Convention Debates* (Sydney), 16 March 1891 at 361.

1162 *Official Report of the National Australasian Convention Debates* (Sydney), 16 March 1891 at 362.

1163 *Official Report of the National Australasian Convention Debates* (Sydney), 16 March 1891 at 363.

1164 *Official Report of the National Australasian Convention Debates* (Sydney), 16 March 1891 at 364, 368, 370.

1165 Williams, *The Australian Constitution: A Documentary History* (2005) at 428, reproducing "Draft of a Bill to Constitute the Commonwealth of Australia", 9 April 1891.

1166 Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1 at 24.

499 At the 1897 Adelaide Convention, Sir George Turner proposed the removal of the words "upon goods for the time being the subject of Customs duties"[1167]. There are no indications that this amendment was intended to change the purpose of the provision[1168]. Sir George thought that his amendment would also enlarge the power of the Commonwealth Parliament, but that view reflected a widespread misapprehension that s 90 involved the conferral of a power on the Commonwealth rather than the withdrawal of State power from an area that would otherwise involve concurrent State and Commonwealth power[1169].

500 The purpose of the provision in giving the Commonwealth exclusive control over tariff policy by tying excise duties to customs duties was also reflected in Sir John Downer's reference to a "great deal of discussion" between delegates in 1891, which Mr McMillan summarised saying that "under almost every conceivable circumstance an excise duty would be a sort of counterpoise to an import duty". Since the Commonwealth might choose not to impose any tariff, Mr McMillan added that "you may have an excise proposed upon an article which is not the subject of Customs duty"[1170]. As Griffith CJ observed in the earliest decision of this Court on s 90, the counterpoise of duties of customs and duties of excise is reflected throughout the *Constitution*: "whenever in the Constitution the expression 'duties of excise' is used, it is used in close juxtaposition with the expression 'duties of customs', as being a term relating to things of the same nature, and governed by the same rules"[1171].

501 The design of the *Constitution*, consistent with this close juxtaposition of customs and excise, is plain. Apart from s 90: s 55 provides for laws dealing with duties of customs and duties of excise to deal only with duties of customs and duties of excise, respectively; s 69 provides for the transfer of departments of customs and of excise in each State to the Commonwealth; s 85 provides for the period for vesting of property of a State used exclusively by departments controlling customs and excise; s 86 relevantly provides for the "collection and

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1167 *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 835-836. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 836.

1168 But compare *Ha v New South Wales* (1997) 189 CLR 465 at 495-496.

1169 Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1 at 23. See also *Official Report of the National Australasian Convention Debates* (Sydney), 16 March 1891 at 367 (Mr Baker).

1170 *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 836.

1171 *Peterswald v Bartley* (1904) 1 CLR 497 at 506.

control of duties of customs and of excise" to pass to the Executive Government of the Commonwealth on the establishment of the Commonwealth; s 87 makes provision for the distribution of the net revenue of the Commonwealth from customs and excise; and s 93 relevantly provides for the consequences, during at least the first five years after the imposition of uniform duties of customs, of duties of excise being paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, including the place at which those duties of excise will be taken to be collected.

502 On the view of an excise as a counterpoise to an import duty, the purpose of making the power to impose an excise exclusive to the Commonwealth was to reduce the prospect of State Parliaments undermining Commonwealth taxation laws implementing tariff policy or, perhaps more broadly, Commonwealth policy with respect to overseas trade. In that respect, the purpose of making excise duties exclusive to the Commonwealth supported the purpose of making customs duties exclusive to the Commonwealth. So too, that was the purpose for the exclusivity of the Commonwealth power in s 90 to "grant bounties on the production or export of goods". The exclusivity of bounties, as a "negative tax"[1172], is likewise confined to the production or export of goods as a means to support the integrity of Commonwealth overseas trade or tariff policy.

503 The removal, during the course of the Convention Debates, of the words that confined the exclusivity of excise duties to "goods for the time being the subject of Customs duties" might have had the salutary effect of avoiding State legislation that undermined a Commonwealth trade policy not to impose a tariff on particular goods. But it also distracted the courts from a focus upon the central purpose of s 90 with the effect that, to adapt and apply the words of Higgins J, it was "quite possible" that s 90 was interpreted such that it "exclude[d] from the power of the States more than was reasonably necessary"[1173]. In 1952, Professor Arndt observed[1174]:

> "Had it not been for the reluctance of the Court to take notice of the intentions of the founders of the Constitution, the Court might have been able to develop a narrow definition of taxes liable to interfere with Commonwealth tariff policy, for instance, 'taxes on goods currently subject to tariffs or other import restrictions'. Such a definition would, it seems,

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1172 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 141.

1173 *John Fairfax & Sons Ltd and Smith's Newspapers Ltd v New South Wales* (1927) 39 CLR 139 at 143.

1174 Arndt, "Judicial Review under Section 90 of the Constitution: An Economist's View: Part 1" (1952) 25 *Australian Law Journal* 667 at 677.

have been quite practicable. It would certainly have had the advantage of preventing the unforeseen restrictive effect of s 90 on State taxing powers."

504 Nearly half a century later, a minority of this Court in *Ha*[1175] similarly sought to tie the essential meaning of an excise in s 90 to the traditional purpose of the provision by requiring, as an additional element of the essential meaning of an excise, that the tax discriminate between goods produced overseas and those produced locally.

(iii) The creation of an additional, new, "free trade" purpose

505 In 1989, a very small number of Justices of this Court created an additional, new, purpose for s 90: free trade requiring a uniform exclusive Commonwealth fiscal policy concerning goods. This purpose was newly discovered. Its genesis did not lie in remarks such as those of Rich J in *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* ("the *Petrol Case*")[1176]. In that case, his Honour said that s 90 gave exclusive power to the Commonwealth over all indirect taxation by the term "customs and excise", and that adopting a narrower interpretation of "duties of excise" would lead to the "fiscal policy of the Commonwealth" being "hampered" due to a "concurrent power by another authority vested in the States"[1177]. His Honour's reference to a Commonwealth fiscal policy that was immune from interference by State Parliaments did not purport to address the extent of that exclusivity or the purpose for it. On the traditional view that the purpose for exclusivity of Commonwealth fiscal policy was to enhance control over overseas trade policy, Rich J was just restating the traditional purpose of supporting the integrity of Commonwealth overseas trade or tariff policy.

506 Nor did the new purpose, first discovered in 1989, find support in the decision of Dixon J in *Parton v Milk Board (Vict)*[1178], where his Honour said that by making the power in s 90 exclusive to the Commonwealth, "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

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1175 (1997) 189 CLR 465 at 511, 517.

1176 (1926) 38 CLR 408 at 437. See, eg, Dixon, "Section 90—Ninety Years On" (1993) 21 *Federal Law Review* 228 at 234.

1177 *Petrol Case* (1926) 38 CLR 408 at 437.

1178 (1949) 80 CLR 229 at 260. See also *Whitehouse v Queensland* (1960) 104 CLR 609 at 618.

not be hampered or defeated by State action"[1179]. Again, Dixon J did not say that the control over taxation of goods extended to any tax that has any connection with a market for the sale of goods. His Honour's focus was upon the policies of the Commonwealth over goods from a national perspective. Those are overseas trade and tariff policies. It has therefore been astutely observed that it might be doubted whether Dixon J "truly saw himself as departing far from the traditional opinion [of the purpose] of s 90"[1180]. Like Rich J before him, Dixon J did not explain the extent of the reach of this "real control" allocated to the Commonwealth over the taxation of commodities or the purpose for a provision that ensured that Commonwealth policies in relation to commodities should not be hampered by State action. Dixon J did not reject the traditional purpose of s 90 of supporting the integrity of Commonwealth overseas trade or tariff policy. Dixon J was saying nothing new.

507 The traditional purpose was maintained, and reiterated, in later decisions that relied upon the exposition of Dixon J in *Parton.* For instance, in the majority in *Western Australia v Chamberlain Industries Pty Ltd*[1181], Barwick CJ reiterated the remarks of Dixon J in *Parton* and, consistently with the traditional purpose of s 90, referred to the control by the Commonwealth Parliament over "the national economy as a unity which knows no State boundaries". Again, the need for that control was to support the integrity of Commonwealth overseas trade or tariff policy. Unsurprisingly, therefore, Barwick CJ said that "the essential nature of a duty of excise" was that it was "a tax upon the transaction of sale itself".

508 Again, in *M G Kailis (1962) Pty Ltd v Western Australia*[1182], and in similar terms in *Hematite Petroleum Pty Ltd v Victoria*[1183], Mason J reiterated that a "uniform fiscal policy for the Commonwealth" would be hampered if the Commonwealth's "exclusive power to grant bounties on the production [or export] of goods", which must be granted uniformly throughout the Commonwealth, could be undermined by State taxes. As Mason J explained, the justification for that "generally accepted" notion of a uniform, exclusive Commonwealth fiscal policy was the traditional purpose of s 90: "[i]f the States had power to impose excise

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1179 Compare Dixon, "Section 90—Ninety Years On" (1993) 21 *Federal Law Review* 228 at 234, citing Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 *Melbourne University Law Review* 296 at 308.

1180 Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 *Melbourne University Law Review* 296 at 308.

1181 (1970) 121 CLR 1 at 17.

1182 (1974) 130 CLR 245 at 265.

1183 (1983) 151 CLR 599 at 631.

duties then the Commonwealth Parliament's power to protect and stimulate home production and influence domestic price levels might be compromised"[1184].

509 The additional, new, purpose for s 90 that could justify expanding the scope of the exclusive Commonwealth fiscal policy beyond those taxes that discriminated, as a matter of substance, between foreign and local goods was first discovered by Mason CJ and Deane J in *Philip Morris Ltd v Commissioner of Business Franchises (Vict)*[1185]. Their Honours discovered the new purpose for s 90 by treating s 90 as part of a package of provisions, including s 92 (relevantly, that upon "the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free"). The other provisions that were said to combine to reveal the new, shared, purpose that was common to all of them were: s 51(ii) (which provides for the Commonwealth's legislative power with respect to "taxation; but so as not to discriminate between States or parts of States"); s 51(iii) (which provides for the Commonwealth's legislative power with respect to "bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth"); and s 88 (which provides that "[u]niform duties of customs shall be imposed within two years after the establishment of the Commonwealth"). Mason CJ and Deane J thought that those provisions revealed a new, shared, purpose for the Commonwealth as "an economic union, not an association of States each with its own domestic economy"[1186].

510 This new purpose was accepted by members of the majority in *Capital Duplicators Pty Ltd v Australian Capital Territory*[1187] ("*Capital Duplicators [No 1]*") and *Capital Duplicators [No 2]*[1188]. In each of these cases, by running together the traditional purpose of s 90 with the newly created "free trade" purpose, their Honours justified an expansive application of "excise" with the consequence that "duties of customs and of excise" in s 90 "must be construed as exhausting the categories of taxes on goods"[1189]. In each case, however, the majority nevertheless carefully constrained the metaphor of "taxes on goods" by reference to the supply-side and directness constraints.

1184 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 631.

1185 (1989) 167 CLR 399 at 426.

1186 (1989) 167 CLR 399 at 426.

1187 (1992) 177 CLR 248.

1188 (1993) 178 CLR 561.

1189 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

511 The first of those cases, *Capital Duplicators [No 1]*, was concerned with whether s 90 made the power of the Commonwealth Parliament to impose duties of excise exclusive of the legislative power of the Legislative Assembly of the Australian Capital Territory. In holding that it did, Brennan, Deane and Toohey JJ said that s 90 was concerned with "the creation and maintenance of a free trade area throughout the Commonwealth", in addition to the overseas trade or tariff-related concern of "uniformity in duties of customs and excise and in bounties"[1190]. In *Capital Duplicators [No 2]*, the question was whether the relevant duties imposed by the Legislative Assembly of the Australian Capital Territory were duties of excise. The majority, comprising Mason CJ, Brennan, Deane and McHugh JJ, reiterated with approval the additional, new, purpose of s 90 set out in *Capital Duplicators [No 1]*[1191].

512 The same approach to the additional, new, purpose of s 90 was taken in the joint judgment of the majority of this Court in *Ha*, comprising Brennan CJ, McHugh, Gummow and Kirby JJ[1192]. The majority ran together what had become the two purposes of s 90, saying that "'inter-colonial free trade on the basis of a uniform tariff'" was an objective that "could not have been achieved if the States had retained the power to place a tax on goods within their borders". It can be accepted that the *Constitution* generally had such broad purposes. It can also be accepted that ss 90 and 92 work together in the sense that "[t]o create a free trade area embracing the Australian colonies it was necessary for agreement to be reached about a uniform external tariff"[1193]. But the novelty of the decisions of the majority in *Capital Duplicators [No 2]* and *Ha*, building upon the ingenuity of Mason CJ and Deane J in *Philip Morris*, was that these related but separate purposes were conjoined and treated as though they were a single purpose of s 90[1194]. As observed by the minority in *Ha*, inter-colonial free trade was the purpose for s 92 and a uniform (external) tariff was the purpose for s 90[1195].

513 If the purpose of s 90 were to guarantee free trade between the States by a uniform national fiscal policy, then, on the assumption (contestable, for the reasons explained below) that State taxes would distort free trade whilst uniform Commonwealth taxes would not, the application of s 90 for more than a century since Federation is curious. Why would the terms of s 90 permit States an

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1190 (1992) 177 CLR 248 at 277-278.

1191 (1993) 178 CLR 561 at 586.

1192 (1997) 189 CLR 465 at 494, quoting *Cole v Whitfield* (1988) 165 CLR 360 at 386.

1193 *Cole v Whitfield* (1988) 165 CLR 360 at 386.

1194 See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 454-455 [22].

1195 (1997) 189 CLR 465 at 511.

unrestrained power to impose taxes on services? Why would the terms of s 90 permit States a power to impose fees for licences to carry on various businesses supplying goods? And, to adapt what Gibbs CJ said in *Hematite Petroleum*[1196], why would the terms of s 90 permit States to impose a wide range of other taxes and incentives that distort the relative price of goods between States: industrial land taxes, payroll tax, quotas on production or manufacture, and charges for power or freight or use of ports or railways?

514 The same point can be made in relation to the prohibition upon bounties in s 90 and the exceptions to that prohibition in s 91. A State bounty is a "negative tax"[1197] which has the same potential to disrupt free trade as a State tax with a direct economic effect on goods. But the exclusive Commonwealth power to impose bounties, like the exclusive Commonwealth power to impose excises, has been confined to those with an economic effect in a market for the sale of *goods*. Further, in the application of the meaning of "bounties" in s 90 it has been held that s 90 prohibits only "direct pecuniary bounties": s 90 does not "require that the States should surrender their function of encouraging otherwise than by direct pecuniary bounties, the production and export of goods"[1198]. Despite the possibility of other types of bounties impairing free trade between the States, it has been held that any wider interpretation of the prohibition on bounties would "produce quite devastating consequences, consequences which could not have been intended"[1199]. The powers of the States would be "much more restricted than has been supposed ever since federation"[1200].

515 Even if the newly created free trade purpose of s 90 were to be assumed to be correct, and even if it were to be assumed (controversially, as explained below) that State taxes that have a direct economic effect in a market for the sale of goods impede free trade more than uniform Commonwealth taxes in the same market, the newly created purpose could not justify treating as excises all those taxes that have any reasonably anticipated economic effect in markets for the sale of goods just as s 92 could not require absolute freedom of trade in goods.

516 The two limbs of s 92—free trade and commerce, and free intercourse—are concerned only to proscribe State laws that discriminate by imposing an unjustified

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1196 (1983) 151 CLR 599 at 617.

1197 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 141.

1198 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 141.

1199 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 148-149.

1200 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 133.

burden on any of those matters in one State compared with another[1201]. The newly created free trade purpose of s 90 could not require an absolute prohibition upon all State taxes concerned with goods. If the free trade purpose in s 92 were properly to be extended to s 90, then it would seem strongly arguable that as a matter of principle the limit should appropriately be identified to recognise as excises only those taxes that impose an unjustified burden on free trade in an interstate market for the sale of goods. In other words, beyond those taxes that are excises because, by application of the traditional purpose, they have a direct economic effect on the supply-side of the market for the sale of goods, the newly created purpose should only extend to taxes that are excises because their reasonably anticipated economic effect will unjustifiably burden free trade in an interstate market for the sale of goods. But such a principle was not explored in this case and it is unnecessary to say anything further about it.

III. The different concepts and different language

(i) The problems caused by inconsistently used terminology

517 One of the major difficulties with the jurisprudence on s 90 of the *Constitution* is that it is beset by the use of inconsistent and unclear terminology. Three concepts that are used inconsistently and that are easily misrepresented are: indirect and direct taxes; direct economic effect; and consumption and consumption tax. An inconsistent and unclear use of these terms in turn pollutes an attempt at clarity in the exposition of the essential meaning of an excise. The different uses of these concepts have led to the appearance of consistency in inconsistent reasoning and the appearance of inconsistency in consistent reasoning.

(ii) The misleading concept of an "indirect" tax

518 The concept of an "indirect tax" is the first ambiguity that vexes the history of s 90. One meaning of "direct taxes", which can be seen in early interpretations of the requirement to apportion direct taxes among the States in Art I, §2 of the *Constitution of the United States*, was those taxes that were concerned with real property and poll taxes[1202]. "Indirect taxes" were therefore any other kind of tax. That meaning of an indirect tax has never been adopted in the Australian constitutional context.

1201 *Palmer v Western Australia* (2021) 272 CLR 505 at 596 [261].

1202 Story, *Commentaries on the Constitution of the United States* (1833), vol 2, bk 3, ch 14 at 424; Chemerinsky, *Constitutional Law: Principles and Policies*, 3rd ed (2006) at 275; Chemerinsky, *Constitutional Law: Principles and Policies*, 7th ed (2023) at 301. See *Hylton v United States* (1796) 3 US 171. Compare *Flint v Stone Tracy Co* (1911) 220 US 107.

519 The second meaning of an "indirect tax" can be seen in the classic nineteenth century expression of indirect taxes by J S Mill. Mill said that an indirect tax was a tax "demanded from one person in the expectation and intention that [that person] shall indemnify [themself] at the expense of another"[1203]. That meaning of "indirect" was adopted in the earliest decision of this Court on s 90, *Peterswald v Bartley*[1204], and numerous times since[1205]. It is a meaning that has three significant difficulties.

520 The first difficulty is that the reasonably anticipated effect of a tax, or the tendency of a tax to be passed on to another, depends upon anticipated market forces rather than any manifested intention of Parliament. The second difficulty is that in many instances there may be no manifested parliamentary intention one way or the other. The third difficulty is that most taxes, at least those concerned with a stage in the process of production, manufacture, sale, or distribution, will be neither completely passed on nor completely absorbed. Hence, in this sense of "indirect" it has rightly been said that "there is nothing inherent in a particular tax which enables it to be classified as direct or indirect"[1206].

521 It might be doubted that this notion of manifested parliamentary intention as to who should bear the cost of the tax was at the heart of what Mill actually meant by an indirect tax. The real import of Mill's distinction, and the real sense in which he used "indirect" and "direct" to describe taxation, may have been to draw a distinction between taxes which were reasonably anticipated to have an economic effect on the supply-side of the market, and hence would be reasonably anticipated to enter into the price of goods (in an unknown proportion), and taxes which have an economic effect on the demand-side of the market and whose effect

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1203 Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), vol 2, bk 5, ch 3, §1 at 367.

1204 (1904) 1 CLR 497 at 512, quoting *Bank of Toronto v Lambe* (1887) 12 App Cas 575 at 582.

1205 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 300; *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 252; *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 549; *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 218; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 435.

1206 *Ha v New South Wales* (1997) 189 CLR 465 at 509. See also *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 553; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 413; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 435; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 610.

was on the demand by a consumer rather than the price of the commodity. Hence, in language that echoes the supply-side constraint, Mill spoke of direct taxes as being those that directly affect a consumer, such as by their effect on income or expenditure[1207], and said of indirect taxes that they were tolerated by "the easy manner in which the public consent to let themselves be fleeced in the prices of commodities"[1208].

522 This tighter sense of an "indirect tax" means that the manifested intention of the Parliament that enacted the tax is irrelevant: provided that the tax is on the supply-side of the market and enters the sale price of the commodity it will be indirect. But if a notion of parliamentary intention is to be added to the concept of an "indirect tax" then it would rightly be said that an excise is not always an indirect tax. Ultimately, however, "indirect tax" is an expression that should be avoided due to the confusion that can arise from the different senses in which it can be used and the different shades of meaning inherent in its use.

523 Since "indirect tax" has so many different shades of meaning the better approach is to focus, as a matter of substance, on the tendency that the tax has to increase the price of the goods[1209]. Even then there is imprecision, since the "price" of goods can, on a formal view, be seen simply as the amount charged by the seller but, on a substantive view, it might also include taxes payable on the sale but very shortly afterwards. More precisely, the focus should be upon the reasonably anticipated economic effect of the tax on the supply-side of a market for the sale of goods. Such an approach can be seen, expressly or impliedly, to some degree in almost every carefully considered judgment in this Court concerning s 90.

524 In the joint reasons in this case, it is suggested that any requirement that an excise be an "indirect tax" (presumably in this sense of a tendency to enter into the price) was "specifically and unanimously rejected"[1210] in the decision of this Court

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1207 Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), vol 2, bk 5, ch 3, §1 at 367.

1208 Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), vol 2, bk 5, ch 6, §1 at 417.

1209 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 302, quoting *R v Caledonian Collieries Ltd* [1928] AC 358 at 362; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 546, 560; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 436; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586. See also *City of Halifax v Fairbanks' Estate* [1928] AC 117 at 126.

1210 See Joint Reasons at [121].

in *Carmody v F C Lovelock Pty Ltd* in relation to duties of customs[1211]. That remark is wrong if it is meant to suggest that, in *Carmody*, Gibbs J had rejected the proposition that to be an excise the tax must have a reasonably anticipated economic effect on the supply-side of a market for the sale of goods. Indeed, only four years later, Gibbs J said, in relation to duties of excise, that since 1949 this proposition had been one which "no member of the Court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed"[1212].

525 The point of the decision was instead that a tax can, as a matter of substance, enter into the price of goods even if the tax is formally payable after the date of sale. In *Carmody*, the legislation in issue[1213] permitted the Minister to impose a "dumping duty" in relation to goods which were, amongst other things, sold to a person in Australia at less than the normal value of the goods at the date of exportation to Australia. The "dumping duty" was imposed upon the defendant importer after the goods had been delivered for home consumption and consumed[1214], so it did not appear in the formal price of the goods as sold. In his consideration of the "indirectness" of the tax, Gibbs J was addressing an argument that the tax could not be a customs duty because it was calculated by reference to "some past transaction and not on goods. Some of the goods may have been consumed by the time the tax is imposed."[1215]

526 The difficulty with this argument was that the liability for the tax would be known by an importer at the time of sale. Gibbs J concluded that the formal contrivance of timing could not prevent the conclusion that, as a matter of substance, the dumping duty increased the price of the goods sold by the importer and paid by the consumer. As Gibbs J explained, "the fact that the tax was retrospective in operation did not prevent it from being a duty of customs". For that reason, as his Honour then said, it was not decisive that "a tax has a tendency to enter into the price of the goods"[1216]. He was speaking of the price formally charged to the consumer. If the character of a tax as indirect, based on a tendency to enter into the price, were to be treated as one that could be defeated by requiring the payment of the tax one day after the sale then form would prevail over

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1211 (1970) 123 CLR 1.

1212 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 221.

1213 *Customs Tariff (Dumping and Subsidies) Act 1961* (Cth), s 7.

1214 See *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 8, 11, 20-21.

1215 (1970) 123 CLR 1 at 5.

1216 (1970) 123 CLR 1 at 27.

substance. No rational consumer would regard the price of the goods as excluding the tax that had to be paid immediately afterwards.

(iii) The need for, and need to identify, a market

527 For more than a century of jurisprudence on s 90, this Court has constantly focused on the need for a market. The reason for this is obvious. The concepts of price, supply and demand are economic concepts that relate to markets. The concept of goods as "articles of commerce"[1217] describes the operation of the sale of goods in a market. References to the economic effect on goods as "subjects of commerce"[1218] describe the effect on goods in a market. Reference to the effect on goods as "integers of commerce"[1219], or as "commodities"[1220], describes the effect on goods in a market. References to excises as "trading taxes" that are levied "in respect of commercial dealings in commodities"[1221] describe the operation of markets.

528 At least for the purpose of this special case, these expressions can all be encapsulated in the description of a "market for the sale of goods". It is possible that many of the expressions could also describe a market for the hire of goods, but if the direct effect of the tax were in such a market then in many cases it is likely that the market would be one for the provision of a service. Section 90 is

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1217 See, eg, *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 304; *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 253, 260, 267; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 547; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 479, 483, 485-486; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 467.

1218 See, eg, *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 374. See also "subjects of manufacture or production" in *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 63.

1219 *Ha v New South Wales* (1997) 189 CLR 465 at 497.

1220 See, eg, *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 300; *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 260; *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 547; *Bolton v Madsen* (1963) 110 CLR 264 at 271; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 231.

1221 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 231. See also *Attorney-General for British Columbia v Kingcome Navigation Co Ltd* [1934] AC 45 at 59, quoted in *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 300-301 and *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 259.

concerned with goods, not services. But this point need not be further considered in this case.

529 The centrality of the market for the s 90 inquiry means that it is not possible for this Court to avoid the exercise of identifying the relevant market. The effects of a tax on supply (after today, also demand), and consequently upon price, are effects that occur in a market. Without identifying the market in which the changes to supply (after today, also demand), and consequently changes to price, occur, it is impossible to speak with any clarity about those effects. Even if this Court were to attempt to avoid the identification of the market in which the tendency for economic effects on demand, supply and price were said to occur, in preference for some abstract approach based on a metaphor of the closeness of the tax to goods, this Court would—like Monsieur Jourdain, who spoke prose without knowing it[1222]—be identifying (or, perhaps, mis-identifying) a market without knowing it.

(iv) Direct economic effect

530 Another reason that the label "indirect tax" is best replaced by a focus upon whether the effect of the tax is on the supply-side of a market or the demand-side is that there is a different sense in which it has been held that an excise must be *direct*. In numerous cases it has been said, or held, that a tax will not be an excise unless it "directly" or "immediately" affects goods[1223]. In some cases this requirement of directness was further confined to a requirement that the tax be measured according to the quantity or value of goods produced or manufactured[1224]. The concern is one that reflects the need for the reasonably anticipated economic effect to be *directly* in a market for the sale of goods, and not indirectly as a result of some economic effect in another market.

1222 Molière, *Le Bourgeois Gentilhomme*, Act 2, Scene 4.

1223 *Petrol Case* (1926) 38 CLR 408 at 437; *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 303; *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 75; *Bolton v Madsen* (1963) 110 CLR 264 at 271; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 213, 231, 238; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 64, 70, 77; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 647. See also *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

1224 *Peterswald v Bartley* (1904) 1 CLR 497 at 509. See, eg, *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 602; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 647; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 412.

531 The requirement of the directness of a reasonably anticipated economic effect in a market for the sale of goods excludes taxes whose effect in that market for the sale of goods is due to those goods being a complement to something else in a different market in which the tax does have a direct effect: for example, in a market for the sale of a business generally, labour, services, land, or other things. In other words, a tax will not be an excise in any of its applications if its direct or immediate economic effect is in a market for: the sale of a business generally (such as a tax that increased the price of a business by requiring increased payment to conduct the business)[1225]; the sale of labour or services (such as a payroll tax)[1226]; the sale of land (industrial land taxes)[1227]; or the sale of other things.

532 For example, a tax that increases the cost of labour in a market for the sale of labour should not be an excise in any of its applications even if it were expected to have an indirect effect upon the price of the goods that are produced with that labour. So too, a tax that increases the cost of using industrial land should not be an excise in any of its applications even if it were expected to have an indirect effect upon the price of the goods that are produced on that land. Again, a tax that increases the price of a business should not be an excise in any of its applications even if it were expected to have an indirect effect upon the price of the goods that are produced by that business.

533 There will be some hard cases where the market in which the tax has its direct effect will be disputed. It might not have been difficult to conclude, for example, that a tax imposed by reference to each half acre of land planted with chicory was in substance a tax "directly affecting commodities"[1228], namely a tax with its direct economic effect in the market for the sale of chicory rather than a tax with a direct economic effect in the market for the sale of land with only an indirect economic effect in the market for the sale of chicory. But, more controversially, although still accepting that "a direct relationship between the tax

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1225 *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 75; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 650-651.

1226 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617, 651; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 381; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454. See also *Victoria v The Commonwealth* (1971) 122 CLR 353 at 369.

1227 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 651; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 381.

1228 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 303.

and the goods must be shown"[1229] and that the tax must be "directly related ... to the particular commodity"[1230], it was later held by a statutory majority (in a decision considered in detail below) that a tax based on the ownership of livestock had its direct effect on the supply-side of the market for the sale of meat, milk, wool, and other commodities produced from the livestock rather than having its direct effect upon the demand-side of the market for the sale of the livestock. It was, however, accepted that the same tax did not have a direct economic effect on the supply-side with respect to other types of livestock, such as horses and foals, which were not used or kept for production and was not an excise in that respect[1231].

(v) "Consumption", "consumption tax", supply-side and demand-side

534 There are numerous, and inconsistent, meanings of "consumption" and "consumption tax". The broadest meaning of "consumption" is simply as a short-hand to describe taxes that have goods as a subject matter of concern rather than people (poll taxes) or land. In this sense a consumption tax has been described as a tax "on articles of consumption"[1232]. Only slightly narrower than this, one meaning of consumption tax adopted in early decisions of the Supreme Court of the United States was a tax that had goods as the subject matter of concern where the goods were to be used in the course of business[1233].

535 A narrower, but colloquial, meaning of a "consumption tax" is a tax that is imposed upon a seller at the point of sale of goods. Such a tax has a direct effect on the supply-side of that market for the sale of goods. But this is not the concept of consumption in the *Constitution*, and not the sense in which it has generally been used in relation to s 90. The sense in which "consumption" is used in the *Constitution* concerns the ownership, possession, use, or destruction of goods which follows the sale of the goods. For instance, s 93 of the *Constitution* refers to "goods produced or manufactured in a State and afterwards passing into another State for consumption". As Quick and Garran said of this reference to consumption in s 93[1234]:

1229 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 77.

1230 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 71.

1231 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 70, 78.

1232 Story, *Commentaries on the Constitution of the United States* (1833), vol 2, bk 3, ch 14 at 419.

1233 See, eg, *Flint v Stone Tracy Co* (1911) 220 US 107 at 151.

1234 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 862.

> "'Consumption' is a term of Economics, applied to denote the absorption, by use, of all kinds of wealth. It is the converse of production; production having reference to the creation of wealth, and consumption to its utilization ... The expression 'passing into another State for consumption' is not intended to imply that complete consumption within the State should be contemplated, but merely that distribution to consumers within the State is contemplated. Goods are 'for consumption' in a State if it is intended that they shall be retailed in that State."

536 It is in this sense that the word "consumption" was used by Barwick CJ in *Anderson's Pty Ltd v Victoria*[1235] when he referred to the "movement of the goods into consumption" to describe the process that preceded the "consumption" by a consumer's ownership, possession, use, or destruction of goods. The events that precede consumption are those on the supply-side of the market. The events of consumption, and those beyond consumption, are on the demand-side of the market.

537 In order to identify whether a tax is a consumption tax there are two necessary steps. First, it is necessary to identify the market in which the tax is reasonably anticipated to have its direct effect. Secondly, it is necessary to identify whether the direct effect in that market is on the supply-side (so that it will not be a consumption tax) or the demand-side of the market (so that it will be a consumption tax). These questions are assessed as a matter of substance, not statutory form. The mere legislative focus on ownership, possession, use, or destruction of goods, and the mere timing of the tax, will not necessarily mean that, as a matter of substance, a tax is a consumption tax[1236]. In other words, in exceptional cases at the margins, a tax that, in formal economic terms, takes effect on the demand-side of a market for the sale of goods will be treated in law in the same way as a tax on the supply-side of the market provided that its reasonably anticipated economic effect is, or is nearly, identical.

538 A tax that is imposed after the sale of goods, by reference to concepts involving the ownership, possession, use, or destruction of goods, might be a consumption tax. But not necessarily. It is important to identify the purpose of the tax and the market in which the tax is reasonably anticipated to take effect. For example, a tax whose purpose concerns the sale of goods in a second-hand market, and is calculated by reference to such sales, will have a reasonably anticipated direct economic effect on the supply-side of that second-hand market even if the form of the tax were expressed by reference to the ownership of the goods by the

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1235 (1964) 111 CLR 353 at 365.

1236 See also *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 8, 27.

first retail purchaser of those goods immediately prior to sale. In substance the tax is upon sale, not ownership.

539 Likewise, a tax will not be a consumption tax if it is concerned, as a matter of substance, with a sale of goods but is formally imposed on the consumer and post-dated, merely as a matter of timing and with no substantively different effect, until after the sale. An example is a tax that is purportedly based on the ownership of a good, payable immediately after sale to the seller, with the amount of the tax calculated by reference to the sale price of the good. The total outlay for the consumer to acquire the good, as a matter of substance, will be the amount paid to the seller combined with the amount of tax. The mere criterion of liability[1237] being an event after sale will not prevent the tax from being treated, as a matter of direct economic effect, in the same way as if it had a direct effect on the supply-side of the market for the sale of the good. For any rational consumer, the direct effect of the tax is no different from a change in the pattern of supply of the good, because there is, as a matter of substance, a consequent increase in the immediate "price plus tax outlay"[1238] for the consumer.

540 These examples illustrate a point that has been described by economists as a principle of equivalence and which was properly accepted in carefully constructed submissions in oral argument by the Solicitor-General for the State of Victoria. The economic theory of equivalence is that "a tax imposed on transactions in a market [such as sale] should have the same impact whether it is *formally* levied on the consumer or the producer"[1239] and "the ultimate incidence of a tax cannot be assessed simply by looking at where the tax is proximately levied"[1240]. Importantly, this principle of equivalence assumes that the *same* tax is imposed by reference to the *same* transaction and that there are no "differences in the salience of the two taxes among market participants" and no "differences in the costs of taxpayer compliance or tax administration"[1241]. Indeed, even when the same tax is imposed by reference to the same transaction, empirical evidence has sometimes suggested that "taxes included in prices (eg, excise taxes) have a larger

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1237 See below at [592]-[594].

1238 Borck et al, "Tax Liability-Side Equivalence in Experimental Posted-Offer Markets" (2002) 68 *Southern Economic Journal* 672 at 681.

1239 Auerbach, "Tax Equivalences and Their Implications" (2019) 33 *Tax Policy and the Economy* 81 at 82 (emphasis added).

1240 Kotlikoff and Summers, "Tax Incidence", in Auerbach and Feldstein (eds), *Handbook of Public Economics* (1987), vol 2, 1043 at 1046.

1241 Auerbach, "Tax Equivalences and Their Implications" (2019) 33 *Tax Policy and the Economy* 81 at 83.

impact on consumer responses than those that are added to seller-quoted prices"[1242]. Different market effects might also occur due to the extent of a delay between the transaction and the tax effects that are experienced.

(vi) "Excise"

541 The central issue in this case concerns the essential meaning of "excise" in s 90 of the *Constitution*. It suffices at this point of these reasons to emphasise that the different meanings of "excise" have been confused by the different meanings of "indirect tax" and "consumption". In different contexts "excise" has been used to mean different things. It also suffices at this point simply to describe broad uses of the term "excise" that have never been accepted in Australian constitutional discourse.

542 A broad meaning of "excise" was adopted in an early decision of the Supreme Court of the United States in 1796 in the context of rejecting the submission that an annual tax on carriages for the conveyance of people was a direct tax that did not comply with the apportionment requirements of Art I, §2 of the *Constitution of the United States*. Paterson J said that there was "no clear and precise idea to the mind" concerning the meaning of "excise" but the framers of the *Constitution of the United States* had clearly intended that Congress should have full power over every species of taxable property[1243]. He held that all taxes concerning things that people spend money upon, "expenses or [articles of] consumption", are indirect taxes, quoting from Adam Smith to the effect that a person's expense is taxed "by taxing the consumable commodities upon which it is laid out"[1244].

543 A broad approach to "excise" was also taken by Blackstone, who divided all perpetual taxes into customs and excises. Customs were taxes payable on merchandise that was exported or imported. But "[d]irectly opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption"[1245]. This broad and loose meaning of an excise, as

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1242 Auerbach, "Tax Equivalences and Their Implications" (2019) 33 *Tax Policy and the Economy* 81 at 90.

1243 *Hylton v United States* (1796) 3 US 171 at 176.

1244 *Hylton v United States* (1796) 3 US 171 at 180, quoting Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 5th ed (1789), vol 3 at 331.

1245 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 8 at 308.

any inland (or home) tax, crossed the Atlantic after it was picked up by Story[1246], and it was then applied by the Supreme Court of the United States, in the context of a broad conferral of power on Congress to levy excise taxes, to extend to all taxes "laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges"[1247]. The Blackstonian approach to "excise" was described by Viscount Simon LC in *Atlantic Smoke Shops Ltd v Conlon*[1248] as one that treated an excise as any inland tax at all that was "for convenience collected through the machinery of the Board of Excise"[1249], illustrating the loose usage by the example of a tax on owning a dog.

IV. Essential meaning and application of a concept

(i) Essential meaning and the correct level of generality

544 In *Matthews v Chicory Marketing Board (Vict)*[1250], Dixon J distinguished between the essential meaning, or connotation, of an excise and the application, or denotation, of that essential meaning. The difference between those two notions has been a central feature of constitutional jurisprudence in this country for a century[1251]. Both are shaped by the purpose of the provision expressed at the appropriate level of generality.

545 The proper approach to the essential, unchanging, meaning of a constitutional expression is usually to characterise it at a high level of generality. Since the *Constitution* was created to endure for centuries, a high level of generality is usually appropriate in order to ensure the constitutional provisions are able to be applied to new facts, events, and circumstances. Nevertheless, there are instances where setting the essential meaning of a provision at too high a level of

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1246 Story, *Commentaries on the Constitution of the United States* (1833), vol 2, bk 3, ch 14 at 423-424.

1247 *Flint v Stone Tracy Co* (1911) 220 US 107 at 151, citing Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*, 7th ed (1903) at 680. See also *Pacific Insurance Co v Soule* (1868) 74 US 433 at 445; *Patton v Brady, Executrix* (1902) 184 US 608 at 617-618.

1248 [1943] AC 550.

1249 [1943] AC 550 at 565.

1250 (1938) 60 CLR 263 at 293, 299.

1251 See *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 637 [57].

generality can have the effect that it no longer accurately reflects the purpose of the provision.

546 An example of a case that illustrates the need to set the essential meaning of a provision at the correct level of generality is *Cheatle v The Queen*[1252]. One of the purposes of s 80 of the *Constitution* in requiring that trials be conducted on indictment has been said to be "to prevent oppression by the Government"[1253]. It would contradict that purpose for the essence of a jury to be treated at a very high level of generality as no more than any adjudicative body (which could be comprised entirely of a person or persons holding the office of a judge). The "essential features" that were, and are, "connoted" by the words "trial by jury" are a trial by an adjudicative body, comprised of representatives of the community, who are unanimous in any decision reached[1254]. Other aspects, such as the need for the representatives to be 12 in number, which was a contemporary aspect of the meaning in 1901, are not an "essential feature"[1255].

(ii) Scope of application and technique of application

547 Once the essential meaning of a clause or provision is identified, a court must apply that meaning to the facts and circumstances before it. Issues can arise concerning the technique by which the essential meaning is to be applied as well as the scope of that application. There is a basic difference between the two[1256]. Scope of application, or inessential meaning, is concerned with the identification of the circumstances to which the essential meaning of an excise applies. Technique of application is concerned with the manner in which those circumstances are to be identified. The long and tortured history of different approaches to the application by this Court of the essential meaning of an excise in s 90 has involved difficult issues of both technique of application and scope of application.

1252 (1993) 177 CLR 541.

1253 *Brownlee v The Queen* (2001) 207 CLR 278 at 288-289 [21], 330 [147], referring to *Williams v Florida* (1970) 399 US 78 at 100.

1254 *Cheatle v The Queen* (1993) 177 CLR 541 at 557, citing *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375. See also at 559-560.

1255 See *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54], 303 [71].

1256 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, 589, 591 comparing issues of "application"/"nature" and those of a "determinant".

V. The traditional essential meaning and application of excise

(i) Traditional essential meaning of excise

548 The earliest approach taken in this Court to the essential meaning of an excise was the decision in *Peterswald*[1257]. The question in that case was whether licence fees payable annually by persons carrying on the business of manufacturing beer for sale were an excise. The licence fees were a tax. The licence fees had a real and substantial effect in a market by reference to the value of money of that time: £30 if the business was within the city of Sydney and £20 otherwise[1258]. Any direct economic effect of the licence fees would not be in the market for the sale of beer. The reasonably anticipated direct effect was upon the value of the business itself, and therefore in the market for the sale of the business. As an increased cost of the business generally, the reasonably anticipated effect of the fees is that they would directly increase the price at which any such business could be purchased. The indirect economic effect of the fees might be, however, to increase the price of the goods sold by the business (beer).

549 This Court (Griffith CJ, Barton and O'Connor JJ) unanimously held that the licence fees were not an excise because such a tax on the manufacturer was not an excise[1259]. The Court treated the essential meaning of an excise as a tax on goods "'produced or manufactured in the States' ... analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax"[1260]. The *Peterswald* approach to the essential meaning of an excise was endorsed in *R v Barger*[1261] by Griffith CJ, Barton and O'Connor JJ and separately, but in broader terms, by Higgins J.

(ii) Traditional application of the essential meaning of excise

550 Although the traditional essential meaning was tied closely to the traditional, and still accepted, purpose of s 90, its scope of application was not straightforward in *Peterswald*. First, there were the problems, three of which were discussed above, with the requirement that the tax be an "indirect tax"[1262]. One of those problems in *Peterswald* was the difficulty in identifying whether the tax was

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1257 (1904) 1 CLR 497.

1258 *Liquor Act 1898* (NSW), s 71(6).

1259 (1904) 1 CLR 497 at 512.

1260 (1904) 1 CLR 497 at 509.

1261 (1908) 6 CLR 41 at 73-74, 77, 117.

1262 Above at [518]-[526].

intended by Parliament to be borne by the beer manufacturers, upon whom it was imposed. Related to this was the difficulty in justifying the requirement that the tax needed to be imposed by reference to the quantity or value of goods produced or manufactured.

551 The element of an "indirect tax", including this sense of parliamentary intention, was eventually abandoned as part of the essential meaning of an excise. As explained above, the focus moved to the reasonably anticipated direct economic *effect* of the tax on the supply-side of the market for the sale of goods, rather than whether there was an *intention* for the tax to have an economic effect on the supply-side because the intention was that the producer, manufacturer, retailer, or distributor would bear the cost of the whole of the tax (such that the market price would be unaffected on the supply-side).

552 Secondly, there was the question of what was meant by a tax being paid on "local" or "domestic" production or manufacture of goods "in the States". Did that mean production or manufacture of goods in Australia or in a particular taxing State? In other words, was the purpose of reducing the risk of State legislation undermining Commonwealth overseas trade or tariff policy best served by a focus upon whether State taxes discriminate between goods produced or manufactured in Australia compared with overseas[1263]? Or was it best served by a focus upon whether State taxes discriminate between goods produced or manufactured in the taxing State compared with elsewhere, including other States and overseas[1264]?

553 It may be that both approaches are correct. In other words, the traditional purpose of s 90 might be best served by a proscription upon any State tax that discriminates, as a matter of substance, between goods based upon their origin of production or manufacture. Hence, all of the following would be an excise: a tax in Western Australia that applied in substance mainly to goods that were produced or manufactured overseas; a tax in New South Wales that applied in substance mainly to goods that were produced or manufactured outside New South Wales; and a tax in South Australia that applied in substance mainly to goods that were produced or manufactured in South Australia.

554 Thirdly, there was the question of how to test for whether a tax discriminates between goods that are produced or manufactured in a particular State or in Australia, and goods that are produced or manufactured elsewhere. It would be necessary, by treating the question as one of substance rather than form,

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1263 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 479-480; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 630-631.

1264 *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 526-527; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 638.

to identify the goods upon which the tax is, in substance, imposed. It might even be arguable that an excise includes a State tax that formally applies to all goods if it could reasonably be expected that the effect of the tax was to discriminate between goods in that State and elsewhere.

VI. Expansion of the essential meaning of excise after *Peterswald*

(i) The first steps in expansion

555 The first expansion of the essential meaning of excise was from taxes that were based upon the quantity or value of domestically produced or manufactured goods to include taxes that were calculated by reference to matters concerning the distribution or sale of goods. This step was significant because a tax that is calculated by reference to the quantity or value of production or manufacture of local goods might be more likely to discriminate between local and imported goods than a tax that is calculated by reference to matters concerning distribution or sale[1265]. The effect on Commonwealth overseas trade or tariff policy might, therefore, be expected to be less pronounced.

556 The expansion occurred in the *Petrol Case*[1266], where a majority of this Court (Gavan Duffy J dissenting) held that a tax imposed on a producer by reference to the point of sale could be an excise. All members of the majority, except Rich J, emphasised that the tax on petrol at point of sale was an excise but only because the seller was the producer, such that it was in substance a tax on domestic production[1267]. As Isaacs J said, the tax at point of sale (in that case, sale by a producer) had to be "so connected with the production of the article sold ... as in effect to be a method of taxing the production of the article. But [it would not be an excise] if [it was] in fact unconnected with production and imposed merely with respect to the sale of the goods as existing articles of trade and commerce"[1268]. And Higgins J emphasised that an "excise duty means a duty on the manufacture, production [etc] in the country itself; and it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption"[1269]. Higgins J's reference to consumption was not to continuing usage after sale, but rather to the use or destruction on sale, such as the sale of gas that is burned on delivery.

1265 *Ha v New South Wales* (1997) 189 CLR 465 at 508-509.

1266 (1926) 38 CLR 408.

1267 (1926) 38 CLR 408 at 419-420, 426, 430-431, 435, 436, 439.

1268 (1926) 38 CLR 408 at 426.

1269 (1926) 38 CLR 408 at 435.

557 The only substantially reasoned judgment of the majority in the *Petrol Case* not to emphasise the necessary link between sale, on the one hand, and domestic production or manufacture, on the other, was that of Rich J. His Honour said only that an excise was an "indirect" tax (which was intended to be passed on to a consumer), but he also referred to the possibility of a tax on use or consumption being an excise[1270].

558 When the reasoning in the *Petrol Case* was adopted and applied by the Court very shortly afterwards in *John Fairfax & Sons Ltd and Smith's Newspapers Ltd v New South Wales* ("the *Newspapers Case*")[1271], Rich J explained the reason for his apparently expansive approach recognising that taxes on use or consumption might be excises. His Honour had not intended to recognise that a consumption tax could be an excise. Rather, he had been concerned to prefer substance over form. For instance, a tax would not cease to be a customs duty "if the States were allowed to impose a tax immediately upon commodities imported from abroad"[1272]. Similarly, a tax whose direct economic effect was on production or manufacture would still be an excise even if, as a matter of form, it was assessed and paid at the time of consumption or use.

559 The traditional focus on domestic production was later reiterated by Rich J and Starke J, two of the three members of the majority in *Matthews*[1273]. In that case, the majority held that a levy on producers of chicory, based on the area of land planted with chicory, was an excise. Rich J and Starke J emphasised the importance of planting chicory as a step in production[1274]. By contrast, the third member of the majority, Dixon J, did not require the sale to be directly connected with the course of production[1275].

(ii) Dixon J's flirtation with a consumption tax as an excise

560 As a barrister, Owen Dixon KC had given evidence to the Royal Commission on the Constitution of the Commonwealth that s 90 should be amended to make exclusive the power of the Commonwealth Parliament to "impose taxes in relation to the importation, production, sale, purchase, use, and

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1270 (1926) 38 CLR 408 at 437.

1271 (1927) 39 CLR 139.

1272 (1927) 39 CLR 139 at 147.

1273 (1938) 60 CLR 263.

1274 (1938) 60 CLR 263 at 281, 286.

1275 (1938) 60 CLR 263 at 300, 303-304.

consumption of goods"[1276]. With the unintentional encouragement of Rich J, Dixon J later expressed the view that this was what s 90 of the *Constitution* meant after all. He achieved this interpretation by purporting to express the essential meaning of an excise at a higher level of generality.

561 In *Matthews*[1277], Dixon J asserted that "[t]he history of the word 'excise' [did] not disclose any very solid ground for saying that ... an essential part of its connotation" was that the duty "should be confined to goods of domestic manufacture or production". Instead, its essential meaning—or, as Dixon J expressed it, its "basal conception"—was expressed at a much higher level of generality by the metaphor of a tax "upon goods" or a tax "in respect of commodities" which was shown to be a "tax directly affecting commodities"[1278].

562 As Dixon J recognised, the difficulty with expressing the essential meaning of an excise in s 90 at such a high level of generality by a metaphor such as a "tax on goods" (or "upon goods") is that the scope for judicial application is vast[1279]. The essential meaning, by the metaphor of a "tax on goods", provides very little guidance as to the type and degree of reasonably anticipated economic effect of the tax in the market for the sale of goods, the factors to be considered in establishing that economic effect, or the weight to be ascribed to the relative factors. The scope of application and technique of application of this metaphor become matters of great uncertainty. Unsurprisingly, as early as 1926, Higgins J said that "the denotation of [excise] ... has greatly fluctuated"[1280]. A little more than a decade later, Dixon J observed that the term "has never received any exact application"[1281].

563 The approach of Dixon J in *Matthews* was unique in the history of decisions concerning s 90. Dixon J considered that the connection to production required in the *Petrol Case* was confined to "strong dicta" in the judgments of Isaacs J and Higgins J[1282]. By relying on the result in the *Petrol Case* and the *Newspapers Case*, which recognised a tax at the point of sale as an excise, without the confining

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1276 Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Melbourne, 13 December 1927 at 779.

1277 (1938) 60 CLR 263 at 299.

1278 (1938) 60 CLR 263 at 300, 303, 304.

1279 (1938) 60 CLR 263 at 304.

1280 *Petrol Case* (1926) 38 CLR 408 at 435.

1281 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 293.

1282 (1938) 60 CLR 263 at 300.

aspects of the reasoning of the majority in the *Petrol Case*[1283], Dixon J reasoned that[1284]:

> "there is no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production".

Later in his reasoning, Dixon J concluded that to be an excise "[t]he 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"[1285].

(iii) The flirtation is short-lived

564 The reasoning of Dixon J in *Matthews* was referred to with approval by Rich and Williams JJ, who combined with Dixon J in *Parton* to form the majority[1286]. But Rich and Williams JJ did not think that Dixon J had substantially departed from all the preceding authority on s 90, because they also said that a duty of excise "must be imposed so as to be a method of taxing the production or manufacture of goods" and that the taxpayer would be intended to pass the cost of the tax on to the purchaser[1287]. In other words, consistently with the reasoning in the *Petrol Case* as applied in the *Newspapers Case*, a tax imposed at the point of sale could be an excise, but only if it was, in substance, a method of taxing production or manufacture[1288]. Their conclusion was that the tax for every gallon of milk that was sold or distributed was an excise because the sale or distribution by the taxpayers (producers) affected the milk as "articles of commerce"[1289].

565 It may be that the only point that Dixon J intended to make was that substance was to be preferred over form so that a tax that had a reasonably

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1283 See also *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 401, 408.

1284 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 300.

1285 (1938) 60 CLR 263 at 304 (emphasis added).

1286 (1949) 80 CLR 229 at 252-253, 260.

1287 (1949) 80 CLR 229 at 252.

1288 (1949) 80 CLR 229 at 252.

1289 (1949) 80 CLR 229 at 253.

anticipated direct economic effect on production or manufacture would still be an excise if it were to be calculated at a later point such as at distribution or sale or even consumption. In that sense, Dixon J would not have intended to depart substantially from previous authority in the application of the essential meaning of an excise as a tax on goods. Indeed, after formulating the purpose of s 90 as giving "the Parliament a real control [over] the taxation of commodities", Dixon J emphasised that "[i]f the exclusive power of the Commonwealth with respect to excise did not go past manufacture and production it would with respect to many commodities have only a formal significance"[1290]. His concern in making the expansion appeared only to be one of ensuring a preference for substance rather than form.

566 Whether or not Dixon J intended to extend an excise even to taxes that, as a matter of substance, were consumption taxes, Dixon J acknowledged in *Parton* that his reasoning in *Matthews* might need to be modified to exclude entirely from the application of the essential meaning of an excise a tax levied upon the consumption of goods[1291]. The reason given by Dixon J in *Parton* for acknowledging the possibility that this was an error in *Matthews* was the decision of the Privy Council in *Atlantic Smoke*[1292]. Over a decade later, his Honour was more candid in recognising his error in *Matthews*[1293] as well as another error that he made in *Parton*, for which he separately "repent[ed]"[1294].

567 The decision in *Atlantic Smoke* concerned whether a tax on the consumption of tobacco was within the legislative power of the Province of New Brunswick. The legislation imposed the tax on the consumer but, by regulations, the vendor was made an agent of the Minister for the purposes of collecting the tax. Two issues arose. The first issue was whether the tax was beyond the power of the legislature of New Brunswick because it fell outside s 92(2) of the *British North America Act 1867*[1295], now the *Constitution Act 1982* (Canada), which provided for the exclusive powers of the Province to impose "[d]irect [t]axation". The Privy

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1290 (1949) 80 CLR 229 at 260.

1291 (1949) 80 CLR 229 at 261.

1292 [1943] AC 550.

1293 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 540-541.

1294 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 539, repenting *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 263.

1295 30 & 31 Vict c 3.

Council announced during argument, and subsequently held, that the tax was direct and the collection mechanisms were therefore "mere machinery"[1296].

568 The second issue, which became the focus of the argument, was whether, notwithstanding that it was a direct tax, the tax could still amount to an excise and hence be an alteration by the Province of its existing "excise laws" contrary to s 122 of the *British North America Act 1867*. Counsel for the respondents argued that an excise shared with a customs duty the element that it was "always imposed at a point in the economic chain other than the last link". The tax on consumption of tobacco was imposed on the last link and was therefore direct in the sense that it was not passed on to another[1297].

569 Delivering the decision of the Board, Viscount Simon LC approved the reasoning of Viscount Cave LC[1298], that there are two separate and distinct categories of tax—direct taxes and indirect taxes—although Viscount Simon LC added that the character of the tax needs to be identified by its "real nature and effect"[1299]. The sense in which Viscount Simon LC was describing the distinction between an indirect and a direct tax was one that had an economic effect on the supply-side and the demand-side of the market, rather than the person who was intended to bear the cost of the tax: "the essential feature of direct taxation [is] that 'under it everyone knows how much [they] really pay[]'"[1300]. These matters explain the conclusion in *Atlantic Smoke* that the consumption tax on tobacco was a direct tax.

570 In considering whether a direct tax (being a tax with an economic effect on the demand-side of a market for the sale of goods) could be an excise, Viscount Simon LC noted that direct taxes might loosely be described as excises. An example he gave was a tax based on ownership (giving the example of a tax on owning a dog). As previously explained, such direct taxes concerning ownership were loosely described at excises "merely because they are for convenience collected through the machinery of the Board of Excise"[1301]. His Lordship,

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1296 [1943] AC 550 at 557, 566.

1297 [1943] AC 550 at 558-559.

1298 *City of Halifax v Fairbanks' Estate* [1928] AC 117 at 124.

1299 *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 at 565.

1300 [1943] AC 550 at 563, quoting Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), vol 2, bk 5, ch 6, §1 at 417.

1301 [1943] AC 550 at 565.

however, relied upon the usual meaning of an excise in contradistinction to the loose meaning[1302]:

> "The word [excise] is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect."

571 In light of this decision, it is unsurprising that Dixon J in *Parton* accepted that his reasoning in *Matthews* needed to be modified to exclude a tax levied upon consumption of goods from the application of the meaning of an excise. Dixon J correctly realised that a consumption tax, with its direct economic effect on the demand-side of a market rather than upon the supply-side, is precisely what the Privy Council had excluded from the meaning of an excise. Such a tax would only fall within the meaning of an excise if that term were used in a loose sense to mean almost any tax.

(iv) More than a century of focus on the reasonably anticipated direct economic effect on the supply-side

572 Some members of this Court did not accept Dixon J's broad description of the essential meaning of an excise as a "tax on goods". Instead they adopted an essential meaning of an excise that incorporated the supply-side and directness constraints. Their approach was consistent with that which had been taken in the *Petrol Case* and the *Newspapers Case*. But the variation in approaches was one without any real difference. Those judges who followed the approach of Dixon J confined the apparent breadth of the essential meaning of an excise by limiting the application of that essential meaning to taxes with a reasonably anticipated direct economic effect on the supply-side of a market for the sale of goods.

573 On either approach, therefore, the effect was that ever since Dixon J's short-lived flirtation with consumption taxes was abandoned in *Parton*, an excise was confined to a tax with a reasonably anticipated direct economic effect on the supply-side of a market for goods (up to the point of sale): a tax that in substance had an economic effect on demand for goods after the point of receipt by a consumer would not be an excise. The apparently broader approach of Dixon J, treating the essential meaning of an excise as a "tax on goods", was an illusion. The constraints in the traditional essential meaning of an excise were maintained.

574 Examples of the two approaches can be seen in the various judgments of this Court in *Dennis Hotels Pty Ltd v Victoria*[1303]. The traditionalists were

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1302 [1943] AC 550 at 565.

1303 (1960) 104 CLR 529.

Fullagar J, Menzies J, and Taylor J. Fullagar J said that Griffith CJ in *Peterswald* had stated "the essential elements which, for the purposes of s 90, distinguish a duty of excise from other duties and taxes" when quoting that the "'fundamental conception'" of an excise was as a "'tax on articles produced or manufactured in a country'"[1304]. Taylor J insisted that a tax, to be an excise, must be imposed before the goods reach the consumer and "must be imposed so as to be a method of taxing the production or manufacture of goods"[1305]. And Menzies J, after a comprehensive survey of the cases, explained that an excise duty is "a tax on the production or manufacture of goods", and that a tax on sale or purchase could be regarded as a tax on production or manufacture if it is imposed "at any point before sale for consumption"[1306].

575 By contrast, Dixon CJ, Windeyer J, Kitto J, and McTiernan J adopted the broader essential meaning of Dixon J, although they confined the application of that essential meaning. Dixon CJ reiterated that an excise was a tax "upon" the goods but not extending to consumption[1307] and that the tax was "directly on the price of the goods sold" and "essentially associated with the quantity and value of the goods"[1308]. Windeyer J referred to the "broad idea of an excise as a tax upon commodities" but noted that the application of that essential meaning could be restricted where a fee for a licence did not "bear any direct relation to the quantity or value of the exciseable liquor"[1309]. Kitto J noted the approach of Dixon J that treated the "essential distinguishing feature" of a duty of excise as being that it is a tax imposed "upon" or "in respect of" or "in relation to goods" but he reaffirmed the need for a "close relation" between the tax and production, manufacture, sale, or distribution[1310]. And McTiernan J recognised that an excise was a tax "payable on or in respect of goods" but confined excises to those taxes payable "directly in respect of" the goods and to those where it was "reasonably expected" that the tax would form part of the sale price[1311].

1304 (1960) 104 CLR 529 at 551, quoting *Peterswald v Bartley* (1904) 1 CLR 497 at 508.

1305 (1960) 104 CLR 529 at 573.

1306 (1960) 104 CLR 529 at 589-590.

1307 (1960) 104 CLR 529 at 539-540, 541.

1308 (1960) 104 CLR 529 at 545.

1309 (1960) 104 CLR 529 at 598, 605.

1310 (1960) 104 CLR 529 at 559. See also at 560.

1311 (1960) 104 CLR 529 at 549.

576 In broad terms, the difference between the majority (Fullagar J, Kitto J, Taylor J, and Menzies J) and the minority (Dixon CJ, McTiernan J, and Windeyer J) in the result that a victualler's licence fee was not an excise was due to the technique of application described as the "criterion of liability", described below. As explained below, that was a technique that was independent of the supply-side and directness constraints upon an excise. It was one that confined the consideration of the Court only to the terms of the statute. Of those judges who applied the criterion of liability technique, however, Menzies J did not apply it as an exclusive criterion. Hence, Menzies J was able to be part of the majority in concluding that a victualler's licence fee was not an excise and a different majority (with Dixon CJ, McTiernan J, and Windeyer J) in concluding that a temporary victualler's licence fee was an excise because it was in substance a tax concerning production or manufacture[1312].

577 By the time of *Philip Morris*[1313], Brennan J could describe as a "rock in the sea of uncertain principle" the limit of an excise as "a tax on a step in the production or distribution of goods to the point of receipt by the consumer". And, in relation to the directness constraint, Mason J would emphasise in *Hematite Petroleum*[1314] that the "apparent breadth" of the meaning of an excise as a tax on goods with an effect on the supply-side of the market ("to the point of receipt by the consumer") is "somewhat illusory because the Court has from time to time insisted that there must be a strict relationship between the tax and the goods in order to constitute a tax upon goods". Although Mason J went on to say that a "continuing problem has been to define or describe that relationship accurately and instructively"[1315], the words "direct effect" suffice to describe that relationship in so far as they focus attention upon the need for the market in which the immediate economic effect of the tax is experienced to be a market for the sale of the goods.

578 In *Bolton v Madsen*[1316], in the course of concluding that a permit fee for the carriage of goods was not an excise, this Court combined the supply-side and directness constraints, saying in a unanimous judgment:

> "It is now established that for 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."

1312 (1960) 104 CLR 529 at 591.

1313 (1989) 167 CLR 399 at 445.

1314 (1983) 151 CLR 599 at 628.

1315 (1983) 151 CLR 599 at 628.

1316 (1963) 110 CLR 264 at 271.

In other words, whether expressed as part of the essential meaning or as limiting the application of a broader essential meaning, a tax would not be an excise unless the tax were reasonably anticipated to have (i) a real and substantial (ii) direct economic effect on (iii) the supply-side of a market for the sale of goods. These three constraints reflect boundaries to the concept of an excise that have not been transgressed by any decision of this Court for more than a century. Nor have they been transgressed by the reasoning of any judge of this Court for more than a century, with the exception of a short-lived flirtation in obiter dicta by Dixon J concerning a consumption tax, applied only once by McTiernan J in dissent[1317]. Until today.

(v) The entrenched constraint of the supply-side

579 Since Federation, no judge of this Court has ever suggested that it would be sufficient for a tax to be an excise under s 90 of the *Constitution* simply if the tax were to have some connection with goods. Even those judges who expressed the essential meaning of an excise as no more than a tax "upon" goods insisted upon constraints in the application of that apparently open-ended meaning, including, in effect, that the reasonably anticipated direct economic effect of the tax was on the supply-side of the market with a tendency to have a consequent effect of increasing the price of the goods at any quantity supplied. By contrast, a tax was treated as not being "on" goods if its reasonably anticipated economic effect was an indirect effect on the demand-side of the market, with a tendency to have a consequent effect of *decreasing* the price of goods due to its effect on consumer behaviour quite independently of the production or manufacture of the goods themselves.

580 The focus upon the reasonably anticipated economic effect of the tax on the supply-side of the market rather than the demand-side was correctly described by Barwick CJ in *Chamberlain Industries*[1318] as "settled doctrine". The basis for the distinction, the Chief Justice explained, was that it was "presumed" that a tax with its effect on the supply-side would "bear on manufacture or production". In other words, a focus upon the supply-side of the market ensured a close economic connection between the tax and the market for the sale of the goods. Similarly, as Kitto J said in *Western Australia v Hamersley Iron Pty Ltd [No 1]*[1319], a duty of excise that was payable at a late stage in distribution was a tax on goods "because of its operation as in reality affecting manufacture or production".

581 As explained above, the focus on the reasonably anticipated direct economic effect of the tax on the supply-side of a market for the sale of goods, and

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1317 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 196, 198, 204.

1318 (1970) 121 CLR 1 at 13.

1319 (1969) 120 CLR 42 at 62.

the consequent increase in the price of the goods, was also the underlying motivation in most cases for the insistence that an excise was an "indirect tax". The language of an indirect tax was confusing particularly because issues of parliamentary intention did not determine the substantive impact of the tax. But the concept did have the benefit of emphasising the need for the tax to have a direct economic effect on the supply-side of the market, with the consequent increase in the price of goods then being passed on to the consumers. As Mill wrote in respect of indirect taxes[1320]:

> "By taxes *on* commodities are commonly meant those which are levied either on the producers, or on the carriers or dealers who intervene between them and the final purchasers for consumption. Taxes imposed directly on the consumers of particular commodities, such as a house-tax, or the tax in this country on horses and carriages, might be called taxes on commodities, but are not; the phrase being, by custom, confined to indirect taxes ... equivalent to an increase of the cost of production ... in common phrase, of bringing the commodity to market."

It was the "indirectness" of effect, the focus upon the supply-side concepts of bringing the goods to market, that supplied a necessary element of the connection between the tax and the goods that would be absent if the connection between the tax and the goods were merely the product of consumer behaviour and expectations on the demand-side of the market.

(vi) The entrenched constraint of direct economic effect

582 Once again, whether a broad or a narrower approach was taken to the essential meaning of an excise, a further constraint was constantly recognised requiring that the reasonably anticipated effect of the tax be a direct economic effect in the market for the sale of the goods. That constraint meant that a tax would not be an excise if its reasonably anticipated direct economic effect is in a market for business generally, labour, services, land, or other things, even if this effect has an indirect and consequential effect in the market for the sale of the goods. This was the sense in which Dixon J used "directness" in *Matthews*[1321] when his Honour described the "basal conception" of an excise as a "tax directly affecting commodities".

1320 Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), vol 2, bk 5, ch 4, §1 at 383 (emphasis added).

1321 (1938) 60 CLR 263 at 303.

583 An example of the directness constraint is *Hughes and Vale Pty Ltd v New South Wales*[1322]. In that case, a charge was imposed on the carriers of goods by reference to the weight of the vehicle, the weight of the load the vehicle was capable of carrying, and the miles travelled. It was argued that the charge was contrary to both s 90 and s 92 of the *Constitution*. A majority of the Court (Dixon CJ, McTiernan J, Williams J, and Webb J) held that the tax did not infringe s 90 or s 92. Dixon CJ said that the charge was not one that was "directly affecting commodities" but was instead a "tax on the carrier because he carrie[d] goods by motor vehicle"[1323]. The tax might be reasonably anticipated to increase the cost of supply of the goods in the market for those goods. But it would only be expected to do so indirectly. Its direct effect was in the market for the service of carriage of goods.

584 Another example is *Browns Transport Pty Ltd v Kropp*[1324], in which this Court unanimously held that a licensing fee for the carriage of passengers or goods was not an excise because the "person taxed is not taxed by reference to ... any relation between [themself] and any commodity as producer, manufacturer[,] processor, seller or purchaser". In other words, the reasonably anticipated immediate or direct economic effect of the tax was in the market for a business to carry passengers or goods rather than the market for goods. It was, "as it purport[ed] to be, simply a fee payable as a condition of a right to carry on a business"[1325].

585 A third example is *Hematite Petroleum*[1326]. In that case, the question was whether Victorian legislation had imposed an excise by its requirement for a fee for a licence to construct or operate particular pipelines. As a result of the relevant amendment, the amount of the fee was increased to $10 million. The largest annual fee in previous years had been around $7,000. The majority (Mason J, Murphy J, Brennan J, and Deane J) held that the fee was an excise. Importantly, the majority emphasised that the direct economic effect of the fee was not in a market for the sale of pipelines (which, as a fixture to land, would not be goods[1327]) by increasing the cost of ownership of the land and pipelines. Nor was the purpose of the fee concerned with any market for a service of transporting hydrocarbons. Rather, as

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1322 (1953) 87 CLR 49.

1323 (1953) 87 CLR 49 at 75.

1324 (1958) 100 CLR 117 at 129.

1325 (1958) 100 CLR 117 at 130.

1326 (1983) 151 CLR 599.

1327 *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454.

a matter of substance, the fee operated to increase the price at which petroleum products would be supplied. The direct economic effect of the fee was to increase the sale price of petroleum products in the market for the supply of those products. The size of the fee and its function as a fee for use of the pipeline meant that in substance the fee was "imposed on a step in the production of refined petroleum products" and the size of the fee meant that it would "inevitably increase the price of the products in the course of distribution to the consumer"[1328].

586 As will be seen below, this directness constraint was also recognised in both the reasoning and the result in *Capital Duplicators [No 2]*.

VII. The expanded technique of application

(i) The criterion of liability technique as a conclusive determinant

587 As explained above, the scope of application of the essential meaning is separate from the technique of application. A wide scope of application might still be restrained by a strict technique of application. A strict technique of application adopted by this Court for a period was to determine whether a tax was on goods by the criterion of liability provided in the State legislation, irrespective of the substantive effect of that legislation. This criterion of liability technique preferred form over substance. It was a technique that looked only to the terms of the legislation for the relevant criterion.

588 The criterion of liability technique was clearly set out by Kitto J in *Dennis Hotels*[1329] in reasons that his Honour adopted in *Whitehouse v Queensland*[1330]. The question in *Dennis Hotels* was whether fees for licences to sell alcohol were excises where the fees were calculated in whole or in part by reference to the amount paid or payable for alcohol in an earlier period by the licensee seller. In the majority in the result that a victualler's licence fee was not an excise, Kitto J observed that the fees did not "tax the purchasing of liquor" but were calculated by reference to earlier sales of liquor so that the tax "[was] not on the liquor; it [was] on the licence"[1331]. In order for the tax to be on the purchasing of liquor, the criterion of liability chosen in the legislation was required to be "the taking of a step in a process of bringing goods into existence or to a consumable state, or

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1328 (1983) 151 CLR 599 at 634. See also at 640, 659, 668.

1329 (1960) 104 CLR 529.

1330 (1960) 104 CLR 609 at 619.

1331 (1960) 104 CLR 529 at 569.

passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer"[1332].

589 By contrast with the approach of Kitto J, the minority in *Dennis Hotels* on this point regarding the victualler's licence fee focused not upon the form of the legislation but instead upon the "real nature of the tax"[1333], whether the fees were "in substance" duties of excise[1334], or "[t]he real nature of the tax ... [based] upon its operation and effect upon the commodity as an article of commerce"[1335].

590 The criterion of liability approach of Kitto J was unanimously adopted by this Court in *Bolton v Madsen*[1336]. That case considered Queensland legislation that prohibited, subject to exceptions, any carriage of goods without a permit. This Court unanimously held that the fee for the permit was not an excise because the legislative "criterion of liability" set out by Kitto J in *Dennis Hotels* had not been satisfied[1337].

591 It is important to reiterate that the criterion of liability technique was separate from the identification of the essential meaning, or its scope of application. The technique operated to prevent the Court from considering anything other than the terms of the legislation when applying the essential meaning. By carefully drafted legislation it was therefore possible for a State Parliament to avoid the characterisation of a tax as an excise. Form would prevail over substance. As Kitto J later said in *Chamberlain Industries*[1338], in assessing the criterion of liability "it is necessary to go to the taxing legislation and to that alone".

1332 (1960) 104 CLR 529 at 559.

1333 (1960) 104 CLR 529 at 546, quoting *R v Caledonian Collieries Ltd* [1928] AC 358 at 362.

1334 (1960) 104 CLR 529 at 548.

1335 (1960) 104 CLR 529 at 595.

1336 (1963) 110 CLR 264.

1337 (1963) 110 CLR 264 at 273.

1338 (1970) 121 CLR 1 at 20.

(ii) The criterion of liability technique reduced to an important consideration

592 As Brennan J recognised in *Philip Morris*[1339], the criterion of liability technique was "gradually eroded"[1340] in favour of a focus not merely upon the terms of the taxing legislation but also on the substance and effect of the tax. In other words, the form of legislation ceased to be the only technique or means by which the scope of application of a "tax on goods" was to be determined.

593 One very influential decision ultimately led to the criterion of liability technique being reduced from the only criterion to be considered in applying the essential meaning, to merely one of the considerations to be applied. The decision was that of Barwick CJ in 1964 in *Anderson's Pty Ltd v Victoria*[1341]. Although Kitto J, Taylor J, and Windeyer J had adopted the criterion of liability technique in that case[1342], the important passage of Barwick CJ that was later reiterated on many subsequent occasions[1343] was one in which the Chief Justice emphasised the substance of the direct economic effect of the tax on the supply-side of a market for the sale of goods beyond merely the form of the legislation[1344]:

> "[I]n arriving at the conclusion that the tax is a tax upon the relevant step, consideration of many factors is necessary, factors which may not be present in every case and which may have different weight or emphasis in different cases. The 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax—all these are included in the relevant considerations. But in the end what must be decided is that

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1339 (1989) 167 CLR 399 at 448.

1340 See *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365-366; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 13-17; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 64, 76-77; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 499; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 629, 633, 658-659, 663, 664-665; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 383-384, 406.

1341 (1964) 111 CLR 353.

1342 (1964) 111 CLR 353 at 373-374, 376, 378-379.

1343 See *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 629; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 400-401; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 448, 492; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, fn 99.

1344 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365-366.

> the tax is in substance a tax upon the relevant step. That being the central question in a controversy as to the nature of the tax, it will not, in my opinion, necessarily be resolved by the form of the tax or by identifying what according to that form the legislature has made the criterion of its imposition, however important in any particular case those matters may be."

594 In 1983, in *Hematite Petroleum*[1345], Mason J pronounced that the criterion of liability technique no longer commanded the acceptance of even a majority of the Court "as a conclusive guide as to what is an excise". As Brennan J later explained, "[t]he statutory criterion of liability to pay a tax and the statutory description of a tax are both important indications of the character of the tax, but it cannot be said that one or other is always conclusive"[1346].

VIII. The settlement in *Capital Duplicators [No 2]* and *Ha*

(i) The decision in Capital Duplicators [No 2]

595 In *Capital Duplicators [No 2]*[1347], licence fees were imposed on wholesalers and retailers of "X" videotapes. The licence fees were not simply regulatory but had "a very substantial revenue purpose"[1348]. A basic fee, of $50 per month ($600 per year)[1349], was payable for the premises in relation to which the licence was to be held, in addition to either an advance fee or a franchise fee for the grant or renewal of the licence, respectively calculated by reference to sales or recent past sales of the videotapes. The basic fee was unanimously held not to be an excise. The advance and franchise fees were held, by majority, to be excises.

596 There were several strands to the reasoning of the majority (Mason CJ, Brennan, Deane and McHugh JJ). First, their Honours definitively rejected the criterion of liability technique, by which legislative form was regarded as being the exclusive criterion of consideration for application[1350]. This Court had

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1345 (1983) 151 CLR 599 at 629.

1346 *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 406. See also *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 450.

1347 (1993) 178 CLR 561.

1348 (1993) 178 CLR 561 at 597.

1349 (1993) 178 CLR 561 at 594.

1350 (1993) 178 CLR 561 at 583-584.

unanimously reached the same conclusion earlier, in *Cole v Whitfield*[1351], in relation to s 92. That strand of reasoning was unexceptional and, as their Honours observed, it was consistent with a substantial line of authority[1352].

597 Despite rejecting the criterion of liability technique, the majority declined to reconsider the correctness of the results in *Dennis Hotels* and *Dickenson's Arcade*, noting the different possible justifications for the results and the considerable reliance placed upon those decisions by the States and Territories[1353]. The majority noted in this respect that reconsidering *Dennis Hotels* and *Dickenson's Arcade* would cause significant upheaval to State financial arrangements concerning State taxes that took the form of fees for a licence to sell tobacco and liquor. The majority therefore treated the fees as exceptions to the general principles governing s 90, by characterising them artificially as licence fees for the privilege of engaging in the relevant activity[1354].

598 Secondly, their Honours emphasised that the rejection of the criterion of liability as the exclusive factor for consideration did not affect the scope of application of the essential meaning of an excise: the rejection "has not disturbed general acceptance of the proposition that a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise"[1355]. That step was also unexceptional in so far as their Honours maintained the focus on the supply-side of the market. The factors that they emphasised included the "immediate entry [of the tax] into the cost of the goods", which could only occur on the supply-side of the market[1356]. Their Honours explained the economic effect of taxes on the supply-side of a market in increasing the price of the goods on which the tax is imposed[1357]:

1351 (1988) 165 CLR 360 at 402 ("criterion of operation").

1352 See *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365-366; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 13-17; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 64, 76-77; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 499; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 629, 633, 658-659, 663, 664-665; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 383-384, 406.

1353 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 591-593.

1354 (1993) 178 CLR 561 at 593, 596.

1355 (1993) 178 CLR 561 at 583.

1356 (1993) 178 CLR 561 at 583, fn 99.

1357 (1993) 178 CLR 561 at 586.

> "A tax on distribution, like a tax on production or manufacture, 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 on which the tax is imposed."

599 Thirdly, in the absence of the criterion of liability as the exclusive factor to consider for the scope of application, the majority in *Capital Duplicators [No 2]* turned to the purpose of s 90 to govern the manner in which to consider the relevant factors. As explained above, by running together the traditional purpose of s 90 with the newly created "free trade" purpose, their Honours justified an expansive application of the essential meaning of an excise to all taxes with a direct economic effect on the supply-side of a market for the sale of goods irrespective of whether those taxes discriminated against, or in favour of, local goods. The effect was that for taxes with a direct effect on the supply-side of a market for the sale of goods, "duties of customs and of excise" in s 90 "must be construed as exhausting the categories of taxes on goods"[1358].

600 By contrast, the traditional purpose of supporting the integrity of Commonwealth overseas trade or tariff policy was the focus of each of the dissentients—Dawson J, and Toohey and Gaudron JJ. Dawson J said that an excise duty should be determined according to the purpose served by s 90, which was to secure a customs union by "ensuring a uniform policy with respect to external tariffs, whether free trade or protectionist"[1359]. Similarly, Toohey and Gaudron JJ said that the purpose of s 90 was "to effectuate economic policy with respect to Australian exports and imports" and to support "a uniform policy in regard to external tariffs"[1360]. Their Honours all reasoned that although the fees might increase the price of the videotapes, they did so for both local and imported goods[1361]. Hence, although the fees had a direct economic effect on the supply-side of the market for the sale of "X" videotapes, they were not excises.

(ii) The decision in Ha

601 In *Ha*[1362], the scope of *Capital Duplicators [No 2]* was considered. The *Business Franchise Licences (Tobacco) Act 1987* (NSW) imposed a licence fee for the sale of tobacco, along with an additional fee determined by reference to the value of tobacco sold in a period preceding the licence period. The State of New

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1358 (1993) 178 CLR 561 at 590.

1359 (1993) 178 CLR 561 at 609.

1360 (1993) 178 CLR 561 at 627.

1361 (1993) 178 CLR 561 at 617-618, 629-631.

1362 (1997) 189 CLR 465.

South Wales, and the other States intervening in the case, did not merely defend the licence fees on the basis of the preserved exception that treated States taxes on the sales of alcohol and tobacco as fees for licences. Instead, the States sought to attack the foundations of the decision in *Capital Duplicators [No 2]*, by which the majority, relying upon Dixon J in *Parton*, had applied the essential meaning of a duty of excise, as a tax on goods, to the distribution or sale of goods without the use of the criterion of liability technique.

602 The States urged the Court to adopt an approach to s 90 which tied the application of the essential meaning of an excise to the traditional purpose of s 90. These submissions were made by the States while "fully appreciating that the attack on the doctrine based on *Parton*, if successful, would destroy the reasoning" that had supported the exceptional treatment of taxes with a direct economic effect in the market for the sale of alcohol or tobacco[1363]. The gamble by the States failed spectacularly. A majority of this Court (Brennan CJ, McHugh, Gummow and Kirby JJ) upheld the approach of the majority in *Capital Duplicators [No 2]*, and abolished the exception, holding that both fees were duties of excise and therefore invalid[1364]. The minority (Dawson, Toohey and Gaudron JJ) maintained the view that they took in *Capital Duplicators [No 2]* that the traditional purpose of s 90 controlled the essential meaning of excise and required discrimination between local and non-local production or manufacture before a tax could be an excise[1365].

(iii) Five important features of the settlement in Capital Duplicators [No 2] *and* Ha

603 The settlement that was achieved by *Capital Duplicators [No 2]* and *Ha* reflected a compromise between the need for a properly functioning Australian federation and a unitary and uniform Australian market. On the questionable assumption that uniform Commonwealth taxes are more conducive to free trade than State taxes (discussed below[1366]), the greatest freedom of movement and trade throughout the Commonwealth might be achieved by making every tax exclusive to the Commonwealth. But the reasoning of the majorities in *Capital Duplicators [No 2]* and *Ha* implicitly recognised that even the purported guarantee in s 92 that trade, commerce and intercourse shall be "absolutely free" must be reconciled with the need for a functional federation. The settlement achieved by *Capital Duplicators [No 2]* and *Ha* included within an excise only those taxes imposed by a State or Territory that are reasonably anticipated to have a real and substantial direct economic effect on the supply-side of a market for the sale of goods. Not

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1363 (1997) 189 CLR 465 at 499.

1364 (1997) 189 CLR 465 at 504.

1365 (1997) 189 CLR 465 at 506-507, 512.

1366 See at [647]-[649].

those with an insubstantial effect. Not those which have their direct economic effect on business generally, labour, services, land, or other things. And not those on the demand-side of the market.

604 There are five important features of the settlement achieved by *Capital Duplicators [No 2]* and *Ha* that are relevant to the special case presently before this Court:

1. The decisions maintained a distinction between (i) a tax that is, as a matter of substance, a fee for a licence to carry on a business and (ii) a tax that is a revenue-raising inland tax with a reasonably anticipated, real and substantial, direct economic effect on the supply-side of a market for the sale of goods. Only the latter is an excise duty. The reason for this is that a fee for a licence to carry on a business might directly affect the value or price of the business but it only indirectly affects the supply-side of the market for the sale of the goods[1367]. It is a tax "in respect of the business generally"[1368]. This distinction recognises the difference between a tax that is "directly related to goods"[1369], and a tax that is only indirectly related to goods but directly related to other matters such as a business generally, labour, services, land, or other things. This directness constraint, and the need for the tax to have a real and substantial effect, were the reasons for the conclusion in *Capital Duplicators [No 2]* that the basic fee of $50 per month for a licence to sell "X" videotapes, and thus to run the business, was not an excise.

2. The decisions maintained the importance of the "immediate entry [of the tax] into the cost of the goods" or, in other words, that the tax have 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 on which the tax is imposed"[1370]. The relevance of this feature could only be

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1367 See *Ha v New South Wales* (1997) 189 CLR 465 at 504, citing *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 (see at 560) and *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 445-446.

1368 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 445-446, quoting *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 563.

1369 *Bolton v Madsen* (1963) 110 CLR 264 at 271. See also *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 303; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

1370 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, fn 99, 586.

that it points to the economic effect of the tax on the supply-side of a market for the sale of goods.

3. The decisions maintained the importance, as a factor in the assessment of an excise, of "the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption"[1371] or "some step taken in dealing with goods" prior to consumption[1372]. Again, the relevance of this feature could only be that it points to the reasonably anticipated economic effect of the tax on the supply-side of a market for the sale of goods.

4. The decisions maintained the relevance of the "'indirectness' of the tax"[1373] in the sense that "the tax should be one which cannot, or is not intended by the legislature to be passed on by the person who is required to pay it"[1374]. Yet again, this points to the reasonably anticipated economic effect of the tax on the supply-side of a market for the sale of goods.

5. The decisions declined to extend a "tax on goods" beyond the supply-side of the market (requiring a direct economic effect on supply by production, manufacture, sale, or distribution) to the demand-side of the market (to include a connection with consumption, in the sense of the costs of ownership, possession, use, or destruction of goods which follows their sale)[1375].

605 In this case, in the manner in which they alleged that the ZLEV Act tax was invalid, the plaintiffs and the Commonwealth sought, in effect, for this Court to depart from each and every one of these features of this settlement.

1371 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, fn 99, citing *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365.

1372 *Ha v New South Wales* (1997) 189 CLR 465 at 499.

1373 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583, fn 99, citing *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365.

1374 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365.

1375 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583; *Ha v New South Wales* (1997) 189 CLR 465 at 499-500.

IX. The application for leave to re-open *Capital Duplicators [No 2]* and *Ha*

(i) The direction by this Court

606 On the third day of the oral hearing of this special case, this Court directed the parties and interveners to tailor their submissions on the basis that the Court was not "minded to reopen either *Ha* or *Capital Duplicators* [*[No 2]*]". In other words, the Court was not prepared to entertain the possibility of departure from either the result or the ratio decidendi in *Capital Duplicators [No 2]* or *Ha*.

607 In *Vunilagi v The Queen*[1376], I explained that the four non-exhaustive and overlapping[1377] questions commonly recited from *John v Federal Commissioner of Taxation*[1378] involve two different dimensions of consideration. The first dimension concerns the force of belief that the result or ratio decidendi of an earlier case cannot be justified as a matter of legal principle assessed by reference to structural integrity. The second dimension concerns the consequences of overruling the result of the earlier case, or departing from its ratio decidendi, including by reference to the reliance that has been placed upon that result or reasoning.

608 The first dimension carries the most weight. Indeed, there may be decisions which are part of a stream of cases and upon which there has been great reliance but which are so fundamentally contrary to basic principle, and which involve such significant and manifest error or injustice, that while they might remain the law it is the duty of a judge of this Court to maintain dissent. In this respect, "[i]t is not ... better that the Court should be persistently wrong than that it should be ultimately right"[1379], and "[o]nce recognised, constitutional heresies are usually best laid to rest"[1380]. The decisions in *Capital Duplicators [No 2]* and *Ha* are not such cases.

609 I joined in this Court's direction although I consider that the decisions in *Capital Duplicators [No 2]* and *Ha* are arguably contrary to constitutional principle because it is arguable that the recognition of a new purpose for s 90

1376 (2023) 97 ALJR 627 at 660-662 [160]-[165].

1377 *Queensland v The Commonwealth* ("the *Second Territory Senators Case*") (1977) 139 CLR 585 at 630.

1378 (1989) 166 CLR 417 at 438-439.

1379 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278. See also *Second Territory Senators Case* (1977) 139 CLR 585 at 593, 599, 622.

1380 *Gould v Brown* (1998) 193 CLR 346 at 427 [132].

erroneously conflates the purpose of s 90 with that of s 92. My decision to join in this Court's direction was made principally because, in light of the five features of the settlement described above[1381], the decisions are not manifestly wrong and they form part of a stream of authority in this Court, developed since *Parton*, with a consistency that recognises the three core constraints of a (i) real and substantial (ii) reasonably anticipated direct economic effect (iii) on the supply-side of a market for the sale of goods.

610 Moreover, the consequences of overturning *Capital Duplicators [No 2]* and *Ha* would be significant. The immediate reaction to the decision in *Ha* was mainly to ameliorate its effect by a safety net scheme of Commonwealth taxes on petroleum products, tobacco and liquor effectively levied on behalf of the States and Territories. But the decisions later contributed to large-scale tax reform, including the replacement of the safety net scheme with the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations in 1999 (replaced by the Intergovernmental Agreement on Federal Financial Relations which came into operation on 1 January 2009) and the introduction of the Goods and Services Tax by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). The Intergovernmental Agreement and cooperation between the States and the Commonwealth were necessary to make the new Goods and Services Tax work, including by the agreement of the States to voluntarily subject themselves to it[1382]. All the revenue from the Goods and Services Tax, less administration costs, is provided by grants to the States and Territories.

(ii) Breaching the settlement in Capital Duplicators [No 2] *and* Ha

611 A stream, when dammed, can radically change course. The submissions of the plaintiffs and the Commonwealth in this case, whilst purporting to be a minor extension of the stream of authority that had culminated in *Capital Duplicators [No 2]* and *Ha*, were, in reality, a proposal to set the law upon a new course by ignoring the importance of one constraint upon the breadth of an excise (the requirement for a real and substantial economic effect), and abolishing two other significant and established constraints (the supply-side and directness constraints).

612 If the submissions of the plaintiffs and the Commonwealth were to be accepted by this Court, then this should be done with an appreciation of the extent to which the stream of authority is changing course, as well as an acknowledgement of the possibility that if the settlement achieved by *Capital*

1381 Above at [603]-[605].

1382 *Hornsby Shire Council v The Commonwealth* (2023) 97 ALJR 534 at 537 [7], 538 [9]-[10]; 410 ALR 32 at 35, 36. See also *TT-Line Co Pty Ltd v Federal Commissioner of Taxation* (2009) 181 FCR 400 at 414 [66]; *Landcom v Federal Commissioner of Taxation* (2022) 114 ATR 639 at 646 [27].

Duplicators [No 2] and *Ha* is replaced by an approach of great uncertainty then there may be, in future, a need for a fresh start. Despite declining leave to re-open *Capital Duplicators [No 2]* and *Ha*, this Court therefore sought submissions from the Commonwealth and the defendant as to the operation of s 90 if those decisions were re-opened. Putting to one side the neglect of the need for a tax to have a real and substantial economic effect before being characterised as an excise, the defendant's submissions powerfully reveal the problems involved with the steps required for the plaintiffs and the Commonwealth to succeed: the removal of the supply-side and directness constraints upon the breadth of an excise.

X. The removal of the supply-side and directness constraints

613 A recognition of the essential meaning of an excise merely as a "tax on goods", ignoring the need for a real and substantial effect of the tax in a market and without applying the supply-side and directness constraints, involves: a neglect of constitutional structure; a neglect of constitutional text; a neglect of contemporary understanding; a neglect of history; a neglect of political choice; a neglect of economics; a neglect of principle; a neglect of precedent; a neglect of authority; and a neglect of the future.

(i) Neglect of constitutional structure

614 In *Ha*[1383], the minority observed that if the link to production or manufacture were broken it would be illogical to continue to exclude consumption taxes from the meaning of an excise. A broad purpose of ensuring free trade might be impeded just as much by a tax with an economic effect on the consumption of goods on the demand-side of a market as it can by a tax with an economic effect on the production or manufacture of goods on the supply-side of a market.

615 The minority in *Ha* made this point as a rhetorical argument of exasperated emphasis. Their point was that once the link to production or manufacture is broken, and the traditional purpose concerning discrimination between Australian and overseas goods is no longer controlling, there was no logical reason that precluded an excise from including taxes that directly affect demand in a market for the sale of goods. And, if the requirement for the tax to have a "direct" economic effect in the market for the sale of goods were also abandoned then, even on the supply-side, as Dawson J said in *Capital Duplicators [No 2]*[1384], an excise might include a "land tax, payroll tax and even income tax levied upon the producers or distributors of goods".

1383 (1997) 189 CLR 465 at 510.

1384 (1993) 178 CLR 561 at 610.

616 The point being made by the minority in *Ha* was obviously, in part, an appeal to precedent. A consumption tax had never previously been held to be an excise. As explained above, a payroll tax had never previously been conceived of as an excise even if the payroll tax applied to industries in which goods were sold, and an industrial land tax had never previously been conceived of as an excise even if the tax applied in industries involving the distribution of goods. But the point being made by the minority in *Ha* went beyond a mere appeal to precedent. It was also a point about the structure and presuppositions of the *Constitution*. The minority had earlier referred to academic commentary in which it was said of *Capital Duplicators [No 2]*[1385]:

> "if the Court was concerned about the effect of its decisions on State finances at the margin, why has it never been concerned with the more fundamental question of whether its decisions have not only arbitrarily impeded the States' ability to finance the activities they are required to perform under the Constitution, but have also endangered the very fabric of the federal system which the Constitution set in place".

617 As Dixon J observed in *Melbourne Corporation v The Commonwealth*[1386], a presupposition of the *Constitution* is the continued existence of the States "as bodies politic whose existence and nature are independent of the powers allocated to them". It is "on this footing" that the *Constitution* "proceeds to distribute the power between State and Commonwealth"[1387]. The less able that the States are to finance their own activities, and the more dependent that they become upon the largesse of the Commonwealth, the less likely it is that the States will be able to exist as independent political entities. Even for those members of this Court who adopted the broadest essential meaning and application of s 90, this underlying constitutional presupposition informed their struggle to find boundaries for the essential meaning of an excise and for the scope or technique of application of that meaning.

618 Only four years ago in *Spence v Queensland*[1388], two members of today's majority were party to a joint judgment that cogently described this presupposition

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1385 Mathews and Grewal, *The Public Sector in Jeopardy: Australian Fiscal Federalism from Whitlam to Keating* (1997) at 511, cited in *Ha v New South Wales* (1997) 189 CLR 465 at 507.

1386 (1947) 74 CLR 31 at 82. See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268, 276.

1387 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82.

1388 (2019) 268 CLR 355 at 386 [6].

as part of the "conception of federalism that has prevailed throughout the century since the *Engineers' Case*". That conception is not consistent with the extent of the expansion of the concept of an excise that was sought by the plaintiffs and the Commonwealth. As Hamill said[1389]:

> "In a scenario in which [the States] are effectively deprived of any real fiscal, administrative or legislative capability in areas of major public spending, and with ever-diminishing autonomy with respect to their revenue raising, the States face the prospect of being reduced to mere agents of the Commonwealth with little state capacity of their own ... Such a scenario raises a fundamental question about the future of Australia as a federation. That is, in circumstances where the capacity of the States is progressively denied, at what point does Australia cease to be a federation?"

(ii) Neglect of constitutional text

619 An approach to the concept of an excise that includes taxes which have a reasonably anticipated indirect effect upon demand or supply in a market for the sale of goods is also contrary to the text of the *Constitution*. Three particular aspects of the text are relevant: first, the fact that the expression "duties of customs" is used throughout the *Constitution* "in close juxtaposition" with "duties of excise"[1390]; secondly, the fact that s 93 describes duties of customs as "chargeable on goods imported into a State" and duties of excise as "paid on goods produced or manufactured in a State"; and thirdly, the fact that the zone of exclusivity of the Commonwealth power to grant bounties is expressly confined in s 90 to "the production or export of goods".

620 As to the first matter, the close juxtaposition of customs and excise throughout the *Constitution* emphasises the supply-side nature of duties of excise: customs duties concern goods produced or manufactured overseas and excise duties concern goods produced or manufactured in Australia. But a customs duty does not include a tax that has no real impact on the price of goods imported from overseas, but only affects demand for local or imported goods of that type by its

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1389 Hamill, "W(h)ither Federalism?" (2007) 19 *Upholding the Australian Constitution* 121 at 145. See also Zimmermann and Finlay, "Reforming Federalism: A Proposal for Strengthening the Australian Federation" (2011) 37(2) *Monash University Law Review* 190 at 213.

1390 *Peterswald v Bartley* (1904) 1 CLR 497 at 506.

impact upon the subsequent ownership, possession, use, or destruction of the goods[1391].

621 The close association of customs and excise throughout the *Constitution* also supports the constraint upon an excise as a tax that has a direct economic effect in a market for the sale of goods. Customs duties are taxes that have a direct economic effect in the market for the sale of those goods. A tax that is concerned with a local industry which is heavily dependent upon imported goods is not a customs duty even if that tax has a large economic effect in the market for the sale of imported goods. Likewise, excise duties are taxes which have a direct economic effect in a market for the sale of goods.

622 As to the second matter, s 93 made interim provision for the collection by the Commonwealth of duties of customs and excise by reference to "the duties of excise paid on goods produced or manufactured in a State" being deemed to have been collected in the State into which the goods passed for consumption. As explained earlier in these reasons, Quick and Garran correctly observed that "consumption" in s 93 is used to describe the demand-side of a market for goods[1392]. The purpose of s 93 was to allocate a place of collection for duties of customs and excise in order to distribute funds. The place of collection was the point of sale, beyond which there would be consumption of the good. Section 93 thus contemplated that duties of excise would not extend to taxes whose effect, as a matter of substance, was only on the demand-side of a market for the sale of goods once the goods had passed into consumption.

623 As to the third matter, as Menzies J observed in *Dickenson's Arcade*, duties of excise and customs are "naturally the corollary" of bounties[1393]. The express limit in s 90 upon the exclusivity of the Commonwealth power to impose bounties which confines that exclusivity to the "production or export of goods" on the supply-side, as well as the implied limit which arises from the nature of bounties, confining the exclusivity of customs duties to imports and exports of goods on the supply-side, are further textual indicators that duties of excise are similarly confined to the supply-side of a market for the sale of goods.

(iii) Neglect of contemporary understanding

624 The scope of application of a constitutional provision is not bound to understandings that were contemporary at Federation. But understandings that

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1391 See *Carmody v F C Lovelock Pty Ltd* (1970) 123 CLR 1 at 23, 26-27, discussed above at [524]-[526].

1392 See above at [535].

1393 (1974) 130 CLR 177 at 213.

were contemporary at Federation are necessary for the essential meaning of a constitutional provision and reveal its purpose. As Dixon J observed, the contemporary understanding of the meaning of an excise by "economists and others" was "a factor to be weighed"[1394]. The greater the neglect of the contemporary understanding of a constitutional provision, the greater the likelihood of constitutional error in identifying or applying the essential meaning.

625 In *Peterswald*, this Court said that the essential meaning of an excise, involving a close association with production and manufacture, was one that aligned with the "distinct meaning in the popular mind"[1395]. There is obvious force in this Court's statement in 1904 about popular contemporary understanding at the time of Federation. They knew. As delegates to the Constitutional Conventions, and as learned people living at the time, the contemporary understanding was their understanding.

626 The contemporary understanding described in *Peterswald* also aligned with the essential meaning of an excise as understood generally, including by contemporary economists. As economists understood and expressed the etymology and essential meaning of an excise, it was "something cut off or deducted, for the benefit of the state, from the price of the article as paid by the consumer"[1396]. In *Hematite Petroleum*[1397], Deane J pointed out that this understanding may have been a solecism since, etymologically, "excise" was derived from the Dutch *excijs* from the Latin *accensare* (to tax) rather than the Latin *excisus* (to cut out or cut off)[1398]. The Commonwealth relied upon this solecism to undermine the contemporary understanding of an excise. But in constitutional interpretation, the relevance of contemporary understanding to the essential meaning or purpose of a provision is not diminished if that understanding is based on etymological error or solecism. In life, as in constitutional interpretation, the meaning of an utterance does not change because the speaker follows a common practice in using a word in a sense that is not etymologically precise.

627 Irrespective of whether the common understanding was based on a correct understanding of the Dutch and Latin root of "excise", the widely understood

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1394 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 299.

1395 (1904) 1 CLR 497 at 509.

1396 Palgrave (ed), *Dictionary of Political Economy* (1894), vol 1 at 786, "excise".

1397 (1983) 151 CLR 599 at 663.

1398 See also *The Oxford English Dictionary* (1933), vol 3 at 379, "excise".

meaning of an excise, "well known in public finance"[1399], was as a "duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers"[1400]. As Sir Robert Giffen said in 1911[1401]:

> "Excise duties are charges upon commodities produced at home on their way to the consumer, and customs duties in the United Kingdom are charges upon commodities brought into the country from abroad; and they are of essentially the same nature. Not only so, but excise duties and customs duties are in some cases supplementary to each other, like articles being produced at home and imported from abroad, so that for the sake of the revenue they have both to be taxed alike."

628 As discussed above, there was an alternative sense in which "excise" was used at Federation to extend beyond taxes that have a direct economic effect on the supply-side of a market for the sale of goods. That alternative use of "excise" was as a loose synonym for "tax", such as any tax that was imposed by the Board of Excise, unconfined by reference to whether the tax even concerned goods[1402]. No one has ever suggested such a conception, which would strip the States of all taxing powers.

(iv) Neglect of history

629 The drafting history and views expressed during the Convention Debates provide strong support for the role of the concepts of production or manufacture of goods in shaping the essential meaning of an excise, including the supply-side and directness constraints. If an excise were to be entirely divorced from the production or manufacture of goods by treating it as concerned with demand-side matters that, as a matter of substance, are entirely after sale, this would be a significant break with that history and understanding. That is so even on the assumption that the purpose of s 90 is to be broadened to include the notion of free trade within the Commonwealth (albeit not free trade at all costs).

630 At the 1897 session of the Convention Debates in Sydney, Mr Isaacs said that "[w]hat we intend by excise would be covered by the definition" in a report

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1399 *The Encyclopaedia Britannica*, 11th ed (1910), vol 10 at 58.

1400 *The Oxford English Dictionary*, online version (July 2023), "excise (noun)", sense 2, quoting *The Encyclopaedia Britannica*, 11th ed (1910), vol 10 at 58. See, further, *Petrol Case* (1926) 38 CLR 408 at 435.

1401 Giffen, "Taxation", in *The Encyclopaedia Britannica*, 11th ed (1911), vol 26 at 460, referred to in *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 298.

1402 *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 at 564-565.

"by an Account[s] Committee, composed of gentlemen of considerable experience", including the Victorian Secretary for Trade and Customs, Dr Wollaston[1403]. The Accounts Committee had observed that, although they had "some difficulty in determining what 'excise' includes", the "Adelaide Convention evidently intended the word [excise] to mean the duties on the manufacture or production of commodities and nothing more" and that this intention was "made plain" in the speech by Sir George Turner[1404]. In order to avoid the lack of certainty of the word "excise" without a definition, the Committee had proposed that "excise" be defined as "the duty chargeable on the manufacture and production of commodities"[1405]. Unsurprisingly, in 1901, Quick and Garran said that the "fundamental conception of the term [excise] is that of a tax on articles produced or manufactured in a country"[1406].

(v) Neglect of political choice: s 90 vs s 109

631 The *Constitution* was drafted to reflect different techniques by which Commonwealth power to tax might become further exclusive of the power of the States. One technique is the legal constraint in s 109. That section provides for a law of the Commonwealth to prevail over a law of a State to the extent of inconsistency. There are unresolved questions concerning the *extent* to which the Commonwealth can exercise its powers so as to exclude the operation of State taxation powers. But although the extent to which the Commonwealth can do so is unresolved, there is no doubt that at least within some particular subjects of Commonwealth power there is generally an ability to legislate with the effect that s 109 would exclude the power of the States to impose taxes over that subject matter[1407].

632 Another technique by which Commonwealth taxation power might become further exclusive of State taxation power is through the practical effect of the exercise of Commonwealth tax laws, as the Commonwealth did in relation to

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1403 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1065.

1404 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

1405 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

1406 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837.

1407 See, eg, *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 626 [30].

income tax. In the *First Uniform Tax Case*[1408], Latham CJ said that "the scheme which the Commonwealth has applied to income tax of imposing rates so high as practically to exclude State taxation could be applied to other taxes so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth".

633 A third technique is by judicial fiat: the judicial expansion of the scope of the taxes which s 90 precludes the States from levying. The difference between this technique and the former two is that the former techniques involve the Commonwealth Parliament making a political choice, in the political arena, about the extent to which it will pursue the exclusivity of its taxation power. The presence of the whip hand of s 109 and the possibility of a political choice by the Commonwealth Parliament to assume practical national control over a subject matter within its power are part of a constitutional design that leaves to the political, not the judicial, arena the resolution of disputes about the extent of fiscal and practical autonomy of the States.

634 By ignoring the constraint of a real and substantial effect on the supply-side of a market, and by removing, by judicial fiat, the long-standing supply-side and directness constraints upon the scope of an excise, today's majority instead removes these important matters of political choice from the political arena and arrogates them to the judiciary.

(vi) Neglect of economics

635 In many cases involving the boundaries of an excise, members of this Court have relied, sometimes heavily, upon principles of economics. Sometimes these economic principles are encompassed in assertions of ordinary experience or of a "tendency" of a tax to be passed on by an increase in the price of goods[1409]. The emphasis upon the "tendency" of the economic impact of a tax, rather than the actual impact of the tax, is an important qualification that ensures that constitutional validity of legislation is assessed according to the reasonably anticipated impact of the tax imposed by the legislation at the time that the

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1408 *South Australia v The Commonwealth* (1942) 65 CLR 373 at 429.

1409 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 302, quoting *R v Caledonian Collieries Ltd* [1928] AC 358 at 362; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 546, 560; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 436; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586. See also *City of Halifax v Fairbanks' Estate* [1928] AC 117 at 126.

legislation is passed[1410] rather than the actual, ex-post impact of the tax or its "incidence in particular or special cases"[1411].

636 The danger with assertions about ordinary experience and tendencies, unsupported by any economic principles and usually without unpacking the underlying economic assumptions, is that they can conceal flawed economic reasoning. For instance, the plaintiffs and the Commonwealth, and the majority of this Court[1412], in abolishing the supply-side and directness constraints, assume that there is no relevant, principled difference in economic analysis between economic effects upon the demand-side of a market for the sale of goods and economic effects on the supply-side. They also appear to assume that an event that leads to a shift in a demand curve is of the same nature as an event that leads to a change in demand by a movement along a demand curve. With great respect, these unpacked assumptions are simply wrong[1413].

(i) The economic analysis on the supply-side of a market

637 As the majority in *Capital Duplicators [No 2]* recognised[1414], a tax that has an economic effect on the supply-side of a market for goods (ie, a tax which changes the pattern of supply) has a tendency to increase the price, which, in turn, has a tendency to reduce the demand for the good. The important point is that the economic effect of the tax is to change the pattern of supply, and therefore the price, with a *consequential* change in equilibrium demand, although the pattern of demand remains the same. The economic analysis underlying the reasoning in *Capital Duplicators [No 2]* and *Ha* can be graphically depicted as seen below.

1410 See *Clubb v Edwards* (2019) 267 CLR 171 at 334-335 [470]-[471]; *Unions NSW v New South Wales* (2023) 97 ALJR 150 at 168 [78]; 407 ALR 277 at 297.

1411 *City of Halifax v Fairbanks' Estate* [1928] AC 117 at 126; *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 300; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 436.

1412 See, eg, Joint Reasons at [150], [192]-[194]; Reasons of Jagot J at [925]-[926], [928].

1413 Samuelson and Nordhaus, *Economics*, 19th ed (2010) at 75-76, 92-93; Stiglitz and Walsh, *Principles of Economics*, 2nd Aust ed (2016) at 42-43, 45, 71; Mankiw, *Principles of Economics*, 10th ed (2023) at 154-155.

1414 (1993) 178 CLR 561 at 586.

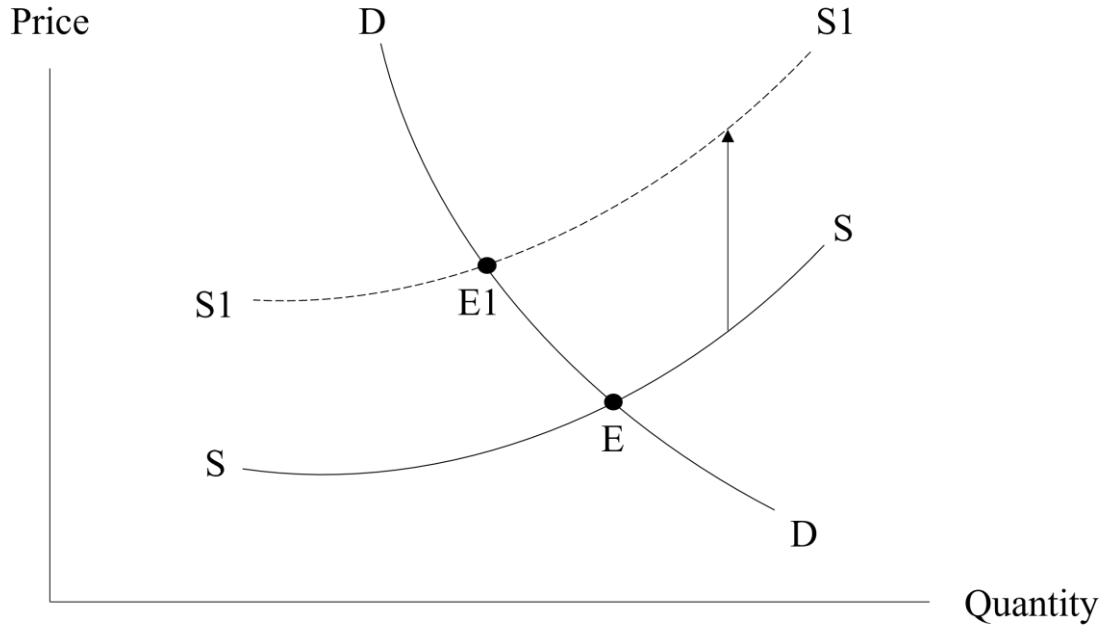

Diagram 1: A tax affecting the supply-side of a market

638 As the diagram above shows, a tax which has an economic effect on the supply-side of a market, by changing the pattern of supply of a good for sale, does so by increasing the cost of the supply of the good. This is depicted by moving the supply curve up (from SS to S1S1). The movement of the supply curve increases the equilibrium market price of sale and decreases the equilibrium quantity of goods supplied. The new equilibrium point (E1) of supply and demand (where S1S1 intersects DD) is at a higher price and a lower quantity of goods. The ultimate consequence of the tax is a lower level of demand due to the new equilibrium price, but it does not change the general pattern of demand: at any given price the demand is unchanged.

(ii) The economic analysis on the demand-side of a market

639 By contrast, as the second diagram (below) shows, a tax that has an economic effect on the demand-side of a market for the sale of a good decreases the pattern of demand by moving the demand curve down (from DD to D1D1) and therefore decreasing the equilibrium market price of sale and the equilibrium quantity of goods supplied. The new equilibrium point (E2) of supply and demand (where SS intersects D1D1) is at a lower price and a lower quantity of goods. The tax changes the general pattern of demand.

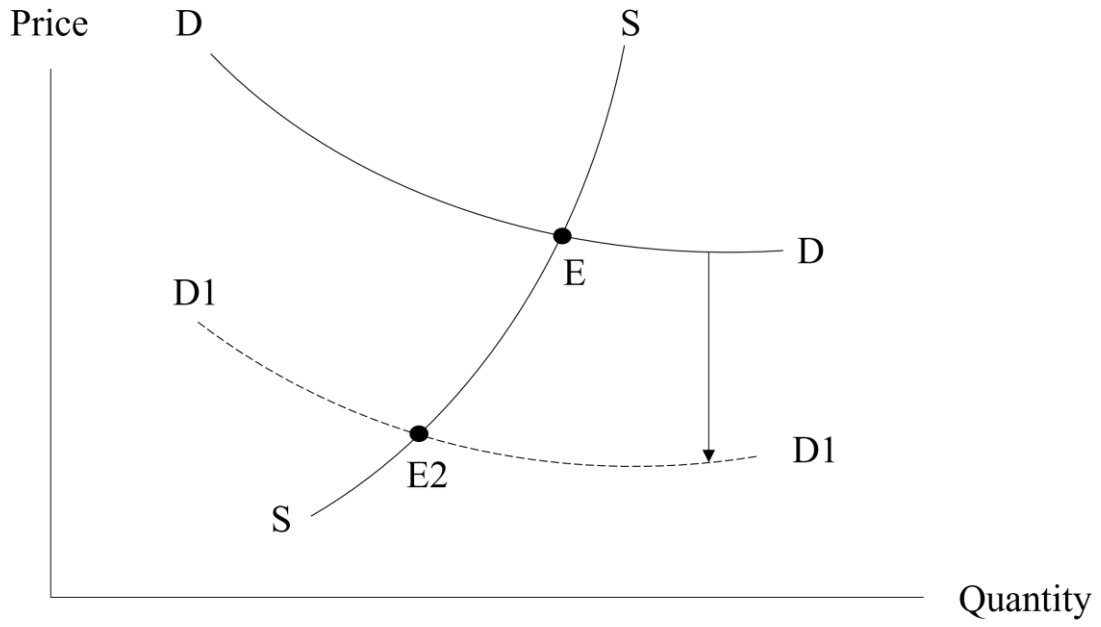

Diagram 2: A tax affecting the demand-side of a market

(iii) Difference between the effects of taxes on the supply-side and the demand-side

640 In the analysis that follows, it is necessary to put to one side those taxes (discussed above at [537]-[540]) which formally take effect on the demand-side but which are, as a matter of substance and economic effect, equivalent to a tax on the supply-side. A simple example is a sales tax that must be paid by the consumer immediately after sale, perhaps collected by the seller. As a matter of substantive effect on the consumer, the fact that the tax is formally imposed on the consumer (and therefore formally on the demand-side) the moment after sale rather than formally imposed on the seller at the moment of sale can make no difference. The consumer will experience the tax in the same way as if there were an increase in price by the seller. Although the tax formally operates on the demand-side of the market, as a matter of substance it is equivalent to a supply-side tax.

641 There are otherwise two important differences between taxes that affect the supply-side and those that affect the demand-side of a market for the sale of goods. First, while a tax with an economic effect on the supply-side has a tendency to increase market price, a tax with an economic effect on the demand-side has a tendency to decrease market price. Secondly, while a tax with an economic effect on the supply-side changes the pattern of supply, it does not change the pattern of demand (unlike a tax with an economic effect on the demand-side), rather it only results in a consequential movement along the demand curve. Contrary to the view of today's majority[1415], "[t]he distinction between changes that result from a *shift*

1415 Joint Reasons at [150], [192]-[194]; Reasons of Jagot J at [925]-[926], [928].

in the demand curve and changes that result from a *movement along* the demand curve is crucial to understanding economics"[1416]. A tax that operates directly in a market for the sale of goods will affect either the pattern of supply in the market, with a tendency to cause a consequential increase in equilibrium price in that market, or the pattern of demand, with a tendency to cause a consequential decrease in equilibrium price in that market.

642 These differences become even more important where the relevant market is for things that are complements to the goods that are the subject of the tax. For instance, a tax with a direct economic effect on the supply-side of a market for petrol will have the effect of increasing the price of petrol as shown in Diagram 1. In the separate market for the sale of cars, a real and substantial increase in the price of petrol might have the effect of shifting downwards the demand curve for the purchase of petrol-based cars and therefore reducing the price of those cars as shown in Diagram 2. The extent of the shift in the demand for cars in Diagram 2 will depend upon the cross-price elasticity of demand. For instance, a small change in the price of petrol might not lead to any change in the number of cars purchased but might lead to fewer car trips. Importantly, it is only in an indirect and attenuated sense of the metaphor that a petrol tax could be described as a "tax on cars". A petrol tax is not a tax that has a direct economic effect on supply or demand in the market for the sale of cars.

(iv) Errors arising from the neglect of economics

643 The first error of economic analysis in this case arose in the submission by the plaintiffs that "because commodity taxes add to the price of commodities, they can contribute to the rate of domestic inflation"[1417]. On the supply-side of a market this is generally correct. On the demand-side of a market it is wrong. A tax that is imposed, after purchase, on the ownership, possession, use, or destruction of a good, payable by the consumer, will tend to decrease demand and therefore decrease, not increase, the price of the good. Its tendency will be deflationary, not inflationary.

644 The second error of economic analysis arose in the plaintiffs' submission that "because commodity taxes cannot discriminate between taxpayers on the basis of their incomes, they will be regressive in their impact"[1418]. Again, on the supply-

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1416 Stiglitz and Walsh, *Principles of Economics*, 2nd Aust ed (2016) at 45 (emphasis in original).

1417 Quoting Hanks, "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?" (1986) 10 *Adelaide Law Review* 365 at 383.

1418 Quoting Hanks, "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?" (1986) 10 *Adelaide Law Review* 365 at 383.

side of a market this might generally be correct. To the extent that taxes on the supply-side of a market for ordinary commodities are passed on to consumer taxpayers, that will usually occur without respect to the income of the consumer purchasing the good. On the demand-side of a market the proposition is wrong again. A tax that is imposed by reference to the ownership, possession, use, or destruction of a good, which might affect the consumer's demand for the good, is capable of being tailored according to the income of the consumer.

645 The third error of economic analysis involves a large assumption by the plaintiffs and the Commonwealth that a tax which has a reasonably anticipated direct economic effect on the supply of or demand for something in one market will indirectly have a real and substantial economic effect on supply or demand in the market for the sale of a complementary good. That assumption is wrong. The indirect effect depends significantly on the cross-price elasticities of the complementary good.

646 A concrete example can be given to illustrate this erroneous assumption by the plaintiffs and the Commonwealth. Suppose an Australia-wide market for imported computers with a price of around $3,000. Suppose also that a tax is imposed in one State requiring a licence fee at the time of purchase of $15 for software commonly used in computers. The $15 licence fee has a tendency to move the supply curve upwards in that State market for the sale of computer software and therefore a tendency to increase the price of computer software in that market. But would that small increase in price be expected to lead to any consequential downward shift in the demand for a capital purchase of imported computers across Australia? Common sense might suggest that it would not. But to assume that it would be reasonably anticipated to do so, or would have a natural tendency to do so, without any economic basis, or even any thought about cross-elasticity of demand, is an error.

647 The fourth error involves the assumption that taxes that have a direct economic effect on the demand-side of a market for the sale of goods can be justified as excises by reference to the expanded purpose of s 90 concerning a free trade area throughout the Commonwealth. If State taxes are of different sizes, a direct effect on the demand curve will be different in different States. But how much do different levels of demand in different States impair free trade between States? And is such an impairment more adverse to free trade than a uniform Commonwealth tax despite different conditions that may prevail in different States?

648 Differential State taxes can accommodate variations in levels of demand within a State and across States. A Commonwealth tax cannot. Section 99 of the *Constitution* prohibits the Commonwealth from giving preference to one State (or any part thereof) over another State (or any part thereof) by any law or regulation of trade, commerce, or revenue. Section 51(ii) prohibits the Commonwealth from using its taxation power to discriminate between States or parts of States. These

constraints upon the Commonwealth's power to impose taxes mean that even the broad free trade purpose asserted for s 90 of the *Constitution* may be inconsistent with the expansion of the concept of an excise.

649 Putting to one side the grant of financial assistance to States under s 96, which is subject to many political considerations, could it really be assumed that a uniform Commonwealth tax, which is unable to respond to different economic conditions in different States due to ss 51(ii) and 99 of the *Constitution*, would promote free trade more than differential State taxes? As Professors Petchey and Shapiro point out, in some "highly plausible scenarios the uniform federal excise tax is actually more distortionary" upon free trade than differential State taxes[1419]. Moreover, they argue, it is open to doubt whether an independent, and competitive, State tax regime would lead to significant variations in tax rates across States[1420].

(vii) Neglect of precedent

650 Precedent is comprised not merely of the results of decided cases. It includes the necessary reasoning that is sufficient for those results[1421]. And it includes seriously considered obiter dicta[1422]. In that light, it is important to note the neglect of precedent that arises from treating an excise as including a tax whose effect is on the demand-side of a market for the sale of goods. As Gibbs J said in *Dickenson's Arcade*[1423], since *Parton* "no member of [this] Court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise".

651 The extension of the essential meaning of an excise to a tax that has a reasonably anticipated economic effect on the pattern of demand, as was sought by the plaintiffs and the Commonwealth, involves a neglect of precedent. It means:

1419 Petchey and Shapiro, "Chariot Wheels and Section 90" (1995) 11(1) *Policy* 13 at 15.

1420 Petchey and Shapiro, "'Shall Become Exclusive:' An Economic Analysis of Section 90" (1994) 70 *The Economic Record* 171 at 181; Petchey and Shapiro, "Chariot Wheels and Section 90" (1995) 11(1) *Policy* 13 at 15.

1421 *Vunilagi v The Queen* (2023) 97 ALJR 627 at 659-660 [155].

1422 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150-151 [134].

1423 (1974) 130 CLR 177 at 221.

Dixon J was wrong[1424]; Dixon CJ was wrong[1425]; Kitto J was wrong[1426]; Taylor J was wrong[1427]; Menzies J was wrong[1428]; Windeyer J was wrong[1429]; Owen J was wrong[1430]; Barwick CJ was wrong[1431]; McTiernan J was wrong[1432]; Walsh J was

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1424 *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 259-261.

1425 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 540-541; *Bolton v Madsen* (1963) 110 CLR 264 at 271, 273.

1426 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 559-560; *Bolton v Madsen* (1963) 110 CLR 264 at 271, 273; *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 373-375; *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 62; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 22.

1427 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 573; *Bolton v Madsen* (1963) 110 CLR 264 at 271, 273; *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 376.

1428 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 588-590; *Bolton v Madsen* (1963) 110 CLR 264 at 271, 273; *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 377; *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 64-65; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 25; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 209.

1429 *Bolton v Madsen* (1963) 110 CLR 264 at 271, 273; *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 379; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 28.

1430 *Bolton v Madsen* (1963) 110 CLR 264 at 271, 273; *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 71.

1431 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 364, 368; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 12-13; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185-187, 193-194.

1432 *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 at 56-57; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 17. But compare *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 196, 204.

wrong[1433]; Gibbs J was wrong[1434]; Stephen J was wrong[1435]; Mason J was wrong[1436]; Jacobs J was wrong[1437]; Gibbs CJ was wrong[1438]; Wilson J was wrong[1439]; Brennan J was wrong[1440]; Deane J was wrong[1441]; Dawson J was wrong[1442]; Mason CJ was wrong[1443]; and McHugh J was wrong[1444]. That list can, after today, also include Gordon J, Steward J, and me.

1433 *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 35-36.

1434 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 218-222; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 63-65.

1435 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 229-231; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 69-70.

1436 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 239; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 628, 632.

1437 *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 520-521; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 80.

1438 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615, 619-621; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 377-378.

1439 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 644, 649-650; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 400, 404.

1440 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 655, 657-658; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 444-445; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 453.

1441 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 665-666; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 429-431, 435-436.

1442 *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 412, 414.

1443 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 429-431, 435-436; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 453.

1444 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 488-492; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 453.

652 In short, amidst a sea of fluid principle with an expanding scope of application and techniques of application, until today a rock of constancy has been that a consumption tax is not a tax upon goods. As Gibbs J expressed the point[1445]:

> "It might be said that these expressions of opinion are not binding because it was not necessary to decide in any of these cases whether a tax imposed on consumption was an excise, but the very greatest weight should be given to the fact that on this issue unanimity has been reached after a fluctuation of judicial opinion."

(viii) Neglect of authority: Dickenson's Arcade *should not be re-opened*

653 Perhaps on the false assumption that the force of precedent exists only with respect to the result of decided cases, the plaintiffs and the Commonwealth directed their attention only to whether this Court should grant leave to re-open, and overrule part of the result or ratio decidendi in, *Dickenson's Arcade*. As I explained in *Vunilagi v The Queen*[1446], the question whether a case should be re-opened requires a preliminary assessment of the prospects that the Court will so depart. Although that preliminary assessment sometimes occurs after full argument, the decision to re-open a case involves a lower threshold, and not necessarily a firm conviction that the Court should overturn the result or ratio decidendi of the earlier case.

654 Even without full argument, but certainly with the benefit of the defendant's outstanding submissions, I am satisfied that leave should be refused and that *Dickenson's Arcade* should not be re-opened. It is necessary to examine that decision closely. Importantly, there were separate aspects of the decision concerned with (i) the substantive legislation and (ii) the subsidiary regulations made under that legislation. As to the substantive legislation, the reasons of five of the six members of the Court accepted that a consumption tax was not an excise. Of those five members, the four who were in the majority reached that conclusion by reliance upon principle and precedent, and their conclusion would have been the same whether or not the criterion of liability technique of application were applied.

655 In *Dickenson's Arcade*, this Court considered two taxes created by the *Tobacco Act 1972* (Tas), respectively in Pt II and Pt III of the Act. Part II (ss 3 to 8) imposed a tax on the consumption of tobacco to be calculated by reference to the retail sale price of the tobacco that was consumed. Regulations provided for the means of collecting the tax. The *Tobacco Regulations 1972* (Tas) had the effect that the tax on the consumption of tobacco would normally be collected at the point

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1445 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 221.

1446 (2023) 97 ALJR 627 at 660 [156].

of retail sale by a "collector", who "will no doubt be the retailer ... or agent"[1447], although the purchaser could lawfully choose instead to pay the tax to the Commissioner of Taxes within seven days of consuming the tobacco[1448]. Part III of the *Tobacco Act* (ss 9 to 19) imposed a tax which was described as a "fee payable by the holder of a licence [to sell tobacco]"[1449].

656 Two of the declarations sought by the plaintiff concerned Pt II of the *Tobacco Act*. First, the plaintiff sought a declaration that the provisions of Pt II of the *Tobacco Act* were invalid as they imposed a duty of excise. Secondly, the plaintiff sought a declaration that Pt II of the *Tobacco Act*, together with regs 2 to 8 of the *Tobacco Regulations*, were invalid as they imposed a duty of excise[1450]. The defendants demurred to the claims for declarations on the ground that the plaintiff had no cause of action.

657 A majority of the Court (Menzies J, Gibbs J, Stephen J, and Mason J) allowed the demurrer to the first declaration, concluding that the provisions of Pt II did not impose an excise[1451]. But a different (statutory[1452]) majority (Barwick CJ, McTiernan J, and Mason J) combined to reject the demurrer in so far as it related to the validity of Pt II of the *Tobacco Act* together with regs 2 to 8 of the *Tobacco Regulations*, concluding that Pt II of the Act, read with the regulations (as Mason J required for invalidity), imposed an excise[1453]. In effect, the result of the case was that Pt II of the *Tobacco Act* was valid but it was required to be disapplied because it imposed an excise to the extent of regs 2 to 8 of the *Tobacco Regulations*.

658 The decision by the majority to allow the demurrer to the first declaration is the most relevant aspect of the decision to the present case. The effect of the reasoning of the majority was that a tax will not be an excise if, as a matter of substance (unlike, for instance, a mere deferred sales tax), it is imposed beyond the point of purchase of a good. Importantly, this conclusion was reached by each member as a matter of both precedent and principle and would have been reached

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1447 (1974) 130 CLR 177 at 215.

1448 (1974) 130 CLR 177 at 209-210, 215.

1449 (1974) 130 CLR 177 at 215. See also at 207.

1450 (1974) 130 CLR 177 at 210.

1451 (1974) 130 CLR 177 at 210, 224, 234, 242.

1452 See *Judiciary Act 1903* (Cth), s 23(2)(b).

1453 (1974) 130 CLR 177 at 194-195, 204-205, 243.

by each member of the majority irrespective of the (formalistic) criterion of liability technique of application.

659 Menzies J relied upon both authority and principle. As to authority, his Honour described how decisions of this Court had "quite definitely" established that a "tax upon consumption" is not a duty of excise[1454]. Although one of those decisions was *Bolton v Madsen*, Menzies J did not rely on the criterion of liability technique of application in that earlier case. Instead, his Honour relied upon it as identifying two limits to the concept of an excise that had developed since *Matthews*: the supply-side and directness constraints, requiring an excise to be imposed at some step "before ... the hands of consumers"[1455]. As to principle, Menzies J justified the supply-side constraint upon an excise by emphasising that duties of excise and customs are "naturally the corollary" of bounties. Just as bounties are applied to "production or export", duties of excise and customs should be applied to production or import. However wide the meaning that was given to production, it could not extend beyond "'the point of receipt by the consumer'"[1456].

660 Gibbs J likewise decided the case by reference to both authority and principle. As to authority, although Gibbs J preferred the criterion of liability technique of application, his Honour relied upon authority that included judgments that had rejected that technique. His Honour considered that the greatest weight should be given to the long-standing unanimity of judicial opinion that a consumption tax is not an excise[1457]. As to principle, his Honour observed that since a tax on consumption could produce the same economic effect as a tax on the last retail sale, as a matter of "economic effect ... [t]he power of the Commonwealth Parliament to tax commodities would be incomplete ... if the power did not extend to taxes on consumption"[1458]. But he explained, impeccably, that this consideration was "not decisive"[1459]. In other words, since (in our federation) "s 90 is intended to effect a distribution of the power to impose taxation between the Commonwealth and the States", a duty of excise cannot extend to a tax with any economic effect in a market for the sale of goods. Limits to that connection must be identified rather than simply attempting to maximise, in favour of the Commonwealth, the exclusive aspect (ie, the aspect concerning excises) of

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1454 (1974) 130 CLR 177 at 209.

1455 (1974) 130 CLR 177 at 209.

1456 (1974) 130 CLR 177 at 213, quoting *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 559.

1457 (1974) 130 CLR 177 at 221.

1458 (1974) 130 CLR 177 at 219.

1459 (1974) 130 CLR 177 at 222.

its power to impose taxes under s 51(ii) of the *Constitution*[1460]. One of those limits is the need for the reasonably anticipated direct economic effect of the excise to be on the supply-side of a market for the sale of goods.

661 Stephen J also decided the case by reference to authority and principle. His Honour began with a powerful appeal to precedent. Without referring to the criterion of liability aspect of *Bolton v Madsen*, Stephen J referred to the "hard won" certainty identified in that case that duties of excise are taxes that are imposed "'before [goods] reach the hands of consumers"'[1461]. Stephen J went on to refer to the same limit identified by Barwick CJ in *Anderson's Pty Ltd v Victoria*[1462] (a case in which the Chief Justice rejected the criterion of liability technique[1463]), that "the step which puts the goods into consumption is ... at the end of the line" for an excise, as well as Dixon J's statement in *Parton*[1464] that an excise is a "tax upon goods before they reach the consumer"[1465]. As to principle, Stephen J referred to the lack of any "exact application" concerning which taxes will amount to an excise and the need to delineate the boundary between State and federal legislative power in taxation[1466]. His Honour also explained that indirect taxes, by which he meant taxes on the supply-side that are intended to be passed on to the consumer, "tend to be more concerned with the commodity" and thus are more likely to be directly related to goods[1467].

662 Mason J also decided the case by reference to authority and principle. As a matter of authority, his Honour began with the view of McTiernan J that the object of s 90 was "a uniform fiscal policy for the Commonwealth"[1468]. But if that object were applied at all costs then s 90 would not even be limited to taxes concerning

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1460 (1974) 130 CLR 177 at 222.

1461 (1974) 130 CLR 177 at 229-230, quoting *Bolton v Madsen* (1963) 110 CLR 264 at 271.

1462 (1964) 111 CLR 353 at 365.

1463 (1964) 111 CLR 353 at 365-366.

1464 (1949) 80 CLR 229 at 260.

1465 (1974) 130 CLR 177 at 230-231.

1466 (1974) 130 CLR 177 at 230, quoting *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 293.

1467 (1974) 130 CLR 177 at 231.

1468 (1974) 130 CLR 177 at 238, quoting *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 265.

goods. Mason J thus recognised the requirement for an excise that the tax have a direct economic effect in the market for the sale of goods and that it extend no further than the point of receipt by the consumer[1469]. Like every other member of the majority in *Dickenson's Arcade*, for Mason J the criterion of liability technique of application was irrelevant to this conclusion. Mason J emphasised that "[w]hatever differences may be detected in the judgment of members of this Court" there had been unanimous agreement "in defining or describing an excise duty in such terms as would exclude a tax imposed on goods after they have passed into the hands of a consumer"[1470]. As to principle, Mason J relied on three matters: (i) consumption "is not sufficiently proximate to the production and manufacture of goods"; (ii) the need for proximity to production and manufacture of goods can be seen in the terms of s 93; and (iii) s 90 deals with bounties on production as well as duties of excise[1471]. All of these matters point to an excise requiring a reasonably anticipated direct economic effect on the supply-side of a market for the sale of goods, therefore excluding a consumption tax from the concept of an excise.

663 In the minority, Barwick CJ reluctantly accepted that precedent required a consumption tax to be excluded from the concept of an excise despite his view that there was no "logical" reason for such an exclusion[1472]. Of course, it can be said that there is also no "logical" reason to confine an excise to taxes that concern a market for the sale of goods. So too, the preservation of a properly functioning federation might not be a matter of logic, but it is an important matter of principle. Perhaps for these reasons, Barwick CJ did not seek to depart from the authority that excluded consumption taxes from the concept of an excise. Instead, his Honour held, with some force, that the substantial operation of Pt II of the *Tobacco Act* was not as imposing a consumption tax but a tax that was essentially connected with the purchase of tobacco so that it was a "tax upon the movement of the tobacco into consumption"[1473]. In short, although the tax was formally imposed on the demand-side of the market it was equivalent to a tax on the supply-side.

664 Only McTiernan J, in a short and lonely dissent on this point, thought that Dixon J's short-lived flirtation with a consumption tax as an excise should be resurrected[1474]. McTiernan J did not consider in any detail whether this conclusion was consistent with constitutional structure, constitutional text, contemporary

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1469 (1974) 130 CLR 177 at 238-239.

1470 (1974) 130 CLR 177 at 239.

1471 (1974) 130 CLR 177 at 239.

1472 (1974) 130 CLR 177 at 185-186.

1473 (1974) 130 CLR 177 at 193-194.

1474 (1974) 130 CLR 177 at 196-198.

understanding, history, political choice, economics, precedent or authority. After today his dissent is less lonely.

665 Neither principle nor authority can justify re-opening *Dickenson's Arcade*. Indeed, as Steward J observes[1475], members of this Court have either affirmed or refused to overrule *Dickenson's Arcade* on nine occasions[1476]. And for the reasons already explained, overturning the result of *Dickenson's Arcade* would be an error based on the neglect of many things: constitutional structure and text, the contemporary understanding of an excise, history, political choice, economics, and precedent. Further, re-opening and overturning the result will have extremely serious consequences for the States. One of the immediate consequences is the doubt that the overturning would cast on many categories of State taxes and the litigation that will ensue to resolve those doubts. The subsequent consequences will be further and significant deterioration of the vertical imbalance in the fiscal structure of the Australian federation, as well as the threat to the federation itself. *Dickenson's Arcade* should not be re-opened.

(ix) Further neglect of authority: Logan Downs *should not be re-opened*

666 *Dickenson's Arcade* is not the only case in this Court that must be re-opened and overruled if this Court were to move to a new test where an excise essentially means a "tax on goods" and where that metaphor can be assessed by reference to whether demand for the goods is indirectly affected.

667 In oral submissions, at least initially, the Solicitor-General of the Commonwealth accepted that a tax that is concerned with "merely possessing the good would be unlikely to be an excise". That submission might have been made to avoid the obvious consequence that if a tax in respect of mere possession or mere ownership could be sufficient to constitute an excise then this Court would also need to re-open the reasoning and part of the result in *Logan Downs Pty Ltd v Queensland*[1477]. But, and with enduring respect, the majority of this Court is not so

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1475 Reasons of Steward J at [748].

1476 *M G Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245 at 258, 260; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 488, 491-492, 496-497, 501-503, 521; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 63-64, 74-76; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615, 633, 663; *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 380, 420; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 409, 440-441, 474-475, 481; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 591-593, 629; *Ha v New South Wales* (1997) 189 CLR 465 at 504.

1477 (1977) 137 CLR 59.

constrained today even in the absence of any application to re-open the reasoning in that decision[1478] and part of the result of the decision. By recognising that the application of a "tax on goods" extends also to taxes that indirectly affect the demand-side of a market for goods[1479], and therefore includes taxes concerning the ownership, possession, use, or destruction of goods, the majority impliedly departs from the reasoning of every member of this Court in *Logan Downs*.

668 In *Logan Downs* the question was whether s 7 of the *Stock Act 1915* (Qld) was an excise. That section authorised the Minister to impose a levy on owners of stock "in respect of stock owned by [them]", where stock was defined in s 3 as relevantly including horses, cattle, sheep, and pigs. A statutory majority of the Court[1480] (Barwick CJ, Stephen J, and Mason J) held that s 7 imposed an excise[1481]. The basis for their reasoning was that s 7 imposed a tax on a step in the production process for the ultimate product produced from the stock (meat, milk, wool, or progeny) rather than by reference to possession or ownership of the stock. In other words, part of the essential reasoning of each member of the majority involved a rejection of the notion that a tax on ownership of any good could be an excise. So too, in the statutory minority, Gibbs J, Jacobs J, and Murphy J all held that although the tax was a "tax on goods" this was not sufficient for it to be an excise[1482]. In other words, every member of this Court rejected the notion that an excise included a tax whose reasonably anticipated direct effect was on the demand-side of a market for goods, by a concern with ownership of goods.

669 In the statutory majority, Mason J (with whom Barwick CJ agreed) held that the tax was an excise because it was a tax concerning the market for the product that was produced from the livestock—meat, milk, wool, or progeny—and therefore was "a tax on production itself"[1483]. The character of the tax as an excise was not lost "merely because in its application to other animals [ie, by possession or ownership of horses and foals] it may not constitute an excise"[1484]. But that

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1478 Compare *Vunilagi v The Queen* (2023) 97 ALJR 627 at 661-662 [165], citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71 [55], 74 [65], 86-87 [100], 101-106 [153]-[167].

1479 See, eg, Joint Reasons at [150], [184]-[185], [192]-[194]; Reasons of Jagot J at [916], [918], [925]-[926], [928].

1480 *Judiciary Act 1903* (Cth), s 23(2)(b).

1481 (1977) 137 CLR 59 at 61, 71-72, 78-79.

1482 (1977) 137 CLR 59 at 63, 80, 84.

1483 (1977) 137 CLR 59 at 78.

1484 (1977) 137 CLR 59 at 78.

broader application meant for Mason J that the tax was not entirely invalid; it was disapplied to the extent that it applied to stock in production but the plaintiff was required to pay the assessment that related to horses owned by the plaintiff[1485]. In short, an essential part of the reasoning of Mason J, and part of the result reached, was that a tax on ownership of stock was not an excise.

670 The third member of the statutory majority, Stephen J, accepted that "not every tax upon goods ... will be an excise"[1486]. His Honour explained that "[o]nce out of the stream of production and distribution, goods cease to be apt subject-matter for duties of excise and it is this that accounts for the character of an excise as an indirect tax"[1487]. His Honour therefore held that the tax could not be an excise in its application to the ownership of stock horses used for working the plaintiff's properties[1488]. But that did not preclude the tax imposed by the *Stock Act* from being an excise in other applications, because Stephen J characterised it overall as a tax upon steps in the production of meat, milk, wool, or progeny[1489].

671 In the statutory minority, Gibbs J emphasised that he was not deciding the case on the basis of the criterion of liability technique[1490], but was deciding the case on the basis that "to be an excise the tax must be imposed at some step in the production or distribution of goods"[1491]. His Honour thought that it was "obvious enough that a tax on the ownership of goods not held for commercial purposes would not be a duty of excise"[1492], and he characterised the tax as one upon ownership of the stock rather than by reference to production or distribution of the stock[1493]. Jacobs J said that he could "see nothing in the *Stock Act*, to suggest that the tax imposed by s 7 on the animals is in substance a tax on their produce"[1494], and that the substantial operation of the *Stock Act* showed that it was a tax on

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1485 (1977) 137 CLR 59 at 79.

1486 (1977) 137 CLR 59 at 69.

1487 (1977) 137 CLR 59 at 69.

1488 (1977) 137 CLR 59 at 70.

1489 (1977) 137 CLR 59 at 69-71. See also at 72.

1490 (1977) 137 CLR 59 at 64, 67.

1491 (1977) 137 CLR 59 at 64.

1492 (1977) 137 CLR 59 at 65.

1493 (1977) 137 CLR 59 at 67.

1494 (1977) 137 CLR 59 at 81-82.

ownership, and therefore was not an excise[1495]. And Murphy J treated the tax as one on ownership, and concluded that it was not an excise because it did not discriminate between goods that were locally produced in Queensland and those produced elsewhere[1496].

(x) Neglect of the future

672 Until today, the supply-side and directness constraints upon the concept of an excise meant that many actual or potential State taxes were not excises. Payroll taxes on employers might have a very significant impact upon the cost of producing or manufacturing goods, and therefore might indirectly affect the price of those goods, especially in labour intensive industries. But their direct economic effect is on the price of labour in the market for the supply of labour. They have only an indirect economic effect in a market for the sale of goods.

673 Industrial land taxes might have a very significant impact upon the cost of producing or manufacturing goods, and therefore indirectly affect the price of those goods. But their direct economic effect is on the price of industrial land generally. They only have a consequent and indirect economic effect on the supply-side of a market for the sale of the goods produced on that land.

674 State income taxes, in the first half of the last century, could have reduced the demand for, and reduced the prices of, goods. But this reduction in demand and prices would be an indirect economic effect in the market for the sale of goods and would operate on the demand-side of any market for those goods.

675 Taxes that are imposed for what is, as a matter of substance, a licence to carry on a business have a direct economic effect on the business. They have a direct economic effect on the price at which the business could be sold. But they only have an indirect economic effect in the market for the sale of the goods with which the business is concerned.

676 For more than a century, the supply-side and directness constraints upon the recognition of an excise have meant that the States have been able to impose numerous different types of taxes with the comfort that those taxes were not excises. The abandonment of these two basic constraints on the concept of an excise will lead to years of confusion as courts struggle to determine the limits of the unconstrained preposition "on" in respect of a metaphorical connection with goods. Once it is accepted that an excise can include taxes on the demand-side of a market for a good which have an indirect economic effect on demand for that

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1495 (1977) 137 CLR 59 at 82-83.

1496 (1977) 137 CLR 59 at 84.

good[1497], then many taxes that had never previously been conceived of as excises could potentially be excises.

677 Until today, the States could have been reasonably certain that an excise did not include a tax on a gift of goods or an inheritance of goods[1498]. Until today, the States could have been reasonably certain that an excise did not include a payroll tax which applied generally but had an indirect effect on companies producing goods[1499]. Until today, the States could have been reasonably certain that an excise did not include an industrial land tax on a producer of goods[1500]. Until today, the States could have been reasonably certain that an excise did not include a tax for a licence to carry on a business[1501]. Until today, the States could have been reasonably certain that an excise did not include a consumption tax[1502]. Not after today.

678 The departure from a requirement of direct economic effect in a market for the sale of goods may also now cast doubt upon the status of authorities concerning the application of a bounty, which limit a bounty to a direct pecuniary benefit even if the effect of the bounty is a substantial disruption of free trade[1503]. It can no longer be certain that this Court would not re-visit previous understandings that eschewed a wide approach to a bounty and which had accepted that a wide

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1497 See, eg, Joint Reasons at [150], [184]-[185], [192]-[194]; Reasons of Jagot J at [916], [918], [925]-[926], [928].

1498 See *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 65.

1499 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617, 651; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 381; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454. See also *Victoria v The Commonwealth* (1971) 122 CLR 353 at 369.

1500 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 651; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 381; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454.

1501 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 597.

1502 See *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

1503 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 148-149.

approach "would constitute a remarkable restriction on the autonomy of a State"[1504].

XI. The nature of the ZLEV Act tax

(i) The operation of the ZLEV Act

679 Under s 7 of the ZLEV Act, the "registered operator" of a ZLEV must pay a charge for use of the ZLEV on "specified roads"[1505]. The registered operator is the person recorded on the register in Victoria as responsible for the ZLEV[1506]. A registered ZLEV must have a garage address in Victoria[1507], and it is an offence to use a motor vehicle (including a ZLEV) on a highway, or own a motor vehicle (including a ZLEV) which is used on a highway, without registering it in Victoria[1508]. There are various exemptions to the requirement to pay the ZLEV Act tax, including for vehicles that are registered in another jurisdiction[1509] and for driving a ZLEV on a private road[1510].

680 The "specified roads" to which the charge for use of Victorian-registered ZLEVs relates are wide-ranging[1511]. They include, for example, public roads all across Australia[1512]; road related areas[1513]; various common law highways in Victoria and common law highways outside Victoria; and public highways[1514]. The effect of the ZLEV Act is therefore, in broad terms, that the registered operator of

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1504 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 149.

1505 ZLEV Act, s 7(1).

1506 ZLEV Act, s 3 definition of "registered operator" read with *Road Safety Act 1986* (Vic), s 3(1) definition of "registered operator".

1507 *Road Safety Act 1986* (Vic), s 6A.

1508 See *Road Safety Act 1986* (Vic), s 7 read with s 6A.

1509 See, eg, ZLEV Act, s 7(1) read with *Road Safety Act 1986* (Vic), s 7 and *Road Safety (Vehicles) Regulations 2021* (Vic), reg 146(1).

1510 ZLEV Act, s 3 definition of "specified road".

1511 ZLEV Act, s 3 definition of "specified road".

1512 *Road Management Act 2004* (Vic), s 3(1) definition of "public road", s 17.

1513 *Road Safety Act 1986* (Vic), s 3(1) definition of "road related area".

1514 *Road Management Act 2004* (Vic), s 3(1) definition of "public highway".

a Victorian-registered ZLEV must pay the distance-based charge for the use of the ZLEV on most roads in Australia.

681 In broad terms, the charge incurred by the registered operator for the use of the ZLEV on specified roads differs according to whether the ZLEV is (i) an electric or hydrogen vehicle (being one that is not fitted with an internal combustion engine that provides propulsion or a fuel source for an electric propulsion system) or (ii) a plug-in hybrid electric vehicle (being one that depends in part on electricity or hydrogen power and in part on an internal combustion engine)[1515]. An electric or hydrogen vehicle is charged 2.5 cents per kilometre driven on specified roads[1516]. A plug-in hybrid electric vehicle is charged 2 cents per kilometre driven on specified roads[1517]. These rates are indexed for inflation each year[1518].

(ii) The purpose of the ZLEV Act tax: a tax akin to a fuel tax

682 The purpose of the ZLEV Act is to impose a charge that is of the same effect as, although is less in amount than, a fuel excise[1519]. But the manner of levying the charge is different: unlike a fuel excise, which is levied at the point of sale, the ZLEV Act tax is levied based on the distance travelled by a ZLEV on specified roads. As the Treasurer of Victoria said in the second reading speech, "ZLEV owners pay little or no fuel excise but they still use the roads ... Just like with fuel excise, a per-kilometre charge ensures vehicle owners who use the roads less pay less in distance-based charges"[1520]. The Treasurer explained that in recognition of the "environmental and health benefits of ZLEVs" the quantum of the charge for ZLEV owners was intended to be "around 40 to 50 per cent less than the per-kilometre equivalent that an average driver pays in fuel excise"[1521].

1515 ZLEV Act, s 8(1) read with s 3 definitions of "electric vehicle", "hydrogen vehicle", and "plug-in hybrid electric vehicle".

1516 ZLEV Act, s 8(1)(a)(i).

1517 ZLEV Act, s 8(1)(a)(ii).

1518 ZLEV Act, ss 8(1)(b), 9.

1519 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

1520 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183, 1184.

1521 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

683 In its purpose, therefore, the very design of the ZLEV Act tax is not as a consumption tax at all. It is a tax that is designed to have the same effect as a fuel tax and therefore for its direct economic effect to concern hydrogen and electricity in the markets for the sale of hydrogen or electricity for use in ZLEVs. Whether the markets for hydrogen or electricity for use in ZLEVs are defined by reference to the purchase of electricity at charging stations or the purchase of hydrogen fuel cells for ZLEVs, or whether they could include the hydrogen or electricity obtained generally but used in ZLEVs, need not be explored, and was not explored, in this case. The short point is that the ZLEV Act tax operates, as designed, to increase the cost to the purchaser of hydrogen or electricity for use in ZLEVs just as a fuel tax increases the cost to the purchaser of petrol or diesel bought at the bowser. But instead of imposing that tax at electric charging or hydrogen refuelling stations, the tax is deferred until after the hydrogen or electricity has been used.

(iii) The ZLEV Act tax is not a tax that is directly "on" ZLEVs

684 The nature of the ZLEV Act tax was in dispute between the plaintiffs (supported by the Commonwealth) and the defendant (supported by the Attorneys-General of the other States and Territories, intervening). The plaintiffs and the Commonwealth submitted that the ZLEV Act tax is a tax "on" ZLEVs. Although their explanations were not always consistent, the plaintiffs and the Commonwealth seemed to settle on an explanation that a tax would be "on" ZLEVs if it decreased the demand for ZLEVs in the market for the sale of ZLEVs.

685 As these reasons have explained, no tax is ever a tax "on" goods. It is persons who are subject to taxes, not goods. The metaphor of a tax "on" goods is concerned with the economic effect of the tax on goods. More accurately, the metaphor of a tax "on" goods is concerned with the direct economic effect of a tax on the supply-side of a market for the sale of goods. The starting point, therefore, is to identify the relevant market for goods in which the economic effect on goods is encountered. The constraint that requires an excise to have a reasonably anticipated direct economic effect in the market for the sale of goods requires that direct economic effect of the tax to be in the particular market for the relevant goods.

686 Any economic effect of the ZLEV Act tax is not directly on the demand for ZLEVs in the market for the sale of ZLEVs. The plaintiffs' submission in this respect is wrong as a matter of legislative purpose, economic effect (to the extent to which that effect can be assumed), and common sense. As to legislative purpose, the purpose of the tax was to replace the fuel excise. It is no more a tax with a direct economic effect on the demand for ZLEVs in the market for the sale of ZLEVs than a fuel tax is a tax with a direct economic effect on the demand for cars in the market for the sale of cars. The purpose of the ZLEV Act tax is to mimic a fuel excise. It is not to mimic a tax that has a direct economic effect on the sale of cars in the market for the sale of cars.

687 As a matter of economic effect, any direct economic effect of the ZLEV Act tax in the markets for the sale of hydrogen or electricity for use in ZLEVs in Victoria would be to increase the cost to a consumer of hydrogen or electricity for use in ZLEVs. In economic terms that economic effect is to shift the supply curve up: hydrogen or electricity for use in ZLEVs now comes at a higher price to the consumer. If the higher price of hydrogen or electricity for use in ZLEVs led to a consequent reduction in the demand for the purchase of ZLEVs then that would be an indirect effect in a different market altogether, namely the market for the sale of ZLEVs.

688 As a matter of common sense, any economic effect that the ZLEV Act tax has on the market for the sale of ZLEVs is also indirect. Many people who will pay the ZLEV Act tax already own ZLEVs. They cannot "un-buy" them in the market for ZLEVs. But just as the immediate or direct way in which a consumer might reduce the economic effect of a petrol tax could be to walk to the shops or to cycle to work, so too registered owners of ZLEVs could reduce the ZLEV Act tax by walking, cycling, or driving less. Even those people who are new purchasers of ZLEVs could only be affected, if at all, indirectly in their decision to buy a ZLEV. The indirect effect arises as a consequence of their assessment of the price of something else: hydrogen or electricity for use in ZLEVs.

(iv) The ZLEV Act tax is not a consumption tax

689 The direct economic effect of the ZLEV Act tax, as a tax that has a reasonably anticipated direct economic effect on the supply and price of hydrogen or electricity for use in ZLEVs, means that the tax is not a consumption tax in the sense described by the plaintiffs and the Commonwealth. It is not a tax that has a direct economic effect on demand for ZLEVs in the market for the sale of ZLEVs. Rather, it is a tax which, with limited exemptions, increases the price of hydrogen or electricity for use in ZLEVs, although that charge and its payment are effectively deferred until after the hydrogen or electricity is used.

690 An alternative means of characterising the ZLEV Act tax as a consumption tax was the submission of the defendant that the ZLEV Act tax is concerned with the activity of driving a ZLEV on specified roads. Although the defendant's description of the ZLEV Act tax was powerfully presented, and was a considerable improvement upon the identification of the relevant market by the plaintiffs and the Commonwealth, the defendant's description is ultimately one that focuses too heavily on the terms of the legislation (the criterion of liability) at the expense of the substantive effect and purpose of the ZLEV Act tax.

691 There are several difficulties in the defendant's characterisation of the ZLEV Act tax. First, even with a focus only on the terms of the legislation, the ZLEV Act tax does not fall upon the person performing the activity (of driving a ZLEV on specified roads). It falls upon the registered operator of the ZLEV. Secondly, the purpose of the ZLEV Act was to create a parallel tax to a fuel excise,

which required connecting the tax to the hydrogen or electricity used in a ZLEV; the distance driven by the ZLEV was just the means by which this was achieved. To adapt the words of Dixon J in *Matthews*[1522], there is no distinction of substance between levying a tax with a direct economic effect on the sale of hydrogen or electricity based on the distance driven by a ZLEV and levying a tax with a direct economic effect on the activity of driving a ZLEV for the same distance. Thirdly, and most fundamentally, the exercise of identifying the direct economic effect of the tax requires the identification of the relevant market upon which the tax operates directly. There is no market, and no purpose to create a market, for the activity of driving a ZLEV.

(v) The ZLEV Act tax is unlikely to have any real and substantial effect in the market for the sale of ZLEVs

692 There is a further problem with the submissions of the plaintiffs and the Commonwealth even if it were erroneously assumed that: (i) an excise does not require a tax to have a direct economic effect in a market for the sale of goods; (ii) an excise includes a tax with an economic effect on the demand-side of a market for the sale of goods (such as a consumption tax); and (iii) the ZLEV Act tax is a consumption tax with an indirect economic effect on the demand-side of a market for the sale of goods.

693 The further problem, even with the benefit of these assumptions, is the inability of the plaintiffs and the Commonwealth to establish that the ZLEV Act tax has any tendency to affect the demand for ZLEVs in the market for the sale of ZLEVs. The submission by the plaintiffs and the Commonwealth that the ZLEV Act tax has a "natural tendency" to decrease demand for the purchase of ZLEVs was nothing more than counterintuitive assertion.

694 In the market for the sale of ZLEVs, the reasonably anticipated consequential effect of a real and substantial increase in the price of hydrogen or electricity in the markets for the sale of hydrogen or electricity for use in ZLEVs may involve a shift of the demand curve for ZLEVs downwards and a reduction in the price of ZLEVs. But there was no economic evidence that supported such an indirect effect. It might even be thought that the only tendency that such an indirect economic effect might impute to reasonable purchasers of ZLEVs is a tendency to act in a counterintuitive manner[1523].

695 Even in absolute terms, the suggestion of a natural tendency to decrease demand for the purchase of ZLEVs may defy common sense. The amount of the ZLEV Act tax was more than a negligible amount, such as an annual cost of $10,

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1522 (1938) 60 CLR 263 at 303.

1523 cf Joint Reasons at [192]-[193].

that might arguably be ignored by a purchaser of a capital asset costing tens of thousands of dollars. But it was certainly less than an amount, such as an annual cost of $5,000, that might, by empirical and economic evidence, be shown to give rise to a reasonable anticipation of a decrease in demand in the market for the sale of ZLEVs. The estimated amount of the ZLEV Act tax was between $260 and $330 per year, a fraction of the cost of a daily coffee, and was predicted to "have a negligible impact on electric vehicle uptake in Victoria"[1524].

696 Another problem with the submissions of the plaintiffs and the Commonwealth is that some rational purchasers of a ZLEV might also be concerned with the relative cost of hydrogen or electricity (including the ZLEV Act tax) when compared with the cost of fuel for non-ZLEVs (petrol or diesel, including the fuel excise). But there was no evidence before this Court of that cost differential in absolute terms. Nor was there any evidence before this Court of other important matters such as the relative life of an electric or hydrogen engine compared with a conventional engine. The assumption that the price of hydrogen or electricity for use in a ZLEV, and the longevity of the engines in ZLEVs, is sufficiently close to that of conventional vehicles so that a tax that is 40 to 50 per cent less than the fuel excise will lead to a real reduction in the purchases of ZLEVs[1525] is, at best, non-expert guesswork.

697 Without economic evidence, the reasonable conclusion is that an additional deferred cost, or reduction in a cost differential, of around $260 to $330 per year would be unlikely to have any real and substantial economic effect on the sale of ZLEVs costing tens, or hundreds, of thousands of dollars. An analogy might be drawn with the basic fee in *Capital Duplicators [No 2]* of $600 per year ($50 per month[1526]), which was unanimously, and succinctly, held not to be an excise[1527]. The majority in *Capital Duplicators [No 2]* took one sentence to say that there was "no basis for holding that [the basic fee] is an excise", referring only to its indirect economic effect in the market for the sale of videotapes (the fee "not [being] calculated by reference to the quantity or value of goods supplied or offered for sale") and its insubstantial amount[1528]. The relatively small amount of $600 per year would have no real and substantial effect in the market for the wholesale or

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1524 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

1525 See, eg, Joint Reasons at [150], [192]-[194]; Reasons of Jagot J at [925]-[926], [928].

1526 (1993) 178 CLR 561 at 594, 597.

1527 (1993) 178 CLR 561 at 597, 619, 631-632.

1528 (1993) 178 CLR 561 at 597.

retail supply of videotapes of likely low cost to the wholesalers and retailers. The opposite conclusion is reached today in relation to the indirect economic effect of a tax of perhaps half that amount in relation to goods whose cost to consumers would likely be much greater than the cost of the videotapes to the wholesale or retail suppliers.

698 No credible economist could draw support for a contrary conclusion that there would be a real and substantial effect from statements in the Legislative Council in South Australia that "[a] survey undertaken by the Australia Institute in 2021 showed that 7 in 10 South Australians would be less likely to purchase an electric vehicle if an electric vehicle levy were to be introduced"[1529]. At a minimum, before drawing any conclusions it would be necessary to know: (i) was the sample size of the survey a statistically significant proportion of the population of South Australia of nearly two million people or did it comprise a sample of less than 0.03 per cent of the population? (ii) was the survey question expressed in a neutral context or did it follow other questions that might have shaped the response, such as questions requiring the consideration of a statement that electric vehicles reduce pollution and are good for the climate, health, and the environment? (iii) what proportion of that seven in ten South Australians were already predisposed to purchase an electric vehicle? (iv) particularly importantly, were those individuals who were surveyed asked if their answer might be different depending upon the size of an annual levy (with options provided such as $100, $500, or $5,000) or was the question posed without reference to an amount and in a manner that might suggest that the fee was substantial?

699 The survey above, conducted by the Australia Institute in 2021, was not part of the material before this Court but it may very well be that the answers to any or all of the four questions above would undermine the surprising assertion that purchasers of ZLEVs would be significantly deterred from a capital purchase of an asset worth between $40,000 and $300,000 by a tax estimated to be between $260 and $330 per year.

XII. Conclusion

700 Nothing in these reasons denies the power of the Commonwealth Parliament to enact legislation to give effect to the national electric vehicle strategy proposed by the Minister for Climate Change and Energy in July 2022[1530]. Nor does anything in these reasons deny the power of the Commonwealth Parliament to make that legislation cover the field, to the exclusion of the States, either as a

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1529 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 November 2022 at 1413.

1530 Compare Joint Reasons at [157]-[162].

matter of law or as a matter of practical effect[1531]. But, by contrast with the joint reasons in the majority of this Court, these reasons treat those decisions to make such power exclusive as ones for the political arena, not matters which should, by judicial fiat, be removed from the political arena and conclusively allocated to the Commonwealth. As Dixon CJ said[1532], quoting from Black J in the Supreme Court of the United States[1533], "[w]ise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve."

701 From the time of Federation, there has been a steady, but inexorable, movement towards the enfeeblement of the fiscal powers of the States. The decision in *Ha* was the most recent step. It was observed after the decision in *Ha* that "[t]he most obvious method of rectifying the absence of revenue accountability in the Australian federal system is through constitutional amendment"[1534]. With great regret, it is necessary to say that the reasons of today's majority, written with huge effort and innovation and a laudable desire to reduce the complex jurisprudence of s 90 to a simple formula, take this movement several large steps further. In doing so, those reasons are not consistent with the settlement brought to s 90 by the decisions in *Capital Duplicators [No 2]* and *Ha*.

702 In many of the s 90 cases in this Court over the last century there has been little dispute about the characterisation of the relevant fee as a tax. There has also been little dispute that there were *goods* involved in some aspect when considering the economic effect of the tax. But, for more than a century, this Court has preserved the effective functioning of the Australian federation by applying further constraints in either the essential meaning or the application of s 90. It is without any detraction from the esteem in which I hold the authors, and with my respectful acknowledgement of their substantial and detailed reasons, that I greatly regret to say that the reasons of the majority today realign our federation by significantly expanding the range of prohibited State taxes. This occurs by a new "practical"[1535] and "evaluat[ive]"[1536] test of whether the tax is a "tax on goods" without significant regard to whether the tax has a real and substantial effect and without the two

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1531 See above at [631]-[632].

1532 *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 56.

1533 *United States v City of Detroit* (1958) 355 US 466 at 474.

1534 McMonnies, "*Ngo Ngo Ha* and the High Court v New South Wales: Historical Purpose in History and Law" (1999) 27 *Federal Law Review* 471 at 497.

1535 Joint Reasons at [154]; Reasons of Jagot J at [919].

1536 See Reasons of Jagot J at [919], [934], [944].

constraints that have existed since Federation, namely that an excise must be: (i) a tax with a reasonably anticipated economic effect on the supply-side, and (ii) a tax whose effect is direct. Matters that once were "obvious enough"[1537] are now either rejected or in serious doubt[1538].

703 Until today the States could have been reasonably certain that an excise did not include: (i) a tax on a gift of goods or an inheritance of goods; (ii) a payroll tax in its application to companies producing goods; (iii) an industrial land tax in its application to a producer or manufacturer of goods; (iv) a tax which, as a matter of substance, was for a licence to carry on a business where the business concerned the production or manufacture of goods; (v) a tax concerning the carriage of goods generally; and (vi) a tax on the ownership, possession, use, or destruction of goods.

704 In *Hughes and Vale*[1539], Dixon CJ took many, many pages to explain why the relevant tax in that case was not contrary to s 92. By contrast, he answered the submissions concerning s 90 in two sentences. A tax calculated by reference to the weight of the vehicle, the weight of the load the vehicle was capable of carrying, and the miles travelled, was not a tax directly affecting the commodities carried, and was therefore not an excise. Rather, it was a tax that had a direct economic effect in the market for the service of carrying goods by motor vehicle[1540]. The concept of an excise did not extend to a tax with an indirect economic effect in the market for the sale of goods that were complements to that service.

705 These dissenting reasons might equally have been confined to two sentences and a short point about directness and the lack of argument concerning the effect of the tax in the markets for the sale of hydrogen or electricity. Or, as in *Capital Duplicators [No 2]*, they might have been confined to two sentences and a short point about the lack of a reasonably anticipated real and substantial effect, reasoning that a tax of several hundred dollars would not be reasonably anticipated to have a real and substantial economic effect in the market for the sale of a good that is worth up to $300,000. Or these reasons might have been confined to a few sentences reinforcing the supply-side aspect of the settlement in *Capital Duplicators [No 2]* and *Ha*.

706 Any of those short-form reasons would have been sufficient to reject the arguments of the plaintiffs and the Commonwealth in the absence of any focus in their argument upon markets for the sale of hydrogen or electricity for use in

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1537 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 65.

1538 Compare, for instance, Joint Reasons at [197].

1539 (1953) 87 CLR 49.

1540 (1953) 87 CLR 49 at 75.

ZLEVs. But in deference, and again with great (and not merely forensic) respect to the innovative and thought-provoking reasons of my colleagues in the majority today, it has been necessary for these reasons to defend at length the long orthodoxy of s 90 of the *Constitution* which has been built upon a vision of the Commonwealth of Australia as a functioning federation.

707 The questions in the amended special case should be answered as follows:

(1) Is s 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*?

Answer: No.

(2) Who should pay the costs of the proceeding?

Answer: The plaintiffs.

708 STEWARD J. In 1987, the "path" from the first decision of this Court to the more recent cases concerning the meaning of duties of excise in s 90 of the *Constitution* was described as "long and tortuous"[1541]. It had been thought that the journey had finally, and exhaustingly, ended in 1997 with the decision of this Court in *Ha v New South Wales*[1542]. But that is not so. The path continues. The Court remains divided by this "hateful tax"[1543]. For the reasons set out below, the dispositive question stated for the opinion of the Full Court in the amended special case should be answered as follows: the charge imposed by s 7(1) ("the ZLEV charge") of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("the ZLEV Act") is valid on the basis that it is not a duty of excise for the purposes of s 90 of the *Constitution*.

709 During the heightened course of argument, both the plaintiffs and the Commonwealth, and each of Australia's States and Territories, sought to re-open and overrule very long-standing authorities of this Court[1544]. The plaintiffs (who are the registered operators of electric vehicles in Victoria) and the Commonwealth wanted this Court to overrule *Dickenson's Arcade Pty Ltd v Tasmania*[1545], which established that a duty of excise for the purposes of s 90 of the *Constitution* did not include a consumption tax. They argued that the ZLEV charge is a consumption tax levied on electric, hydrogen and plug-in hybrid electric vehicles ("ZLEVs") as goods and is thus an excise. Victoria, and each intervening State and Territory, submitted that if this Court were to grant leave to re-open *Dickenson's Arcade*, then it should also grant leave to reconsider the correctness of *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[1546] and *Ha*[1547]. For the reasons given below, none of these cases should be reconsidered.

710 In *Ha*, a majority of this Court (Brennan CJ, McHugh, Gummow and Kirby JJ) "reaffirm[ed] that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic

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1541 Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 *Melbourne University Law Review* 296 at 296.

1542 (1997) 189 CLR 465.

1543 Johnson, *A Dictionary of the English Language* (1755) "excise".

1544 Any reference to the Commonwealth, States or Territories in their role as interveners is to the Attorneys-General of those respective jurisdictions.

1545 (1974) 130 CLR 177.

1546 (1993) 178 CLR 561.

1547 (1997) 189 CLR 465.

origin"[1548]. Their Honours said further that duties of excise are "taxes on goods" in the sense of being "taxes on some step taken in dealing with goods"[1549]. In determining the character of an impost, the majority in *Ha* rejected the "criterion of liability" test earlier established by this Court's decision in *Dennis Hotels Pty Ltd v Victoria*[1550] in favour of a test that examined the "practical operation (or substance) of a law"[1551]. The majority also expressly reserved for consideration whether a duty of excise included a tax on the consumption of goods on the basis that it was "unnecessary to consider" that issue[1552]. What was meant by "a tax on the consumption of goods", and thus what exactly was reserved for consideration, was not explained by their Honours.

711 In contrast, the minority in *Ha* (Dawson, Toohey and Gaudron JJ), after reviewing the case law, and the applicable constitutional history and context, decided that for the purposes of s 90 of the *Constitution* the word "excise" had a more limited meaning. In order to achieve a "customs union", as distinct from an "economic union"[1553], an excise was held to be a "State tax which fell selectively upon goods manufactured or produced in that State"[1554] and no more. This Court in *Peterswald v Bartley*[1555] had adopted that same construction almost from its inception, but that interpretation did not survive for long.

712 The plaintiffs and the Commonwealth also contended for a broader proposition, namely that s 90 gave exclusive power to the Commonwealth with respect to all inland taxes on goods payable by a person engaged in some dealing with goods, and that, accordingly, the Commonwealth had exclusive power to impose consumption taxes. Victoria, and almost all of the intervening States and Territories, urged the Court to reject this submission and instead to affirm the reasons of the minority in *Ha*. For the reasons set out below, this contention of the plaintiffs and the Commonwealth is both remarkable and entirely unprecedented.

1548 (1997) 189 CLR 465 at 499.

1549 (1997) 189 CLR 465 at 499.

1550 (1960) 104 CLR 529 at 559-560 per Kitto J. That approach was unanimously endorsed in *Bolton v Madsen* (1963) 110 CLR 264 at 271 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

1551 (1997) 189 CLR 465 at 498.

1552 (1997) 189 CLR 465 at 499-500.

1553 (1997) 189 CLR 465 at 511.

1554 (1997) 189 CLR 465 at 512.

1555 (1904) 1 CLR 497 at 509 per Griffith CJ, Barton and O'Connor JJ.

It would, if accepted, distort the relationship between the States and Territories and the Commonwealth in a way that was unintended by the founding fathers; it would render the States and Territories the constitutionally fiscal minions of the Commonwealth.

713 As it happens, for the reasons set out below, the word "excise" as it appears in s 90 of the *Constitution* had, at the time of Federation, an unambiguous, fixed and limited meaning. It is the meaning established unanimously by this Court in 1904 in *Peterswald*, as upheld by the minority in *Ha*, of an excise as a tax on locally produced and manufactured goods.

The ZLEV charge is not a tax "on" goods

714 An excise is generally considered to be a type of tax on goods. As already mentioned, the case of the plaintiffs and the Commonwealth was that the ZLEV charge is a consumption tax on the use of ZLEVs, and thus an excise. Victoria submitted to the contrary. It argued that s 7(1) of the ZLEV Act imposes a charge on a type of activity, namely that of driving a ZLEV on specified roads, and is not a tax "on" goods. It otherwise accepted, as it must, that the charge is a tax and not a fee for a service or privilege. It is a "compulsory exaction of money by a public authority for public purposes, enforceable by law"[1556]. In that respect, the charge is paid into the Consolidated Fund of Victoria and there is no legal requirement that the money collected be appropriated or expended for any particular purpose[1557]. Whether the ZLEV charge is a tax "on" goods turns upon the correct characterisation of the statutory regime which provides for its imposition.

715 Section 7 of the ZLEV Act is in the following terms:

> "(1) The registered operator of a ZLEV must pay a charge for use of the ZLEV on specified roads.
>
> (2) The ZLEV charge is to be determined and paid in accordance with this Act and the regulations."

716 The phrase "registered operator" is defined in s 3 of the ZLEV Act to mean "the person who is or was the registered operator (within the meaning of the *Road Safety Act 1986*) of the ZLEV when it is or was used on the road". Liability is thus imposed on the person who owns or manages the ZLEV, rather than the user of the

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1556 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276 per Latham CJ.

1557 *Financial Management Act 1994* (Vic), s 9(2).

vehicle[1558]. Indeed, it is conceivable that a registered operator may be liable to pay the ZLEV charge without having personally driven the vehicle at all during a specified period because the vehicle was driven by other people. Moreover, the charge is payable regardless of the purpose for which a ZLEV is being used. It is thus payable when a ZLEV is being wholly used for domestic purposes. It follows that the registered operator may or may not have had any connection with the production, manufacture, sale or distribution of his or her ZLEV.

717 The term "specified road" is defined in s 3 of the ZLEV Act to mean a "public road"[1559], a "road related area"[1560], a "highway at common law", whether located in or outside of Victoria, and a road "within the meaning of the *Road Management Act 2004*, other than a private road, prescribed by the regulations". Pursuant to s 6(1), the ZLEV Act is expressed to apply within and outside of Victoria to the "full extent of the extraterritorial legislative power of the [Victorian] Parliament". Section 6(2) says, in particular, that the Act "extends to the use of ZLEVs outside Victoria".

718 The rate of the ZLEV charge is determined by s 8. The amount payable depends upon the type of ZLEV that is being used. For a ZLEV that is an "electric vehicle" or a "hydrogen vehicle", as these terms are defined[1561], the rate payable during the financial year starting on 1 July 2021 was 2.5 cents for each kilometre travelled on specified roads[1562]. For a "plug-in hybrid electric vehicle", as that term is defined[1563], the rate payable during the financial year starting on 1 July 2021 was 2 cents for each kilometre travelled on specified roads[1564]. During each subsequent year, the rate payable is varied in accordance with a formula for indexation in ss 8(1)(b) and 9 of the ZLEV Act.

1558 See definition of "registered operator" in s 3 of the ZLEV Act, read with definitions of "the register" and "registered operator" in s 3(1) of the *Road Safety Act 1986* (Vic) and reg 23 of the *Road Safety (Vehicles) Regulations 2021* (Vic).

1559 Within the meaning of the *Road Management Act 2004* (Vic).

1560 Within the meaning of the *Road Safety Act 1986* (Vic).

1561 ZLEV Act, s 3.

1562 ZLEV Act, s 8(1)(a)(i).

1563 ZLEV Act, s 3.

1564 ZLEV Act, s 8(1)(a)(ii).

719 The registered operator of a ZLEV[1565] must lodge an "initial declaration" in accordance with s 10 and subsequent declarations setting out the odometer reading of the ZLEV at that time, the distance, if any, travelled by the ZLEV *not* on specified roads since the last declaration, and "evidence" of these matters[1566]. The Secretary to the Department of Transport must then determine the amount of the charge in accordance with a formula that requires him or her to reduce the total distance travelled by a ZLEV by the distance travelled that was *not* on specified roads[1567]. In the absence of evidence "to the contrary", the Secretary may assume that all of the driving had taken place on specified roads[1568].

720 After determining the amount of the ZLEV charge payable, the Secretary then issues the registered operator with an invoice[1569]. Failure to lodge declarations as required or to pay an invoice can, amongst other things, result in the suspension of the registration of a ZLEV[1570] and, if non-compliance continues after suspension, the cancellation of registration[1571]. The ZLEV charge and any interest payable under the ZLEV Act are debts due to the State[1572]. If not paid by the date for payment, the Secretary, on behalf of the State, may bring enforcement proceedings to recover any unpaid charges "in a court of competent jurisdiction"[1573].

721 The charge is not a one-off payment. It is an ongoing payment for every registration period. And liability to pay is not limited to the first registered operator of a vehicle. It is payable by subsequent registered operators of the vehicle when used on specified roads[1574].

1565 ZLEV Act, s 7(1).

1566 ZLEV Act, s 11.

1567 ZLEV Act, s 15.

1568 ZLEV Act, s 15(3).

1569 ZLEV Act, s 18(1).

1570 ZLEV Act, ss 29-34.

1571 ZLEV Act, ss 35-39.

1572 ZLEV Act, s 58(1).

1573 ZLEV Act, s 58(2).

1574 See definition of "registered operator" in s 3 of the ZLEV Act.

722 The amount of the charge is relatively modest. In the Second Reading Speech for the *Zero and Low Emission Vehicle Distance-based Charge Bill 2021* (Vic), the Treasurer of Victoria informed the Legislative Assembly that it was expected that the average amounts payable per year would be $330 for electric vehicles and $260 for plug-in hybrid electric vehicles[1575]. That is consistent with the actual amounts paid here by the plaintiffs. The first plaintiff has received an invoice of $148.68 and the second plaintiff has received invoices of $29.32 and $284.51.

723 Both the plaintiffs and the Commonwealth submitted that the reference in s 7 to "use" of a ZLEV on specified roads was, from a practical perspective, mere verbiage that disguises the true operation of the ZLEV charge. The plaintiffs argued that given the breadth of the definition of "specified road" in s 3 of the ZLEV Act, the prospect of a registered operator being charged otherwise than by reference to the total distance travelled by a ZLEV was "remote", particularly considering that the onus to prove use on non-specified roads is imposed on the registered operator. The Commonwealth agreed. It contended that the ZLEV charge would be imposed on the "vast majority" of uses of a ZLEV and that there was no "realistic possibility" that a registered operator would be able to operate a ZLEV without incurring a liability to pay the charge. The Commonwealth thus asserted that the impost was "readily distinguishable" from a toll, which it contended is an impost that applies only on "particular roads" and can be avoided while still driving a vehicle.

724 Three observations should be made about the ZLEV charge. First, an excise – for the purposes of s 90 of the *Constitution* – has been established to be, at the very least, a tax on a step in the passage of a good from the process of

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1575 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

manufacture to the final sale to the end consumer[1576]. As Brennan J said in *Philip Morris Ltd v Commissioner of Business Franchises (Vict)*[1577]:

> "If there be any rock in the sea of uncertain principle, it is that a tax on a step in the production or distribution of goods to the point of receipt by the consumer is a duty of excise."

725 Ordinarily, an excise will be imposed on a dealing with a good as it moves to home consumption and increases in value in the distribution chain. Of course, it may be imposed on more than one step in that process. But once the journey is complete, it would be unusual to describe any ongoing and regular charge thereafter imposed on the use of goods as they decline in value as an excise[1578]. Here, the ZLEV charge is not a tax on the journey of a good from manufacture, production, distribution and then to final sale. It is a tax which is imposed after the consumer has first purchased a ZLEV; indeed, in the case of second-hand ZLEVs, it is imposed well after such vehicles have entered into home consumption. It is also imposed again and again for each exigible period, and will continue to be paid for so long as the vehicle is registered in Victoria and is driven on specified roads. It is payable as the ZLEV declines in value.

1576 See, eg, *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 260 per Dixon J; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 549 per McTiernan J, 555 per Fullagar J, 559 per Kitto J; *Bolton v Madsen* (1963) 110 CLR 264 at 271 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185 per Barwick CJ, 213 per Menzies J, 221, 226 per Gibbs J, 230-231 per Stephen J, 238-239 per Mason J; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615 per Gibbs CJ, 628, 630, 634 per Mason J, 655 per Brennan J, 665-666 per Deane J; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 600-602 per Dawson J, 627-628 per Toohey and Gaudron JJ.

1577 (1989) 167 CLR 399 at 445. See also at 468, 474 per Dawson J, 488, 492 per McHugh J.

1578 The decision of this Court in *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 does not support the proposition that a tax is "on" goods, and thus an excise, whenever the criterion of liability is any use of those goods. That case concerned a regular State impost on cattle, horses, sheep and pigs. Barwick CJ, Stephen and Mason JJ held that to the extent that such animals were held for the purposes of eventually realising from them a product, such as meat or wool, the charge was an excise. As such, the animals were articles of commerce, and the impost was one imposed on their production. It may be doubted whether the animals, as they grew and got closer to the point of realisation into animal products, were in each exigible period the same article of commerce.

726 Secondly, a charge on a "step" in the production and sale of a good, generally, but not necessarily, affects the price of the good as it makes its journey to the consumer; moreover, its burden is often passed on down the chain[1579]. That is not, of course, a necessary attribute of a tax on goods, and the determinative relevance of the distinction between a direct and an indirect tax has been doubted by this Court[1580]. Nonetheless, it is a usual attribute[1581]. The ZLEV charge is not a tax of this kind. There is no evidence that its existence has, in any way, affected the price of ZLEVs, or has influenced the quantity of sales made of such vehicles. Indeed, it is unlikely that such a small impost could have such an influence. Rather, in the case of a retail purchase, its future burden is wholly absorbed by the registered operator of a ZLEV. As such, it exhibits the character of a direct tax. Nor does the amount of the charge payable depend upon the value of the ZLEV in question, or the number of ZLEVs sold. The amount of the charge turns entirely on the use on specified roads of a given ZLEV, regardless of its value and, critically, regardless of the type of ZLEV in question (save for the distinction drawn by the ZLEV Act between electric, hydrogen and plug-in hybrid electric vehicles) or the state or condition of the vehicle.

1579 *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 252 per Rich and Williams JJ, 260 per Dixon J, 264 per McTiernan J; but cf Sawer, "The Future of State Taxes: Constitutional Issues", in Mathews (ed), *Fiscal Federalism: Retrospect and Prospect* (1974) 193 at 203-204. See also Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 *Melbourne University Law Review* 296 at 317.

1580 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 284-285 per Starke J; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 553-555 per Fullagar J, 590 per Menzies J, 593-594 per Windeyer J; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 222-223 per Gibbs J; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 429, 435 per Mason CJ and Deane J, 470-471 per Dawson J; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 602 per Dawson J; *Ha v New South Wales* (1997) 189 CLR 465 at 509 per Dawson, Toohey and Gaudron JJ.

1581 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 277-279 per Latham CJ. See also *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 per Barwick CJ; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 230-231 per Stephen J, 241 per Mason J; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 633 per Mason J; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 473 per Dawson J.

727 Thirdly, whilst one must consider the true character of an impost by reference to its practical operation or substance[1582], it cannot be doubted here that it will be the legal criterion which largely creates and defines that operation or substance. In that respect, even though it may be accepted that the ZLEV Act was inspired by a perceived fall in Victoria's share of the petroleum excise collected by the Commonwealth[1583], this is not a case where the form of the ZLEV charge was said to be a type of subterfuge[1584]. It follows that one cannot ignore or discount that a feature of the legal criterion for this charge is that it is confined to the use of ZLEVs on only specified roads. The proposition that this part of the criterion of liability should be considered to be irrelevant to the characterisation of the charge because of the likely use of ZLEVs on public roads should be rejected as speculation. A farmer might, for example, over a given registration period, use his or her ZLEV on private roads and nowhere else. That registered operator will not be liable to pay the ZLEV charge. Thus, the ZLEV charge is not imposed on any use of a ZLEV without more; it is only imposed on particular uses of a ZLEV.

728 It should be accepted that an indelible feature of every excise is that it must at least bear, in some way, a sufficiently close connection or relationship with a particular good[1585]. The ZLEV charge is not of this character. Of course, it bears a

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1582 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 186 per Barwick CJ; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 629-633 per Mason J, 639 per Murphy J; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 433-436 per Mason CJ and Deane J, 444-451 per Brennan J, 492 per McHugh J; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 583 per Mason CJ, Brennan, Deane and McHugh JJ; *Ha v New South Wales* (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1583 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

1584 cf *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 304 per Dixon J; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 14 per Barwick CJ; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 76-77 per Mason J; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 633 per Mason J; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 586 per Mason CJ, Brennan, Deane and McHugh JJ; *Ha v New South Wales* (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1585 *Ha v New South Wales* (1997) 189 CLR 465 at 504 per Brennan CJ, McHugh, Gummow and Kirby JJ, endorsing the test of "no closer connection" as stated in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 560 per Kitto J. See also

relationship or connection with each ZLEV registered in Victoria; but that relationship is not so proximate as to enable it to be said that it is truly a tax "on" goods of that type. The three features of the charge, described above, compel that conclusion. It is an ongoing charge, bearing the character of a direct tax; there is no evidence of it affecting the price of or demand for ZLEVs; and it is calculated by reference to the distance travelled by identified categories of vehicles on specified roads, regardless of the value or condition of those vehicles and regardless of the particular model of the vehicle[1586].

729 Victoria's characterisation of the ZLEV charge as a tax on the use of ZLEVs in defined circumstances, rather than a tax on that vehicle itself, should be accepted. The charge, to use the language of Dixon J in *Matthews v Chicory Marketing Board (Vict)*[1587], is one imposed upon a person "engaged in a given pursuit", namely the driving of a ZLEV on specified roads or allowing such a vehicle to be so driven. In *Matthews*, Dixon J said that a tax of this character is not an excise[1588], notwithstanding that at that time his Honour was of the view that an excise included a consumption tax. A consumption tax is not a tax on an activity which only *involves* goods.

730 In addition, Tasmania's submission, that the ZLEV charge is analogous to the fee payable for a permit to carry goods, as considered by this Court in *Bolton v Madsen*[1589], should also be accepted. In that case, the fee for the permit was calculated by reference (in part) to the distance travelled by a vehicle carrying goods. This Court unanimously decided that the fee did not "affect" the goods carried, namely wool, but was instead "a fee to use a particular truck to carry any quantity of any wool"[1590]. So too with the ZLEV charge; it is imposed without any

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Bolton v Madsen (1963) 110 CLR 264 at 271 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 30 per Owen J; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 634-635 per Mason J; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 445-446 per Brennan J.

1586 As mentioned above, subject to the distinction drawn by the ZLEV Act between electric, hydrogen, and plug-in hybrid electric vehicles.

1587 (1938) 60 CLR 263 at 300.

1588 (1938) 60 CLR 263 at 300.

1589 (1963) 110 CLR 264 at 273 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

1590 (1963) 110 CLR 264 at 271.

regard to the value, condition or type of ZLEV and only when used on specified roads. It is thus not a tax "on" goods.

731 Contrary to the observation of Dixon J in *Matthews*, the Commonwealth urged that a tax on the ongoing use of a good could be an excise and referred to the decision of this Court in *Hematite Petroleum Pty Ltd v Victoria*[1591]. That decision does not, with respect, support the Commonwealth's contention. It concerned the *Pipelines Act 1967* (Vic). Pursuant to s 25 of that Act a person could not construct or operate a pipeline without a licence; each licensee was therefore obliged to pay an ongoing pipeline operation fee. Prior to being amended, the Act specified that the fee for oil and gas pipelines was $35 per kilometre or, in one case, $40 per kilometre. For the 1981-1982 financial year the fee in the case of a trunk pipeline was increased to $10,000,000. The taxpayer was a licensee who conveyed hydrocarbons recovered from oil and gas platforms in Bass Strait, through a series of these types of pipelines, which it owned and operated, to certain production facilities at Longford and Long Island Point in Victoria. Mason J summarised the features of the applicable statutory scheme as follows[1592]:

> "Here the significant features of the pipeline operation fee are: (1) that it is levied only upon a trunk pipeline, ie, the gas and fuel Corporation pipeline, the Gas Liquids pipeline and the crude oil pipeline, through which flow the entirety of the hydrocarbons recovered from the Bass Strait fields; (2) that it is a fee payable for permission to operate a pipeline for which the plaintiffs otherwise hold a permit to own and use; (3) that the fee is a special fee which is extraordinarily large in amount, having no relationship at all to the amount of the fees payable for other pipeline operation licences – the fee payable for a trunk pipeline is $10,000,000 whereas the fee payable for any other pipeline is $40 per kilometre; and (4) that the fee is payable before an essential step in the production of refined spirit can take place – the transportation of the hydrocarbons from Longford to Long Island Point where the refinery is situated."

732 An argument that the licence fee was payable for the privilege of operating a pipeline was rejected. Looking at the practical effect and substance of the fee paid, it was not for the use of the pipeline, but rather it was a tax on the production of hydrocarbon products, such as oil and gas. It was thus an excise. As Mason J observed[1593]:

1591 (1983) 151 CLR 599.

1592 (1983) 151 CLR 599 at 634.

1593 (1983) 151 CLR 599 at 634.

> "The coexistence of these features indicates that the pipeline operation fee payable by the plaintiffs is not a mere fee for the privilege of carrying on an activity; it is a tax imposed on a step in the production of refined petroleum products which is so large that it will inevitably increase the price of the products in the course of distribution to the consumer. The fee is not an exaction imposed in respect of the plaintiffs' business generally; it is an exaction of such magnitude imposed in respect of a step in production in such circumstances that it is explicable only on the footing that it is imposed in virtue of the quantity and value of the hydrocarbons produced from the Bass Strait fields."

733 The contention that a tax on any ongoing use of a good is a tax "on" goods, and thereby an excise, is rejected.

The ZLEV charge as a consumption tax

734 If, contrary to the foregoing, the ZLEV charge is a tax "on" goods, the plaintiffs, the Commonwealth and Victoria each accepted that this could only be so because it was a tax on the consumption of goods. In that respect, they also accepted that Barwick CJ's formulation in *Dickenson's Arcade* of what constitutes a consumption tax was applicable, namely "the act of the person in possession of the goods in using them or in destroying them by use, irrespective of the manner or means by which that possession was obtained"[1594]. That definition does not address whether a consumption tax is one which can be imposed in an unlimited way, such as on the continuous use of a durable good, as distinct from the first use of a non-durable good after the point of sale. Nonetheless, for the purposes of what follows, its correctness may be assumed.

735 The plaintiffs and the Commonwealth invoked the judgment of Dixon J in *Matthews* in support of their case. In particular, they relied upon the following passage from his Honour's reasons, which relevantly states that an excise includes a tax on consumption[1595]:

> "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."

1594 (1974) 130 CLR 177 at 187.

1595 (1938) 60 CLR 263 at 304 (emphasis added).

736 Following the decision of the Judicial Committee of the Privy Council in *Atlantic Smoke Shops Ltd v Conlon*[1596], in *Parton v Milk Board (Vict)* Dixon J reconsidered his earlier position and decided that it was "probably a safe inference" that a tax on consumption could not be an excise[1597].

737 Then, almost 50 years ago, in *Dickenson's Arcade*[1598], five out of six Justices of this Court expressly decided that an excise, for the purposes of s 90 of the *Constitution*, did not include a consumption tax[1599]. As already mentioned, the plaintiffs and the Commonwealth sought leave to re-open this decision. Before considering that application, the reasoning of the Court should be explained.

The reasons in Dickenson's Arcade

738 *Dickenson's Arcade* concerned a tax on the "consumption" of tobacco imposed by the *Tobacco Act 1972* (Tas). Contrary to the submissions of the plaintiffs, the Court did not so decide because of some outdated deference to the advice of the Privy Council given in *Atlantic Smoke Shops* (discussed below). Rather, in the case of four Justices, they did so because, amongst other things, of an understanding of what the word "excise" was intended to mean for the purposes of s 90 of the *Constitution*. It is therefore important to examine each of the judgments of Barwick CJ, Menzies, Gibbs, Stephen and Mason JJ.

739 Because the reasons of Barwick CJ differed from the other four Justices, it is useful to commence with the reasons of Menzies J. His Honour observed that the unanimous decision of this Court in *Bolton v Madsen*[1600] had established "quite definitely that 'for 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'"[1601]. It followed that a tax upon consumption could not be an excise. But Menzies J did not limit his analysis to an application of *Bolton v*

1596 [1943] AC 550.

1597 (1949) 80 CLR 229 at 261.

1598 (1974) 130 CLR 177.

1599 (1974) 130 CLR 177 at 185-186 per Barwick CJ, 209 per Menzies J, 221-222 per Gibbs J, 230 per Stephen J, 239 per Mason J. At 202, McTiernan J dissented on the basis that nothing in the judgment of *Atlantic Smoke Shops* rendered erroneous the definition of excise adopted by Dixon J in *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 so as to require that definition to be modified "with respect to consumption".

1600 (1963) 110 CLR 264.

1601 (1974) 130 CLR 177 at 209.

Madsen. After rejecting a submission that invited the Court to re-open the decision in *Dennis Hotels*[1602], his Honour went on to reason that the exclusive power to grant bounties conferred on the Commonwealth by s 90 was likely to be "co-extensive with the exclusive power to impose duties of customs and duties of excise"[1603]. His Honour then stated that he associated the word "production" with "excise" and the word "export" with "customs", when read in the context of s 90[1604]. Whilst Menzies J accepted that a "wide conception" of what constitutes a duty on production had been established by this Court, nonetheless "that conception [was] still confined to a tax directly related to goods imposed at some step of their production or distribution"[1605]. That did not include a tax on consumption. In that respect, Menzies J observed that a tax "may be indirect and may affect the economy", but was not a duty of excise unless it fell within the *Bolton v Madsen* formulation[1606].

740 Gibbs J acknowledged that Dixon J in *Matthews*[1607] had earlier described an excise as including a consumption tax, and reasoned that "if it is permissible to consider the economic effect of the tax, it is impossible ... to draw a line between the last retail sale and the act of consumption"[1608]. However, Gibbs J noted that following the decision in *Atlantic Smoke Shops*, Dixon J had accepted that a duty of excise did not include a consumption tax[1609]. Gibbs J observed that since then no member of the High Court had "dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise"[1610].

1602 (1960) 104 CLR 529.

1603 (1974) 130 CLR 177 at 213.

1604 (1974) 130 CLR 177 at 213.

1605 (1974) 130 CLR 177 at 213.

1606 (1974) 130 CLR 177 at 213.

1607 (1938) 60 CLR 263 at 300.

1608 (1974) 130 CLR 177 at 219.

1609 (1974) 130 CLR 177 at 221, referring to *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 261.

1610 (1974) 130 CLR 177 at 221.

741 But, like Menzies J, Gibbs J did not confine his reasoning to the weight of prior authority. His Honour reasoned that a more precise definition of the word "excise" was supported by available dictionaries. Gibbs J said[1611]:

> "Although the expression 'excise' has, as I have said, sometimes been used to include taxes on consumption, a more precise definition of the word is that given by the *Encyclopaedia Britannica*, 11th ed, vol 10, and adopted by the *Oxford English Dictionary*: 'a term now well known in public finance, signifying a duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers' ... To the same effect is the definition from the *Encyclopedia of Social Sciences*, cited by Windeyer J in *Dennis Hotels Pty Ltd v Victoria*: 'a tax on commodities of domestic manufacture, levied either at some stage of production or before the sale to home consumers'."

742 In that respect Gibbs J said that the boundaries of the Commonwealth's exclusivity over excise duties was defined by the words of s 90 and not by "economic, social or political theory"[1612]. It followed that his Honour's earlier observation about the economic effect of a tax was of no moment. Nor did it matter that the Commonwealth's control over the taxation of goods would necessarily be incomplete; the meaning of s 90 could not be approached "having regard to the position of the Commonwealth alone"[1613]. The *Constitution*, Gibbs J observed, was a "federal constitution" and s 90 is "intended to effect a distribution of the power to impose taxation between the Commonwealth and the States"[1614].

743 Stephen J observed that the phrase "duty of excise" had never possessed any exact application[1615]. His Honour noted that this phrase concealed "no ultimate truth ... awaiting recognition by the judicial fossicker"[1616]. It was in that context that Stephen J said that the unanimity achieved in *Bolton v Madsen*, which had been "hard won", should not be "lightly ... disturbed" in so important an area of constitutional principle[1617]. His Honour added that "[n]o convincing reasons have

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1611 (1974) 130 CLR 177 at 221-222 (footnotes omitted).

1612 (1974) 130 CLR 177 at 222.

1613 (1974) 130 CLR 177 at 222.

1614 (1974) 130 CLR 177 at 222.

1615 (1974) 130 CLR 177 at 230, citing with approval *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 293 per Dixon J.

1616 (1974) 130 CLR 177 at 230.

1617 (1974) 130 CLR 177 at 230.

... been advanced ... for the adoption now of any new meaning of the phrase 'duty of excise' so as to include a tax on consumption"[1618].

744 But like Menzies and Gibbs JJ, Stephen J's reasons were not limited to the application of prior authority. Whilst, like Gibbs J, Stephen J was of the view that the "economic effect" of a consumption tax was like that of an excise, that was not determinative of its true character[1619]. Stephen J then gave a number of reasons for why, as a matter of substance and principle, a consumption tax could not be characterised as a duty of excise. First, his Honour said that whilst the distinction between direct and indirect taxes might be less relevant, "it remains true that indirect taxes tend to be more concerned with the commodity and less with the particular taxpayer than are direct taxes"[1620]. Consistently with this, and with what Dixon J had said in *Matthews*[1621], a tax imposed upon a person "engaged in a given pursuit [does] not amount to an excise"[1622]. For reasons already given, the last observation is especially pertinent to this case[1623]. Secondly, Stephen J observed that another common feature of an excise was that its burden could be passed on; this was not possible with a consumption tax[1624]. Thirdly, and critically, Stephen J also characterised an excise as a "trading tax" imposed on a commercial dealing with goods; a consumption tax was not of this nature[1625]. This last critical attribute is discussed below[1626].

745 Mason J was of a similar opinion to Menzies and Stephen JJ, although he considered that the impost imposed by the *Tobacco Act 1972* (Tas) was, in reality, an excise[1627]. His Honour observed that whatever differences might have been detected in the different judgments of this Court in the period leading up to

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1618 (1974) 130 CLR 177 at 230.

1619 (1974) 130 CLR 177 at 230.

1620 (1974) 130 CLR 177 at 230-231.

1621 (1938) 60 CLR 263 at 300.

1622 (1974) 130 CLR 177 at 231.

1623 See [729].

1624 (1974) 130 CLR 177 at 231.

1625 (1974) 130 CLR 177 at 231.

1626 See [760]-[766].

1627 This was because of certain collection obligations imposed on retailers of tobacco by the *Tobacco Regulations 1972* (Tas).

Dickenson's Arcade, "they all agree in defining or describing an excise duty in such terms as would exclude a tax imposed on goods after they have passed into the hands of a consumer"[1628]. His Honour recognised that even though this conclusion limited the power of the Commonwealth to control the taxation of goods and, as such, might have been considered an "unacceptable limitation" on federal power, it was nonetheless justified[1629].

746 Mason J said that the justification for excluding consumption taxes from the constitutional concept of an excise was that "consumption is not sufficiently proximate to the production and manufacture of goods – a concept of proximity which it derives from the reference in s 93 to 'taxes paid on the production and manufacture of goods' and from the circumstance that s 90 deals with bounties on production as well as duties of excise"[1630].

747 Finally, Barwick CJ doubted whether the decision of the Privy Council in *Atlantic Smoke Shops* was correct[1631]. Whilst accepting that what is an excise is a question of law and not a matter of "economic theory", his Honour thought there was no "logical reason" for excluding goods which had entered into consumption from constituting duties of excise for the purposes of s 90[1632]. Despite this, his Honour decided to accept this limitation "in deference to the views expressed by other Justices" of this Court[1633]. Accordingly, Barwick CJ concluded that "a tax upon the 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"[1634].

Subsequent consideration of Dickenson's Arcade

748 The correctness of *Dickenson's Arcade* was affirmed (or not overruled) in nine subsequent decisions of this Court: *M G Kailis (1962) Pty Ltd v Western*

1628 (1974) 130 CLR 177 at 239.

1629 (1974) 130 CLR 177 at 238-239.

1630 (1974) 130 CLR 177 at 239.

1631 (1974) 130 CLR 177 at 185.

1632 (1974) 130 CLR 177 at 185.

1633 (1974) 130 CLR 177 at 185-186.

1634 (1974) 130 CLR 177 at 186.

Australia[1635], *H C Sleigh Ltd v South Australia*[1636], *Logan Downs Pty Ltd v Queensland*[1637], *Hematite Petroleum Pty Ltd v Victoria*[1638], *Evda Nominees Pty Ltd v Victoria*[1639], *Gosford Meats Pty Ltd v New South Wales*[1640], *Philip Morris*[1641], *Capital Duplicators [No 2]*[1642] and *Ha*[1643]. Whilst the acceptance of *Dickenson's Arcade* has narrowed over time, no decision of this Court has since strongly doubted the conclusion reached that a consumption tax is not an excise. Having said that, it must be accepted that the occasion for considering that issue has only arisen for the first time here in the amended special case.

749 Four attempts have also been made for leave to re-open *Dickenson's Arcade*, albeit, it must be admitted, in most cases as part of a rolled-up historical attack on *Dennis Hotels* as well. On each occasion leave was refused. In *Evda Nominees Pty Ltd v Victoria*[1644], it was because, amongst other things, the States had "organized their financial affairs" in reliance upon it and upon *Dennis Hotels* and *H C Sleigh*. Leave was refused for substantially the same reason in *Philip Morris*[1645]. In *Capital Duplicators [No 2]*, leave was refused for, amongst other

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1635 (1974) 130 CLR 245 at 258 per Gibbs J, 260 per Stephen J.

1636 (1977) 136 CLR 475 at 488 per Barwick CJ, 491-492 per Gibbs J, 496-497 per Stephen J, 501-503 per Mason J, 521 per Jacobs J.

1637 (1977) 137 CLR 59 at 63-64 per Gibbs J, 74-76 per Mason J.

1638 (1983) 151 CLR 599 at 615 per Gibbs CJ, 633 per Mason J, 663 per Deane J.

1639 (1984) 154 CLR 311 at 316 per Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ.

1640 (1985) 155 CLR 368 at 380 per Gibbs CJ, 420 per Dawson J.

1641 (1989) 167 CLR 399 at 409 per Mason CJ (on behalf of the Court, other than Deane J), 440-441 per Mason CJ and Deane J, 474-475 per Dawson J, 481 per Toohey and Gaudron JJ.

1642 (1993) 178 CLR 561 at 591-593 per Mason CJ, Brennan, Deane and McHugh JJ, 629 per Toohey and Gaudron JJ.

1643 (1997) 189 CLR 465 at 504 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1644 (1984) 154 CLR 311 at 316 per Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ.

1645 (1989) 167 CLR 399 at 424-425 per Mason CJ and Deane J, 472 per Dawson J, 486-488 per McHugh J.

things, "very strong practical reasons"[1646]. In that case, the Commonwealth specifically contended that a tax on consumption was an excise[1647], although that contention was seemingly advanced only on the predicate that there was a re-opening of other earlier cases. Finally, leave to re-open *Dickenson's Arcade* was refused in *Ha*, albeit on the narrow basis that the decision stands as authority for the particular impost it considered and no more[1648]. It warrants mentioning that in *Ha* the Commonwealth submitted it was "unnecessary … to revisit the issue" because consumption taxes "are not part of the Australia[n] fiscal structure"[1649].

The precedential value of Dickenson's Arcade

750 It was submitted by the plaintiffs and the Commonwealth that *Dickenson's Arcade* had, in any event, lost all of its precedential force for a number of reasons. First, it was submitted that Menzies, Gibbs, Stephen and Mason JJ were each obliged to apply the now discarded "criterion of liability" method to determine the true character of the tax there in question. If they had been permitted to consider the "economic effect" of a consumption tax – instead of being confined by a test that has since been discarded as the exclusive determinant of the character of an excise – they would have included it as an excise.

751 That submission should be rejected as no more than speculation. As Gibbs J explained in *Logan Downs*[1650], the difference of opinion that existed at the time in relation to the importance of the criterion of liability test did not extend to other statements of principle in *Bolton v Madsen*, including as to the description there given of the nature of an excise. The Commonwealth's submission also assumes that consideration of the "economic effect" of an impost exhausts a characterisation of its substance. It does not. As accepted in argument all taxes, direct or indirect, have the potential to affect the price and the market in which goods are sold. The extent to which a tax has this attribute will depend on the goods in question, the circumstances of the market in which the goods are traded, and the form of the impost.

752 The submission also ignores each of the additional reasons given by Menzies, Gibbs, Stephen and Mason JJ for deciding that a consumption tax cannot be an excise. In that respect, it is difficult to accept that Mason J applied the criterion of liability methodology. Rather, the predicate of his Honour's reasoning

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1646 (1993) 178 CLR 561 at 591-592 per Mason CJ, Brennan, Deane and McHugh JJ.

1647 (1993) 178 CLR 561 at 565-566 (G Griffith QC, during argument).

1648 (1997) 189 CLR 465 at 504 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1649 *Ha v New South Wales* [1997] HCATrans 99 (13 March 1997) at 266 lines 23-41.

1650 (1977) 137 CLR 59 at 64.

was that whatever difference may be detected in past judgments, there was consensus that a duty of excise did not include a tax imposed on goods after they passed into the hands of consumers; that conclusion being justified because the notion of consumption is not sufficiently connected to the production and manufacture of goods[1651].

753 In any event, the submission of the plaintiffs and the Commonwealth fails to distinguish between the content of the test of what is an excise and the methodology to be used to determine whether a law imposes an excise. The criterion of liability doctrine was one such methodology. It had nothing to do with determining the test for what is and what is not a duty of excise. As Mason CJ, Brennan, Deane and McHugh JJ were at pains to emphasise in *Capital Duplicators [No 2]*[1652]:

> "The rejection of the criterion of liability as an exclusive test has not disturbed general acceptance of the proposition that a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise. That is the fundamental proposition for which *Bolton v Madsen* stands as authority, subject only to the qualification that it speaks of taxes 'directly related to goods'."

754 Finally, the submission fails to take account of the particular context considered in *Dickenson's Arcade*, including that the *Tobacco Regulations 1972* (Tas) effectively provided for the collection of the tax by tobacco retailers. In such circumstances, it was understandable that their Honours considered a consumption tax of this particular kind shared economic attributes with a duty of excise. It was, as a matter of substance, a sales tax. I shall return to this issue.

755 It was next submitted, as already mentioned, that *Dickenson's Arcade* was a product of unwarranted deference to the Privy Council's advice in *Atlantic Smoke Shops*. This decision, it was said, addressed a very different constitutional context, namely ss 92 and 122 of the *British North America Act 1867* (Imp). The former provision was concerned with the exclusive power of the Canadian provinces to impose "direct taxation"; the latter debarred the provinces from passing a law

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1651 (1974) 130 CLR 177 at 239.

1652 (1993) 178 CLR 561 at 583. *Logan Downs Pty Ltd v Queensland* is another example confirming that the criterion of liability was about methodology only. Gibbs J, in dissent, noted that he did not need to decide that case using that method, even though he agreed with it: (1977) 137 CLR 59 at 64.

affecting "excise laws". It was in that context that Viscount Simon LC, speaking on behalf of the Judicial Committee, said the following[1653]:

> "The word [excise] is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect."

756 The foregoing general observation has nothing in particular to do with the specific application of the *British North America Act*. It was expressly approved of by Latham CJ in *Parton*[1654] and, as already mentioned, it led Dixon J to qualify his well-known description of a duty of excise as previously expressed in *Matthews* by excluding from it a tax on consumption[1655]. But that "modification" was no unthinking subordination of an antipodean judge to an imperial London. It was because the justification for extending the concept of an excise from a duty on production and manufacture, as first established in *Peterswald*[1656], to a duty on distribution and sale[1657], did not apparently apply to a duty on consumption. The justification was that a duty on distribution and sale had the "same effect" on a commodity as a duty on production and manufacture. As Dixon J explained in *Parton*[1658]:

> "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. If the exclusive power of the Commonwealth with respect to excise did not go past manufacture and production it would with respect to many commodities have only a formal significance."

1653 [1943] AC 550 at 565.

1654 (1949) 80 CLR 229 at 244.

1655 (1949) 80 CLR 229 at 261.

1656 (1904) 1 CLR 497.

1657 A concept established by at least the decision in *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263.

1658 (1949) 80 CLR 229 at 260 (emphasis added).

757 Significantly, Dixon J did not state that a tax on consumption has the "same effect" on a commodity as a tax on manufacture and production. That is because it does not; that is why his Honour's boundary of what is a duty of excise finishes "before [the good] reaches the consumer". In *Logan Downs*, Stephen J explained, with typical lucidity, why this is so in the following terms[1659]:

> "However, it is not every tax upon goods which will be an excise. It is not simply the taxing of goods that distinguishes the incidence of an excise duty from that of other taxes; it is rather the taxing of goods during the process by which they are first brought into existence and then ultimately pass to the consumer or user. A tax upon the ownership of goods after that process is at an end, the goods having come to the hands of the ultimate user, is no duty of excise. Once out of the stream of production and distribution, goods cease to be apt subject-matter for duties of excise and it is this that accounts for the character of an excise as an indirect tax; being imposed upon goods in the particular way it is, its incidence will tend to be passed on in the price of the goods, as they flow along the stream of production and distribution to the end user. But a tax upon goods which have reached the hands of the ultimate consumer will, on the contrary, impose a quite direct form of taxation upon their owner. The goods will not pass out of his hands, bearing with them, as a component of their price, the tax imposed upon them; instead the tax will lie where it falls, upon the owner. It will thus lack the quality of a duty of excise and be a direct tax upon the owner, the goods only providing the means of identifying the person to be taxed."

758 No decision of this Court has ever held, contrary to the foregoing, that all taxes on consumption have the "same effect" on goods as a tax on manufacture and production. Yet this was the proposition the plaintiffs and the Commonwealth really needed to establish. In particular, the Commonwealth accepted that an attribute of a duty of excise is that it must, like a tax on manufacturing, have an effect on the market for the goods in question. Logically, this meant having an effect on the price of goods. That is because an adjustment of the price of the goods in question to take account of the presence of such a liability (whether in whole or in part) is the usual means by which this burden is defrayed. As Mason J observed in *Hematite Petroleum Pty Ltd v Victoria*[1660]:

> "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 purchaser. As the

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1659 (1977) 137 CLR 59 at 69.

1660 (1983) 151 CLR 599 at 632.

> 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."

759 The attempt by the plaintiffs and the Commonwealth to diminish the precedential value of *Dickenson's Arcade* fails.

An excise is a "trading tax"

760 Stephen J's reference in *Logan Downs* to the "stream" of production and distribution is a reminder that, as his Honour observed in *Dickenson's Arcade*, an excise is necessarily a trading tax. A tax on goods which is not of this kind – because, for example, it is imposed on the retail consumption of a good – cannot be, for this reason, an excise. This is a foundational and long-settled proposition.

761 Thus, in *Attorney-General for British Columbia v Kingcome Navigation Co Ltd*, Lord Thankerton, speaking for the Privy Council, said[1661]:

> "Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted."

762 In *Matthews*, Dixon J agreed with the foregoing characterisation of an excise[1662]. This explains why, in the cases, Dixon J, and other Justices of this Court, have used the terminology of an excise being a tax on goods as "articles of commerce" or "integers of commerce", or in "commercial dealings in

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1661 [1934] AC 45 at 59.

1662 (1938) 60 CLR 263 at 300-301.

commodities", as distinct from just taxes on "goods"[1663]. Dixon J repeated that view in *Parton*[1664] and in *Dennis Hotels*[1665]. In *Dennis Hotels*, Dixon CJ said[1666]:

> "Whether a tax is a duty of excise must be considered by reference to its relation to the commodity as an article of commerce."

763 That an excise is a "trading tax" is a fundamental attribute of such an impost; it is its very essence. There is no reason to doubt this long-standing principle for the purposes of s 90. Indeed, the plaintiffs and the Commonwealth did not challenge it. Instead, they offered up a concept of what is an article of commerce that would apply to any good. They submitted that any good which is potentially vendable is an article of commerce. Such a broad approach is entirely unwarranted and unsupported by authority or principle. It should be rejected precisely because it obliterates any distinction between a tax which is a "trading tax" on goods and a tax which is not. Plainly, the Privy Council and successive judgments of this Court do not support such a proposition.

764 A tax on the production, manufacture, sale or distribution of a commodity is a tax on an item which may properly be characterised as an "article of commerce" precisely because it is being dealt with by a series of business enterprises. When a particular good ventures into home consumption because it is purchased by a retail consumer, it thereafter ceases to bear its commercial character, and instead becomes an item for domestic application.

765 In that respect, the mere fact that durable goods that have entered into home consumption have then been used and thus have declined in value, and might

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1663 See, eg, *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 300-301 per Dixon J; *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 252-253 per Rich and Williams JJ, 259-261 per Dixon J; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 539-541 per Dixon CJ, 559 per Kitto J, 574 per Taylor J, 588-590 per Menzies J; *Bolton v Madsen* (1963) 110 CLR 264 at 273 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185 per Barwick CJ, 204 per McTiernan J, 231 per Stephen J; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 430 per Mason CJ and Deane J, 443-444 per Brennan J, 478-479, 482-483, 485-486 per Toohey and Gaudron JJ; *Ha v New South Wales* (1997) 189 CLR 465 at 496-497 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1664 (1949) 80 CLR 229 at 259.

1665 (1960) 104 CLR 529 at 541.

1666 (1960) 104 CLR 529 at 547.

ultimately be re-sold as second-hand commodities, does not compel any contrary conclusion. The mere possibility of re-sale, whether remote or likely, does not affect the basal and undeniable proposition that goods are not articles of commerce when they are being used for domestic purposes.

766 The foregoing proposition is central to the correct understanding of the ZLEV charge. On no view can it be characterised as a trading tax in the sense described in *Kingcome Navigation* and subsequently endorsed by this Court. It is not a tax on a business dealing with a good. As already explained, the ZLEV charge is payable regardless of the reason why a particular vehicle is "used" on a specified road. And when purchased by a retail consumer, its future use will generally be domestic in nature. And because the liability to pay the charge can arise from the use of a second-hand ZLEV, that ongoing liability will then only be remotely connected to production, manufacture, sale or distribution. In that respect, no part of the criterion of liability created by s 7 of the ZLEV Act requires a ZLEV to be an article of commerce. Victoria's submission that the ZLEV charge is not a trading tax and that ZLEVs are not "articles of commerce", plainly expressed, should be accepted.

The "nature and general tendency" of the ZLEV charge

767 The plaintiffs and the Commonwealth nonetheless sought to achieve their objective of demonstrating that the ZLEV charge is a trading tax by asserting that "the nature and general tendency" of a consumption tax is that it will, like any duty of excise, affect the market for ZLEVs in the required way. The concept of a tax having a "nature and general tendency" which, when identified, will assist in determining its essential character comes from the observation of Viscount Cave LC, speaking on behalf of the Privy Council in *City of Halifax v Estate of J P Fairbanks*[1667]. The case concerned whether a certain "business tax" imposed by the Province of Nova Scotia was a direct tax for the purposes of s 92 of the *British North America Act*. In the seminal passage, Viscount Cave LC said[1668]:

> "It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity".

1667 [1928] AC 117.

1668 [1928] AC 117 at 126.

768 On this occasion, it did not seem to matter to the plaintiffs or to the Commonwealth that a foundational plank to their arguments rested upon an advice of the Privy Council concerning the *British North America Act*[1669].

769 Dixon J approved of the "nature and general tendency" test in *Matthews.* In particular, his Honour said[1670]:

> "What is decided is that to be an excise the tax must be imposed in respect of commodities. A tax imposed upon a person filling a particular description or engaged in a given pursuit does not amount to an excise. In this way a distinction arises which resembles that required by sec 92(2) of the *British North America Act* 1867, which confers upon a provincial legislature exclusive power to make laws in relation to direct taxation within the Province in order to [raise] revenue for provincial purposes. 'The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples' (per Lord Haldane, *Attorney-General for Manitoba v Attorney-General for Canada*). But 'it is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity' (per Lord Cave, *City of Halifax v Fairbanks' Estate*)."

770 In *Matthews*, Dixon J cited with approval another, subsequent "general tendency" advice of the Privy Council on appeal from Canada[1671]. That decision was *R v Caledonian Collieries Ltd*, in which Lord Warrington of Clyffe, writing on behalf of their Lordships, referred to the "general tendency" of an indirect tax on the sale of a commodity by a taxpayer, namely that the taxpayer[1672]:

> "would seek to recover [the tax] in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains."

1669 cf the critique of Dixon J's reasons in *Parton* as inexplicably deferential to *Atlantic Smoke Shops*.

1670 (1938) 60 CLR 263 at 300 (footnotes omitted).

1671 (1938) 60 CLR 263 at 302.

1672 [1928] AC 358 at 362.

771 That "general tendency" existed in the foregoing case because the respondents were "producers of coal, a commodity the subject of commercial transactions"[1673].

772 In *Parton*, Dixon J observed that the impost on milk considered in that case had the character of an indirect tax. That was because the tax had "from its nature a tendency to enter into the price obtained for the milk" and was "susceptible of being passed on" to the consumer[1674]. In *Dennis Hotels*, Kitto J referred to the "general tendency" of an excise and said[1675]:

> "Indeed, the fact which in general justifies the description of an excise duty as an indirect tax, in the sense of John Stuart Mill's dichotomy, is that when, in the ordinary case, excise duty becomes payable, it amounts to a statutory addition to the cost of a particular act or operation in the process of producing or distributing goods, so that in the costing of the goods in relation to which the act or operation is done, for the purpose of arriving at a selling price to be charged to the next recipient in the chain that leads to the ultimate consumer, the duty paid in respect of those goods may enter – and therefore, according to the natural course of business affairs, will enter – as a charge relating to those goods specifically. This, I apprehend, is what is meant by saying that an indirect tax 'enters *at once*' (the italics are mine) 'into the price of the taxed commodity', as the Privy Council said of a customs duty in *Bank of Toronto v Lambe*, and by saying that such a tax is 'intended' or 'desired' or 'expected' to be passed on (Mill's own words, adopted by the Privy Council in *Bank of Toronto v Lambe*), or has 'a general tendency' to be passed on (per Lord Warrington of Clyffe in *R v Caledonian Collieries*)."

773 In *Philip Morris*, Mason CJ and Deane J observed[1676]:

> "In the end the reason why a tax upon any step in the production, manufacture, sale or distribution of goods is held to be a duty of excise is that such a tax has *a general tendency* to be passed on to persons down the line to the consumer and will prejudice the demand for the goods burdened by the imposition of the tax."

1673 [1928] AC 358 at 362.

1674 (1949) 80 CLR 229 at 259.

1675 (1960) 104 CLR 529 at 559-560 (footnotes omitted).

1676 (1989) 167 CLR 399 at 436 (emphasis added).

774 Finally, in *Capital Duplicators [No 2]*, Mason CJ, Brennan, Deane and McHugh JJ said[1677]:

> "A tax on distribution, like a tax on production or manufacture, 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 on which the tax is imposed."

775 There are no authorities which support the proposition that a consumption tax exhibits the same "general tendency" of an indirect tax whereby its burden is passed on, in whole or in part, to another[1678]. There are no authorities which state that a consumption tax has the "same effect" on goods as a tax on manufacture and production. For the reasons already given, the *obiter* observations made in *Dickenson's Arcade* about the economic effect of a consumption tax of the kind there considered do not support the contrary proposition.

776 In that respect, the observations of Stephen J in *Logan Downs*[1679] are, with respect, compelling. The natural tendency of a businessperson to pass on the burden of an excise is one naturally available in the sale of a commodity as part of a "stream" of commercial dealings. It is naturally available because the businessperson seeks to make a profit. It is one of the reasons why an excise is described as a "trading tax". The Privy Council recognised this in *R v Caledonian Collieries Ltd*. But the same considerations do not apply to the purchase by a retail consumer of goods which have entered into home consumption. The retail consumer has no profit motive and will wholly absorb the cost of acquisition, including any excise previously levied on the goods acquired, and may in a given case have no ability, natural or otherwise, to affect the price of the goods sold. Such an impost, paid by the consumer, is a direct tax.

777 The Court was invited to consider, perhaps as a matter of "logic and common experience" or as a "constitutional fact", whether the ZLEV charge, as a general proposition, has a tendency to affect the market for ZLEVs. The plaintiffs and the Commonwealth contended that the ZLEV charge has a tendency to affect

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1677 (1993) 178 CLR 561 at 586 (emphasis added).

1678 In *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 610, Dawson J observed that every tax (including a consumption tax) has a tendency to be passed on to the extent that market forces allow and, therefore, to increase the price of goods. However, that view was expressed immediately before his Honour went on to say that the "tendency of a tax to be passed on and to increase the price of goods does not ... serve to differentiate between excise duties and other taxes".

1679 (1977) 137 CLR 59 at 69.

the price of such vehicles, even though it is not payable until after sale, because a rational customer will take into account the ongoing cost associated with operating a ZLEV when deciding whether to purchase such a vehicle, and that will have a natural tendency to reduce the price they are prepared to pay. It was asserted that making the operation of ZLEVs more expensive, in this way, has a natural tendency to alter the market by affecting supply and demand for such vehicles. The Commonwealth did not assert that this was a constitutional fact; it said it was a matter of characterising the impost.

778 No evidence was led about the market for ZLEVs in Victoria (or Australia generally). Absent such evidence, and given that the retail consumer has no motive or ability to pass on the burden of the charge to another, the proposition that the ZLEV charge has a natural tendency to affect demand for ZLEVs should not be accepted. That is especially so given that the ZLEV charge is a relatively small annual amount. From the perspective of many consumers, the burden it casts may be an irrelevant consideration. This is not a case where the economic consequences of the ZLEV charge are so obvious and patent as to justify a finding based on judicial notice[1680]. Nor is there other material before the Court that might justify the finding of a constitutional fact concerning the impact of the impost[1681]. In truth, judicial assertions about the impact the ZLEV charge might have on the ZLEV market rise no higher than speculation.

779 In that respect, Victoria submitted that at the point of sale of a ZLEV, the future use of the ZLEV by potentially different registered users would be unascertainable. It follows that the economic burden of the ZLEV charge could not be known at that time, and therefore could not be factored into the price of a given ZLEV. I respectfully agree with Victoria.

Dickenson's Arcade was correctly decided so the ZLEV charge is not an excise

780 For the foregoing reasons, *Dickenson's Arcade* was correctly decided. The ZLEV charge is thus not an excise. Even without the authority of *Dickenson's Arcade*, on no view can it be said that the ZLEV charge, assuming it to be a tax on goods, is an excise. That is because it is not a trading tax on goods. The charge must be paid regardless of whether or not a given ZLEV is an "article of commerce". Moreover, for the reasons already given, it does not exhibit any general tendency to be passed on to consumers, or to affect the market in which ZLEVs are purchased and then used. Finally, it is impossible to conclude that a

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1680 *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 227 per McTiernan J; *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622 per Jacobs J; *Thomas v Mowbray* (2007) 233 CLR 307 at 517 [629] per Heydon J.

1681 *Thomas v Mowbray* (2007) 233 CLR 307 at 514-522 [620]-[639] per Heydon J.

regular and ongoing impost charged on the domestic use of a vehicle on public roads falls within what this Court said in *Ha* was the definition of an excise, namely a tax on a step in the production, manufacture, sale or distribution of a commodity. The reservation made in that case for consumption taxes, like the reference to a consumption tax in *Matthews*, is ambiguous. For instance, it might have been intended to be a reference to a tax on first retail purchase, but on no view was it a reservation in relation to a charge of the kind imposed by the ZLEV Act. As pointed out by Mr Stephen Dowell in his learned book, an earlier edition of which was relied upon extensively by Dixon J in *Matthews*, when the Imperial Parliament historically taxed the consumption of goods, such as wine or beer, it was only "payable on the sale of the articles"[1682]. This is the traditional conception of a consumption tax.

781 There are otherwise no historical analogues of a consumption tax in the pre-Federation era, being a tax levied continuously on the consumer for the ongoing use of the same good while it is declining in value (indeed, prior to Federation, the only excise duties levied by the former colonies were charges on the production of beer, spirits and tobacco[1683]). Such a tax exhibits only a remote nexus with the production, manufacture, distribution and sale of goods; it is, to use the language of Mason J in *Dickenson's Arcade*[1684], not "sufficiently proximate" to the production and manufacture of ZLEVs.

Leave to re-open *Dickenson's Arcade* should be refused

782 Leave was sought to re-open *Dickenson's Arcade*[1685]. For the reasons set out above, the decision rests upon a principle carefully worked out in a significant number of cases; that principle is that to be an excise the duty must constitute a trading tax, which has the same effect on commodities as a tax on their manufacture or production. For the reasons also given above, the attempt to dilute *Dickenson's Arcade* either on the basis of alleged inappropriate deference to an authority of the Privy Council, or because the judges of this Court were then

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1682 Dowell, *A History of Taxation and Taxes in England: From the Earliest Times to the Present Day*, 3rd ed (1965), vol 2 at 8.

1683 *Official Report of the National Australasian Convention Debates* (Sydney), 13 and 16 March 1891 at 349, 366. See also Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 21 *Sydney Law Review* 627 at 637-638.

1684 (1974) 130 CLR 177 at 239.

1685 The plaintiffs, the Commonwealth and Victoria each applied the four factors set out in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

confined to a "criterion of liability" methodology for characterising taxes, should be rejected.

783 Whilst there were differences in the reasoning of each of Barwick CJ, Menzies, Gibbs, Stephen and Mason JJ, the explanations given by all of the Justices, save for the Chief Justice, are not inconsistent with each other, and really represent cumulative reasons for why one should exclude a consumption tax from the notion of a duty of excise. Nor has it been demonstrated that the result in *Dickenson's Arcade* has led to considerable inconvenience; perhaps that is because, as Mason J observed in that case, a consumption tax (which is not a sales tax) is a "phenomenon infrequently encountered"[1686].

784 The Commonwealth contended that changes in technology had the potential to create new ways of tracking the consumption of goods, therefore allowing taxes on consumption to be levied in ways that are not presently practical. In light of that development, the Commonwealth said that to interpret s 90 as not including taxes on the use or consumption of goods would undermine the scope and purpose of s 90, facilitating evasion by "the adoption of unreal distinctions"[1687]. However, this submission rose no higher than speculation. And, in any event, if this result were to occur, it was unclear why this might offend the *Constitution* or injure the Commonwealth in circumstances where the concept of excise was never intended to take away from the States and Territories *all* fiscal levers that might affect the market for goods in some way.

785 Finally, Victoria submitted that it had acted in reliance upon *Dickenson's Arcade*. Whilst it did not identify any particular law which depended for its efficacy upon the decision[1688], it did submit, in general terms, that a range of State imposts might be adversely affected if *Dickenson's Arcade* were to be overruled. These were identified as duties paid on the transfer of land which included goods, motor vehicle duties and vehicle registration charges, commercial passenger vehicle levies, gaming machine levies and "point of consumption" betting taxes, and waste disposal levies. Victoria contended that if these taxes were imperilled, it could have "a marked effect on the capacity of the States to raise revenue for government"[1689].

1686 (1974) 130 CLR 177 at 239.

1687 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 304 per Dixon J.

1688 Victoria, understandably, did not want to make any specific concessions that might inspire future attacks upon the validity of such laws.

1689 *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 501 per Mason J.

786 In oral argument, the Solicitor-General for Victoria explained in more detail the threat to waste disposal levies imposed by the *Environment Protection Act 2017* (Vic)[1690] if the Commonwealth were to be given exclusive rights to tax goods. Section 145 of that Act imposed a levy "for each tonne of waste" received at waste management facilities which are subject to the "waste levy". Given the submissions of the plaintiffs and the Commonwealth that the federal Parliament has an exhaustive power over all taxes on goods, it is not unreasonable to accept the potential threat to this impost.

787 The plaintiffs complained that the foregoing lacked specificity and was thus inadequate. Moreover, so the plaintiffs asserted, a majority of the imposts said to be threatened should properly be characterised as fees for services, such as the waste disposal levies, or fees for privileges, such as the vehicle registration charges. That submission was equally devoid of any detail.

788 Bearing in mind that it was the plaintiffs and the Commonwealth that wanted to re-open *Dickenson's Arcade*, much of their complaint rings hollow. It was not incumbent on Victoria specifically to identify a list of possibly impugned Acts of the Victorian Parliament, and then explain in detail why each would be rendered invalid as an excise if the plaintiffs and the Commonwealth were to succeed. It was sufficient for it to demonstrate, in a practical way, that it was probable that at various times in the past, and presently, Victoria had relied upon *Dickenson's Arcade* for the proposition that it could impose taxes on consumption. Victoria met that task. In these circumstances, it would be unreasonable to assume that there had been no such reliance.

789 For the foregoing reasons, leave to re-open *Dickenson's Arcade* should be refused. Even if it was right to reconsider that decision, the proposition that a consumption tax is not a duty of excise is plainly correct and is in conformity with the settled jurisprudence of this Court concerning s 90 of the *Constitution*.

A tax on all goods

790 The primary contention of the plaintiffs and the Commonwealth was that s 90 of the *Constitution* conferred a monopoly on the federal Parliament over the taxation of all goods whether imported or locally made. Imported goods were properly the subject of customs duties. In contrast, so long as an inland tax had, in substance, a direct or sufficient connection with goods, it was necessarily an excise. It followed that the Commonwealth had exhaustive control over the taxation of all goods, and this was intended to prevent the States from defeating or undoing the uniform taxation policies of the federal government with respect to duties of customs and excise, as well as bounties. The imposition by a State of any levy on goods additional to that imposed by the Commonwealth, or on goods not

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1690 See especially Pt 6.6 of that Act.

taxed by the Commonwealth, would result, it was said, in distortions in the market for such goods, which Federation in 1901 was intended, amongst other things, to eradicate.

791 The plaintiffs and the Commonwealth relied upon the following passage from the majority in *Capital Duplicators [No 2]*[1691], which was quoted with approval by the majority in *Ha*[1692], and which, on one view, appears to construe the phrase "duties of customs and of excise" in s 90 as "exhausting the categories of taxes on goods":

> "The submissions advanced by the defendants and South Australia deny the proposition that 'duties of customs and of excise' in s 90 exhaust the categories of taxes on goods. Those submissions accept that a tax which, in form or even in substance, imposes a duty on the importation of goods or on the local production or manufacture of goods would be within the scope of s 90. But a tax which does not fall within either of those categories but which imposes a duty indifferently on all goods (whether imported or locally produced or manufactured) is said to be outside the scope of s 90. These propositions were rejected expressly and, in our respectful opinion, rightly by Dixon CJ and Windeyer J in *Dennis Hotels*. Moreover, they are inconsistent with the purpose which Dixon J attributed to s 90 in *Parton* and which has been attributed to s 90 by subsequent judgments in this Court. *Adhering to that view of the purpose of s 90, the term 'duties of customs and of excise' in s 90 must be construed as exhausting the categories of taxes on goods.*"

792 With great respect, it cannot be accepted that the Court intended to state, by what is set out above, that s 90 of the *Constitution* conferred a monopoly over all taxes on goods on the Commonwealth. There are two reasons why that must be so.

793 First, this Court has said on numerous occasions that not every inland tax on goods is an excise. This was said, for example, expressly by Gibbs J[1693] and Stephen J[1694] in *Logan Downs* and by Gibbs J[1695] again and Jacobs J[1696] in

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1691 (1993) 178 CLR 561 at 589-590 per Mason CJ, Brennan, Deane and McHugh JJ (emphasis added; footnote omitted).

1692 (1997) 189 CLR 465 at 488 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1693 (1977) 137 CLR 59 at 63.

1694 (1977) 137 CLR 59 at 69.

1695 (1977) 136 CLR 475 at 491.

1696 (1977) 136 CLR 475 at 521.

H C Sleigh[1697]. It also contradicts the proposition that an excise is a trading tax; not all taxes on goods exhibit this character. It is inconceivable that the majority in *Capital Duplicators [No 2]* really intended to confer on the Commonwealth so sweeping a monopoly over the taxation of goods when this proposition was unsupported by any prior authority of this Court, and is in fact directly inconsistent with what has been said in the past.

794 Secondly, the suggested monopoly is inconsistent with the passage in the reasons of the majority in *Capital Duplicators [No 2]* which immediately followed that set out above[1698] (and which is not reproduced in the majority reasons in *Ha*). The passage is as follows[1699]:

> "That leaves the question whether a tax on goods should be classified as a duty of customs to the extent to which it applies to imported goods and a duty of excise to the extent to which it applies to goods of local production or manufacture. Some support can be found for this distinction. However, once it is accepted that duties of excise are not limited to duties on production or manufacture, we think that it should be accepted that the preferable view is to regard the distinction between duties of customs and duties of excise as dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution – inland taxes – in the case of excise duties. It is unnecessary in this case to consider taxes on the consumption of goods."

795 Earlier, the majority had also identified (albeit in a footnote) the factors to be considered in determining whether an impost is a duty of excise. The factors included "[t]he 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, [and] the form and content of the legislation imposing the tax"[1700].

796 The foregoing passage from *Capital Duplicators [No 2]* – which identifies only some, but not all, of the steps in the inland commercial and domestic life of a commodity which may attract tax and thus an excise – is inconsistent with the

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1697 See also *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615 per Gibbs CJ, referring to *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 491-494 per Gibbs J.

1698 See [791].

1699 (1993) 178 CLR 561 at 590 (footnotes omitted).

1700 (1993) 178 CLR 561 at 583, citing *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 per Barwick CJ.

broad monopoly propounded by the plaintiffs and the Commonwealth in this case. So too is the identification of the applicable factors in the footnote by reference to Barwick CJ's formulation in *Anderson's Pty Ltd v Victoria*. If s 90 conferred upon the Commonwealth a monopoly on all inland taxes on goods, it would have been unnecessary for the majority of the Court to have confined an excise duty to a tax on "production, manufacture, sale or distribution" of goods. But this is nonetheless what the majority did.

797 The plaintiffs and the Commonwealth further submitted that their proposition is supported by the "high constitutional purpose" of s 90[1701]. That purpose, it was said, was first stated by Dixon J in *Parton* in the following terms[1702]:

> "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."

798 The expression by Dixon J of the proposition that it was intended for the federal Parliament to have "real control of the taxation of commodities" as only an "assumption" is significant. For the reasons set out below, the assumption is unsupported by authority, and if it was intended to mean that the Commonwealth should have exclusive control over all taxes on goods, it is wrong.

799 In *Capital Duplicators [No 2]*, Mason CJ, Brennan, Deane and McHugh JJ said of the purpose of ss 90 and 92 of the *Constitution* that they created an "economic union". Their Honours said[1703]:

> "[Sections] 90 and 92, taken together with the safeguards against Commonwealth discrimination in s 51(ii) and (iii) and s 88, created a Commonwealth economic union, not an association of States each with its own separate economy. Section 92 of the Constitution ensured that the domestic market of each State be opened equally to goods from interstate and goods of local production or manufacture, but that would not have been sufficient by itself to create a Commonwealth economic union. Differential taxes on goods, if permitted, could have distorted local markets within the Commonwealth. That possibility was averted by ss 51(ii) and (iii), 86, 88,

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1701 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 586 per Mason CJ, Brennan, Deane and McHugh JJ.

1702 (1949) 80 CLR 229 at 260 (emphasis added).

1703 (1993) 178 CLR 561 at 585 (footnotes omitted).

> 90 and 92 of the Constitution which created a single legislative authority to impose taxes on goods and to grant bounties and required those powers to be exercised uniformly. Sections 90 and 92 of the Constitution both came into operation when uniform duties of customs were imposed by the Commonwealth. The constitutional contemporaneity of those events together with the provisions of s 51(ii) and (iii) show that the customs and excise imposts to be paid to government in respect of particular goods and the bounties to be paid by government on particular goods were to be uniform throughout the Commonwealth. The purpose is not difficult to detect. It 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."

800 The plaintiffs and the Commonwealth submitted that permitting the States to levy consumption taxes would erode the "economic union" created by the *Constitution* and would result in distortions in the market as different States levied consumption taxes on different goods or on the same goods at different rates.

801 So much may be accepted. But it is important to ensure that any recourse to "high constitutional purpose" does not become self-fulfilling, and result inexorably in the elimination of State legislative power in the pursuit of absolute federal control. As Gibbs J observed rightly in *Dickenson's Arcade*, the ambit of the exclusivity conferred by s 90 "cannot be answered by having regard to the position of the Commonwealth alone"[1704]. The problem is, as was recognised by the majority in *Capital Duplicators [No 2]*, and here conceded by the plaintiffs and the Commonwealth, the States will always retain the power to "hinder the attainment" of the objects of economic union and the prevention of distortions in the market[1705]. Of course, the existence of such power cannot be a reason for denying to s 90 a "broad constitutional purpose"[1706]. But as Gibbs J also said in *Dickenson's Arcade* concerning the imposition of consumption taxes by the States[1707]:

> "To say that the control by the Commonwealth Parliament of the taxation of goods will not be complete, or that its fiscal policy may be hampered, if the States can impose a tax at the point of consumption, is in my opinion

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1704 (1974) 130 CLR 177 at 222.

1705 (1993) 178 CLR 561 at 587.

1706 (1993) 178 CLR 561 at 587.

1707 (1974) 130 CLR 177 at 222.

> not decisive against [the exclusion of consumption taxes from the constitutional concept of an excise]."

802 The real question is how much "real control of the taxation of commodities"[1708], to use the language of Dixon J in *Parton*, did the *Constitution* intend to confer on the Commonwealth? The only sensible answer is that communicated by the language of s 90 itself; the extent of the Commonwealth's control is delimited by the words "customs", "excise" and "bounties"[1709]. To again borrow from what Gibbs J said in *Dickenson's Arcade*[1710]:

> "Section 90 does not refer to taxes on goods but to duties of customs and of excise."

803 The reality of the submission of the plaintiffs and the Commonwealth is precisely to deny the correctness of that observation.

804 The position of the plaintiffs and the Commonwealth is not supported by the decision of this Court in *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia*[1711]. In that case, South Australia sought to impose a tax on the first sale and delivery of motor spirit produced in that State. A majority held that this tax was an excise. The plaintiffs and the Commonwealth relied upon the reasons of Rich J, who said, in a one-page judgment, that[1712]:

> "In [his Honour's] opinion, the Constitution gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term 'customs and excise.' If the expression 'duties of excise' be restricted to duties upon or in respect of goods locally produced the fiscal policy of the Commonwealth may be hampered. One authority should exercise the complementary powers of customs, excise and bounties without hindrance, limitation, conflict or danger of overlapping from the exercise of a concurrent power by another authority vested in the States."

1708 (1949) 80 CLR 229 at 260.

1709 It is not answered by making assumptions about the economic aspirations of the Commonwealth and any need to prevent their frustration: cf *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 631 per Mason J.

1710 (1974) 130 CLR 177 at 222.

1711 (1926) 38 CLR 408.

1712 (1926) 38 CLR 408 at 437.

805 Rich J was also of the view that an excise covered "duties upon goods collected in respect of use, consumption or sale", observing that, so far as his Honour was aware, there was no authority to the contrary[1713]. But Rich J was alone in so reasoning. And his opinion was not supported by any cited authority, save for an empty appeal to what is understood by "economists"[1714]. Knox CJ applied the earlier decision of *Peterswald* (as to which see below)[1715]. Isaacs J was of the view that the impost was "essentially a burden and a tax on the production of the goods"[1716]. Higgins J reasoned[1717]:

> "[F]or the purpose of sec 90 and our Constitution as a whole ... excise duty means a duty on the manufacture, production ... in the country itself; and it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption."

806 This "opinion" was said to be "quite consistent" with *Peterswald*[1718]. Powers J agreed with Knox CJ[1719]. And Starke J unequivocally said[1720]:

> "Duties of excise under the Constitution have received a definite interpretation from this Court in *Peterswald v Bartley*. They are duties charged upon goods produced or manufactured within Australia itself."

807 The submission that s 90 conferred upon the Commonwealth a monopoly of the taxation of goods is rejected.

The re-opening of *Capital Duplicators [No 2]* and *Ha*

808 Victoria, and almost all of the intervening States and Territories, submitted that if the Court was willing to re-open *Dickenson's Arcade*, then it should also be willing to re-open *Capital Duplicators [No 2]* and *Ha*. In essence, and as mentioned earlier, they submitted that the minority judgments in *Capital*

1713 (1926) 38 CLR 408 at 437.

1714 (1926) 38 CLR 408 at 437.

1715 (1926) 38 CLR 408 at 420.

1716 (1926) 38 CLR 408 at 430.

1717 (1926) 38 CLR 408 at 435.

1718 (1926) 38 CLR 408 at 435.

1719 (1926) 38 CLR 408 at 436.

1720 (1926) 38 CLR 408 at 438 (footnote omitted).

Duplicators [No 2] and *Ha* should now be preferred and that the original conception of a duty of excise, unanimously expressed in *Peterswald*, should be restored. In that case, Griffith CJ, writing on behalf of the Court, said[1721]:

> "Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word 'excise' had a distinct meaning in the popular mind, and that there were in the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States,' the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax. Reading the Constitution alone, that seems to be the proper construction to be put upon the term."

809 I would not grant leave to re-open *Dickenson's Arcade*, so, on one view, there is no need to consider the re-opening of *Capital Duplicators [No 2]* and *Ha*. However, given that other Justices of this Court take a different view, I explain below that at least one of the submissions propounded by Victoria, and almost all the other States and Territories, as to why *Capital Duplicators [No 2]* and *Ha* were wrongly decided should be accepted.

810 But it is not enough. Without rehearsing the four factors from *John v Federal Commissioner of Taxation*[1722], neither case should be re-opened. Instead, it should be accepted that both the Commonwealth and the States and Territories have so deeply arranged their fiscal affairs in reliance upon both decisions – especially, at least in part, in relation to the sharing of revenue raised by the various Acts that impose Goods and Services Tax[1723] – that neither should now be

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1721 (1904) 1 CLR 497 at 509. The other members of the Court were Barton and O'Connor JJ.

1722 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

1723 See, eg, *A New Tax System (Goods and Services Tax) Act 1999* (Cth); *A New Tax System (Goods and Services Tax Imposition – General) Act 1999* (Cth); *A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999* (Cth); *A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999* (Cth); *Federal Financial Relations Act 2009* (Cth).

disturbed. In *Capital Duplicators [No 2]*, when the Court was asked to reconsider *Dennis Hotels* and *Dickenson's Arcade*, the majority observed[1724]:

> "[T]here are very strong practical reasons why the rule of stare decisis should be observed in relation to [*Dennis Hotels* and *Dickenson's Arcade*]. Not only was the authority of *Dennis Hotels* acknowledged in *Bolton v Madsen*, but also that decision was itself followed in the unanimous decision in *Anderson's Pty Ltd v Victoria*. Later, in *Dickenson's Arcade*, the Court refused to depart from *Dennis Hotels* and, subsequently, in *H C Sleigh*, the Court followed and applied the two earlier decisions. Since then, the Court has twice refused to reconsider the correctness of *Dennis Hotels* and *Dickenson's Arcade*."

811 Very similar "strong practical reasons" exist here for not re-opening either *Capital Duplicators [No 2]* or *Ha*.

The serious problem – the word "excise" has always had a clear and limited meaning in s 90

812 As already mentioned, Victoria and almost all the other States and Territories identified a serious problem with this Court's jurisprudence concerning what is a duty of excise for the purposes of s 90 of the *Constitution*. The problem lies in the assumption underpinning Dixon J's reasons in *Matthews*, namely that "the word 'excise' has never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application"[1725]. This led his Honour to make the following observation[1726]:

> "The history of the word 'excise' does not disclose any very solid ground for saying that, according to any established English meaning, an essential part of its connotation is, or at any time was, that the duty called by that name should be confined to goods of domestic manufacture or production."

813 This aspect of Dixon J's reasons has since been accepted by numerous authorities of this Court[1727]. However, it is not correct for the purpose of

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1724 (1993) 178 CLR 561 at 591-592 (footnote omitted).

1725 (1938) 60 CLR 263 at 293.

1726 (1938) 60 CLR 263 at 299.

1727 See, eg, *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 230 per Stephen J; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 616 per Gibbs CJ; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 411

determining the meaning of the word "excise" for the purposes of s 90 of the *Constitution*. Instead, for the reasons which follow, the minority in *Ha* were right to decide that the founding fathers intended that this word was to bear only a limited and specific meaning, and that, in combination with the conferral on the Commonwealth of exclusive power over the imposition of customs duties and the grant of bounties, the purpose of s 90 was to create a federal customs union, and no more[1728].

814 In *Ha*, the majority accepted that the original concept of a duty of excise, as it existed at the 1891 Convention, was tied to the notion of a customs duty and was thus limited to a tax on the local manufacture and production of goods[1729]. The resolution agreed at the 1891 Convention thus described the proposed federal power to impose a duty of excise, as follows[1730]:

> "That the power and authority to impose ... duties of excise upon goods the subject of customs duties ... shall be exclusively lodged in the federal government and parliament, subject to such disposal of the revenues thence derived as shall be agreed upon."

815 The plaintiffs and the Commonwealth did not dispute that this was the original intended meaning of the word "excise". However, as the majority pointed out in *Ha*, at the Adelaide Convention of 1897, and at the behest of Sir George Turner, the words "upon goods for the time being the subject of customs duties"

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per Dawson J; *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 432-433 per Wilson, Dawson and Toohey JJ; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 425 per Mason CJ and Deane J, 488 per McHugh J; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 584 per Mason CJ, Brennan, Deane and McHugh JJ, 606 per Dawson J; *Ha v New South Wales* (1997) 189 CLR 465 at 493 per Brennan CJ, McHugh, Gummow and Kirby JJ.

1728 (1997) 189 CLR 465 at 505-509 per Dawson, Toohey and Gaudron JJ. See also *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 608-611 per Dawson J, 624-628 per Toohey and Gaudron JJ.

1729 (1997) 189 CLR 465 at 495-496.

1730 *Official Report of the National Australasian Convention Debates* (Sydney), 16 March 1891 at 370.

were removed[1731]. This was meant to "enlarge" the exclusive power of the federal government to impose duties of excise; in Sir George Turner's words[1732]:

> "Why should we limit our power to impose excise upon articles which are the subject of Customs duty. ... [I]t might be that we would deem it to be advisable to have an excise duty on an article which was not subject to Customs duty."

816 The agreement to remove the words persuaded the majority in *Ha* that the power to impose duties of excise had thereby become a "free-standing power". The majority then said[1733]:

> "[The power to impose duties of excise] was capable of exercise in conjunction with the exclusive power to impose customs duties in order to further either protectionism or external free trade but the exercise of the power was not to be confined to the fulfilment of either purpose. The history of s 90 denies any necessary linkage between the exclusivity of the power to impose duties of excise and Commonwealth tariff policy."

817 With profound respect, it is doubtful whether the deletion of the words "the subject of customs duties" was intended to result in such a dramatic change to the proposed exclusive power of the Commonwealth to impose duties of excise. At the subsequent 1897 Convention held in Sydney, Mr Isaac Isaacs drew to the attention of the delegates the report of an Accounts Committee, entitled "Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia" ("the Wollaston Report")[1734]. The Committee was led by the Victorian Secretary for Trade and Customs, Dr Wollaston. This Report included a section entitled "Excise". It commenced with the observation that the Committee had found "some difficulty in determining what 'excise' includes"[1735]. The Report then acknowledged that the Adelaide Convention "evidently intended the word to mean

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1731 (1997) 189 CLR 465 at 496.

1732 *Official Report of the National Australasian Convention Debates* (Adelaide), 19 April 1897 at 835-836.

1733 (1997) 189 CLR 465 at 496.

1734 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1065.

1735 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

the duties on the manufacture or production of commodities and nothing more"[1736]. It was then observed that if the meaning of the word "excise" was to be derived from British legislation, "the Federation Bill will have a different meaning in that respect to that intended by the Convention"[1737]. The Report noted that this was because even though the earliest English "Excise ordinance", introduced by Pym in 1643, was a duty imposed only on the manufacture of commodities, since then there had been "constant additions" to the taxable list, and every new impost had "borne the name of excise"[1738]. In such circumstances, the Committee recommended that the word "excise" be defined as follows[1739]:

> "Excise shall mean the duty chargeable on the manufacture and production of commodities."

818 The foregoing was, of course, accepted in *Peterswald* as the meaning of the term "excise" in s 90, with Griffith CJ, Barton and O'Connor JJ having themselves been delegates at the Constitutional Conventions.

819 At the 1897 Convention held in Sydney, Mr Isaacs recommended the acceptance of the Wollaston Report definition[1740]. Mr Edmund Barton then asked about the meaning of the word "excise" in the Constitution of the United States. He is recorded as saying that the word "excise" is "used there in the sense of excise on the manufacture of commodities"[1741]. Mr Barton stated that he found the Wollaston Report to be of "great assistance" and predicted that the word "excise" would be held to bear the same meaning as it did in the United States[1742]. *Peterswald* was a vindication of Mr Barton's prediction. It was only if the delegates

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1736 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

1737 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

1738 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

1739 Wollaston et al, *Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia* (1897) at 10.

1740 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1065.

1741 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1065.

1742 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1067.

considered there to be "any doubt about that" proposition that Mr Barton then expressed the view that it would be "a comparatively easy matter to provide for" a definition of excise[1743]. And there matters stood. As a result, the better view is that the delegates to the Convention thought that a duty of excise meant exactly what this Court subsequently said it meant in *Peterswald*; that is, a duty analogous to a customs duty imposed upon goods when produced or manufactured[1744].

820 Critically, there is no support whatsoever in the Convention Debates for the view that the term "excise" meant all inland taxes on goods; that it meant any tax with a sufficient connection with goods; that it included a tax on the sale or distribution of goods; or, most remotely, that it was intended to include a consumption tax. Moreover, and with very great respect, the Debates in Sydney in 1897 squarely contradict the theory that the removal of the words "the subject of customs duties" was intended to make the substantial change described by the majority in *Ha*.

821 The *Peterswald* definition of a duty of excise was accepted as the constitutionally intended meaning of the word "excise" by Quick and Garran. In the first edition of the "Annotated Constitution of the Australian Commonwealth" the learned authors stated[1745]:

> "The fundamental conception of the term ['excise'] is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury, as spirits, beer, tobacco, and cigars, it had been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles produced or manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth."

822 In 1927, Mr Owen Dixon KC was a member of a Committee of Counsel of Victoria (the other members being Mr Wilbur Ham KC and Mr Robert Menzies) ("the Counsel Committee") that gave evidence to the Royal Commission on the Constitution of the Commonwealth. This Committee said that the expression "duties of excise" had been construed to include only duties levied on goods

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1743 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 22 September 1897 at 1067-1068.

1744 (1904) 1 CLR 497 at 509. This was also the view expressed in Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 21 *Sydney Law Review* 627 at 637-638.

1745 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837.

produced within a State[1746]. As such, the States, they said, retained the power of levying taxation upon the sale, use or consumption of goods produced abroad[1747]. In the view of the Counsel Committee, the scheme "actually adopted seem[ed] inadequately expressed"[1748]. They contended that "if the power of the Commonwealth to control the economic consequences of the importation of goods is to be maintained free from the disturbing factors which may be introduced by legislation of the States, a greater area of Commonwealth power" than was described in s 90 was justified[1749]. This observation equates with the assumption made by Dixon J in *Parton*[1750] as to the purpose of s 90. The Counsel Committee suggested that s 90 be amended to read as follows[1751]:

> "The power of the Parliament to impose taxes in relation to the importation, production, sale, purchase, use, and consumption of goods, and to grant bounties on the production or export of goods shall be exclusive."

823 As can be seen, this is relevantly the meaning of the term "duty of excise" which Dixon J was to favour 11 years later in *Matthews*. The Royal Commission rejected the Counsel Committee's recommendation in 1929. The Commissioners wrote that there "does not appear to be any sufficient reason why the Commonwealth should have exclusive power over all indirect taxation imposed immediately upon or in respect of goods"[1752]. Nonetheless, by reason of *Matthews*, what Dixon KC could not do, Dixon J did.

824 For the foregoing reasons, the premise of Dixon J's reasons in *Matthews* must now be seen to be incorrect. The concept of what is a duty of excise for the purposes of s 90 did have a fixed and narrower meaning. It is the meaning described in *Peterswald*. It follows from this that the views of the minority in

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1746 Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Melbourne, 13 December 1927 at 779.

1747 Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Melbourne, 13 December 1927 at 779.

1748 Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Melbourne, 13 December 1927 at 779.

1749 Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Melbourne, 13 December 1927 at 779.

1750 See above at [756].

1751 Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence*, Part 3, Melbourne, 13 December 1927 at 779.

1752 Australia, *Report of the Royal Commission on the Constitution* (1929) at 259.

Capital Duplicators [No 2] and *Ha* are correct. However, for reasons already given, it should be accepted that the States and Territories, and the Commonwealth, have long relied upon the decisions of the majority in each of these cases. That reliance is of great importance to the economic stability of the nation, and it should not now be disturbed, even though it seems to be plain that over the course of the 20th century the States and Territories have wrongly been denied by this Court taxing power over goods.

825 Nonetheless, the new construction of s 90 favoured by the majority may well in the future lead to uncertain and unintended consequences and, if that occurs, I agree with Edelman J that this may justify a "fresh start"[1753].

826 I would answer the questions of law posed by the amended special case as follows:

(a) Section 7(1) of the ZLEV Act is not invalid because it does not impose a duty of excise within the meaning of s 90 of the *Constitution*.

(b) The plaintiffs pay the costs of Victoria.

1753 Reasons of Edelman J at [612].

JAGOT J.

The case in its immediate context

827 The parties agreed to state one question of law to the Court:

> "Is s 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*?"

828 Section 90 of the *Constitution* provides that "[o]n the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive".

829 The ZLEV Charge Act is the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic).

830 Section 7(1) of the ZLEV Charge Act provides that:

> "The registered operator of a ZLEV must pay a charge for use of the ZLEV on specified roads."

831 Section 3 of the ZLEV Charge Act defines a ZLEV as follows:

> "***ZLEV*** means any of the following that is not an excluded vehicle –
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> (a) an electric vehicle;
>
> (b) a hydrogen vehicle;
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> (c) a plug-in hybrid electric vehicle".

832 The plaintiffs are registered operators of ZLEVs within the meaning of the ZLEV Charge Act. They have been issued with invoices for, and have paid, the ZLEV charge described in s 7(1).

833 Victoria accepted that the ZLEV charge is an inland tax (in contrast to a border tax), but said that it is not a tax on goods and, accordingly, is not an excise.

834 The case involves a question identified but not decided in the majority reasons in the most recent decisions on s 90 of the *Constitution*, *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[1754] and *Ha v New South*

1754 (1993) 178 CLR 561.

Wales[1755], as to whether a tax on the consumption of goods may be a tax on goods and thus an excise within the scope of s 90. Victoria contended that the earlier case of *Dickenson's Arcade Pty Ltd v Tasmania*[1756], as authority for the proposition that a consumption tax can never be an excise, meant that the ZLEV charge, if a tax on goods, is not an excise. The plaintiffs sought re-consideration of *Dickenson's Arcade* to the extent necessary to enable them to succeed in having s 7(1) of the ZLEV Charge Act invalidated as unlawfully imposing an excise. Victoria, in response, sought re-consideration of *Capital Duplicators [No 2]* and *Ha*, insofar as those cases held that s 90 applied to taxes on goods, whether of foreign or domestic origin. The Attorney-General of the Commonwealth and the Australian Trucking Association (with leave) intervened in support of the plaintiffs' case. The Attorneys-General of the other States and Territories intervened in support of Victoria's case. During the hearing the Court refused Victoria's application to re-consider *Capital Duplicators [No 2]* and *Ha*.

835 For the following reasons, the question of law should be answered "yes" – s 7(1) of the ZLEV Charge Act is invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*.

The decision-making framework

Chapter IV of the Constitution

836 Chapter IV of the *Constitution* concerns finance and trade. In respect of trade, s 88 provides that "[u]niform duties of customs shall be imposed within two years after the establishment of the Commonwealth". Section 90 provides that "[o]n the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive". Correspondingly, s 90 also provides, relevantly, that "[o]n the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect". Section 92 provides that "[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

837 The exclusive powers of the Commonwealth in respect of duties of customs, duties of excise, and bounties on the production or export of goods are subject to other provisions of the *Constitution*. For example, by s 51(ii) and (iii), the Parliament's power to make laws for the peace, order, and good government of the Commonwealth with respect to, respectively, taxation is qualified "so as not

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1755 (1997) 189 CLR 465.

1756 (1974) 130 CLR 177.

to discriminate between States or parts of States", and bounties on the production or export of goods is qualified "so that such bounties shall be uniform throughout the Commonwealth". By s 55, relevantly, "laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only".

838 Section 99 also provides that "[t]he Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof".

839 A series of other provisions regulated the management of the Commonwealth's revenue stream from Federation. By s 86, "[o]n the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth". By s 87, "[d]uring a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure" and "[t]he balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth". By s 89, until the imposition of uniform duties of customs:

> "(i) the Commonwealth shall credit to each State the revenues collected therein by the Commonwealth;
>
> (ii) the Commonwealth shall debit to each State:
>
> (a) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;
>
> (b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth;
>
> (iii) the Commonwealth shall pay to each State month by month the balance (if any) in favour of the State."

840 Section 93 also provides:

> "During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides:
>
> (i) the duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and

afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State;

(ii) subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs."

841 Section 94 provides that "[a]fter five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth"[1757].

842 Accordingly, the constitutional scheme was (and is) that, within the two-year period from Federation until the imposition of uniform duties of customs throughout the Commonwealth (s 88), the collection and control of duties of customs and of excise, and the control of the payment of bounties, passed to the Commonwealth (s 86). The Commonwealth credited the revenues it collected against each State as relevant, debited its expenditure as permitted, and then paid the balance to each State month by month (s 89). For five years after the imposition of uniform duties of customs, the Commonwealth had to continue to credit revenue, debit expenditure, and pay balances to the States as required by s 89, but subject to one alteration – the crediting of revenue to each State was to be adjusted so that if duties of customs were chargeable on goods imported into one State that then passed into another State for consumption, or if duties of excise were paid on goods produced or manufactured in one State that then passed into another State for consumption, the revenue was taken to have been collected in the State in which the goods were consumed (s 93).

The contemporary approach to s 90

843 Judicial decision-making is bound to its one location along the temporal continuum. Once a precedent is established, it is binding. Once obiter dictum of high authority is articulated, it is to be applied. Judicial decision-making must confront the law as it is, not as it was. This Court may overrule its previous decisions[1758]. In doing so, however, it adheres to a principled decision-making framework reflective of the law's objectives of consistency, predictability, and fairness. While it has been said that "the doctrine of *stare decisis* should not be so

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1757 See *New South Wales v The Commonwealth* (1908) 7 CLR 179.

1758 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

rigidly applied to the constitutional as to other laws"[1759], it remains fundamental to judicial reasoning that no judge is entitled to give effect to their own opinions "as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court"[1760].

844 In deciding if it should overrule one of its previous decisions, particular weight is given by this Court to whether: (a) the earlier decisions "rest upon a principle carefully worked out in a significant succession of cases"; (b) the earlier decisions involved different reasoning of the Justices constituting the majority; (c) "the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience"; and (d) "the earlier decisions had not been independently acted on in a manner which militate[s] against reconsideration"[1761].

845 In the context of a matter involving the purpose and meaning of s 90 of the *Constitution*, this decision-making framework means that *Capital Duplicators [No 2]* and *Ha* – the modern s 90 cases – and the joint majority judgments of Mason CJ, Brennan, Deane and McHugh JJ in the former, and of Brennan CJ, McHugh, Gummow and Kirby JJ in the latter, should be seen as the relevant judicial starting point from which further analysis may be undertaken.

846 In respect of the purpose of s 90, the majority in *Capital Duplicators [No 2]* concluded that the weight of judicial authority since *Parton v Milk Board (Vict)*[1762] spoke against "a return to a narrow definition of excise"[1763]. They endorsed the purpose Dixon J attributed to s 90 in *Parton*, being 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"[1764], as accepted "by subsequent judgments in this Court"[1765]. On this basis, they concluded that "'duties of customs and of excise' in s 90 must be construed as

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1759 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278, quoting Willoughby, *The Constitutional Law of the United States* (1910), vol 1 at 52.

1760 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599.

1761 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

1762 (1949) 80 CLR 229. See *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586, 590.

1763 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 588.

1764 *Parton* (1949) 80 CLR 229 at 260.

1765 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

exhausting the categories of taxes on goods"[1766]. By this, it is plain from their reasons that their Honours did not mean that every inland tax which might in any way affect the supply and price of, or demand for, goods is a tax on goods and therefore an excise. They meant that if a tax is properly *characterised* as an inland tax on goods, the tax is an excise[1767].

847 The majority in *Capital Duplicators [No 2]* also concluded that, by that time (1993), there could be no going back to a more restrictive interpretation of the purpose or scope of s 90. Since the rejection in *Parton*[1768] of the narrow *Peterswald v Bartley*[1769] definition of an excise as a tax on the production or manufacture of goods (by reference to their value or quantity when produced or manufactured)[1770], "federal financial arrangements [had] been designed and implemented on the basis of the interpretation given by this Court to s 90"[1771]. Further, they said that "since *Parton*, there has been little support for the view that an excise is confined to a tax on, or by reference to, the local production or manufacture of goods"[1772]. They considered that to abandon the broader interpretation of s 90 "would have widespread practical ramifications and generate extraordinary confusion"[1773]. They reached this view on the basis of a comprehensive review of the authorities, despite recognising, with good reason, that "[i]t would be a tedious and unproductive exercise to refer to all the cases"[1774].

848 The majority identified that the constitutional purpose of s 90 is "to ensure that differential taxes on goods ... should not ... distort competition"[1775]. To achieve this, s 90 gives the Commonwealth "effective control over economic policy

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1766 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

1767 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

1768 (1949) 80 CLR 229.

1769 (1904) 1 CLR 497.

1770 *Peterswald v Bartley* (1904) 1 CLR 497 at 509.

1771 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

1772 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 587.

1773 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590-591.

1774 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 588.

1775 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585.

affecting the supply and price of goods throughout the Commonwealth"[1776]. It does so, they said, as part of the constitutional scheme of "the creation and maintenance of a free trade area throughout the Commonwealth and uniformity in duties of customs and excise and in bounties"[1777].

849 In respect of the proper approach to the application of s 90, the majority in *Capital Duplicators [No 2]* reinforced that the criterion of liability created by the legislation (the legal incidence of the tax) is not, as it once was, the exclusive method to determine if the legislation imposes a tax on goods and, thereby, a duty of excise. Rather than the statutory criterion of liability by which the tax is levied determining the legal character of the tax, "the Court has regard to matters of substance" and "looks to the practical or substantial operation of the statute as well as to its legal operation"[1778] and a variety of other factors including "[t]he 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax – all these are included in the relevant considerations"[1779].

850 In 1997, the case of *Ha*[1780] involved another invitation to this Court to resile from the reasoning in *Parton* (and *Capital Duplicators [No 2]*). This invitation included reference to the same historical material advanced in the present matter. Brennan CJ, McHugh, Gummow and Kirby JJ, in the majority, rejected the invitation. In so doing, their Honours recorded that the same submissions had also been put and rejected by the majority in *Capital Duplicators [No 2]*[1781]. Nevertheless, to test the contention that the departure in *Parton* from the narrow view of an excise in *Peterswald* was unjustified, they revisited the overall historical and policy context of Ch IV of the *Constitution*[1782]. They did so on the basis that constitutional revisionism could not be justified unless the current

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1776 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

1777 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586, quoting *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 277-278.

1778 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.

1779 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99, quoting *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365.

1780 (1997) 189 CLR 465.

1781 *Ha* (1997) 189 CLR 465 at 488-490.

1782 *Ha* (1997) 189 CLR 465 at 491-497.

orthodoxy involved "a clear departure from the text of the Constitution"[1783]. They concluded that, while the original purpose of s 90 as proposed in the 1891 Convention involved only protecting the tariff policy of the Commonwealth[1784], the purpose evolved to form part of a scheme in Ch IV of the *Constitution* to ensure "free trade throughout the Commonwealth"[1785]. Accordingly, they declined to construe s 90 more narrowly, as to do so would "subvert an objective which Federation was designed to achieve"[1786]. Their Honours put it this way[1787]:

> "It is clear that an objective of the movement to Federation was 'inter-colonial free trade on the basis of a uniform tariff' as this Court pointed out in *Cole v Whitfield*. That objective could not have been achieved if the States had retained the power to place a tax on goods within their borders. If goods that attracted a State tax were imported into the State from outside the Commonwealth, Commonwealth tariff policy would have been compromised by the imposition of a State tax."

851 Accordingly, the majority in *Ha* said that "the States yielded up and the Commonwealth acquired to the exclusion of the States the powers to impose taxes upon goods which, if applied differentially from State to State, would necessarily impair the free trade in those goods throughout the Commonwealth"[1788]. In so concluding, the majority quoted at length from *Capital Duplicators [No 2]*, including that the distinction between duties of customs and duties of excise is "dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution – inland taxes – in the case of excise duties"[1789].

852 In its constitutional context, it is apparent that the reference to "the duties of excise paid on goods produced or manufactured in a State" in s 93(i) does not indicate that "duties ... of excise" in s 90 is confined to goods produced or manufactured in Australia. Section 93 operated for a confined period only after the imposition of uniform duties of customs. The majority in *Ha* rejected the same

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1783 *Ha* (1997) 189 CLR 465 at 491.

1784 *Ha* (1997) 189 CLR 465 at 495.

1785 *Ha* (1997) 189 CLR 465 at 497.

1786 *Ha* (1997) 189 CLR 465 at 497.

1787 *Ha* (1997) 189 CLR 465 at 494 (citation omitted).

1788 *Ha* (1997) 189 CLR 465 at 497.

1789 *Ha* (1997) 189 CLR 465 at 490, quoting *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

argument based on s 93(i) which Victoria made in the present case. As the majority in *Ha* put it[1790]:

> "Section 93 was not concerned with duties of excise imposed otherwise than on production or manufacture in another State since, in practice, the agreed allocation of revenue was in respect only of customs duties or duties of excise on production or manufacture collected in the other State. ... [Section] 93 throws no light on the connotation of the term 'duties of excise' in s 90. In particular, s 93 does not imply that to be a duty of excise, an impost must be a tax on goods the discrimen of liability to which is their production or manufacture in Australia."

853 In *Ha*, the majority also referred to s 55 as a provision supporting the indifference of s 90 to the local or foreign origin of goods. As they put it, if a Bill "did not disclose on its face that local production or manufacture was to be a criterion of liability but the Act in practice operated to impose a tax on local production or manufacture, a challenge to the validity of the Act would require the Court to assess the practical operation of the law although the Parliament had not done so. Section 55 does call for a classification of taxing laws by reference to the criteria of liability that they express. The criterion of inland taxes on goods serves to identify clearly duties of excise for the purposes of s 55."[1791]

854 The constitutional text provides ample support for these authoritative contemporary statements of the key purpose and operation of s 90. The majority reasoning also fits coherently within the broader contemporary framework of constitutional interpretation. Before *Capital Duplicators [No 2]* and *Ha*, in *Cole v Whitfield*, seven judges of this Court said the "purpose of [s 92] is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries"[1792]. Accordingly, s 90 and s 92 "further the plan of the *Constitution* for the creation of a new federal nation" by creating and fostering "national markets" expressive of "national unity"[1793]. Section 92 alone "would not have been sufficient by itself to create a Commonwealth economic union. Differential taxes on goods, if permitted, could have distorted local markets within the Commonwealth."[1794] While taxes on goods are only "a particular way by which a government may attract or discourage trade

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1790 *Ha* (1997) 189 CLR 465 at 493.

1791 *Ha* (1997) 189 CLR 465 at 496-497.

1792 (1988) 165 CLR 360 at 391.

1793 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452 [12].

1794 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585.

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 achieve would be prejudiced and the Parliament would not have effective control over economic policy affecting the supply and price of goods throughout the Commonwealth"[1795].

855 The coherency of this constitutional compact cannot be reconciled with ascribing to s 90 the narrow purpose of protecting tariff policies of the Commonwealth. For example, in *Dennis Hotels Pty Ltd v Victoria*[1796], Dixon CJ exposed one of the logical conundrums in narrowing s 90 to taxes on locally produced or manufactured goods. Section 90 refers to "duties of customs and of excise". Dixon CJ considered it "ridiculous to say that a State inland tax upon goods of a description manufactured here as well as imported here was not met by s 90, excluding as that section does both duties of customs and duties of excise, because the duty was not confined to goods imported and so was not a duty of customs and was not confined to goods manufactured at home and so was not a duty of excise"[1797]. This conundrum remains unanswered. Others are equally apparent. Even a narrow purpose of giving the Commonwealth exclusive control of tariffs can be undermined by permitting State taxes that fall equally on imported and locally produced goods[1798]. As the majority said in *Ha*, "the imposition of State taxes upon other inland dealings with goods as integers of commerce, even if those taxes were not protectionist, would have created impediments to free trade throughout the Commonwealth"[1799]. Such an approach to s 90 would also expose the provision to "evasion by easy subterfuges and the adoption of unreal distinctions"[1800], reducing the provision to insignificance. Nor can the coherency of this constitutional compact be reduced, as Victoria would have it, to the protection and stimulation of Australian domestic production and manufacture. Mason J's statement in *Hematite Petroleum Pty Ltd v Victoria*[1801] that the Commonwealth's exclusive power over customs and excise "can protect and

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1795 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585-586.

1796 (1960) 104 CLR 529.

1797 *Dennis Hotels* (1960) 104 CLR 529 at 540.

1798 eg, Rose, "Excise", in Coper and Williams (eds), *The Cauldron of Constitutional Change* (1997) 39 at 41-42.

1799 *Ha* (1997) 189 CLR 465 at 497.

1800 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 304.

1801 (1983) 151 CLR 599.

stimulate home production"[1802] is only part of his Honour's reasoning, which culminates in a reiteration of the proposition that the object of s 90 is "to give the Parliament a real control over the taxation of commodities"[1803].

856 As noted, Victoria's application for *Capital Duplicators [No 2]* and *Ha* to be re-considered was rejected during the hearing. The majority reasoning in both cases is unified, consistent, and coherent. The cases involved detailed consideration and rejection of the same arguments that are now put to justify re-opening and overruling them. These arguments are incapable of improving with age. The cases have also stood as a key component of the basis for Commonwealth-State financial relations for nearly 30 years. As the Amended Special Case records: (a) on 12 August 1997, the Commonwealth Cabinet agreed to accelerate a tax reform process, in part because of the High Court's decision in *Ha*; (b) subsequently, the Commonwealth Treasurer circulated the Howard Government's Plan for a New Tax System which included the introduction of the Goods and Services Tax ("GST"), which it was anticipated would replace the Commonwealth wholesale sales tax and nine types of taxes levied by the States[1804]; and (c) related arrangements included the 1999 Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, the 2008 Intergovernmental Agreement on Federal Financial Relations, and the *Federal Financial Relations Act 2009* (Cth). As the Attorney-General of the Commonwealth submitted, to re-open *Capital Duplicators [No 2]* and *Ha* would "unpick one of the strands forming part of the overall GST settlement that was agreed over 20 years ago".

857 Two further observations should be made about *Capital Duplicators [No 2]* and *Ha*. First, in both cases, in the context of rejecting any attempt to narrow the scope of s 90, the majorities said[1805] their approach accorded with the view of Rich J in *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia*[1806] and *John Fairfax & Sons Ltd and Smith's Newspapers Ltd v New South Wales*[1807]. In those cases, Rich J described an excise as a duty "upon goods collected in respect of use, consumption or sale" irrespective of their origin and

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1802 *Hematite* (1983) 151 CLR 599 at 631.

1803 *Hematite* (1983) 151 CLR 599 at 632.

1804 This occurred with the enactment of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

1805 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590 fn 40; *Ha* (1997) 189 CLR 465 at 490 fn 92.

1806 (1926) 38 CLR 408 at 437.

1807 (1927) 39 CLR 139 at 146.

"inland duties upon or in respect of goods wherever produced". Rich J's further description of s 90 as giving to the Commonwealth exclusive power "over all indirect taxation imposed immediately upon or in respect of goods ... by compressing every variety thereof under the term 'customs and excise'", particularly in the context of his Honour's rejection of the expression "duties of excise" as having "any precise connotation", does not implicitly exclude or confine that which has been expressly included in the potential scope of a duty of excise (namely, a tax on consumption of goods). Second, and in the same context, the majorities also expressly reserved the question of the status of taxes on the consumption of goods. In *Capital Duplicators [No 2]*, Mason CJ, Brennan, Deane and McHugh JJ said[1808]:

> "[O]nce it is accepted that duties of excise are not limited to duties on production or manufacture, we think that it should be accepted that the preferable view is to regard the distinction between duties of customs and duties of excise as dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution – inland taxes – in the case of excise duties. It is unnecessary in this case to consider taxes on the consumption of goods."

858 In *Ha*, after quoting this part of *Capital Duplicators [No 2]*[1809], Brennan CJ, McHugh, Gummow and Kirby JJ said[1810]:

> "[A]s the present case requires a declaration of the limits of the protection offered by the franchise cases so as to accord with the *Parton* doctrine, it seems right to accede to the defendants' application to reopen the *Parton* line of cases. But the correctness of the doctrine they establish must now be affirmed. Therefore we reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods. In this case, as in *Capital Duplicators Case [No 2]*, it is unnecessary to consider whether a tax on the consumption of goods would be classified as a duty of excise."

859 In contrast, the minority in *Capital Duplicators [No 2]* and *Ha* (Dawson, Toohey and Gaudron JJ) accepted that the exclusion of taxes on consumption from

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1808 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590 (citation omitted).

1809 *Ha* (1997) 189 CLR 465 at 490.

1810 *Ha* (1997) 189 CLR 465 at 499-500 (citation omitted).

s 90 was illogical[1811], but considered that this indicated that a return to a narrower conception of an excise as a tax falling selectively on goods produced or manufactured locally was required[1812].

860 It is the express reservation relating to the exclusion of taxes on the consumption of goods from s 90 which must now be resolved. To do so, further discussion of the evolution of this aspect of judicial thought about s 90 is required.

Way stations to Capital Duplicators [No 2] and Ha

861 As discussed, *Capital Duplicators [No 2]* and *Ha* both reviewed, in detail, the evolution of legal thought in relation to s 90. In both cases, the broad conception of the purpose of s 90 prevailed, the contention that an excise was confined to taxes on locally produced or manufactured goods was rejected, s 90 was held to exhaust the category of inland taxes on goods, and it was expressly noted that it was unnecessary, in the context of those cases, to consider how the exclusion of taxes on the consumption of goods from *Parton* accorded with those conclusions.

862 Dixon J was the source of the exclusion of taxes on consumption from "duties ... of excise" in s 90. Initially, in stating his rejection of an excise being confined to a tax on the production or manufacture of goods or to a tax calculated only by reference to the value or quantity of the goods, Dixon J in *Matthews v Chicory Marketing Board (Vict)* said[1813]:

> "If the word 'excise' received a meaning which confined its application to taxes the relation of which to the commodity concerned was of some narrow and strictly defined nature, as, for instance, by an arithmetical relation to quantity, it would not only miss the principle contained in the use of the word 'excise,' but it would expose the constitutional provision made by sec 90 to evasion by easy subterfuges and the adoption of unreal distinctions. 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. But if the substantial effect is to impose a levy in respect of the commodity the fact that the basis of assessment is not strictly

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1811 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 602, 610, 628; *Ha* (1997) 189 CLR 465 at 510.

1812 *Ha* (1997) 189 CLR 465 at 510-512.

1813 (1938) 60 CLR 263 at 304.

> that of quantity or value will not prevent the tax falling within the description, duties of excise."

863 Subsequently, in *Parton*, Dixon J said that s 90 "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"[1814], but also re-framed his characterisation of an excise in these terms[1815]:

> "In *Matthews v Chicory Marketing Board (Vict)* I examined the history of the word 'excise' and its meaning and I shall not go over the same ground again. It is probably a safe inference from *Atlantic Smoke Shops, Ltd v Conlon*, which has since been decided, that a tax on consumers or upon consumption cannot be an excise. This decision perhaps makes it necessary to that extent now to modify the statement: 'that so far there is no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production'. The modification is with respect to consumption."

864 With hindsight, the safer inference is that *Atlantic Smoke Shops Ltd v Conlon*[1816] does not provide a reasoned foundation for the limitation which Dixon J proposed. In any event, thereafter, faced with increasing inventiveness of the States and Territories to increase their revenue streams, further conceptual problems soon emerged.

865 In *Dennis Hotels*, Dixon CJ referred to, but did not expand upon, the exclusion of taxes on consumption from s 90 proposed in *Parton*[1817]. Fullagar J considered that a tax on goods extended to a charge on a person, at least, "by reason of and by reference to the fact that [the person] is the owner, importer, exporter, manufacturer, producer, processor, seller, purchaser, hirer or consumer of particular goods"[1818]. Fullagar J reasoned that, for the purposes of s 90, such a charge ceased to be a tax on goods only once the goods had passed into the general

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1814 *Parton* (1949) 80 CLR 229 at 260.

1815 *Parton* (1949) 80 CLR 229 at 261 (citations omitted).

1816 [1943] AC 550.

1817 *Dennis Hotels* (1960) 104 CLR 529 at 540-541.

1818 *Dennis Hotels* (1960) 104 CLR 529 at 554.

"mass of vendible commodities in a State"[1819]. Kitto J expressly adopted the exclusion of taxes on consumption from s 90 as proposed in *Parton*[1820]. Taylor J also considered that it must be "taken to be decided by a majority of the Court in *Parton's Case*, that a tax upon the sale of goods at any stage before they reach the consumer must, in some circumstances at least, be regarded as a duty of excise"[1821]. Menzies J reached the same conclusion, considering it to be settled law that a tax on production or manufacture of goods is an excise duty, and a tax on sale or purchase of goods "at any point before sale for consumption is to be regarded as a tax on production or manufacture"[1822]. Windeyer J acknowledged that the distinction between direct and indirect taxes was unsatisfactory[1823], but also said that "[s]earching for the incidence and ultimate effect of a particular commodity tax may not be a fruitful economic inquiry"[1824]. He observed further that the fact that the precise extent to which the burden of a tax is "'passed on' is not predictable and is not uniformly discernible in each item of the commodity sold" does not mean a commodity tax is not an excise[1825]. Ultimately, according to Windeyer J, it should be accepted that "a tax on commodities levied on anyone before the ultimate consumer does ordinarily affect the price the ultimate consumer pays"[1826]. In the event, the result in *Dennis Hotels* was that a licence fee based on purchases of liquor for a period before the licence was not an excise, but a licence fee based on sales within the licence period was an excise.

866 Subsequently, in the unanimous decision of *Bolton v Madsen*, in which a permit fee required for the carriage of goods was held not to be an excise, the Court said[1827]:

1819 *Dennis Hotels* (1960) 104 CLR 529 at 556.

1820 *Dennis Hotels* (1960) 104 CLR 529 at 559.

1821 *Dennis Hotels* (1960) 104 CLR 529 at 573 (citation omitted).

1822 *Dennis Hotels* (1960) 104 CLR 529 at 590.

1823 *Dennis Hotels* (1960) 104 CLR 529 at 593. See also at 553 per Fullagar J.

1824 *Dennis Hotels* (1960) 104 CLR 529 at 594.

1825 *Dennis Hotels* (1960) 104 CLR 529 at 597.

1826 *Dennis Hotels* (1960) 104 CLR 529 at 594.

1827 (1963) 110 CLR 264 at 271.

> "It is now established that for 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. ...
>
> [I]t is the criterion of liability that determines whether or not a tax is a duty of excise. The tax is a duty of excise only when it is imposed directly upon goods or, to put the same thing in another way, when it directly affects goods".

867 This apparent conceptual and methodological clarity also soon fell into doubt.

868 By the time *Dickenson's Arcade* was decided, over a decade later, Barwick CJ considered that there "was no logical reason ... for ending at the point of entry into consumption the area which might yield a duty of excise"[1828]. Nonetheless, he accepted that[1829]:

> "seemingly under what was considered to be the constraint of the opinion of the Privy Council in *Atlantic Smoke Shops Ltd v Conlon*, the area has been so limited. Whilst the question whether the decision of the Privy Council really required this limitation may well have been open to argument, in deference to the views expressed by other Justices, I have accepted the limitation. But this conclusion does not preclude an examination of what precisely is the limit of the area within which statutes may operate to impose a duty of excise. However, a tax upon the 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."

869 Given this constraint, Barwick CJ framed the relevant question in *Dickenson's Arcade* as "whether the intended operation of the Act is confined to the imposition of a tax on consumption of tobacco or whether that operation extends to impose a tax on its entry into consumption"[1830]. He described "consumption" of a good as involving the use, or the destruction by use, of the good[1831]. Barwick CJ concluded, reluctantly, that the licensing impost in *Dickenson's Arcade* was indistinguishable from that in *Dennis Hotels* and thus was

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1828 *Dickenson's Arcade* (1974) 130 CLR 177 at 185.

1829 *Dickenson's Arcade* (1974) 130 CLR 177 at 185-186 (citation omitted).

1830 *Dickenson's Arcade* (1974) 130 CLR 177 at 186.

1831 *Dickenson's Arcade* (1974) 130 CLR 177 at 187.

not an excise[1832]. The purported consumption impost, however, he considered to be in substance "a tax upon the movement of the tobacco into consumption"[1833] and, accordingly, a tax upon the tobacco and thus an excise[1834]. Given the diversity of reasoning in *Dennis Hotels*, Barwick CJ characterised that case as "authority only in relation to the statutory and factual situation it resolved and in relation to a case which has, if not precisely, at least substantially and indistinguishably the same statutory and factual situation"[1835].

870 McTiernan J in *Dickenson's Arcade* considered that the "Constitution does not manifest an intention to exclude from the operation of s 90 a tax charged on goods in the hands of the consumer. Such a tax is of the nature of a duty of excise."[1836] In so concluding, McTiernan J noted that: (a) the question in *Parton* was "not whether it is within the legislative power of a State to impose a duty in respect of goods in the hands of the user or consumer"[1837]; and (b) the issue in *Atlantic Smoke Shops* depended on whether the impost involved "direct taxation" or not, whereas an excise was generally considered to be a form of indirect taxation[1838].

871 Menzies J in *Dickenson's Arcade* embraced the then prevailing orthodoxy established in *Bolton v Madsen*, but also acknowledged that an apparent tax on consumption, in substance, may be a tax on retail sale and purchase and thus an excise[1839]. Menzies J also declined to re-open *Dennis Hotels* on the basis that it "is an important decision upon the faith of which States have ordered their affairs for

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1832 *Dickenson's Arcade* (1974) 130 CLR 177 at 189.

1833 *Dickenson's Arcade* (1974) 130 CLR 177 at 193.

1834 *Dickenson's Arcade* (1974) 130 CLR 177 at 194.

1835 *Dickenson's Arcade* (1974) 130 CLR 177 at 188.

1836 *Dickenson's Arcade* (1974) 130 CLR 177 at 196. See also at 197-198, referring to *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 424, 435 and *Matthews* (1938) 60 CLR 263 at 277, 285, 300.

1837 *Dickenson's Arcade* (1974) 130 CLR 177 at 200.

1838 *Dickenson's Arcade* (1974) 130 CLR 177 at 200-203. See also Fullagar J's similar views in *Dennis Hotels* (1960) 104 CLR 529 at 553-554.

1839 *Dickenson's Arcade* (1974) 130 CLR 177 at 209.

some thirteen years"[1840] and had been recognised in both *Bolton v Madsen*[1841] and *Anderson's Pty Ltd v Victoria*[1842].

872 In *Dickenson's Arcade*, Gibbs J considered that the question "whether a duty imposed on the consumption of goods is a duty of excise has never been the subject of any direct decision by this Court"[1843]. Gibbs J observed that "if it is permissible to consider the economic effect of the tax, it is impossible ... to draw a line between the last retail sale and the act of consumption" and that the "power of the Commonwealth Parliament to tax commodities would be incomplete, and its fiscal policies possibly liable to some frustration, if the power did not extend to taxes on consumption"[1844], but concluded that the established meaning of "duties ... of excise" in s 90 excluded taxes on consumption[1845]. His Honour also characterised *Dennis Hotels* as authority for the proposition only that "legislation which provides for the grant of a licence to sell goods, on payment of a licence fee, the quantum of which is based on the value of the goods purchased for the premises in a previous year, does not impose a tax directly related to the goods"[1846].

873 Stephen J in *Dickenson's Arcade* said that if, on its true construction, the tax was on the consumption of tobacco it would be outside the scope of s 90[1847]. Stephen J accepted that the economic effect of a consumption tax, "like that of acknowledged duties of excise, reflect[s] back upon the manufacturer or producer" but rejected the materiality of that fact having regard to the already "hard won" consensus which *Parton* and *Bolton v Madsen* represented[1848].

874 Mason J in *Dickenson's Arcade* said that "[w]hatever differences may be detected in the judgment of members of this Court in recent decisions, they all agree in defining or describing an excise duty in such terms as would exclude a tax imposed on goods after they have passed into the hands of a consumer" and that

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1840 *Dickenson's Arcade* (1974) 130 CLR 177 at 212.

1841 (1963) 110 CLR 264.

1842 (1964) 111 CLR 353.

1843 *Dickenson's Arcade* (1974) 130 CLR 177 at 217.

1844 *Dickenson's Arcade* (1974) 130 CLR 177 at 219.

1845 *Dickenson's Arcade* (1974) 130 CLR 177 at 222.

1846 *Dickenson's Arcade* (1974) 130 CLR 177 at 226.

1847 *Dickenson's Arcade* (1974) 130 CLR 177 at 229.

1848 *Dickenson's Arcade* (1974) 130 CLR 177 at 230.

these statements had to be regarded as establishing that a tax on the consumption of goods is not an excise[1849]. But his Honour also considered that this exclusion was of marginal significance, as a "tax on consumption which is not also a tax on sale of goods is a phenomenon infrequently encountered"[1850].

875 In the event, the result in *Dickenson's Arcade* was that a licence fee calculated by reference to the value of tobacco sold in a period before the licence was not an excise, a tax on the consumption of tobacco was not an excise, but regulations under which the consumption tax was payable by arrangements between the retailer and the Commissioner of Taxes, by which the retailer was able to request but not require the consumer to pay the tax, purportedly authorised an excise and were invalid.

876 In *Logan Downs Pty Ltd v Queensland*[1851], an annual levy on livestock payable by the owner was held to be an excise. Barwick CJ agreed with Mason J. Mason J noted the demise of the criterion of liability test. Mason J said that a "sufficiently direct relationship between the tax and the goods may be established in circumstances where it is not possible to demonstrate that the imposition has increased the cost of goods to a purchaser by a calculable amount"[1852]. Mason J characterised the levy as a tax on the livestock "and at least to the extent that it is a tax on livestock used for their product ... is ... a tax on production itself for it is an addition to the cost of production and it has a natural, though not a necessary, relation to the quantity or value of what is produced"[1853]. Mason J also rejected the relevance of the fact that the statutory definitions of "owner of stock" included non-owners and of "stock" included non-productive stock. It was sufficient that the definitions included owners of stock and productive stock[1854]. To the extent the statute authorised a tax on stock used for production it involved an unlawful excise[1855].

1849 *Dickenson's Arcade* (1974) 130 CLR 177 at 239.

1850 *Dickenson's Arcade* (1974) 130 CLR 177 at 239.

1851 (1977) 137 CLR 59.

1852 *Logan Downs* (1977) 137 CLR 59 at 76.

1853 *Logan Downs* (1977) 137 CLR 59 at 78.

1854 *Logan Downs* (1977) 137 CLR 59 at 78.

1855 *Logan Downs* (1977) 137 CLR 59 at 79.

877 Gibbs J disagreed. He stressed that not every tax on goods is an excise, giving a tax on consumption as an example[1856]. Gibbs J concluded that the tax did not affect the stock as articles of commerce but was levied by reason of their mere existence[1857]. Stephen J said that to be an excise the tax must be on goods "during the process by which they are first brought into existence and then ultimately pass to the consumer or user" and "[o]nce out of the stream of production and distribution, goods cease to be apt subject-matter for duties of excise"[1858]. This, he explained, was because the former circumstance involved an indirect tax, but the latter a direct tax which would lie where it fell, upon the owner, and would not tend to be passed on to the end user[1859]. The levy was thereby an excise to the extent it fell on animals used for production[1860]. Jacobs J concluded that to be an excise the tax had to be on the "commodity produced, and not merely a tax on the equipment, live or dead, used to produce the commodity"[1861], and that the levy was a tax on mere ownership[1862]. Murphy J considered an excise to be confined to locally produced or manufactured goods[1863].

878 By the time *Philip Morris Ltd v Commissioner of Business Franchises (Vict)*[1864] was decided in 1989, the underlying conceptual difficulties had fully surfaced, including the effective abandonment of the criterion of liability of the tax as the sole method to determine if a law imposed a tax on goods and an excise. In *Philip Morris*, Mason CJ and Deane J considered that the history of successive drafts of s 90 and the Convention Debates were unhelpful to the ascertainment of the purpose of s 90 due to the "sheer lack of evidence of a convincing or consistent nature from the available materials"[1865]. More light was shed, they said, by the

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1856 *Logan Downs* (1977) 137 CLR 59 at 63.

1857 *Logan Downs* (1977) 137 CLR 59 at 67.

1858 *Logan Downs* (1977) 137 CLR 59 at 69.

1859 *Logan Downs* (1977) 137 CLR 59 at 69.

1860 *Logan Downs* (1977) 137 CLR 59 at 71-72.

1861 *Logan Downs* (1977) 137 CLR 59 at 82.

1862 *Logan Downs* (1977) 137 CLR 59 at 83.

1863 *Logan Downs* (1977) 137 CLR 59 at 84-85.

1864 (1989) 167 CLR 399.

1865 *Philip Morris* (1989) 167 CLR 399 at 425.

"interrelationship of s 90 and other sections of the Constitution"[1866]. They traced the evolution of legal thought in the cases concerning s 90[1867] including the expansion beyond taxes on the production or manufacture of goods by reference to their quantity or value, the relevance of the tax being indirect, the rise and fall of the criterion of liability as the sole method to determine if a law imposed an excise, and the controversy concerning the licence or franchise fee cases. They observed that[1868]:

> "In the end the reason why a tax upon any step in the production, manufacture, sale or distribution of goods is held to be a duty of excise is that such a tax has a general tendency to be passed on to persons down the line to the consumer and will prejudice the demand for the goods burdened by the imposition of the tax. 'It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity', said Lord Cave, speaking for the Judicial Committee in *City of Halifax v Fairbanks' Estate*, a passage cited by Dixon J with evident approval in *Matthews*."

879 Mason CJ and Deane J also concluded that "*Dennis Hotels* and *Dickenson's Arcade* can be rationalized by reference to traditional considerations relating to the licensing of dealings in alcohol and tobacco and to the particular characteristics of those items of personal consumption"[1869]. Applying the approach in *Dickenson's Arcade*, their Honours characterised the tax as one on the authority to sell tobacco, rather than on tobacco[1870].

880 Brennan J, in dissent in the result in *Philip Morris*, and in a lament that many judges will understand, observed that while the Court had properly refused leave to re-consider the franchise cases, as "[b]etter, it seemed, to adhere to existing principle and to resolve the instant case in the light of existing authority", the "problem ha[d] proved to be more difficult than it then appeared"[1871]. Brennan J also acknowledged that the tension in the cases to that point was reflected in the

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1866 *Philip Morris* (1989) 167 CLR 399 at 425.

1867 *Philip Morris* (1989) 167 CLR 399 at 428-436.

1868 *Philip Morris* (1989) 167 CLR 399 at 436 (citations omitted).

1869 *Philip Morris* (1989) 167 CLR 399 at 438 (citation omitted).

1870 *Philip Morris* (1989) 167 CLR 399 at 442.

1871 *Philip Morris* (1989) 167 CLR 399 at 443.

conflicting reasons for judgment in *Philip Morris*[1872]. Based on his review of the cases preceding *Philip Morris*, Brennan J said this[1873]:

> "If there be any rock in the sea of uncertain principle, it is that a tax on a step in the production or distribution of goods to the point of receipt by the consumer is a duty of excise."

881 Brennan J also traced the evolution of the approaches to s 90[1874] and of the franchise cases[1875]. He concluded that the "tension between general principle and the applicability of cases as precedents when they cannot be satisfactorily reconciled with general principle must be resolved by restricting the applicability of the cases to circumstances which are substantially the same"[1876]. Having confined the franchise cases to their facts, Brennan J concluded that the impost in *Philip Morris* was an excise[1877].

882 Dawson J in *Philip Morris* held to the narrow view that s 90 was confined to "a tax upon goods produced or manufactured in a State"[1878]. He considered that the criterion of liability remained the sole test for determining if a law imposed such a tax, with the consequence that the taxes in that case were imposed on wholesalers of tobacco in that capacity and not any capacity as a producer or manufacturer of the tobacco[1879]. Toohey and Gaudron JJ said that the decisions in *Dennis Hotels*, *Dickenson's Arcade* and *H C Sleigh Ltd v South Australia*[1880] could be seen either as a "denial of the correctness of the wide view of imposts prohibited by s 90 as exemplified in the statement of Dixon J in *Parton*" or as an "anomalous exception of judicial creation to the constitutional prohibition contained in s 90"[1881]. Like Dawson J, they responded to this apparent dilemma by confining

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1872 *Philip Morris* (1989) 167 CLR 399 at 443.

1873 *Philip Morris* (1989) 167 CLR 399 at 445.

1874 *Philip Morris* (1989) 167 CLR 399 at 443-451.

1875 *Philip Morris* (1989) 167 CLR 399 at 451-459.

1876 *Philip Morris* (1989) 167 CLR 399 at 460.

1877 *Philip Morris* (1989) 167 CLR 399 at 461, 464.

1878 *Philip Morris* (1989) 167 CLR 399 at 466.

1879 *Philip Morris* (1989) 167 CLR 399 at 473-475.

1880 (1977) 136 CLR 475.

1881 *Philip Morris* (1989) 167 CLR 399 at 481.

duties of excise under s 90 to taxes affecting goods as subjects of Australian production or manufacture[1882].

883 McHugh J in *Philip Morris*, in dissent in the result, considered that "the criterion of liability does not determine whether or not a tax is an excise"[1883], "consideration of many factors besides the 'criterion of liability' is necessary"[1884], "[r]egard must be had to the substance of the operation of the statute"[1885], and the fees in that case were an excise unless the franchise cases required, as a matter of authority, the contrary conclusion[1886]. McHugh J, in common with Brennan J, confined the franchise cases to their own facts[1887].

Organising concepts

884 From these intertwined threads, in which legal orthodoxy was transformed into apparent heresy within and across judicial generations, eight points may be made.

885 First, it may be doubted that any further assay of the historical material will be productive. The "judicial fossicker"[1888] seems unlikely to be able to unearth more of use from the historical material. Either: (a) evidence of an evolution from a narrow to a broad conception of s 90 by the time the constitutional conception was finalised will be found or not; or (b) no evidence of a "convincing or consistent nature"[1889] will be discerned. Either way, this approach has not to date provided any firm foundation for judicial decision-making.

886 Second, the battle for a narrow conception of the scope of s 90 has been fought, lost, re-fought, and lost again. Whatever might have been the weight of judicial opinion leading up to *Capital Duplicators [No 2]* and *Ha*, those cases contain clear majority decisions rejecting any restrictive interpretation of s 90, be the restriction the confining of duties of excise to taxes on the production and

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1882 *Philip Morris* (1989) 167 CLR 399 at 484-485.

1883 *Philip Morris* (1989) 167 CLR 399 at 492.

1884 *Philip Morris* (1989) 167 CLR 399 at 492.

1885 *Philip Morris* (1989) 167 CLR 399 at 492.

1886 *Philip Morris* (1989) 167 CLR 399 at 494.

1887 *Philip Morris* (1989) 167 CLR 399 at 496-500.

1888 *Dickenson's Arcade* (1974) 130 CLR 177 at 230.

1889 *Philip Morris* (1989) 167 CLR 399 at 425.

manufacture of goods, or to taxes on the production, manufacture, sale, or distribution of goods produced or manufactured in Australia. Mere effluxion of time since 1993 and 1997 provides no good reason for any retreat from the authoritative statements in those decisions that s 90 gives the Commonwealth control over economic policy affecting the supply and price of, or demand for, goods, by the creation of a free trade area throughout the Commonwealth, and that s 90 exhausts the class of inland taxes on goods[1890].

887 Third, nothing has changed since 1993 when the majority in *Capital Duplicators [No 2]* said that since *Parton* was decided federal financial arrangements must have assumed the correctness of that decision, so that any retreat from the broad conception of s 90 in *Parton* "would have widespread practical ramifications and generate extraordinary confusion"[1891]. To retreat from the broad conception now, another three decades on, would be irreconcilable with the processes and objectives of judicial reasoning.

888 Fourth, insofar as *Dennis Hotels* and *Dickenson's Arcade* endorsed the broad conception of s 90 as not confined to taxes on the production or manufacture of goods or taxes on locally produced goods, all challenges to those cases have comprehensively failed. Insofar as those (and other) cases involved a carve-out from s 90 for taxes said to be licence fees because they related to goods sold before the licence period, those cases have been repeatedly questioned.

889 Fifth, insofar as *Dickenson's Arcade* concerned the exclusion of taxes on consumption from s 90, it is apparent that, even within the reasons of the majority in *Dickenson's Arcade*, there is divergence. At one end, there is acceptance that to be excluded from s 90 the tax must, in substance, relate to the act of consumption. At the other end, there is the proposition that a tax on consumption will usually also be a tax on sale or may, in substance, be a tax on entry into consumption.

890 Sixth, in characterising an excise as an "inland tax" in respect of the production, manufacture, sale, or distribution of goods and observing that it "is unnecessary in this case to consider taxes on the consumption of goods"[1892] in *Capital Duplicators [No 2]*, and saying that an excise is a tax on "some step" in "the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin" and that "it is unnecessary to consider whether a tax on the

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1890 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586; *Ha* (1997) 189 CLR 465 at 497-499.

1891 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590-591.

1892 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

consumption of goods would be classified as a duty of excise"[1893] in *Ha*, the majorities in both cases were expressly reserving that question for future consideration. They were doing so because that exclusion, in terms of both the purpose and scope of s 90 as established in the majority reasons in those cases, was obviously anomalous. In effect, once the criterion of liability was abandoned as the sole method to determine if a law imposed an excise, there was no reason in the constitutional text or context for the exclusion. To the contrary, the required focus on the substantive and practical operation of the law imposing the tax, and the multiplicity of factors informing the closeness of the relationship between the tax and the goods as articles of commerce, was no more reconcilable with the exclusion than the special status of liquor and tobacco rejected in *Ha*. The exclusion also cannot be reconciled with the scope of s 90 being to exhaust the category of taxes on goods. There can be no doubt that in each case the majority well understood that the express reservation of the exclusion of consumption taxes was necessary given the otherwise overarching, cogent and coherent constitutional concept of s 90 which they had (at last) achieved.

891 Seventh, it also cannot be doubted that the majorities in *Capital Duplicators [No 2]* and *Ha* well understood that the identified "steps" of the production, manufacture, sale, or distribution of goods represented, as the Attorney-General of the Commonwealth put it, the "archetypes of the relationships with goods that the States have historically attempted to tax" and not, as Victoria would have it, the "'settled contours' of an excise".

892 Eighth, given that "there are powerful reasons for thinking that the grant of exclusive power to the Commonwealth to impose excise duties was not intended to be a mere matter of form"[1894], and again as the Attorney-General of the Commonwealth submitted, it is necessary to recognise that "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."[1895] This recognition is necessary to give effect to the "high constitutional purpose" of s 90 to ensure that the Commonwealth has real control over the taxing of goods by the creation of a free trade area throughout the Commonwealth[1896]. Both the formalism involved in using the legal incidence of a tax (the legal criterion of liability), an approach "lending itself 'to evasion by easy

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1893 *Ha* (1997) 189 CLR 465 at 499-500.

1894 *Hematite* (1983) 151 CLR 599 at 630.

1895 eg, *Dennis Hotels* (1960) 104 CLR 529 at 594; *Logan Downs* (1977) 137 CLR 59 at 78; *Hematite* (1983) 151 CLR 599 at 630, 632; *Philip Morris* (1989) 167 CLR 399 at 436; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

1896 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

subterfuges and the adoption of unreal distinctions'"[1897], and the parsing of markets and sub-markets, are irreconcilable with this high constitutional purpose. The rejection of the criterion of liability as the determinant of a duty of excise carries with it acceptance that the substantive incidence of a tax is not determined by its legal incidence. Further, it is because the substantive incidence of any particular tax (whether it falls mainly on producers, sellers, consumers, or others dealing in the goods before or after sale) involves complex and dynamic interactions between supply, demand, and price that it is necessary in this constitutional context to look instead primarily to the closeness of the relationship between the tax and the goods and the general tendency of the tax to affect the relations of supply and price of, or demand for, the goods, irrespective of any actual or assumed point-in-time elasticity or inelasticity of supply and demand which may affect the immediate or short-term substantive incidence of the tax.

893 These matters, taken together, meant that Victoria's application for leave to re-consider *Capital Duplicators [No 2]* and *Ha* was rooted in barren ground. It was impossible to discern any principled basis upon which it would be permissible to re-consider *Capital Duplicators [No 2]* and *Ha*. Mere expedience, and the effluxion of time, could not properly found any such application. By contrast, albeit based on the same considerations, the plaintiffs' application for *Dickenson's Arcade* to be re-considered, to the extent it decided that taxes on consumption cannot be an excise, springs from fertile soil. Before turning to that question, it is convenient to examine the provisions of the ZLEV Charge Act.

The ZLEV Charge Act

Extrinsic material

894 The Second Reading Speech in respect of the *Zero and Low Emission Vehicle Distance-based Charge Bill 2021* (Vic) in the Legislative Assembly said that the Bill establishes "a fairer and more sustainable framework for road users to contribute to the maintenance and expansion of Victoria's road network"[1898]. It was noted that the Victorian Government "is committed to accelerating the adoption of ZLEVs and is investing to address perceived barriers to uptake"[1899]. The investments included rolling out a fast-charging network, creating a zero-emission bus fleet, introducing electric vehicle-ready provisions for new buildings, and

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1897 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586, quoting *Matthews* (1938) 60 CLR 263 at 304.

1898 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1182.

1899 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

accelerating the take-up of ZLEVs in the Government's fleet[1900]. It was also noted that the fuel excise is an important source of revenue that, via Commonwealth infrastructure grants, contributes to Victoria's capacity to invest in its road network. The Second Reading Speech recorded that "this funding mechanism is not financially sustainable in the long term"[1901], as the Commonwealth fuel excise revenue had been declining due to the fuel efficiency of modern engines and increased uptake of alternative-powered vehicles. Further, these alternative-powered vehicles face a lower tax burden than other vehicles and do not contribute to the costs of road maintenance, as they pay little or no fuel excise. The Bill, however, would "ensure all motorists contribute their fair share to the cost of funding Victorian roads and road-related infrastructure"[1902].

895 The Second Reading Speech further explained that the Bill introduced a distance-based charge on the use of roads for Victorian-registered ZLEVs from 1 July 2021. The charge would be 2.5 cents per km for zero-emission light vehicles and 2 cents per km for plug-in hybrid-electric light vehicles. Conventional hybrid light vehicles, predominantly powered by a petrol or diesel engine, would not be charged[1903]. It was estimated that, based on average use, owners of electric light vehicles would pay an additional $330 per year and owners of plug-in hybrid-electric light vehicles would pay an additional $260 per year. Owners of ZLEVs, however, would continue to pay about 40 to 50 per cent less in road-related taxes and charges than an average driver pays in fuel excise[1904]. Further, existing incentives to take up ZLEVs would continue, such as the motor vehicle stamp duty concession for all low emission passenger vehicles[1905].

1900 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

1901 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

1902 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

1903 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1183.

1904 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

1905 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

896 According to the Second Reading Speech[1906]:

> "On balance, the Government anticipates the introduction of the distance-based charge will have a negligible impact on electric vehicle uptake in Victoria, particularly as the Government is investing the revenue raised from the first few years of the distance-based charge in vehicle-charging infrastructure that will help address a significant barrier to ZLEV uptake.
>
> The Government will continue to promote the take-up of ZLEVs by ensuring they pay less than conventional petrol and diesel vehicles. Indeed, we commit to review the per-kilometre rates periodically to ensure these more environmentally friendly vehicles continue to pay less in road-related taxes and charges than their fuel-based counterparts. More broadly, we will continue to evaluate zero and low emission transport policies to encourage take-up of zero and low emission technologies, and to ensure Victoria remains on track to meet its 2050 net zero emissions target."

The statutory scheme

897 Section 1 of the ZLEV Charge Act provides that:

> "The purpose of this Act is to require registered operators of zero and low emission vehicles to pay a charge for use of the vehicles on certain roads."

898 In addition to the definitions of "ZLEV", "electric vehicle", "hydrogen vehicle", "plug-in hybrid electric vehicle" and "ZLEV charge", s 3 of the ZLEV Charge Act includes these definitions:

> "***registered***, in relation to a ZLEV, means registered under Part 2 of the **Road Safety Act 1986**;
>
> ***registered operator***, in relation to a ZLEV that is or has been used on a specified road, means the person who is or was the registered operator (within the meaning of the **Road Safety Act 1986**) of the ZLEV when it is or was used on the road;
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> ...

1906 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

specified road means –

(a) a public road within the meaning of the **Road Management Act 2004**; or

(b) a road related area within the meaning of the **Road Safety Act 1986**; or

(c) a highway at common law in Victoria that is not a public road or road related area referred to in paragraph (a) or (b); or

(d) a highway at common law outside Victoria; or

(e) a road within the meaning of the **Road Management Act 2004**, other than a private road, prescribed by the regulations".

899 Part 2 of the *Road Safety Act 1986* (Vic) includes s 6A, which provides that the "Secretary must not register a vehicle unless the Secretary is satisfied that the vehicle's garage address is in Victoria". By s 7(1), a person must not, relevantly, use on a highway a motor vehicle unless that motor vehicle "is registered under this Part or exempted from registration under the regulations". Section 3(1) defines "motor vehicle" as, relevantly, "a vehicle that is used or intended to be used on a highway and that is built to be propelled by a motor that forms part of the vehicle". It also defines "registered operator" of a vehicle as meaning "the person recorded on the register as the person responsible for the vehicle". By reg 23 of the *Road Safety (Vehicles) Regulations 2021* (Vic), a person is eligible to be the registered operator of a vehicle if, relevantly, the person owns or manages the vehicle.

900 By s 3(1) of the *Road Management Act 2004* (Vic), a "road" includes any public highway, any designated ancillary area, and any land declared to be a road under s 11 or forming part of a public highway or designated ancillary area. A "public highway" means any area of land that is a highway for the purposes of the common law. A "public road" means a public road within the meaning of s 17. Section 17 identifies public roads as any freeway, arterial road, declared road under the *Local Government Act 1989* (Vic), declared road under the *Melbourne City Link Act 1995* (Vic), declared road under the *EastLink Project Act 2004* (Vic), and various other identified roads. A "highway at common law outside Victoria" includes any "way over which every member of the public has a right to pass and repass", whether formed or not, and whether subject to conditions of use or not. It is used in distinction from a private road over which members of the public have

no right to pass[1907]. Accordingly, "specified road" in s 3 of the ZLEV Charge Act is defined in a manner that includes all public roads in Australia.

901 Section 6 of the ZLEV Charge Act provides that:

> "(1) This Act applies within and outside Victoria to the full extent of the extraterritorial legislative power of the Parliament.
>
> (2) In particular, this Act extends to the use of ZLEVs outside Victoria."

902 As noted, s 7(1) provides that the registered operator of a ZLEV must pay a charge for the use of the ZLEV on specified roads. Section 7(2) provides that the ZLEV charge is to be determined and paid in accordance with the Act and the regulations.

903 Section 8(1) prescribes the rate of the ZLEV charge as:

> "(a) for each kilometre travelled on specified roads during the financial year starting on 1 July 2021 –
>
> (i) 2.5 cents for a ZLEV that is an electric vehicle or hydrogen vehicle; or
>
> (ii) 2.0 cents for a ZLEV that is a plug-in hybrid electric vehicle; and
>
> (b) for each kilometre travelled on specified roads during any subsequent financial year, subject to subsection (2), the rate in paragraph (a) as varied under section 9."

904 Section 9 prescribes a method for the indexation of the ZLEV charge from year to year.

905 Sections 10 and 11 respectively require the registered operator of a ZLEV to lodge an initial declaration and subsequent yearly declarations setting out the odometer reading of the ZLEV and evidence of that reading. By s 12, the Secretary may require the registered operator of a ZLEV to lodge a declaration. By s 15, the Secretary must determine the ZLEV charge based on a formula in which the distance travelled by the ZLEV on specified roads is multiplied by the rate of the ZLEV charge under s 8 to yield the ZLEV charge as determined. Other provisions enable the Secretary to obtain further information to enable the ZLEV charge to be determined (s 16), to determine a charge in the absence of a declaration or evidence

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1907 *Halsbury's Laws of Australia* (online edition, updated 12 September 2022), Highways, Roads and Bridges at [225-1].

(s 17), and to issue invoices for payment of the ZLEV charge (s 18), and regulate the payment of interest on unpaid ZLEV charges (ss 23 to 25).

906 Section 29(1) enables the Secretary to suspend the registration of a ZLEV if a declaration is not lodged, an invoice is not paid, or a ZLEV is not presented for inspection in accordance with a notice to do so. By s 31, if a registration is suspended, the ZLEV is unregistered for the purpose of the *Road Safety Act*. Section 7(3) of the *Road Safety Act* makes it an offence for a person to contravene s 7(1), which provides, relevantly, that a person must not use on a highway a motor vehicle or own a motor vehicle which is used on a highway unless that motor vehicle is registered under that Act. Section 35(1) of the ZLEV Charge Act also enables the Secretary to cancel the registration of a ZLEV in specified circumstances.

907 Part 4 of the ZLEV Charge Act provides for a scheme under which the registered operator of a ZLEV may make an objection to an invoice and to the suspension or the cancellation of the registration of a ZLEV, including a right of review to the Victorian Civil and Administrative Tribunal in respect of the Secretary's decision about an objection.

908 Section 58(1) provides that the ZLEV charge and any interest payable under Pt 2 are debts due to the State.

Victoria's four "pathways" around s 90

909 Victoria submitted that there were four alternative "pathways" that led to the conclusion that s 7(1) of the ZLEV Charge Act, imposing the ZLEV charge, does not infringe s 90 of the *Constitution*. As noted, Victoria accepted that the ZLEV charge is an inland tax (being "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered"[1908]), but argued it was not a tax on goods, and not an excise. The pathways around s 90 were: (a) s 7(1) does not impose a tax on goods, but a tax on the activity of driving a ZLEV on specified roads; (b) the conclusion in *Dickenson's Arcade* that a tax on consumption is not an excise should not be re-considered; (c) if that conclusion in *Dickenson's Arcade* is re-considered, it should be affirmed; and (d) *Capital Duplicators [No 2]* and *Ha* should be re-considered and it should be concluded that they are wrong insofar as they decided that an inland tax on goods, whether locally produced or manufactured or imported, is an excise.

1908 *Matthews* (1938) 60 CLR 263 at 276.

The first pathway – a tax on an activity, not on goods?

910 Victoria's characterisation of the ZLEV charge as a tax on an activity and not on the ZLEV as a good or article of commerce depended on three characteristics. First, the ZLEV charge is imposed after the first sale to a customer and subsequently. Second, the ZLEV charge is assessed periodically over the duration of the registration of the ZLEV. Third, the amount of the ZLEV charge is not calculated by reference to the value or quantity of the ZLEV but is based on the distance travelled in the ZLEV over specified roads. These characteristics, Victoria said, mean the ZLEV charge is not a tax on ZLEVs, and not a tax on the use of ZLEVs, but rather a tax on the activity of driving a ZLEV on specified roads.

911 In accepting that the ZLEV charge is a tax, Victoria also necessarily accepted that it is not a fee for a service. The ZLEV charge also manifests no regulatory character suggesting it is a fee for the privilege or authority to drive a ZLEV on a specified road. In this regard, the ZLEV charge may be contrasted with Pt 3 of the *Road Safety Act*, dealing with licensing of drivers. Section 17 in Pt 3 discloses the safety and regulatory purposes of the licensing provisions (to ensure that people who drive motor vehicles on highways are competent drivers, to ensure that drivers are aware of safe driving practices and road law, to ensure that people who are, or who become, unfit to drive are not permitted to drive on highways, and to enable the identification of drivers for the purposes of law enforcement and accident investigation). By s 19, a person must be over 18 years of age to be eligible for a driver licence and the Secretary must be satisfied the person is qualified to hold the licence. By s 21A, the fee for a driver licence relates to the period of the licence, not the amount of driving carried out. Other provisions distinguish driver licences from learner permits and probationary driver licences. By s 24, driver licences may be cancelled, suspended, or varied. No such regulatory scheme focused on safety is apparent from the provisions of the ZLEV Charge Act. Nor is there any rational reason for supposing that the activity of driving a ZLEV on a specified road calls for any regulation different from that of driving any motor vehicle on a specified road.

912 That the ZLEV charge is not a fee for a service and exhibits no regulatory character tends to undermine the relevance of the distinction between a tax on using a ZLEV and a tax on the activity of driving a ZLEV on a specified road on which Victoria's first pathway to avoid s 90 depends. Other considerations, explored below, also indicate that the distinction which Victoria drew between a tax on the activity of driving a ZLEV on a specified road and a tax on the use of ZLEVs is spurious.

913 That the ZLEV charge involves a liability arising annually after the point of sale cannot be determinative given that the criterion of liability is no longer the sole method for determining if a law imposes a tax on goods but merely one of a multitude of factors that may assist in the characterisation of the tax. This must

follow from the fact that there is "much flexibility in [the] application"[1909] of the concept of a duty of excise and the question is one of substance, not form, the focus being the "practical or substantial operation of the statute as well as ... its legal operation, [which] requires that a variety of factors be taken into account"[1910]. Further, if, as is the case, the scope of a tax on goods necessarily involves a close relationship between the person paying the tax and the goods as articles of commerce[1911], then the evolution of commerce will inevitably give rise to new types of taxes on goods and therefore new types of excise.

914 Contrary to submissions in support of Victoria, the case is also not analogous to *Browns Transport Pty Ltd v Kropp*[1912] or *Bolton v Madsen*. In *Browns Transport*, the tax was on the carrier of goods or people, the charge being in the discretion of the Commissioner of Transport, or calculated by reference to the gross revenue earned, or calculated on a ton-mile or passenger-mile basis. So far as the carriage of goods was concerned, the tax was imposed without reference to the nature or value of the goods. As such, it was held that the tax was a fee payable for the right to carry on the carriage business, not a "tax 'upon' goods, or 'in respect of' goods, or 'in relation to' goods" which required that the person be taxed "by reference to, or by reason of, any relation between [the person] and any commodity as producer, manufacturer[,] processor, seller or purchaser"[1913]. In *Bolton v Madsen*, the levy was a tax on the carriage of goods by road which required a permit for a fee payable by the consignor or consignee of the goods. As noted, the tax was held not to be an excise, but a fee payable as a condition of a right to carry on the business of carrying goods on the road[1914]. It also cannot be overlooked that both *Browns Transport* and *Bolton v Madsen* were decided on the basis of the criterion of liability test.

915 In any event, by way of contrast, the registered operator of a ZLEV is not carrying on any business merely by reason of that status. The registered operator of a ZLEV (which, as noted, must mean the owner or manager of the ZLEV) attracts liability for the ZLEV charge by reason of their status as registered operator of the ZLEV and the fact of the ZLEV being driven on specified roads. The

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1909 *Matthews* (1938) 60 CLR 263 at 304.

1910 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583; see fn 99.

1911 *Matthews* (1938) 60 CLR 263 at 304.

1912 (1958) 100 CLR 117.

1913 *Browns Transport* (1958) 100 CLR 117 at 129.

1914 *Bolton v Madsen* (1963) 110 CLR 264 at 272-273.

registered operator need not be the person who drives the ZLEV, but, if not the driver, they will be the person authorising or enabling another person to do so.

916 The fact that a ZLEV never driven on a specified road will not incur the ZLEV charge tends to confirm that the ZLEV charge is a tax on the use of a ZLEV for the purpose intended by every registered operator of a ZLEV (use on public roads, which is the only reason a ZLEV must be registered). It may be accepted that a "tax imposed on the ownership of goods without more" has never been held to be a duty of excise[1915]. What cannot now be accepted in the light of *Capital Duplicators [No 2]* and *Ha*, however, is that a tax properly characterised as a tax on owning a good (that is, rather than a levy or fee regulating or licensing such ownership) is necessarily outside the concept of a tax on the good[1916].

917 The exclusion from the charge of the use of a ZLEV on private roads does not affect the true character of the charge as a charge on use. It is not that the distinction between "specified road" (in effect, all public roads) and other roads (in effect, all private roads) is spurious. The distinction makes sense in the context of the purpose of the ZLEV Charge Act to make sure that registered operators of ZLEVs, who pay less in fuel excise, nevertheless contribute a share to Victoria's revenue, some of which is used on maintaining and enhancing road infrastructure. The distinction is simply immaterial when it comes to characterising the true nature of the charge. So much is apparent from the fact that the person who must pay the charge, the registered operator, only has that status of registered operator insofar as the ZLEV is "used or intended for use on a highway"[1917] in circumstances where all highways are within the definition of "specified road".

918 The ZLEV charge, then, is a tax on the use of ZLEVs. It is a charge imposed on the registered operator of the ZLEV. The ZLEV being a durable good which is not destroyed by use, the charge is payable by the registered operator annually throughout the registration of the ZLEV. If not paid, the registration of the ZLEV may be suspended or cancelled, with the result that the ZLEV may not be driven on any public road, this being the (or at least a) purpose for which the registered operator must have acquired the ZLEV given that the status of "registered operator" of a vehicle involves use or intended use of the vehicle on highways[1918].

1915 *Logan Downs* (1977) 137 CLR 59 at 65.

1916 eg, *Dennis Hotels* (1960) 104 CLR 529 at 554.

1917 *Road Safety Act 1986* (Vic), s 3(1) (definition of "highway") and s 6 (which provides that Pt 2, covering registration of vehicles, "applies only to motor vehicles and trailers which are used or intended for use on a highway"), read with ZLEV Charge Act, s 3 (definition of "specified road").

1918 *Road Safety Act 1986* (Vic), s 6.

In this context, the fact that the use of the ZLEV may be by any person is immaterial. One way or another, it is the registered operator alone who may authorise such use and who remains responsible for the vehicle, including being liable for the payment of the ZLEV charge.

919 It is also apparent that Victoria's purpose in imposing the ZLEV charge was to raise revenue[1919]. Moreover, the Second Reading Speech acknowledged that, in imposing the ZLEV charge, the amount of the charge proposed under the then Bill had been assessed to ensure that the tendency it would otherwise have, to decrease demand for ZLEVs (contrary to Victoria's overall policy), did not eventuate, as Victoria was taking other measures to ensure owners of ZLEVs continued to pay less than owners of conventional petrol and diesel vehicles[1920]. In determining whether a tax is a tax on a good, the legislative purpose of the tax, and that there are, or need to be, other legislative or policy measures designed to offset or minimise the tendency or effect of the tax on the supply and price of, or demand for, the good, are relevant to an evaluation of the legal and practical operation of the law imposing the tax. These factors indicate that the tax affects ZLEVs as goods, that is, as articles of commerce. They also reflect the reality that a good such as a ZLEV does not lose its character as an article of commerce merely because it reaches the hands of the first consumer. It is always an article of commerce because it is not destroyed by use and continues to have commercial value.

920 Once it is accepted, as it must be, that s 90 exhausts the class of taxes on goods, there is no scope for the conceptual limitation of an excise as a tax on a step in dealing with goods only to the point of receipt by the consumer. Some goods are destroyed by use by the consumer. Others continue. A tax on a person by reason of the person's relationship with a good at any stage in the life of the good may or may not be a tax on the good. That characterisation – whether it is a tax on the good or not – involves a focus on the substance of the tax, its legal and practical operation, and all other factors capable of informing the nature and degree of the connection between the person liable for the tax and the good. But if it is properly characterised as an inland tax on goods, principally but not exclusively by reference to the closeness of the relationship between the tax and the goods and the general tendency of the tax to affect the relations of supply, demand, and price for the goods, it is an excise. This does not involve destroying the only "rock in the sea of uncertain principle" Brennan J could identify in *Philip Morris*[1921]. In identifying that sole remaining anchor point, Brennan J was saying that such a tax

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1919 *Philip Morris* (1989) 167 CLR 399 at 463; *Ha* (1997) 189 CLR 465 at 503.

1920 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2021 at 1184.

1921 (1989) 167 CLR 399 at 445.

(a tax on a step in the production or distribution of goods to the point of receipt by the consumer) is an excise. He was not saying that a tax on goods in the hands of the consumer could never be an excise.

921 What then of the economic effect of the ZLEV charge on the supply and price of, or demand for, motor vehicles generally or ZLEVs in particular? Section 90 does not identify a duty of excise by reference to its effect on the market for the goods said to be the subject of the tax. One reason for this emerges from the observation of Windeyer J in *Dennis Hotels* that "whether a duty does enter at once into the price of the taxed commodity and in what sense, to what extent and for how long it does so, must depend upon how far various factors and circumstances remain unchanged and on the relative elasticity of demand and supply"[1922]. This is why his Honour rightly said that a search for the "ultimate effect of a particular commodity tax may not be a fruitful economic inquiry"[1923]. The focus in s 90 is the legal character of the tax, not the economic consequences of its imposition. This said, the economic dimensions of a tax are relevant. The proposition that an excise must be an indirect tax (that is, one that tends to be passed on) once dominated, but indirectness (to the extent it survives at all as a concept of utility) has been reduced to another feature of the tax of potential relevance in its characterisation. The focus on the general, natural, or ordinary tendency of the tax to affect the supply and price of, or demand for, the goods, however, continues.

922 For example, while the reasoning in *Commonwealth Oil Refineries* saw the essence of a duty of excise in its indirectness or entry "at once into the price of the taxed commodity"[1924], by the time of the decision in *Matthews*, Starke J could say that the Canadian cases were "no authority for the proposition that a tax cannot be an excise duty unless it has the characteristics of an indirect tax"[1925] and his emphasis, and that of Dixon J, was on the true nature and general tendency of the tax[1926]. In *Parton*, Dixon J referred to the tendency or susceptibility of the tax to being passed on[1927]. The six judges in the unanimous decision of *Browns Transport* denied indirectness the status of an essential element of a duty of excise[1928]. In

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1922 *Dennis Hotels* (1960) 104 CLR 529 at 594.

1923 *Dennis Hotels* (1960) 104 CLR 529 at 594.

1924 *Commonwealth Oil Refineries* (1926) 38 CLR 408 at 435; see also at 437, 438.

1925 *Matthews* (1938) 60 CLR 263 at 285.

1926 *Matthews* (1938) 60 CLR 263 at 285, 300-303.

1927 *Parton* (1949) 80 CLR 229 at 259.

1928 *Browns Transport* (1958) 100 CLR 117 at 129.

Dennis Hotels, Fullagar J considered it a "pity" that the distinction between direct and indirect taxes "was ever raised or mentioned in relation to s 90"[1929]. In *Anderson's*, Barwick CJ considered the directness or indirectness of the tax as something that "may assist" but was not "necessarily conclusive", being nothing more than "circumstances and though sometimes of a compelling kind, they are not criteria"[1930]. In *Dickenson's Arcade*, Gibbs J said he had "not derived any assistance from the theory that a duty of excise would generally be an indirect tax"[1931] and shared the regret of Fullagar J that the distinction had ever found its way into the s 90 discourse[1932]. In *Capital Duplicators [No 2]*, the majority accepted the indirectness of the tax to be one relevant circumstance[1933], but in that case and *Ha* the ultimate proposition is that duties of excise are inland taxes on "some step taken in dealing with goods"[1934]. A succinct statement undermining the indirectness of the tax as a conceptually useful tool is that of the minority, Dawson, Toohey and Gaudron JJ, in *Ha* as follows[1935]:

> "The distinction between indirect and direct taxes is now recognised as being economically unsound because market forces determine whether a tax will be passed on or not and there is nothing inherent in a particular tax which enables it to be classified as direct or indirect."

923 This legal conclusion reflects orthodox economic principles[1936]. Rather than the actual economic effect of a tax on the market for the good determining the character of the tax as a tax on the good or not, the constitutional context of s 90

1929 *Dennis Hotels* (1960) 104 CLR 529 at 553.

1930 *Anderson's* (1964) 111 CLR 353 at 365.

1931 *Dickenson's Arcade* (1974) 130 CLR 177 at 222.

1932 *Dickenson's Arcade* (1974) 130 CLR 177 at 223.

1933 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583 fn 99.

1934 *Ha* (1997) 189 CLR 465 at 499; see also *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

1935 *Ha* (1997) 189 CLR 465 at 509.

1936 eg, Seligman, *The Shifting and Incidence of Taxation*, 3rd ed (1910); Musgrave, *The Theory of Public Finance: A Study in Public Economy* (1959) at 351; Kotlikoff and Summers, "Tax Incidence", in Auerbach and Feldstein (eds), *Handbook of Public Economics* (1987), vol 2, 1043; Gamble, "Excise Taxes and the Price Elasticity of Demand" (1989) 20 *Journal of Economic Education* 379; Barron, Blanchard and Umbeck, "An Economic Analysis of a Change in an Excise Tax" (2004) 35 *Journal of Economic Education* 184.

requires the focus to be the general tendency of the tax to impact the supply and price of, or demand for, the good. A tendency of the tax to affect the supply and price of, or demand for, the good is an indicator that the tax is sufficiently closely connected to the good to be capable of characterisation as a tax on the good. This distinction, between overall general tendency and actual effect, makes sense in a constitutional context. Actual market effects are highly dynamic, and time and fact dependent, and shorter-term and longer-term market effects may be different. Of their nature, actual market effects involve an inapt level of abstraction for decision-making about the operation of s 90. Natural, ordinary, and general tendencies also concern a question of fact, but invite focus at an appropriate level of abstraction for the constitutional context, felicitously described in the joint judgment of Kiefel CJ, Gageler and Gleeson JJ as "a level of specificity no greater than is necessary to resolve the constitutional controversy before [the court]"[1937]. The focus on the natural, ordinary, and general tendencies of a tax in respect of the supply and price of, or demand for, a good also invites conceptual analysis by reference to assumed relatively stable and "all other things being equal" (or ceteris paribus) circumstances, which are likely to yield stable and predictable outcomes and thereby are apt for constitutional decision-making, in contrast to decisions based on disputed economic evidence about the actual economic effect of a tax in a market at the time of the analysis.

924 With this in mind, Dixon CJ's distinction between "ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred" and "matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend"[1938] continues to be important. He said that "[m]atters of the latter description cannot and do not form issues between parties to be tried like the former questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute"[1939]. Dixon CJ concluded that "if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity"[1940]. The actual effect of a tax on the supply and price of, or demand for, goods, even in the context of s 90, is akin to an ordinary question of fact. The natural, ordinary, and general tendency of a tax in respect of the supply and price of, or demand for, a good is more in the nature of information that the court should have, capable of

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1937 Reasons of Kiefel CJ, Gageler and Gleeson JJ at [153].

1938 *Breen v Sneddon* (1961) 106 CLR 406 at 411.

1939 *Breen v Sneddon* (1961) 106 CLR 406 at 411.

1940 *Breen v Sneddon* (1961) 106 CLR 406 at 412, quoting *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292.

ascertainment by reference to the court's "knowledge of the society of which it is a part"[1941].

925 In the present case, it may be accepted that an annual impost of an additional $260 to $330 per year on the use of a ZLEV may be perceived by some people to be insignificant compared to the overall cost of a ZLEV. Equally, however, it is obvious that purchasers of a ZLEV in Victoria could be expected to be cognisant of the existence of the ZLEV charge and its annual incidence over the entire period for which they are the registered operator of the ZLEV, and of the fact that the charge falls on ZLEVs alone and not on other vehicles. Victoria's proposition that the amount of the charge is unascertainable at the point of sale and therefore cannot enter into the price of a ZLEV assumes that people are incapable of estimating the value to them of avoiding the annual charge for their likely period of ownership and its possible effect on the re-sale value of the ZLEV. No conception of people as a version of Homo economicus is necessary to reject that proposition. It is within the ordinary human experience of members of a modern liberal capitalist democracy that if a good within a general class of discretionary purchases is subject to some non-trivial financial burden not imposed on some other good or goods within that class, the existence of that burden is inherently likely to be relevant to the price of or demand for the good. The burden may not act at all on all purchasers. It may not act in the same manner on all purchasers. People may underestimate or overestimate the extent of the burden. But that is not the point. The point is that the burden, of its nature, tends to affect the supply and price of, or demand for, a ZLEV.

926 Another key factor reinforces this conclusion in the present case. It is that this is the very anticipated effect (depressing demand for ZLEVs in Victoria) that the Second Reading Speech exposes Victoria was keen to mitigate. Victoria did not want to depress demand for ZLEVs in Victoria (quite the contrary) and therefore needed to peg the ZLEV charge to an amount that it perceived would ensure ZLEVs remained the overall beneficiary of Victorian Government financial policy. In so doing, Victoria recognised and acted upon its knowledge of ordinary human experience that: (a) ZLEVs are one type of motor vehicle the purchase of which at least some people will see as interchangeable with the purchase of a motor vehicle other than a ZLEV which will not be subject to the ZLEV charge; and (b) but for offsetting actions, at least some people may well be dissuaded from purchasing a ZLEV due to the ongoing financial burden of the ZLEV charge. Victoria was not alone in taking this view based on ordinary human experience of contemporary Australian society. South Australia repealed its equivalent

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1941 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622.

legislation because, according to the Second Reading Speech concerning the *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Bill 2022* (SA)[1942]:

> "This government has acted immediately to introduce this Bill to repeal the levy in order to provide certainty for those looking to purchase an electric vehicle, and to encourage the uptake of electric vehicles by reducing the cost of owning and operating an electric vehicle.
>
> A survey undertaken by the Australia Institute in 2021 showed that 7 in 10 South Australians would be less likely to purchase an electric vehicle if an electric vehicle levy were to be introduced.
>
> This Bill will repeal the levy before any electric vehicles can be taxed for the kilometres they drive. We want to encourage South Australians to buy an electric vehicle and the levy will have the opposite effect.
>
> Over the coming decade the price of electric vehicles is expected to fall, and electric vehicles will become increasingly common on our roads. This Bill will operate to increase the number of electric vehicles on the road resulting in reduced state greenhouse gas emissions from transport and an improvement in air quality."

927 It is also relevant that no-one has doubted that s 90 is not to be avoided by mere drafting expedients. In *Hematite*, Mason J made the point about the substance rather than the form of a tax in these terms[1943]:

> "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 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.
>
> ... [T]here are many cases where an examination of the relevant circumstances will disclose that a tax is a duty of excise notwithstanding that it is not expressed to be in relation to the quantity or value of the goods."

928 Just as a tax on sale imposed on a retailer may burden production, so too a tax on a consumer payable after sale may diminish demand for the goods and

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1942 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 November 2022 at 1413.

1943 *Hematite* (1983) 151 CLR 599 at 632.

thereby burden production and depress supply[1944]. At the least, such a tax has "a natural, although not a necessary"[1945] tendency to that effect, whether a tax in fact materially decreases the price consumers overall are willing to pay for the goods or not[1946].

929 The tendency of a tax on goods to decrease demand for the goods is one example of a possible distortion of the national unified free trade area throughout the Commonwealth which s 90 was intended to avoid. The potential for distortion of the national unified free trade area in respect of ZLEVs which the ZLEV charge embodies is manifest. ZLEVs registered in Victoria are only one sub-set of all vehicles registered in Victoria and one sub-set of all vehicles and all ZLEVs in Australia. The Commonwealth's capacity to determine economic policy for Australia as a whole, including distance-based charges for all road use generally or all road use by ZLEVs, which do not pay the fuel excise, would be distorted if the sub-set of ZLEVs registered in Victoria was already subject to a distance-based charge either in Victoria or, as is the case under the ZLEV Charge Act, on all specified roads in Australia. By s 90 of the *Constitution*, however, the Commonwealth alone has exclusive power over duties of customs and excise on ZLEVs. The Commonwealth alone also has the capacity to fund road infrastructure throughout Australia. The ZLEV Charge Act, by imposing the ZLEV charge on the registered operator of any ZLEV registered in Victoria and which is driven on a specified road anywhere in Australia, introduces an obvious distortion into the Australian economic union and the national unified free trade area achieved by the constitutional compact.

930 What then of the required closeness or proximity of the connection between the ZLEV charge and ZLEVs as goods? ZLEVs are durable goods. They are not destroyed by use. They continue to have value to an owner as an object available for use and for re-sale or other commercial dealings over their life cycle. The mere fact that an owner, due to their favourable economic circumstances, may not need to exploit a ZLEV as an article of commerce at one or other time is immaterial. As s 90 exhausts kinds of taxes on goods, conceptual coherency demands that the essence of a good as an article of commerce for the purpose of s 90 must be its availability for commercial exploitation in some form and manner as and when the owner might require or desire it, but irrespective of any particular owner's need or wish to do so.

931 In the present case, the fact is that the ZLEV charge is a tax on the use of ZLEVs. The tax falls on the person who owns or manages the ZLEV. It is

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1944 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586.

1945 *Matthews* (1938) 60 CLR 263 at 303.

1946 See, eg, fn 1936.

calculated by reference to the use of the ZLEV. There are no intervening factors in play by which the ZLEV charge is distanced or separated from the registered operator using or authorising another to use the ZLEV for the purpose for which it must have been acquired if the ZLEV is registered, being its use on specified roads.

932 For these reasons, Victoria's first pathway – that the ZLEV charge is a tax on the activity of driving a ZLEV on specified roads and not a tax on ZLEVs – cannot be accepted. The ZLEV charge is a tax on ZLEVs.

The second pathway – whether Dickenson's Arcade should be re-opened

933 As foreshadowed, the first (but not the only) problem for Victoria is that the reasoning in *Dickenson's Arcade* is more nuanced than Victoria would allow. As noted, in *Dickenson's Arcade*: (a) Barwick CJ accepted only that "a tax upon the 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"[1947] and distinguished a tax on consumption from a tax on entry into consumption[1948]; (b) McTiernan J did not accept the exclusion of a consumption tax from an excise[1949]; (c) Menzies J accepted that an apparent tax on consumption might, in substance, be a tax on retail sale and purchase and thus an excise[1950]; (d) Gibbs J thought the question whether a tax on consumption could be an excise had not been decided, but concluded it could not[1951]; (e) Stephen J considered a tax on consumption was outside the scope of s 90[1952]; and (f) Mason J accepted that the weight of authority demanded that a tax on the consumption of goods not be regarded as an excise but considered this exclusion of marginal significance, as a "tax on consumption which is not also a tax on sale of goods is a phenomenon infrequently encountered"[1953].

934 Further, even if *Dickenson's Arcade* is not re-opened, it cannot now be authority for the proposition that a tax the criterion of liability for which is the consumption of a good can never be an excise. That proposition is irreconcilable with the demotion of the criterion of liability from an exclusive methodological

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1947 *Dickenson's Arcade* (1974) 130 CLR 177 at 186.

1948 *Dickenson's Arcade* (1974) 130 CLR 177 at 186, 193.

1949 *Dickenson's Arcade* (1974) 130 CLR 177 at 196.

1950 *Dickenson's Arcade* (1974) 130 CLR 177 at 209.

1951 *Dickenson's Arcade* (1974) 130 CLR 177 at 217-222.

1952 *Dickenson's Arcade* (1974) 130 CLR 177 at 229.

1953 *Dickenson's Arcade* (1974) 130 CLR 177 at 239.

determinant to one factor only in the overall evaluation of the question whether a tax is a tax on goods. Accordingly, *Dickenson's Arcade* is, at best, authority for the proposition only that a tax which, in substance, is a tax on the consumption of goods is not an excise. But that proposition itself cannot fit within the contemporary framework for the operation of s 90 authoritatively established in *Capital Duplicators [No 2]* and *Ha*.

935 The ratio of *Dickenson's Arcade*, to the extent it excludes taxes on the consumption of goods from s 90, could hardly be described as having been based on the careful working out of principle in a series of significant cases. Quite the contrary. It is sufficient to say that the evolution of legal thought about s 90, at least until *Capital Duplicators [No 2]*, is marked by the appearance of certainty and clarity at one time, but the subsequent exposure by new factual circumstances of incoherence, inconstancy, and instability. Dixon J's comprehensive review of the law in *Matthews* and associated conclusion that to be an excise a 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"[1954] represented the culmination of coherent concept. Yet the subsequent narrowing in *Parton* to exclude taxes on consumption based on *Atlantic Smoke Shops* reintroduced conceptual equivocation. This may explain why Dixon J in *Parton* expressed the narrowed concept in qualified, not absolute, language ("[i]t is probably a safe inference ... [that] perhaps makes it necessary ... to modify the statement"[1955]). The narrowed concept emerged without apparent (or at least exposed) analysis of the different constitutional context under consideration in *Atlantic Smoke Shops*[1956]. Dixon J did not reconcile the narrowed concept with the required focus on the "substantial effect" of the tax being "to impose a levy in respect of the commodity" as an article of commerce[1957]. Nor did he reconcile the narrowed concept with the constitutional purpose of s 90 "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", which was not to be reduced by drafting expedients and ingenuity to "a formal significance"[1958].

1954 *Matthews* (1938) 60 CLR 263 at 304.

1955 *Parton* (1949) 80 CLR 229 at 261.

1956 The province had power in respect of "direct taxation within the province": *Atlantic Smoke Shops* [1943] AC 550 at 560.

1957 *Matthews* (1938) 60 CLR 263 at 304.

1958 *Parton* (1949) 80 CLR 229 at 260.

936 Subsequent decisions did not improve matters. Kitto J advanced the now-discarded criterion of liability test in *Dennis Hotels* to determine if the law imposed a tax on steps in respect of goods from production to the point of receipt by the consumer[1959]. That test was unanimously adopted in *Bolton v Madsen*[1960]. But no further analysis of the cut-off point, receipt by the consumer, is apparent. *Bolton v Madsen* also did not last. In *Hematite*, its conceptual limits and lack of fitness for constitutional purpose were exposed[1961]. By the time *Philip Morris* was decided, it could be said that "a long line of cases has made it abundantly clear that the *Bolton* formula, at least when applied in this way, no longer commands the acceptance of the Court"[1962].

937 Accordingly, there is not a carefully worked out principle apparent excluding from the constitutional concept of a tax on goods a tax on the consumer of the goods. Instead, by the time of *Capital Duplicators [No 2]* the majority in that case could expressly state that "there is no judicial consensus as to the meaning or application of the expression 'duties of excise' in s 90"[1963]. That lack of consensus extended to the true nature of the exclusion of taxes on the consumption of goods from the scope of s 90, as is apparent from the divergent views expressed in *Dickenson's Arcade* and the divergent explanations for that decision proposed in *Philip Morris*[1964]. In this context, the majority's conclusion in *Capital Duplicators [No 2]* that "the term 'duties of customs and of excise' in s 90 must be construed as exhausting the categories of taxes on goods"[1965], thereby enabling an effective national economic union[1966], with the associated express deferral of consideration of the status of taxes on consumption[1967], repeated in *Ha*[1968], is significant. It represents an important signpost flagging the anomalous status of

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1959 *Dennis Hotels* (1960) 104 CLR 529 at 559.

1960 (1963) 110 CLR 264 at 273.

1961 *Hematite* (1983) 151 CLR 599 at 630-631, 633, 655, 665.

1962 *Philip Morris* (1989) 167 CLR 399 at 432.

1963 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 582.

1964 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 592-593.

1965 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

1966 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585.

1967 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

1968 (1997) 189 CLR 465 at 499-500.

taxes on consumption being excluded from the concept of taxes on goods by reason of a mere definitional, rather than analytical, exercise.

938 It is also significant that the Court's previous consistent refusals to overrule *Dennis Hotels* and *Dickenson's Arcade* concerned their foundation on the expansive view of s 90 consistently with *Parton*, from which regulatory schemes imposing an impost on a person for the grant of authority to carry out an activity were an exception only because they could not be characterised as a tax on goods at all[1969]. In *Ha*, the circumstances of the case required the majority to determine the "limits of the protection offered by the franchise cases so as to accord with the *Parton* doctrine"[1970]. The majority rejected the proposition that tobacco and alcohol formed some special class of goods excluded from s 90 given their inherent susceptibility to regulation[1971]. They said[1972]:

> "The maintenance of constitutional principle evokes a declaration that the *Dennis Hotels* formula cannot support what is, on any realistic view of form and of 'substantial result', a revenue-raising inland tax on goods. The States and Territories have far overreached their entitlement to exact what might properly be characterised as fees for licences to carry on businesses. The imposts which the Act purports to levy are manifestly duties of excise on the tobacco sold during the relevant periods. The challenged provisions of the Act are beyond power."

939 By analogy, in the present case, the very fact that Victoria has imposed the ZLEV charge indicates that correction of the error introduced in *Parton*, and repeated in *Dickenson's Arcade*, to the effect that taxes on the consumption of goods can never be an excise, is now necessary and timely. No State or Territory has identified any statute enacted in reliance on the exclusion of taxes on consumption from s 90 other than the ZLEV Charge Act itself and equivalent legislation, either not yet operative or repealed, in some other States[1973]. At most, Victoria identified some State levies that might (or might not) be invalidated. This is insufficient. It does not demonstrate any reliance on the relevant reasoning in *Dickenson's Arcade*. Further, and unlike the circumstances in *Ha*, there is no

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1969 See, eg, *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 580-582, 584, 591-593.

1970 *Ha* (1997) 189 CLR 465 at 499.

1971 *Ha* (1997) 189 CLR 465 at 501.

1972 *Ha* (1997) 189 CLR 465 at 503 (citation omitted).

1973 eg, *Electric Vehicles (Revenue Arrangements) Act 2021* (NSW); *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA), repealed by *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Act 2023* (SA).

evidentiary basis from which it may be inferred that this conclusion would have "serious implications for the revenues of the States and Territories"[1974]. When deciding whether to re-consider and overrule a case a relevant criterion is the nature and extent of the disruption to the status quo, not the mere confining of future possibilities.

940 For these reasons, *Dickenson's Arcade* should be re-opened.

The third pathway – whether Dickenson's Arcade should be affirmed

941 Victoria's third pathway to validity of the ZLEV charge – that, insofar as it is authority for the proposition that a tax on consumption cannot be an excise, *Dickenson's Arcade* should be affirmed – must be rejected.

942 Consistently with the conclusions above, the matters Victoria proposed in support of this pathway to validity of the ZLEV charge are unpersuasive.

943 In summary, and contrary to Victoria's arguments, there is no sound rationale for the assertion that a tax on goods in the hands of the consumer is, for that reason alone, not a tax on goods as articles of commerce. As explained, once it is accepted that an excise involves a tax on a step taken in dealing with goods as articles of commerce[1975], the fact that a tax is imposed on consumption by the consumer cannot justify the exclusion of such a tax from the scope of s 90. It is not that every tax involving any burden on the passing of a good into the hands of the consumer is necessarily a tax on the good and an excise. Many taxes may impose a burden on a good but not be a tax on the good and therefore not an excise. That is the question of characterisation which must be determined principally but not exclusively by reference to the "close relation" between the tax and the good (that is, the tax being in respect of a step in the life cycle of the good) and, all other things being equal, the tendency of the tax being such as to affect the good as an article of commerce (that is, to affect the good in terms of the interrelated aspects of supply, demand, and price)[1976]. The point is that a tax on consumption is not necessarily excluded from being a tax on a good and thus an excise merely because the temporal criterion of liability arises after sale and the legal criterion of liability falls on the consumer by reference to use. Those exclusions suffer from the formalism firmly rejected in the context of all contemporary constitutional discourse[1977].

1974 *Ha* (1997) 189 CLR 465 at 503.

1975 *Ha* (1997) 189 CLR 465 at 497, 499.

1976 *Matthews* (1938) 60 CLR 263 at 304.

1977 *Ha* (1997) 189 CLR 465 at 498 and the cases cited in fn 124.

944 This also explains why Victoria's calling in aid payroll and similar taxes is unhelpful. As noted, many taxes may burden (and thus affect the supply and price of, or demand for) a good but not be a tax on the good. They may not be a tax on the good because, in their legal and practical operation, the relationship between the person who is liable to pay the tax and the good is insufficiently close to enable the tax to be characterised as a tax on the good. The question of characterisation of the tax being one of substance rather than form, the label attached to the tax cannot be determinative. Equally, however, the tendency of the tax to distort the supply and price of, or demand for, the good is a principal factor in the overall evaluation required.

945 Further, Victoria's proposition that a tax on consumption cannot have the same economic effect as a tax on the production, manufacture, sale, or distribution of goods assumes without any apparent justification that a tax on consumption can never burden the production, manufacture, sale, or distribution of goods. The logic of this assumption has been consistently doubted for good reason, as discussed above. In the case of ZLEVs, it is also irreconcilable with the context in which the ZLEV Charge Act was enacted. In any event, as discussed, s 90 does not operate by reference to economic effect demonstrated by economic analysis of a market or markets as they might exist at one point in time, but by legal characterisation based principally but not exclusively on the closeness of the relationship between the tax and the goods and the general tendency of the tax to affect the relations of supply, demand, and price for the goods. Underlying s 90 is the assumption that the vesting of exclusive power in the Commonwealth in respect of duties of customs and of excise and to grant bounties on the production or export of goods is the best way to ensure the intended economic union fostered by Ch IV.

946 As explained above, Victoria's reliance on s 93(i) of the *Constitution* as supporting its case is also misplaced.

947 Victoria's proposition that it is inherent in the etymological meaning of "excise" that it can be deducted or excised at the point of sale is effectively debunked in the judgment of Kiefel CJ, Gageler and Gleeson JJ[1978]. No more need be said.

948 For these reasons, *Dickenson's Arcade* should be overruled.

949 From this it will also be apparent that I agree with Kiefel CJ, Gageler and Gleeson JJ that, by reason of s 90, "any tax on ZLEVs or any other goods – whether imposed at the stage of their importation into Australia or production or manufacture in Australia or at any subsequent stage in their distribution, sale, ownership, control, use, resale, reuse or destruction in Australia or export from

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1978 Reasons of Kiefel CJ, Gageler and Gleeson JJ at [14]-[17].

Australia – can be imposed only by uniform national legislation"[1979]. In this case, the ZLEV charge is a tax, not a fee for service. It is not a licence or permit fee for an activity properly the subject of a regulatory scheme. Rather, the ZLEV charge is a tax on the use of ZLEVs. The relationship or connection between the legal and practical operation of the tax (the ZLEV charge) and the use of the goods (ZLEVs) is close – indeed, it is direct and immediate. Further, as explained, the ZLEV charge affects ZLEVs as articles of commerce. The ZLEV charge, accordingly, is an excise.

The fourth pathway – re-considering Capital Duplicators [No 2] and Ha

950 Victoria's fourth and final pathway cannot be taken, for the reasons already given.

Conclusion

951 The substantive question, is s 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the *Constitution*, should be answered "yes". Victoria should pay the costs of the proceeding.

1979 Reasons of Kiefel CJ, Gageler and Gleeson JJ at [197].