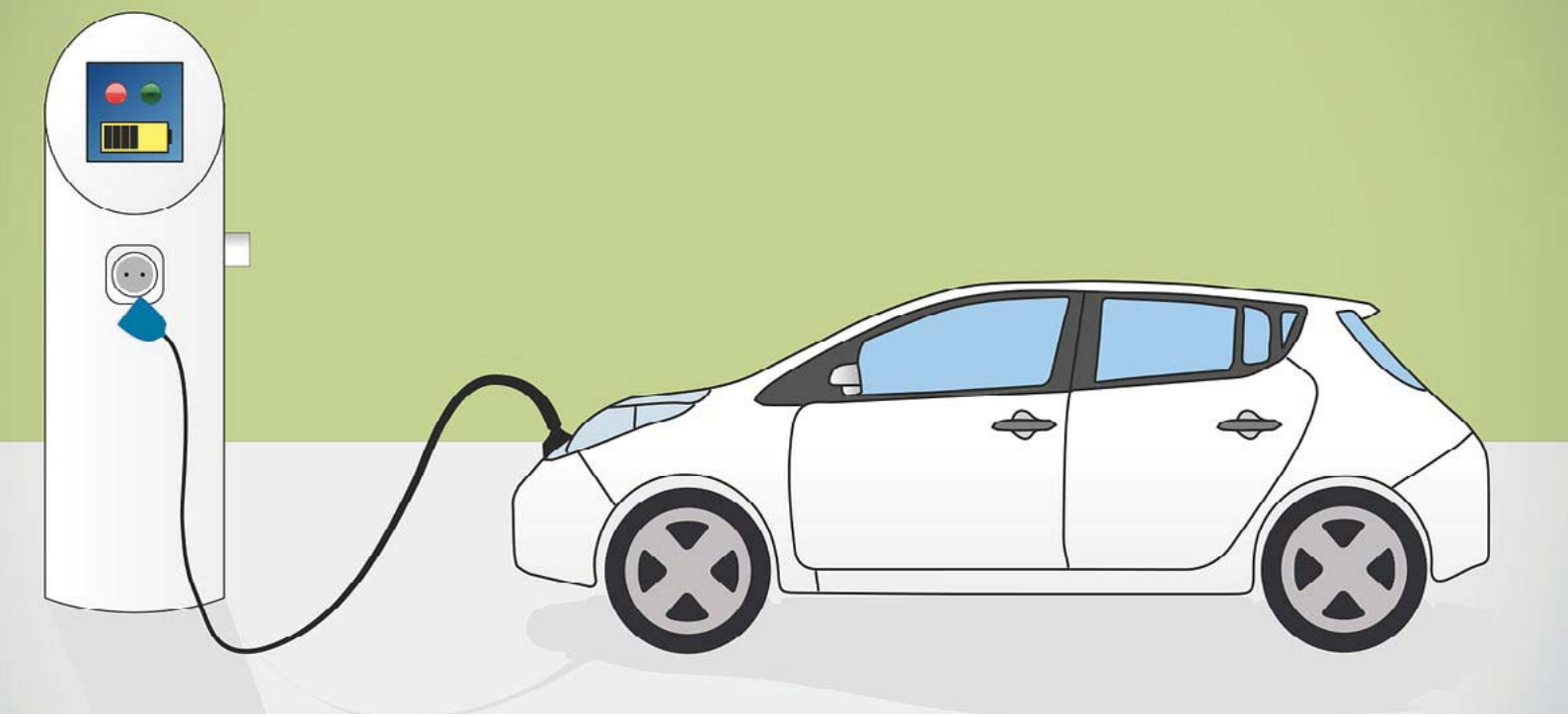
A (still) 'hateful' tax, a fresh start and a constitutional milestone

Vanderstock v Victoria [2023] HCA 30



Hamilton Zhao
Frederick Jordan Chambers

On 18 October 2023, the High Court found, by a majority of 4:3, that s 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ('*ZLEV Charge Act*') imposed a duty of excise within the meaning of s 90 of the *Constitution* and was therefore invalid as being beyond the powers of the Victorian Parliament. Five separate judgments were delivered by the court: two by the majority judges (Kiefel CJ, Gageler and Gleeson JJ, Jagot J agreeing) and three by the minority judges (Gordon J, Edelman J, and Steward J dissenting). The case is notable for the groundbreaking expansion of the categories of taxes on goods falling within the scope of duties of excise for the purposes of s 90 of the *Constitution* to those that are imposed at the stage of consumption, and for the concomitant consequences that it holds for the future of taxes that may be imposed by the states. It is also notable for the justices' divergent views as to the decision's jurisprudential basis and its implications for the federal structure.

Context

On 1 July 2021, Victoria enacted the *ZLEV Charge Act*. The *ZLEV Charge Act* sought to impose a charge on the use of zero and low emission vehicles ('ZLEVs') on certain (or 'specified') roads. Section 7(1) of the *ZLEV Charge Act* was the critical provision seeking to give effect to that aim.

The definition of 'specified road' in the *ZLEV Charge Act* was broad. It encompassed any area of land, public or private inside or outside Victoria, over which the public has a right of way.

The rate of the charge imposed by sub-ss 7(1) and (2) of the *ZLEV Charge Act* was a fixed amount travelled by a ZLEV on specified roads. In the 2021–22 financial year, the amount was 2.5 cents per kilometre for a ZLEV that was an electric or hydrogen vehicle and 2 cents per kilometre for one that was a plug-in hybrid vehicle (Keifel CJ, Gageler and Gleeson JJ: at [177]).

The charge was payable by the registered operator of a ZLEV, and the Secretary of the Victorian Department of Transport was responsible for its administration. It was required, through mechanisms stipulated in the *ZLEV Charge Act*, to determine the amount of the ZLEV charge payable by the registered operator and collect the charged amount (together with any interest) as a debt due

to Victoria. The Secretary had the power to impose penalties consequent upon a failure by the registered operator to pay the charged amount (which included the cancellation of the relevant ZLEV's registration).

The plaintiffs were registered operators of ZLEVs, with the first plaintiff operating an electric vehicle and the second plaintiff a plug-in hybrid electric vehicle. They challenged the validity of the *ZLEV Charge Act* as a law of the Parliament of Victoria imposing an excise and hence contrary to s 90 of the *Constitution*.

The meaning of 'excise' after a century

The decision is a culmination of a century of jurisprudence on s 90 of the *Constitution*.

All members of the court undertook a thorough examination of that jurisprudence and its historical roots. However, that exploration resulted in divergent views as to the history and in significant but uncertain consequences for the future of s 90.

A critical issue which divided the court is whether a tax imposed at or after the stage of 'consumption' of goods was properly an 'excise' within the meaning of s 90. The plaintiffs sought to reopen *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 ('*Dickenson's Arcade*'), where a majority of the court had held that a tax on the consumption of goods after they were in the hands of consumers was not an excise.

The majority in *Vanderstock v Victoria* [2023] HCA 30 ('*Vanderstock*') held that a tax properly characterised as a tax on goods may be a duty of excise if it is imposed at the stage of consumption of those goods, and in so doing overruled *Dickenson's Arcade* (at [133]–[134]). The minority considered that the *ZLEV Charge Act* did not impose an excise, because taxes imposed at the stage of consumption do not constitute an excise. The minority judges each expressed the view that the majority's decision was contrary to precedent and would have far-reaching consequences for taxes imposed by the states.

The majority's decision

The crux of the majority's decision lies in the reformulation of an excise within the meaning of s 90 of the *Constitution*. In short, on the majority's view, for a tax to qualify as an excise, (a) it must bear a close relation to the production or manufacture, sale, distribution, or *consumption* of goods and (b) the tax must be of such a nature as to affect the goods as the subjects of manufacture or production or as articles of commerce (Keifel CJ, Gageler and Gleeson JJ: at [147] and [148], Jagot J agreeing: at [885]–[892]).

Applying that reformulated test for an excise, the majority held that the *ZLEV Charge Act* imposed an excise as a tax which runs with goods (viz, ZLEVs) where (a) the ZLEV charge is levied periodically so long as the predominant (if not sole) use of a ZLEV is being driven on specified roads by its registered operator and any subsequent persons to whom the ZLEV's registration may be transferred and (b) its capacity to increase the cost of ZLEVs has a natural tendency to dampen their demand because prospective purchasers acting rationally would factor the charge into the prices they are prepared to pay for ZLEVs in the same manner as they would for non-ZLEV vehicles (at [192]). As addressed below, the minority (in particular, Edelman J) disagreed with the latter proposition.

At the end of the joint reasons (at [197] and [198]), two further points about the purpose of s 90 were made to justify holding that the *ZLEV Charge Act* imposed an excise. First, ss 90 and 92 of the *Constitution* combine to ensure that within the free trade area comprising Australia's geographic area, Australians are guaranteed equality in the taxes they are required to bear as consumers of all goods (including ZLEVs), and insofar as that purpose is concerned any taxes on goods can only be imposed by uniform national legislation. Second, the exclusive power of the Commonwealth Parliament under s 90 to impose excise ensures that uniform laws of trade or commerce or taxation it enacts for the purpose of stimulating demands for ZLEVs to reduce greenhouse gas emissions and to fulfil Australia's international treaty obligations are not interfered with by state or territory taxes on ZLEVs or other goods. To that end, any loss in revenue of the states and territories due to the decrease in fuel excise caused by an increased uptake of ZLEVs can only be offset by Commonwealth legislation imposing taxes of a similar nature.

The minority took issue with the majority's views on those two matters (see for example Gordon J: at [418]–[420]; Edelman J: at [515]–[516]).

The dissentients' views

Each of the minority judges wrote lengthy dissents. They extensively canvassed and addressed the text and context of s 90 (including its history) as well as constitutional principles and the consequences of the majority's ruling (in overruling past precedents and its impact on the states' taxing powers).

Two crucial concerns emerging from the dissents are the erosion of the states' taxation powers and the effect on taxes hitherto imposed by them (such as land and payroll taxes) that were previously beyond the bounds of excise for the purposes of s 90 of the *Constitution*.

In particular, Justice Edelman held that an excise must have a substantive economic effect on the supply in the market of the good on which the applicable tax is imposed, and such effect must also be a direct effect in that market rather than an effect that arises indirectly due to an economic effect in a different market (at [443]). His Honour considered the supply and direct effect constraints as critical matters which are essential to the proper characterisation of a tax as an excise (at [446]–[453]).

His Honour also expressed the view that the majority's extension of the meaning of an excise to a tax with a reasonably anticipated effect on the demand of a good (and their consumption) was contrary to a significant volume of precedent, citing over the course of a paragraph (at [651]) with two pages of footnotes, all of the justices of the High Court who were 'wrong' according to the majority's reasons (at [650]–[652]).

Future consequences – clarity achieved or a fresh start?

It is clear the court remains divided by the 'hateful' tax (Steward J: at [708]) that is an excise, and 'fresh' starts may be required as to what imposts would constitute excise for the purposes of s 90 of the *Constitution* in view of the expanded scope of duties of excise as laid down by the majority of the High Court – which in turn calls into question the scope of state taxes (see Gordon J: at [416] and Edelman J: at [457], [480]–[482], [531], [616]–[617], [672]–[678] and [703]).

It has been said that the majority's reformulation of excise leads to uncertainty as to the scope and limit of s 90 of the *Constitution*. A road of litigation may need to be travelled to determine if that is correct. There is at least one current case in the New South Wales Supreme Court that will be affected by the outcome of *Vanderstock*, being the current challenge to the imposition of payroll tax by s 6 and pt 8 of the *Payroll Tax Act 2007* (NSW) in *Aymsheen Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 1237.[1]

Ultimately, this decision may be a fresh beginning for a new line of s 90 jurisprudence: only time will tell if that is so. BN

ENDNOTES

1 Proceedings No. 2023/116760.