HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. There are four alternative pathways for the Court to find that s 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**Act**) does not impose a duty of excise contrary to s 90 of the Constitution, and is therefore valid.

A. First pathway: Section 7(1) does not impose a tax "on goods"

3. Section 7(1) of the Act (**ZLEV charge**) is not a tax "on goods", and so is not a tax on the "use" or "consumption" of goods. Rather, it is one on the activity of driving a ZLEV on specified roads. That follows from the charge being: *only* imposed when a ZLEV is driven on a specified road; calculated by reference to distance travelled, rather than the quantity or value of the ZLEV driven; and levied on a single good, periodically, after the point of sale: Act, ss 1, 7-8, 11, 15, 18 (**V1**, **T4**).

B. Second pathway: *Dickenson's Arcade* should not be re-opened

4. Alternatively, if the ZLEV charge is a tax "on goods", it is on the consumption of goods (**PS [46]**; **CS [6]**, **[47]**). In *Dickenson's Arcade* (1974) 130 CLR 177, five Justices held that such a tax is not an excise: 185-186, 209, 213, 217-223, 229-231, 238-239 (**V4**, **T21**).

5. The plaintiffs require leave to re-open *Dickenson's Arcade*. That case is not irreconcilable with, or rendered an "anomaly" by, *Capital Duplicators* (**V4, T17**) or *Ha* (**V4, T23**). On the contrary, the majority in both cases accepted that the prevailing law was that consumption taxes are not excises, and did nothing to disturb that position (cf **PS [14]**, **CS [30]**). The statements in both cases that s 90 "exhaust[ed] the category of taxes on goods" must be read in context: at 590 (**V4**, **T17**); 488 (**V4**, **T23**). The identification of specific steps in respect of which a tax on goods is an excise – production, manufacture, sale or distribution – belies the suggestion that a tax on *any step* taken in dealing with goods could be an excise (cf **PS [23]**, **CS [15]**). As to Dixon J's exclusion of consumption taxes in *Parton* (1949) 80 CLR 229 at 260-261 (**V6**, **T33**), this was not solely motivated by *Atlantic Smoke Shops* [1943] AC 550 (**V8**, **T43**) (cf **PS [31]**, **CS [26]**). Nor is the continuing exclusion of consumption taxes a product of deference to that decision (cf **PS [39]**, **CS [30]**).

6. Leave to re-open *Dickenson's Arcade* should be refused. Applying the factors articulated in *John* (1989) 166 CLR 417 (**V5**, **T27**):

(a) *First*, prior to *Dickenson's Arcade*, the Court had handed down at least five decisions, over 25 years, in which members of the Court affirmed a concept of an excise that covered taxes on goods before they reach the hands of the consumer: (1) *Parton* at 260-261 (**V6**, **T33**); (2) *Dennis Hotels* (1960) 104 CLR 529 at 540-541, 556, 559-560, 573, 589-90 (**V4**, **T20**); (3) *Bolton v Madsen* (1963) 110 CLR 264 at 271 (**V3**, **T15**); (4) *Anderson's* (1964) 111 CLR 353 at 364-365, 373, 376, 377 (**V3**, **T12**); and (5) *Chamberlain Industries* (1970) 121 CLR 1 at 13, 25, 28, 35-36 (**V7**, **T40**). Since *Dickenson's Arcade*, multiple applications to overturn the decision have been rejected: see, eg, *Philip Morris Ltd* (1989) 167 CLR 399 (**V6**, **T35**); *Capital Duplicators* (**V4**, **T17**); and *Ha* (**V4**, **T23**);

(b) *Second*, there are common core aspects of the reasons of Menzies, Gibbs, Stephen and Mason JJ (cf **PS [40]**);

(c) *Third*, the plaintiffs' alleged inconvenience — an "anomaly" between the purpose of s 90 and its operation — does not withstand scrutiny (cf **PS [24]**). In contrast, the decision has given certainty to States and Territories for almost 50 years; and

(d) *Fourth*, by legislating in reliance upon *Dickenson's Arcade*, the States and Territories have acted upon it in a manner which militates against reconsideration.

C. Third pathway: If *Dickenson's Arcade* is reopened, it should be affirmed

7. Alternatively, if *Dickenson's Arcade* is reopened, it should be affirmed. *First*, a duty of excise has long been understood to be a tax on goods as "articles" of commerce: *Matthews* (1938) 60 CLR 263 at 301, 304 (**V5**, **T29**); *Parton* at 253, 259-260 (**V6**, **T33**); *Bolton* at 271 (**V3**, **T15**); *Dickenson's Arcade* at 209, 221, 223, 230-231, 238-239 (**V4**, **T21**); *Ha* at 494, 497, 499 (**V4, T23**). A consumption tax is not such a tax, because it is imposed after goods have reached the hands of the consumer. *Second*, a tax on consumption cannot be said to have the same economic effect as a tax on the manufacture, production, sale or distribution of goods. *Third*, it is inherent in the etymological meaning of excise that the cost can be "deducted" or "excised" at the point of sale; a consumption tax cannot be so deducted. *Fourth*, s 93(i) of the Constitution distinguishes between acts of production and manufacture, in respect of which excises may be levied, and the act of consumption, which is necessarily subsequent to those acts.

D. Fourth pathway: An excise is a tax falling selectively upon locally produced goods

8. Alternatively, the Court should reconsider the meaning of excise more fundamentally, and find that an excise is a tax that falls selectively upon locally produced goods: *Capital Duplicators* at 617, 629-30 (**V4**, **T17**); *Ha* at 514-15 (**V4**, **T23**). Victoria seeks leave to reopen *Capital Duplicators* and *Ha* insofar as those cases establish that a tax that falls on goods *regardless of their place of origin* is a duty of excise. *Parton* (**V6**, **T33**) does not stand for this principle, so Victoria does not need leave to reopen that decision.

9. The text, purpose and context of s 90 support this interpretation. It reflects the *established meaning* of "excise" in Australia at Federation: Quick and Garran, JBA 2535 (**V9**, **T65**); Convention Debates, JBA 2499-2501 (**V9**, **T60**); secondary sources (**V9**, **T 55**, **57**, **63**, **64**). The drafting history of s 90 suggests its *purpose* was to give the Commonwealth effective control over tariff policy: *Cole v Whitfield* (1988) 165 CLR 360 at 386, 393 (**V4**, **T18**); *Ha* at 506 (**V4**, **23**); Convention Debates, JBA 2518-2519 (**V9**, **T62**). Giving the Commonwealth exclusive power to levy taxes falling selectively on locally produced goods ensured that tariff policy could not be frustrated by State taxes of that kind. The collocation of "excise" and "customs" in ss 55, 69, 85-87, 90 and 93, and the presence and terms of ss 92 and 93(i), also support this interpretation.

10. Having regard to the *John* factors, the Court should grant leave to re-open *Capital Duplicators* and *Ha*, so that the correct construction of s 90 can be affirmed:

    (a) *Capital Duplicators* was the first occasion on which a (slim) majority of the Court held that a tax could be a duty of excise *regardless of whether the goods taxed were of foreign or domestic origin*. That conclusion was based on two false premises: that "excise" had no clearly established meaning at Federation; and that the purpose of s 90 was to give the Commonwealth real control of the taxation of commodities.

    (b) *Capital Duplicators* and *Ha* have contributed to the erosion of the States' and Territories' fiscal autonomy, and thereby caused significant inconvenience.

    (c) There is no evidence to suggest that *Capital Duplicators* or *Ha* has been acted on in a manner that militates against their reconsideration.

Dated: 15 February 2023

Rowena Orr

Rowena Orr **Sarah Zeleznikow** **Madeleine Salinger**