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

BETWEEN: **CHRISTOPHER VANDERSTOCK**
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

AND:

THE STATE OF VICTORIA
Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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

The purpose of s 90 is to ensure trade is not distorted by differential taxes on goods (CS [10]-[11], [15])

2. Chapter IV establishes a "Commonwealth economic union, not an association of States each with its own separate economy": *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 585-587 (majority). The purpose of s 90 is to "ensure that differential taxes on goods … should not divert trade or distort competition", that being a necessary part of achieving "the creation and maintenance of a free trade area throughout the Commonwealth": *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 584-587, 590 (majority); *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 491, 494-497 (majority). Section 90 was the mechanism by which "the States yielded up … the powers to impose taxes upon goods which, if applied differentially from State to State, would necessarily impair the free trade in those goods": *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 494.

A duty of excise is an inland tax with a sufficient connection to goods (CS [13]-[19])

3. The terms "duties of customs and of excise in s 90 must be construed as exhausting the categories of taxes on goods": *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 590 (majority); *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 488 (majority).

4. Section 90 requires an assessment of whether there is a sufficient connection between a tax and a class of goods such that the impost can be characterised as a tax "on goods". Such an assessment is not novel: *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 583 (majority), 601-602 (Dawson J). It is clearly required by the "no closer connection test": *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 501, 504 (majority); *Philip Morris* (1989) 167 CLR 399 (**JBA 6, Tab 35**) at 436 (Mason CJ and Deane J). Evaluative assessments in constitutional law should not be avoided: *Palmer v Western Australia* (2021) 95 ALJR 229 (**JBA 8, Tab 45**) at [147], [149] (Gageler J).

5. Without purporting to be comprehensive, at least the following considerations are relevant when evaluating whether a tax is "on goods":

   (a) Whether the connection between the tax and goods is "of such a nature" as to "affect" the class of goods "as articles of commerce": *Matthews* (1938) 60 CLR 263 (**JBA 5, Tab 29**) at 302-304 (Dixon J).

(b) Whether the legislature has specified any dealing with goods as the criterion of liability to pay the tax (this being a matter that is highly relevant when it is present, but no longer decisive when absent): *Bolton* (1963) 110 CLR 264 (**JBA 3, Tab 15**) at 273 (the Court); *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 583 (majority).

(c) Whether the amount of the tax relates to the quantity or value of the selected dealing in goods (which, for a usage tax, means the amount of use of the goods): *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 597 (majority); *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 503 (majority).

(d) Whether the tax is, in operation and effect, a "revenue-raising inland tax on goods", or whether it is a fee for a privilege imposed as part of a regulatory scheme: *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 502-503 (majority).

Taxes on the use of goods may be excises (CS [20]-[31])

6. Taxes on the use of goods have the same capacity to divert trade and distort competition as other forms of taxes on goods: *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 602, 610 (Dawson J), 628 (Toohey and Gaudron JJ). Proof of such an economic effect is not necessary, the question being whether a tax has a "natural tendency" or "general tendency" to affect demand for goods of the relevant class: *Duplicators (No 2)* (**JBA 4, Tab 17**) at 586 (majority); *Philip Morris* (1989) 167 CLR 399 (**JBA 6, Tab 35**) at 436 (Mason CJ and Deane J); *Chamberlain Industries* (1970) 121 CLR 1 (**JBA 7, Tab 40**) at 13 (Barwick CJ).

7. A tax on the use of a class of goods may be an excise even if liability to pay the tax arises after the goods reach the first consumer. Such a tax may have a tendency to affect that class of goods as articles of commerce, by affecting the decisions of prospective purchasers of goods in that class and (in the case of durable goods) by affecting re-sale.

8. The tentative exclusion of consumption taxes in *Parton* (1949) 80 CLR 229 (**JBA 6, Tab 33**) arose as a result of the erroneous application of *Atlantic Smoke Shops* [1943] AC 550 (**JBA 8, Tab 43**). It was then incorporated into the formulation of the criterion of liability test, with the result that it was repeated in numerous cases in which consumption taxes were not in issue and no argument was directed to them: *Dennis Hotels* (1960) 104 CLR 529 (**JBA 4, Tab 20**) at 559 (Kitto J); *Bolton* (1963) 110 CLR 264 (**JBA 3, Tab 15**) at 273 (the Court).

9. Three members of the majority in *Dickenson's Arcade* treated the criterion of liability test as requiring the conclusion that a consumption tax could not be an excise, irrespective of its substantive effect on the market for goods of the relevant class: *Dickenson's Arcade* (1974) 130 CLR 177 (**JBA 4, Tab 21**) at 181-183 (argument), 209 (Menzies J), 217-224 (Gibbs J), 229-231 (Stephen J), cf 238-241 (Mason J). Subsequently, the criterion of liability test was authoritatively rejected as the exclusive determinant of an excise: *Duplicators (No 2)* (1993) 178 CLR 561 (**JBA 4, Tab 17**) at 583 (majority). The central plank of its reasoning having been overruled, *Dickenson's Arcade* has "nothing to say" on the critical question: *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 198, 201 (the Court). That explains why *Duplicators (No 2)* at 590 and *Ha* at 499-500 treated the question of whether consumption taxes fall within s 90 as open.

10. Alternatively, if necessary, leave should be given to re-open *Dickenson's Arcade*, and it should be overruled. The Commonwealth has not previously sought such re-opening.

The ZLEV Charge Act imposes an excise (CS [42]-[49])

11. The ZLEV Charge Act has a sufficient relationship with goods (ZLEVs) to constitute an excise within s 90. Almost all registered operators of a ZLEV can expect to pay the ZLEV charge on every kilometre driven in the vehicle over its useable life, and the amount of the tax varies almost exactly with the use of the ZLEV: ZLEV Charge Act (**JBA 1, Tab 4**), ss 3, 7, 8, 15. The tax falls selectively on the use of ZLEVs rather than all users of "specified roads": ASC [44] (**ASCB 41**). Those features have a natural tendency to make ZLEVs less attractive to Victorian consumers than to consumers in other jurisdictions and thereby to affect them as articles of commerce.

12. The ZLEV Charge Act has a revenue-raising purpose and does not form part of a regulatory scheme. The Court should reject Victoria's artificial distinction between a tax on the "activity of using" ZLEVs on specified roads and a tax on the "consumption or use" of ZLEVs: *Hematite Petroleum* (1983) 151 CLR 599 (**JBA 5, Tab 25**); *Matthews* (1938) 60 CLR 263 (**JBA 5, Tab 29**); *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**).

Re-opening *Ha* and *Duplicators (No 2)* (CS [32]-[41])

13. If Victoria's application to re-open *Ha* and *Duplicators (No 2)* is allowed to be argued, it should be refused: *Ha* (1997) 189 CLR 465 (**JBA 4, Tab 23**) at 488-491, 499 (majority).

Dated: 14 February 2023

Stephen Donaghue David Thomas Celia Winnett Michael Maynard