HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M61/2021
File Title:	Vanderstock & Anor v. The State of Victoria
Registry:	Melbourne
Document filed:	Form 27F - Qld intervener - Outline of oral argument
Filing party:	Interveners
Date filed:	16 Feb 2023

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

and

KATHLEEN DAVIES
Second Plaintiff

10 and

THE STATE OF VICTORIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

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

A. The ZLEV charge is not an excise on the current authorities

2. The plaintiffs and the Commonwealth seek to overturn a long line of authorities that an excise is a tax on a dealing with goods as articles of commerce before they reach the consumer. That invitation should be refused. It is not anomalous to exclude taxes on the use of goods from the concept of a duty of excise.

3. It has long been recognised that duties of excises are taxes on goods as articles of commerce or trading taxes. It has also long been recognised that a duty of excise has a 'tendency to enter into the price obtained for the goods' and be 'passed on' to a consumer. It is therefore generally an indirect tax:

   (a) ***Parton*** *v Milk Board (Vic)* (1949) 80 CLR 229 at 259-260 (Dixon J), 252-253 (Rich and Williams JJ) [**C6 Tab 33, 1488-9, 1481-2**]; **QS [8]-[29]**.

4. Current authority supports that duties of excise have those features:

   (a) ***Ha*** *v New South Wales* (1997) 189 CLR 465 at 490, 496-9 [**C4 Tab 23 790, 796-799**].

   (b) ***Capital Duplicators [No 2]*** *Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 583, 597 [**C4 Tab 17 475, 478, 489**].

5. Applying those propositions, the ZLEV charge is not a tax on goods.

B. ZLEV charge is not a tax on goods

6. The ZLEV charge is not a tax on articles of commerce before they reach the hands of consumers. It is not imposed on trade in ZLEVs or commercial transactions involving ZLEVs. It does not depend on the quantity or value of a ZLEV: there is no analogy with 'amount of use'. The ZLEV charge is not imposed on a trader and passed onto a consumer. It is not an indirect tax. It does not enter into the price of a new ZLEV. Indeed, the age of the ZLEV and its value are irrelevant to the charge. Use of the ZLEV is not proximate to its manufacture or production or the movement of ZLEVs into consumption: *Capital Duplicators [No 2]* at 583 fn 99 [**C4 Tab 17 475**].

7. The Commonwealth's multifactorial list does not assist with establishing whether a charge on use is a duty of excise [**Cth Oral Outline [5]**]:

(a) The impact on demand does not distinguish a tax on goods from any other kind of impost. The Commonwealth's conception of 'articles of commerce' is so broad as to be meaningless. It should be rejected. Rather, a tax is on goods as 'articles of commerce' when it taxes commercial dealings with goods.

(b) The Commonwealth accepts that not all taxes on use are duties of excise. On that logic, the criterion of liability factor does not allow one to distinguish between whether a tax on use is a duty of excise or not.

(c) A tax on the 'amount of use' is not analogous to the traditional conception of a duty of excise as tax on the quantity or value of a good. That conception is founded on the notion that traded *items* can be quantified and valued.

(d) A revenue-raising purpose is unlikely to reveal whether a tax is on a dealing with a good. Revenue raising may be relevant to whether a tax is a fee for the privilege of carrying on a business, but it is irrelevant when that question is not in issue.

C. The imprecise notion of demand

8. The plaintiffs and the Commonwealth seek to avoid the proper characterisation of the ZLEV charge by referring to its possible effect on demand. However, the authorities have referred to the passing on of a tax by reference to an effect on price: **QS [8], [22]**. They have not been about a generalised effect of a tax on demand. The possible effect of a tax on demand cannot distinguish an excise from other taxes or indeed any other impost that must be borne by a trader: *Ha* at 508 (Dawson, Toohey and Gaudron JJ) [**C4 Tab 29 808**]; *Capital Duplicators [No 2]* at 613 (Dawson J) [**C4 Tab 17 505**].

9. In any event, there is no evidence before the Court that all or any taxes on use would have the same effect as the existing categories of excise duties. In the absence of such evidence in the special case, the Court should not infer there is a natural tendency for taxes on use once they have reached the consumer to have the same effect on demand as taxes on production or even taxes on sale: *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [526] (Callinan J) **Cf Reply [13]**. Controversial assertions about economic effects should not be accepted at face value without some demonstrated empirical basis.

D. Applications to re-open

10. ***Dickenson's Arcade*:** The plaintiffs' argument about the application of the fourth factor in *John* to its application to re-open *Dickenson's Arcade* should be rejected. The States are left in an invidious position if they are forced to identify all legislation enacted in reliance on a principle to defend that principle.

11. ***Capital Duplicators [No 2] and Ha*:** In the alternative to the arguments in parts A to C, the Court should re-open *Capital Duplicators [No 2]* and *Ha* and hold that an excise is a tax that is 'in substance on production and manufacture': **QS [65]**.

12. The approach of the majority in *Capital Duplicators [No 2]* and *Ha* is not supported by the text, purpose and context of s 90: **QS [40]-[64]**. The reasoning of the majorities:

    (a) has the incoherent result that there is nothing preventing a State from distorting a market for goods in myriad ways provided it does not do so by way of a tax on goods. It can, for example, make payments directly to consumers, grant incentives, make regulations and impose other taxes consistent with s 92;

    (b) states a purpose of s 90 – to remove taxes which might 'divert trade or distort competition' by removing all taxes on goods – that sits uneasily with the 'free trade' purpose of s 92 being achieved by removing only 'discriminatory burdens of a protectionist kind';

    (c) has negatively affected the States' ability to raise revenue by expanding the concept of excise by reference to 'highly debatable economic theory' that is essentially incapable of being falsified: **C9 Tab 53 200**; and

    (d) has severed the link with local production and manufacture of goods which had been regarded in earlier authorities including *Parton* as the basis for the expansion of the concept of excise to include taxes on the sale and distribution of goods: *Parton* (1949) 80 CLR 229 at 252-3 (Rich and Williams JJ), 260 (Dixon J) [**C6 Tab 33 1481-2, 1489**]; *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 374-5 (Kitto J) [**C3 Tab 12 295]**; *Hematite Petroleum Ptd Ltd v Victoria* (1983) 151 CLR 599 at 632 (Mason J), 657 (Brennan J), 663-5 (Deane J) [**C5 Tab 25 922, 947, 953**]; *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 431 (Mason CJ and Deane J) [**C6 Tab 35 1547**].

Dated: 16 February 2023

G J D Del Villar Felicity Nagorcka Sarah Spottiswood