HIGH COURT OF AUSTRALIA

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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

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REPLY SUBMISSIONS OF THE PLAINTIFFS

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PART I: CERTIFICATION

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

PART II: REPLY

A TAX ON THE STEP OF CONSUMPTION IS AN EXCISE

2 A tax on the "production, manufacture, sale or distribution of goods" is an excise. If a tax is, in substance, imposed upon one of those steps, that is enough to conclude that the tax is one imposed "on goods". The common thread between taxes imposed on those steps is that each is an "inland tax" on goods, rather than one imposed on goods at the border: **PS [13.1]**. The Plaintiffs' contention is that "consumption" should be added to those steps, also being an "inland tax": **PS [45.2]**. If the ZLEV charge is, in substance, imposed on the step of consumption, it will have the necessary "sufficient connection" with goods to be characterised as an excise: see **PS [45.2]**, **Cth [3]**. To reach that conclusion, it is not necessary to undertake an economic analysis as to whether, in this particular case, the ZLEV charge has in fact depressed demand for ZLEVs.[1]

3 The Plaintiffs' approach to s 90 accords with the proposition that s 90 exhausts the categories of taxes on goods: **PS [23]**, **Cth [15]**. Of course, the Court in *Ha* expressly left open the correctness of the Plaintiffs' present contention. But that does not detract from the exhaustive nature of s 90 as identified in *Ha*: cf **Vic [36]**, **NSW [27]**, **Qld [34]**, **SA [48]**. Rather, the Court's analysis can be understood as respecting existing authority for the purpose of that case, consistent with the orthodox approach of the Court to not deciding constitutional issues unless necessary to resolve a controversy between the parties.[2] That said, it is telling that the Court omitted from the "*Ha* formulation" (**Vic [17.2]**) the words "before they reach the hands of consumers" — being the words from *Bolton*: **PS [12]**. That omission can have only been deliberate. The earlier authorities that adopt formulations that include those words (or equivalent) must be read in that light: cf **Vic [23]-[24]**, **Qld [18]-[19]**, **SA [10]-[11]**.[3]

B NOT A "TAX ON AN ACTIVITY"

4 To say that the ZLEV charge is a "tax on an activity" (**Vic [12]**) does not assist in resolving

1 See *Anderson's* (1964) 111 CLR 353 at 365, 367-368 (Barwick CJ); *Chamberlain* (1970) 121 CLR 1 at 13 (Barwick CJ). Cf **Qld [35]-[39]**; **WA [12]**; and compare what is required when considering whether a measure infringes s 92: see *Palmer v Western Australia* (2021) 95 ALJR 22 at [238] (Edelman J) and **Qld [39] n 62**. See further at paragraph 13 below regarding the way in which the Court ought approach statements in the authorities concerning the effect of consumption taxes.

2 See *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at [57]-[58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [100] (Edelman J)

3 Little can be drawn from *Logan Downs* (1977) 137 CLR 59 in relation to a tax on "ownership", for the Court split equally and the decision therefore has no ratio: cf **SA [21]-[23]**; see also **WA [13]**.

the proper characterisation of the ZLEV charge: **Cth [44]**.[4] For the reasons given above and in chief, it is sufficient that the ZLEV charge is, in substance, imposed upon the step of consumption (which it is). Reframing the issue by reference to a particular activity may be useful for the purpose of identifying whether a particular charge is one imposed as a "fee" for the privilege of engaging in that activity.[5] However, in the present context, inserting the word "activity" into the analysis serves no purpose, for Victoria has conceded that the ZLEV charge is a "tax", and therefore has conceded that it is not a fee for the privilege of engaging in the activity of using specified roads: **PS [47]-[48]**, **Cth [43]**, **[49]**.

5 The Minister's stated purpose for imposing a discriminatory charge on the use of ZLEVs
10 (as against the use of other types of motor vehicles: see **PS [52]**, **Cth [48]**) is irrelevant to the character of the ZLEV charge: cf **Vic [13]**. What matters is the legal and practical operation of the Charge Act. Further, there is no basis for the contention that there is a need to "remedy the substantial disproportion in road-user charges that would otherwise occur": **Vic [13]**. That contention is premised on the "fuel excise"[6] being a "road-user charge".[7] Fuel excise is, of course, necessarily imposed by the Commonwealth Parliament. To the extent that the use of ZLEVs may result in the Commonwealth receiving less revenue from the fuel excise, that is a matter for the Commonwealth Parliament to "remedy".[8]

C RE-OPENING AND OVERRULLING *DICKENSON'S ARCADE*

6 Victoria and several interveners assert that the Court has, in several earlier cases, refused
20 to overrule *Dickenson's Arcade*: **Vic [24]**, **Tas [22]**, **NT [20]**, **WA [39]**. That submission overlooks the critical point that, in each of those cases, what was sought was a re-opening of the Court's reasoning in relation to that part of the statutory scheme that imposed a "franchise fee", which relied upon the *Dennis Hotels* formula.[9] It was the correctness of that formula, in light of the *Parton* doctrine, that was in issue in those cases. It is true that

4 The related assertion that the ZLEV charge is "different to those charges previously held to be excises" (**Vic [10]**) is unsurprising: the question of whether exactions on use or consumption are excises is the (novel) point to be resolved in this matter.

5 For example, that inquiry may be useful for determining whether "road-user charge" is a fee for privilege or a fee for service **SA [24]-[25]**. *Hughes & Vale Pty Ltd v NSW* (1953) 87 CLR 49, a case principally about s 92, did not consider the question whether the charge the subject of the challenge was tax on vehicles as commodities: at 75 (Dixon CJ), 76 (McTiernan J), 87 (Williams J); cf **SA [24]-[25]**.

6 Being an excise imposed on certain "Excisable goods" within the meaning of the *Excise Act 1901* (Cth), as identified in the Schedule to the *Excise Tariff Act 1921* (Cth). See especially items 10.5 and 10.10.

7 It also ignores the fact that, to the extent that a ZLEV is powered by electricity provided by a taxable supply, GST will be payable on that supply under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

8 Moreover, only a small portion of "fuel tax" revenue must be distributed to the States and Territories to be expended "in relation to Australian road infrastructure investment": see *Fuel Indexation (Road Funding) Special Account Act 2015* (Cth), s 9.

9 The same mistake is made at **Vic [25]**. In contrast, the distinction is properly recognised at **NSW [16]**, **[21]**.

in *Capital Duplicators [No 2]*, the Commonwealth advanced the submission that a consumption tax is an excise.[10] It is not clear whether the Commonwealth sought leave to re-open *Dickenson's Arcade* on that point. Even if it did, that is not a factor that points against re-opening here. The issue simply did not arise.

7 As to the *John* factors, the following can be added to **PS [39]-[42]** and **Cth [30]**.

8 ***First factor*:** None of the cases in the period between *Matthews* and *Dickenson's Arcade* involved a decision about the validity of a consumption tax of the kind considered in *Dickenson's Arcade* and the kind now under consideration. For that reason, none are authority for the proposition that a consumption tax is not an excise (**PS [39]**, **Cth [28]**, **NSW [14]**; cf **SA [13]**, **NT [15]**), nor should they be understood as involving a "careful" working out of the principle (cf **Vic [22]**). Each case uncritically repeated a formula that excluded consumption taxes from s 90,[11] being a formula derived from Dixon J's erroneous reliance on *Atlantic Smoke Shops*: see **PS [31]-[35]**, **[39]**; **Cth [26]**.[12]

9 ***Second factor*:** Victoria accepts that the majority reasoning on Pt II of the Act upheld in *Dickenson's Arcade* was relevantly different. It thus necessarily accepts that the second factor points in favour of re-opening: see **Vic [25]**, and also **WA [37]**; cf **NSW [17]**, **Tas [26]**. The second factor does not call for any additional inquiry about the strength or otherwise of the reasoning employed by those judges.

10 ***Third factor*:** To say that *Dickenson's Arcade* has achieved the "useful" result of "preserving the federal compact" (**Vic [26]**) invokes the notion of "the federal balance" and assumes that the balance has been struck correctly. Absent some explanation of its content or meaning, the notion does not assist.[13] In contrast, the anomaly identified by the Plaintiffs and the Commonwealth in the operation of s 90 exists, at least in part, because of the reasoning in *Dickenson's Arcade* when viewed in light of the reasoning in *Ha*. That is, its existence arises on existing authority: cf **NSW [19]**. If leave to re-open is necessary and granted, the question will be whether the anomaly should be corrected.

[10] (1992) 177 CLR 248 at 565-566 (Griffith QC). In *Ha*, the Commonwealth submitted it was unnecessary to decide the issue. See [1997] HCATrans (13 March 1997): "We say that it is unnecessary in this case … to revisit the issue of imposts on consumption" (Griffith QC).

[11] Where the correctness of a proposition is assumed without argument, it does not form part of the ratio: *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13] (Gleeson CJ, Gummow and Heydon JJ). See also *Namoa v The Queen* (2021) 271 CLR 442 at [17] (Gleeson J). Cf **Vic [20] n 23**.

[12] That wrong turn is defended by only Queensland and SA: see **Qld [32]**, **SA [50];** cf **WA [36]**, **NT [28]**.

[13] See *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at [195]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Cf **NSW [29]**; **Tas [32]**, **[41]**.

11 ***Fourth factor*:** Contrary to **Vic [27]**, it is doubtful whether "evidence" is required to support an application for leave to re-open an existing decision, and even more doubtful whether the notion of "onus" is appropriate in relation to such evidence. The *John* factors are not rigid rules but rather matters that may be relevant to the Court's exercise of the discretion to re-open an existing authority. Moreover, it is Victoria, not the Plaintiffs, "who could reasonably be expected to provide information on the facts" relating to any inconvenience it may suffer if the Court were to overrule *Dickenson's Arcade*.[14]

12 Victoria has now identified information said to be of that kind: **Vic [28]**. But it has done no more than provide, at a high level of generality and without any specific statutory
10 references, examples of charges that bear no resemblance to the consumption tax upheld in *Dickenson's Arcade*. In any event, at the level of generality at which they are identified by Victoria, the majority[15] of those charges can readily be characterised as either "fees for services" (waste disposal levies[16]) or "fees for privileges" (vehicle registration charges;[17] commercial passenger vehicle levies;[18] gaming machine levies[19]). If, upon examination of the relevant statutes, such charges truly are "fees", they will not, by definition, be "taxes" and therefore will not be "excises": see **PS [47]**.

13 ***Overruling:*** If the correctness of *Dickenson's Arcade* on the relevant point falls to be considered, it should be overruled for the reasons set out at **PS [16]-[35]** and **CS [20]-[30]**. The bulk of the submissions in support of *Dickenson's Arcade*, in essence, rely on the
20 notion that a relevant logical distinction can be drawn between taxes on sale and taxes on consumption: see **Vic [32]-[34]**. That logic was criticised by at least three judges in *Dickenson's Arcade* and the three dissenting judges in *Ha*: their Honours reasoned that the economic effect of taxing the consumption of goods bears on production and manufacture in the same way as taxes upon their distribution and sale: see **PS [25]-[28]**; **Cth [22]**.[20]

[14] See *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at [39] (Kiefel CJ, Bell, Nettle and Edelman JJ). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [85] (French CJ).

[15] In the context of dutiable transactions, stamp duty on goods is imposed only if the goods are the "subject of an arrangement that includes a dutiable transaction over an estate or interest" that is otherwise dutiable property: see *Duties Act 2000* (Vic), ss 7, 10(1)(d). More specific duties in relation to motor vehicles (Ch 9), and cattle, sheep, goats and pigs (Ch 10—Miscellaneous duties) may be in a different category: see *Kithock* (2000) 102 FCR 42, cited in **PS [42.3]**.

[16] See *Local Government Act 1989* (Vic), s 162(b), 221(b); *Environment Protection Act 2017* (Vic), s 145.

[17] See *Road Safety Act 1986* (Vic), s 9(2); see also **PS [52] n 123**.

[18] See *Commercial Passenger Vehicle Industry Act 2017* (Vic), s 235.

[19] See *Gambling Regulation Act 2003* (Vic), ss 3.4A.3(1A), 3.4A.5(9), 3.4A.11C (relating to gaming machine entitlements). Victoria's reference to "point of consumption betting taxes" appears to be a reference to the tax imposed by Pt 6A of the Act. It is not apparent how that tax has any connection to goods.

[20] As if to emphasise the point, the criticisms made at **Qld [38]** in relation to the effect of consumption taxes upon demand are equally applicable to taxes upon sale and distribution.

Being a matter of constitutional fact,[21] no expert evidence is required for the Court to accept the persuasive force of those considered judicial observations by former members of this Court: cf **NSW [36]**; **Qld [38]**.[22] And, once they are accepted, there is no principled reason to defer to earlier statements that depend upon Dixon J's invocation of *Atlantic Smoke Shops*. Section 93 of the Constitution provides no reason, for it "throws no light on the connotation of the term 'duties of excise' in s 90":[23] : cf **Vic [34]**; **NT [23]**.

D RE-OPENING THE *PARTON* LINE

14 If it arises, the Court should refuse Victoria's application for leave to re-open *Capital Duplicators [No 2]* and *Ha* (**Vic [38], [51]**) — and the "*Parton* line of cases"[24] (**Vic [51.1] n 90**) — for the reasons given at **Cth [32]-[41]**. If the *Parton* line of authority is again to be re-opened (as it was in *Ha*), it should be reaffirmed (as it was in *Ha*). The submissions to the contrary depend primarily upon acceptance of one or more of the following propositions: (1) the word "excise" had a particular meaning at Federation (**Vic [41]-[46]**);[25] (2) the constitutional context suggests a narrower reading of s 90 (**Vic [50]**);[26] or (3) the purpose of s 90 is not that identified by Dixon J in *Parton* (**Vic [47]-[49]**).[27] All three propositions were rejected in *Ha*.[28] "The repetition on this occasion does nothing to enhance their cogency, despite the care and vigour with which they [have been] presented".[29]

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[21] Because it goes to the construction of the Constitution: see *Thomas v Mowbray* (2007) 233 CLR 307 at [614] (Heydon J).

[22] Once those observations are accepted, the submissions that place weight on the notion of "commercial dealing" and "articles of commerce" (whatever those notions may mean) can therefore be put to one side: see **Vic [33]**, **Qld [8], [12]**; **ACT [23]-[24]**. In any event, *Ha* does not suggest those notions have any role to play: there is no reason to assume the references in that case to "dealing" mean "commercial dealing": see **Cth [3]**, **[14]-[15]**.

[23] *Ha* (1997) 189 CLR 465 at 493 (majority).

[24] *Ha* (1997) 189 CLR 465 at 499 (majority).

[25] See also **Qld [44]-[55]**; **NT [30]-[34]**. Cf **PS [18]**; **Cth [7]**; **WA [43]**.

[26] See also **Qld [53]**; **NT [45]-[52]**.

[27] See also **Qld [56]-[64]**; **Tas [36]-[40]**, **NT [35]-[44]**.

[28] See *Ha* (1997) 189 CLR 465 at 491-496 (majority). See also *Betfair [No 1]* (2008) 234 CLR 418 at [13], [22] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[29] *Ha* (1997) 189 CLR 465 at 499 (majority).