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

B E T W E E N:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

AND

THE STATE OF VICTORIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL OF WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ORAL OUTLINE OF SUBMISSIONS

DESTRUCTIVE AND REPETITIVE CONSUMPTION

2. There are two types of consumption after the first retail sale of goods: the destructive consumption of goods (eg smoking tobacco or drinking wine); or the repetitive use of re-usable goods.

3. A tax upon either form of consumption may be described as an "inland consumption tax". However, there is a difference in the effects of taxing the different forms of consumption.

4. A tax upon destructive consumption of goods is necessarily a tax which can only be imposed once. Once goods are destructively consumed, they no longer exist. Such a tax relates to an ascertainable quantity or value of the goods destroyed. The amount of the tax will be readily capable of calculation at the point of sale, in advance of the destructive use. It may be collected by a retailer on behalf of a consumer, simply by adding the amount of the tax to the price of the goods at the point of consumer sale.

5. The effect of a tax upon the repetitive use of goods (a "usage consumption tax") depends upon whether, and to what extent, the activity of using the goods has occurred or will occur after a consumer purchase. Such a tax is not readily incorporated into the retail sale price of goods, in any simple and calculable fashion. It will depend upon the consumer's use of goods. A consumer may choose not to use the goods at all and avoid any liability for a tax.

PREVIOUS AUTHORITY

6. No previous case has considered the specific question of an excise in relation to a tax upon the repetitive use of goods. However, in ***Dickenson's Arcade*** five judges accepted generally that an inland consumption tax is not an excise. (See fn 37 of WA's Submissions.) That conclusion may be justified as a matter of principle in relation to a tax upon the repetitive use of goods. This submission is developed here. Further, as a matter of authority, ***Dickenson's Arcade*** should not be overruled as applied to such a tax. WA supports Victoria's submissions about that, and also about reconsidering ***Ha*** and ***Capital Duplicators (No 2)*** (if necessary).

CONDITIONS FOR A DUTY OF EXCISE

7. In ***Bolton v Madsen*** (**JBA C3/15/413**) at 271, the Court said that duties of excise are taxes which are: (a) "directly related to goods"; and (b) "imposed at some step in their production or distribution before they reach the hands of consumers".

8. The plaintiffs contend that these criteria should be expanded to mean that: (a) there must be a "sufficient relationship" between the tax and goods; and (b) a "sufficient relationship" includes an inland consumption tax imposed upon repetitive use of goods, because such a tax will have a "natural and general tendency" to affect the level of demand in the market for the goods.

PLAINTIFF'S EXPANSION UNJUSTIFIED

9. The purpose of s.90 is to prevent taxes on goods from affecting the market for those goods by discouraging trade and distorting competition: ***Capital Duplicators (No 2)*** at 585-586. The focus is upon the price effect of a tax, because price is the means by which home production may be stimulated, or alternatively exposed to greater competition: ***Capital Duplicators (No 2)*** at 586-587.

10. Where a tax is imposed prior to the point of sale, the effect upon the price of goods may be easily ascertained. If the tax is directly upon a step of production, manufacture, distribution or sale, the natural and general tendency is that this tax will be incorporated into the price of the goods. However, even so, not all taxes affecting goods prior to sale will be sufficiently direct to constitute a tax *upon* goods. In ***Kropp*** (**JBA C3/16/424**) and ***Bolton***, taxes based upon usage of a vehicle or roads to transport goods prior to sale were not "directly related" to the goods, and consequently there was no excise.

11. Since ***Bolton,*** the purpose of s.90 has been clarified by the majority in ***Capital Duplicators (No 2)***. However, the majority affirmed that the requirement that an excise tax be "directly related to goods" was a fundamental proposition: at 582, 583. So, whether a tax is "directly related" to goods should now be measured by reference to the clarified purpose explained in ***Capital Duplicators (No 2)***.

12. It follows that, whether a connection between a tax and goods is sufficient so that the tax may be described as "directly related" to the goods, must now depend upon the nature of the price effect of the tax. For the tax to be "directly related to the goods", the tax must have a direct effect upon the price of the goods. That is to say,

the imposition of the tax must (in a substantive or practical way) mean that the price of the goods is likely to increase and to affect the market for these goods.

13. On this view, the results in ***Kropp*** and ***Bolton*** would be the same. The price effect of the tax was at least two stages removed from a price consequence. The tax was imposed upon the carrier of goods, who might then charge an equivalent amount to the owner of the goods. The owner of the goods might then recover an amount equivalent to the tax upon sale.

14. Where a tax is based upon the repetitive use of goods after sale, ie using the goods for an activity, it will generally be difficult to determine the price effect of the tax upon the *market* for the sale of these goods. That is because: (a) at the point of sale, the extent of taxable use will be unique to each consumer. A consumer may choose not to use the goods at all, or may choose not to use them within the relevant market area, eg, a person may purchase a ZLEV in Victoria, and register and use it in New South Wales; and (b) for each consumer, the extent of subsequent taxable use may well be unpredictable even by that consumer.

15. As a result: (a) the effect of taxable use upon the whole *market* for ZLEVs is not direct, as it depends upon anticipated and predicted taxation, not actual taxation; (b) it is not possible to say, as a matter of constitutional fact, that the "natural and general tendency" of the anticipated taxation upon repetitive usage is to alter or distort the price of goods. The tax is not an inherent part of the cost base of the goods, in contrast to a tax upon production, manufacture, distribution or sale of goods; and (c) due to the individualised and unpredictable nature of the anticipated taxation, there could not be any economic evidence to show the natural and general tendency of such a tax.

16. Consequently: (a) as a matter of law, the Court cannot conclude that the connection between the ZLEV charge and the ZLEV is sufficiently direct to constitute a tax on goods and to be an excise; (b) further and in any event, as a matter of fact, there is no evidence (economic or otherwise) of any substantial price effect upon ZLEVs or upon the *market* in which they are sold. For this further reason alone, the Court cannot conclude that there is any excise.

Date: 16 February 2023

J A Thomson SC J Berson