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 M61of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

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and

KATHLEEN DAVIES
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

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OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSIONS

2. Authority and principle stand against the contentions of the Plaintiffs and the Commonwealth that the notion of "excise" in s 90 should now be expanded beyond a tax on goods "before they reach the hands of the consumer" (SA, [4]-[6]).

Authority

3. The "hands of the consumer" limit was unanimously endorsed as the doctrine of this Court 60 years ago: *Bolton v Madsen* (1963) 110 CLR 264 (V3, T15; SA, [5]). It has been confirmed by members of this Court on no less than 40 occasions since it was articulated by Justice Dixon in *Parton v Milk Board (Vic)* (1949) 80 CLR 229 (V6, T33; SA, [11]).

Principle

4. The "hands of the consumer" limit has a principled foundation which lies in a correlative understanding of the concept of customs and excise duties as trading taxes (SA, [47]). The notion of a trading tax is synonymous with an indirect tax: *Logan Downs* (1977) 137 CLR 59, 69 (Stephen J) (V5, T28; SA, [33]). Far from being illogical or anomalous, as the Plaintiff's (PS, [16.3], [22]) and the Commonwealth (Cth, [30]) contend, this limitation, grounded in the notion of trading and indirect taxes, finds reflection in (i) the *Convention Debates*, (ii) the authority of the Court both preceding and post-dating the decision in *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 (V4, T21), and (iii) contextually from the operation of s 93.

Convention Debates

5. In the course of the 1891 *Convention Debates*, Mr Alfred Deakin, who had identified the need to exclude the authority of the States to impose excise duties and then proposed an amendment to insert after the words "custom of duties" the words "and duties of excise upon goods the subject of custom duties" (V9, T61, 16 March 1891), contrasted customs and excise duties with forms of direct taxation which would be left to the States (*Convention Debates 1891*, 3 April 1891, p 674; see also, pp 670 and 678).

Authority

6. The notion of direct taxation found expression in the unanimous statement of the meaning of "excise" in *Peterswald v Bartley* (1904) 1 CLR 497 (V4, T6). Although that notion has subsequently been expanded, the limitation referrable to an understanding of excise and customs duties as trading or indirect taxes has remained.

7. The passages relied on by the Plaintiffs and the Commonwealth from *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 (V5, T29), *Parton* (V6, T33) and *Capital Duplicators v Australian Capital Territory [No 2]* (1993) 178 CLR 561 (V4, T17), properly understood, are not inconsistent with maintenance of the "hands of the
10 consumer" limitation derived from the notion of trading and indirect taxes for the following reasons.

8. The reliance placed by the Plaintiffs (PS, [10], [16.1], [18]) and the Commonwealth (Cth, [25]) on the inclusion by Justice Dixon in *Matthews* (V5, T29) of "consumption" in the list of steps which if taxed may constitute an excise is misplaced (SA, [18]). The Plaintiffs and the Commonwealth fail adequately to grapple with the relevant passage which identified a requirement that the tax must affect the goods "as the subjects of manufacture or production or as articles of commerce": *Matthews*, 304 (V5, T29). When the statement is placed within the broader context of his Honour's reasons, replete with references to notions of trading and indirect taxes, the reference to
20 "consumption" should be understood to mean a tax on a commodity passing into consumption (see the definitions discussed in *Mathews*, 298, V5, T29).

9. The reliance placed by the Plaintiffs (PS, [11], [16.2], [19], [24]) and the Commonwealth (Cth, [11]) on the purpose of s 90 identified by Justice Dixon in *Parton*, where his Honour said 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 is adopted should not be hampered or defeated by State action", is misplaced (SA, [47]). Again, his Honour's judgment is replete with references to notions of trading and indirect taxes, including the reference to "commodities" in the very passage relied on. Read contextually, the policy control to which his Honour was
30 referring should be understood to mean control over imposts that might affect the input costs and thereby the price of commodities.

10. The reliance placed by the Plaintiffs (PS, [13.1], [16.3], [23]) and the Commonwealth (Cth, [15], [21]) on the statement in the majority judgment in *Capital Duplicators* (JBA 4, Tab 17), that duties of custom and of exercise "exhaust[s] the categories of taxes on goods", is misplaced. That statement was responsive to submissions advanced in support of the narrow understanding of "excise". Further, read in light of the express reservation concerning taxes on "consumption", this statement must be understood to mean that duties of custom and excise exhaust the categories of trading and indirect taxes on goods, whilst remaining silent about taxes on goods that have passed into consumption (SA, [17-18], [48]).

10 *Section 93*

11. Whilst s 93 has frequently been called in aid of the narrow conception of "excise", limited to taxes on manufacture and production, it can also be seen to provide some contextual support for the "hands of the consumer" limit. Of course, s 93 makes express reference not only to "goods produced or manufactured" but also "passing into another State for consumption". As Quick and Garran explain, the accounting mechanism adopted contains within it an assumption that in accordance with the theory of trading and indirect taxes, the imposition of customs and excise duties would be borne by the ultimate consumer (J Quick & R Garran, *The Annotated Constitution of the Australian Commonwealth*, p 862).

20 12. Even if the Court were to harbour doubts about the "hands of the consumer" limit, such a long-standing rule, based on a principled understanding of trading and indirect taxation, should not now be disturbed.

Dated: 16 February 2023

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