CONSUMPTION TAXES AND SECTION 90: AN ANALYSIS ON THE LAW OF EXCISES

WINSTON LI

Word count: 3511

The University of Adelaide – Law and Justice Internship (LAW 3527)

CONTENTS

CONSUMPTION TAXES AND SECTION 90: AN ANALYSIS ON THE LAW OF EXCISES

I INTRODUCTION

Enacted by the Victorian Parliament, the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ('**Act**') entered into force on 1 July 2021.[1] Section 7(1) of the Act requires that the registered operator of an electric, hybrid, or hydrogen vehicle ('**ZLEV**') 'pay a charge for use of the ZLEV on specified roads' ('**ZLEV Charge**').[2] On 16 September 2021, two ZLEV owners issued a writ of summons in the High Court of Australia against the State of Victoria ('***Vanderstock v Victoria***'), contending that s 7(1) of the Act is invalid as it imposes a 'duty of excise' within the meaning of s 90 of the *Australian Constitution*, and is therefore beyond the legislative power of the Victorian Parliament.[3]

The case raises two questions for the High Court's consideration. First, whether a tax imposed on the consumption of goods is a duty of excise within the meaning of s 90, and second, whether the ZLEV Charge is such a tax (being a tax on the use of a ZLEV). The High Court's most recent formulation of excise duties in the case of *Ngo Ngo Ha v New South Wales* ('***Ha***')[4] put simply that a 'duty of excise' is 'a tax on a step in the production or distribution of goods to the point of receipt by the consumer'.[5] There, the Court left open the issue of consumption taxes. However, the view that excise duties excluded taxes on consumption was previously accepted in unanimity by the Court, although in obiter and not without criticism.[6]

---

1 *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) s 2 ('***ZLEV Charge Act***').

2 Specified roads being, in plain terms, State and public roads that are not private roads: Ibid s 3 (definition of 'specified road').

3 *Australian Constitution* s 90; Christopher Vanderstock and Kathleen Davies, 'Writ of Summons', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 16 September 2021.

4 (1997) 189 CLR 465, 490 (Brennan CJ, McHugh, Gummow and Kirby JJ) ('***Ha***').

5 *Ha* (n 5) 490 (Brennan CJ, McHugh, Gummow and Kirby JJ).

6 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 185–6 (Barwick CJ), 218–221 (Gibbs J), 230–1 (Stephens J), 239 (Mason J) ('***Dickenson's Arcade***'); *Bolton v Madsen* (1963) 110 CLR 264, 273 ('***Bolton***').

This essay addresses these criticisms in detail, which form the substantive arguments raised by the plaintiffs in *Vanderstock v Victoria*. Whilst there are numerous arguments pertinent to the reasoning and substance of the issue, this essay argues three key ones: the underlying purpose of s 90, the ordinary meaning of the word 'excise', and the economic effect of excise duties.

Ultimately, it will conclude that despite criticisms, a consumption tax should not be considered a duty of excise. It is fundamentally a tax attached to the *act of consumption*, lacking the necessary characteristics of a tax '*attached to goods*' through their commercial dealings, which is the essence of an excise duty.

II A HISTORY OF UNCERTAINTY

A *The beginnings of 'excise'*

1 *Earliest views*

It is clear at the outset that the word 'excise' has 'never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application'.[7] No common use of the term can be found in the Convention Debates of the 1890s.[8] When the High Court first considered the operation of s 90 in 1904, Starke J derived a formulation considering the ordinary meaning of the term as it was then used:

> [b]earing in mind that:
>
> - the *Constitution* was framed in Australia by Australians; and

---

7 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 293 ('***Matthews***').

8 *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 7 April 1891, 789-801 ('***The Sydney Convention Debates***'). See also William Blackstone, *Commentaries on the Laws of England* (Oxford Clarendon Press, 1st ed, 1753) Book 1, Ch 8, 308–10, 318 ('***Blackstone's Commentaries***'); Robert Harry Inglish Palgrave, *Dictionary of Political Economy Volume 1* (Cornell University Library, 1894) 786–787; Joseph Bateman, *The Laws of Excise* (A. Maxwell & Son, 1843) 6.

- for the use of the Australian people; and
- that the word "excise" had a distinct meaning in the popular mind; and
- that there were in the States many laws in force dealing with the subject; and
- that when used in the *Constitution* it is used in connection with the words 'on goods produced or manufactured in the States',

the conclusion is almost inevitable that, whenever it is used, *it is intended to mean a duty analogous to a customs duty imposed upon goods* either in relation to quantity or value *when produced or manufactured*, and *not in the sense of a direct tax* or personal tax ('***Peterswald* formulation**').[9]

Indeed, it is often the view of critics of the expanded scope of s 90 in later years that the High Court's dicta on the subject since ought to be discarded in favour of the narrower *Peterswald* formulation.[10] That expansion is argued by many to have been founded upon the irrational application of the distinction between 'direct' and 'indirect' taxes; the term 'direct taxation' being expressly used in s 92(2) of the *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3 ('***Canadian Constitution***'), the Canadian 'equivalent' to s 90.

2 *Direct and indirect taxes*

More than thirty years after *Peterswald* in *Matthews v Chicory Marketing Board (Vic)* ('***Matthews***'),[11] Dixon J (as his Honour then was) qualified the *Peterswald* formulation with the statement that 'customs or excise duties on commodities ordinarily regarded as indirect taxation … are duties which are imposed in respect of commercial dealings'.[12] Considering

9 *Peterswald v Bartley* (1904) 1 CLR 497, 509 (emphasis added) (formatted for clarity) ('***Peterswald***').
10 See, eg, *Ha* (n 5) 510 (Dawson, Toohey and Gaudron JJ in dissent).
11 *Matthews* (n 7).
12 Ibid 284 (Dixon J).

what was meant by the words of Starke J, 'not in the sense of a direct tax', his Honour explained:

> a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another.[13]

With that analogy, his Honour cited examples of Canadian Privy Council decisions where duties of excise were referred to as types of indirect taxation,[14] and held that duties of excise were regarded – by their ordinary meaning – as forms of 'indirect taxation' imposed in respect of commercial dealings.[15] Thus, his Honour reasoned that the scope of s 90 – as an indirect tax – should extend beyond production and manufacture, finding that a duty of excise is a tax:

> levied "upon goods" … [bearing] a close relation to the production or manufacture, *the sale or the consumption* of goods and must be of such a nature as to affect them as the subjects of manufacture or production or *as articles of commerce*.[16]

3 *Consumption a direct tax*

Five years after *Matthews* in *Atlantic Smoke Shops v Conlon* ('***Atlantic Smoke Shops***'),[17] the Privy Council held – again considering the *Canadian Constitution* – that a tax on consumption is a 'direct tax', being paid by the final consumer who lacks the ability to pass the tax on to

---

13 Ibid 301 (Dixon J).

14 See *Attorney-General for Manitoba v Attorney-General for Canada (No 2)* [1925] AC 561; *City of Halifax v Fairbanks' Estate* [1928] AC 117; *Attorney-General for British Columbia v McDonald Murphy Lumber Co* [1930] AC 357; *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168; *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357.

15 *Matthews* (n 7) 284 citing *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45, 59.

16 Ibid 304 (emphasis added).

17 [1943] AC 550.

another by 'subsequent dealing'.[18] When the High Court was called to reconsider the issue in *Parton v Milk Board (Vic)* ('***Parton***'),[19] Dixon J accepted the Privy Council's view:

> [i]n *Matthews*, I examined the history of the word "excise" and its meaning and … [i]t is probably a safe inference from *Atlantic Smoke Shops*, which has since been decided, that a tax on consumers or upon consumption cannot be an excise.[20]

Therein lies the critical issue that has plagued the Court since: whether Dixon J's reasoning in applying *Atlantic Smoke Shops* and other Canadian cases on s 92(2) – that considered a separate constitution not like ours, despite the native considerations expressed by Starke J in his *Peterswald* formulation – was correct and whether it ought to be overturned. While an excise duty may be a form of indirect taxation, is that necessarily exclusive of direct taxes that, in any case, are attached to goods? That is the question posed by subsequent criticisms.

B *Parton to Dickenson's Arcade*

Parton was later entrenched by a number of High Court decisions, with Dixon CJ leading the Court.[21] By the time of *Dickenson's Arcade Pty Ltd v Tasmania* ('***Dickenson's Arcade***')[22] in 1974, it was 'well-accepted' that once a commodity had reached the hands of a consumer, a tax imposed by reference to that commodity would not be an excise.[23] In that time, the High Court had unanimously derived and approved a new formulation, that a duty of excise, in its essence, is a tax upon:

---

18 *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550, 563.
19 (1949) 80 CLR 229 ('***Parton***').
20 Ibid 261 (Dixon J) (citations omitted).
21 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Bolton v Madsen* (n 6); *Dickenson's Arcade* (n 6); *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 ('***Capital Duplicators (No 2)***'); *Ha* (n 5); *Commissioner for ACT Revenue v Kithock Pty Ltd* (2000) 102 FCR 42.
22 *Dickenson's Arcade* (n 6).
23 *Bolton* (n 6) 273 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

> the taking of a step in a process of bringing goods into existence or to a consumable state or of passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer.[24]

But while the Court entrenched this qualification with Dixon CJ leading it, it was not without dissent or criticism from other judges.

1 *Judicial criticisms*

The most critically acclaimed criticism of this reasoning on indirect taxation comes from the dissent of Fullagar J in *Dennis Hotels Pty Ltd v Victoria* ('***Dennis Hotels***').[25] There, four of five judges each individually accepted *Parton* with the view that it was binding, and with Dixon CJ restating his earlier reasons.[26]

Fullagar J's criticism begins with what his Honour considers to have been an incorrect interpretation of the then-leading decision on s 90, *Peterswald*, in *Matthews*. His Honour argued that:

> [a]ttention to it may have been invited by the concluding words … 'and not in the sense of a direct tax or personal tax'. But I understand [Starke J] to have intended by those words not to add anything by way of definition to what he had already said, but merely to give an example, by way of contradistinction, of something which would not be a duty of excise.[27]

His Honour further reasoned that the interpretation of s 90 had become clouded by Dixon J's references to Privy Council decisions that centred upon the distinction between 'direct' and 'indirect' taxes in the *Canadian Constitution*. His Honour reasoned:

---

24 Ibid applied in *Commissioner for ACT Revenue v Kithock Pty Ltd* (2000) 102 FCR 42, 48 [21].
25 (1960) 104 CLR 529 ('***Dennis Hotels***').
26 Ibid 540–1 (Dixon CJ), 559 (Kitto J), 573 (Taylor J), 558–90 (Menzies J).
27 Ibid 553 .

> [t]here can be no such justification … for the use of Canadian precedents, when we come to interpret our own s 90, which was adopted in a quite different setting and employs much more specific terminology [to the *Canadian Constitution*].[28]

In effect, his Honour sought to abandon the expansion of s 90 in favour of the original *Peterswald* formulation – 'what characterizes a duty of excise is that the taxpayer is taxed by reason of, and by reference to, his *production or manufacture* of goods'.[29]

While accepting *Parton*, Menzies J further reasoned that categorising an excise duty as indirect 'is not more than one factor in favour of the conclusion that [a tax] is an excise'.[30]

2 *Accepting the position*

By 1974 – after Dixon CJ had retired from the Court – the qualification first expressed in *Parton* remained accepted, notwithstanding each of their Honours' reservations. Barwick CJ, for example, toiled with the fact that there 'was no logical reason … for ending at the point of entry into consumption', but 'in deference to the views expressed by other Justices, … accepted the limitation'.[31] Menzies J, similarly compelled by prior unanimity of the Court, also accepted the position.[32] Gibbs J went further, recognising that:

> since *Parton* no member of the Court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise.[33]

---

28 Ibid 554.
29 Ibid 555.
30 Ibid 590.
31 *Dickenson's Arcade* (n 6) 185–6.
32 Ibid 209.
33 Ibid 221.

While Gibbs J acknowledged that the position was always expressed in obiter, the Court's unanimity should nonetheless be given the 'greatest weight'.[34] Notwithstanding his acceptance of the position, his Honour held reservations against the economic and practical rationale of excluding consumption taxes. In his Honour's opinion, it would be impossible to distinguish between the effect of a tax over the last retail sale and the act of consumption, and a tax on either would produce 'exactly the same economic effect on production and manufacture as would a tax on the last retail sale'.[35]

3 *The question at issue*

Regardless of these criticisms, Stephens J sharply pointed out that the economic effect of a tax 'cannot constitute any conclusive determinant of the character of a tax as an excise';[36] it is the textual meaning of s 90 which is the issue. His Honour further contended that '[n]o convincing reasons have, in my view, been advanced before us for the adoption now of any new meaning of the phrase 'duty of excise' so as to include a tax on consumption'.[37]

III JUDICIAL AND POLICY PERSPECTIVES

Despite judicial criticisms on the matter, analysis must be had to the practical effect of how duties of excise are applied. These considerations look to the substantive reasons behind the cases: the underlying purpose of s 90, the ordinary meaning of the word 'excise', and the economic effect of excise duties.

---

34 Ibid.
35 Ibid 218–19.
36 Ibid 230.
37 Ibid 230.

A *The underlying purpose*

1 *An economic union*

It is a longstanding view that s 90 is unequivocally 'intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action'.[38] That is a factor that must be considered in interpreting s 90, where the Convention Debates shine no light on the particular meaning of the words.[39]

To give effect to this purpose, it has been strongly reasoned that s 90 must be construed as 'exhausting the categories of taxes on goods'.[40] In other words, there can be no taxes on goods that are not within the scope of s 90. Such a view would effectively give Parliament exclusive power over taxes imposed on goods, enabling a single scheme for the taxation of goods across the Commonwealth.[41] If consumption taxes were excluded:

> [the] purpose which uniformity of customs, excise and bounties was intended to achieve would be prejudiced and the Parliament would not have effective control over economic policy affecting the supply and price of goods throughout the Commonwealth.[42]

Considered in the context of *Vanderstock v Victoria*, this argument encourages the implementation of a *national* ZLEV Charge.[43]

---

38 *Parton* (n 19) 260 (Dixon J); *The Sydney Convention Debates* (n 8) 789–801. See also Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 530.

39 *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).

40 *Capital Duplicators (No 2)* (n 21) 590.

41 Ibid 586.

42 Ibid.

43 Australian Trucking Association, 'Proposed Submissions of the Australian Trucking Association', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 4 October 2022, [12]–[15].

2 *The States' taxing power*

Arising from the same argument is the need to avoid having two sets of customs and excise duties in existence within the Commonwealth – to facilitate interstate free trade on the basis of a uniform tariff.[44] In that sense, the Convention Debates on s 90 always considered the *existing* customs and excise duties imposed by each of the colonies as they then were.[45]

That need is recognised by the High Court, in that Ch IV 'ordain[s] that the Commonwealth be an economic union, not an association of States each with its own domestic economy'.[46] Applying a purposive approach to interpreting s 90, it follows that taxes on the consumption of goods should be regulated uniformly by the Federal Parliament, not by a disparate set of individual State taxes. The plaintiffs make this argument against the ZLEV Charge,[47] which should be a uniform, national charge – the taxing of road travel by ZLEVs, projected to soon occur regularly across State borders, should require a uniform tariff at a federal level.

B *The ordinary meaning – a 'trading tax'*

The contextual meaning of the term, 'excise', may be clarified by its usage alongside 'customs' in s 90. In *Matthews*, Dixon J noted that:

> [c]ustoms and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.[48]

---

44 *The Sydney Convention Debates* (n 8) 789–801; Moore (n 38) 530. See also *Australian Constitution* s 92.

45 Ibid.

46 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399, 426 (Mason CJ, Brennan, Deane and McHugh JJ) ('***Philip Morris***').

47 Christopher Vanderstock and Kathleen Davies, 'Submissions of the Plaintiffs', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 19 September 2022. See also Commonwealth of Australia, 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 4 October 2022; Australian Trucking Association (n 43).

48 *Matthews* (n 7) 59 (Dixon J) citing *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45, 59.

That distinction is apparent in the ordinary usage of the term at Federation, with reference to the various duties of customs and excise imposed by each of the colonies as they then were.[49] While that comparison is sensible, the question is whether that analogy of trading taxes must then exclude all forms of direct taxation that may relate to goods, such as taxes on consumption. In *Dickenson's Arcade*, Stephens J considered that an excise duty is a trading tax first, and an indirect tax second.[50] Customs and excise duties – dealt with together under s 90 – are duties imposed in respect of commercial dealings in commodities that are, in essence, trading taxes – a consumption tax is no such tax.

The words 'customs' and 'excise', being two forms of duties both dealt with under s 90, are inherently treated alike.[51] This view accords with the original *Peterswald* formulation – that a duty of excise is analogous to a customs duty imposed upon goods.[52] With this in mind:

> the preferable view is to regard the distinction between duties of customs and duties of excise as dependent on the step which attracts the tax: importation or exportation in the case of customs duties; *production, manufacture, sale or distribution* — inland taxes — in the case of excise duties.[53]

Additionally, direct taxes are inherently less closely related to goods than other indirect taxes and are, to that extent, less likely to be 'directly related to goods' as those words are used in s 90.[54] Thus, whether or not an excise is a direct or indirect tax is insignificant. As Menzies J recognised, 'a duty of excise will generally be an indirect tax … because it is a tax upon goods rather than a tax upon persons'.[55] Under this view, the High Court may be asked to consider

---

49 *Blackstone's Commentaries* (n 8) Book 1, Ch 8, 308–10, 318; Moore (n 38) 530. See also Palgrave (n 8) 786–787; Bateman (n 8) 6; John Owens, *A History of the Excise* (Fb&c Limited, 1879) 1.

50 *Dickenson's Arcade* (n 6) 230–1.

51 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 15 February 1898, 940–2.

52 See *Peterswald* (n 9) 509 (Starke J).

53 *Capital Duplicators (No 2)* (n 21) 590 (Mason CJ, Brennan, Deane and McHugh JJ) (emphasis added).

54 *Bolton* (n 6) 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Own JJ).

55 *Dennis Hotels* (n 25) 555.

whether the ZLEV Charge is a 'consumption tax' attached to the ZLEV itself, or merely the activity of operating a ZLEV.

C *Economic effect*

1 *Indirect in effect*

Looking to the economic effect, it is necessary to define the relevant activity. In *Dickenson's Arcade*, Barwick CJ described consumption as 'the act of the person in possession of the goods in using them or in destroying them by use';[56] the ZLEV Charge is a tax on such a use. Then considering the economic effect or purpose of s 90:

> the reason why a tax upon any step in the production, manufacture, sale or distribution of goods is held to be a duty of excise is that such a tax has *a general tendency to be passed on to persons down the line to the consumer and will prejudice demand for the goods* burdened by the imposition of the tax.[57]

Consequently, it may be illogical to exclude a tax directly imposed on the ultimate consumer – demand for the goods will be burdened by the economic effect of the relevant tax.[58] However, the contrary argument arises where the volume of consumption cannot be predicted to any degree of certainty – that necessarily makes it difficult to impose the value of the tax as a component of the purchase price.[59] The economic effect of taxing consumption and purchase for consumption becomes distinctly different.[60] This is the case such as for the ZLEV Charge, where the anticipated use at the time of purchase is purely speculative; the value of the tax – the amount of driving on specified roads – cannot be 'excised' from the purchase price so as to

---

56 *Dickenson's Arcade* (n 6) 187.
57 *Philip Morris* (n 46) 436 (Mason CJ, Brennan, Deane and McHugh JJ) (emphasis added).
58 See also *Matthews* (n 7) 301 (Dixon J).
59 Heinz W Arndt, 'Judicial review under section 90 of the Constitution: An economist's view' (1952) 25(11) *Australian Law Journal* 667, 669–70.
60 Cf *Dickenson's Arcade* (n 6) 218–19 (Gibbs J).

affect demand for ZLEVs. It therefore becomes difficult to define the economic effect of such a charge, and it follows that a tax on this consumption lacks the economic effect of an excise duty – it is not 'attached to goods'[61] per se. But that is not necessarily the case for goods destroyed by consumption.[62]

2 *Consumption compared with a licence*

It is well-established that a licence to sell goods is not an excise.[63] That is because it holds '*no closer connection* with production or distribution than that it is exacted for *the privilege of engaging in the process*'.[64] To that extent, it must be reasoned whether a tax on consumption is, in substance, attached to the goods which are being consumed, or merely the activity of consuming them – that must be the ultimate question that informs whether such a tax is of the kind intended to be governed by s 90.[65]

That question revives the earlier consideration – whether a consumption tax is a direct tax that is inherently less closely related to goods than other forms of excise duties. It is a question similarly tied with the reasoning of why a licence fee is not an excise.[66] A tax on the consumption of a good that is not destroyed through use cannot then be tied to the 'quantity or value' of the goods.[67] In saying so, it should be noted that judicial criticisms of *Parton* occurred during a time when taxes on the continued consumption of the *same goods* were thought to be implausible or impractical.[68]

---

61 See *Matthews* (n 7) 301 (Dixon J).
62 See, eg, *Dickenson's Arcade* (n 6) 218–19 (Gibbs J).
63 *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).
64 *Dennis Hotels* (n 25) 560 (Kitto J); Ibid 501 (Brennan CJ, McHugh, Gummow and Kirby JJ) (emphasis added).
65 See, eg, the construction of an *ad valorem* 'licence fee' as an excise: *Dennis Hotels* (n 25) 592 (Windeyer J).
66 *Dennis Hotels* (n 25) 592 (Windeyer J). See also John G Wilkin, '*Dennis Hotels Pty Ltd v Victoria*' (1960) 2(4) *Melbourne University Law Review* 543–549.
67 *Peterswald* (n 9) 509 (Starke J).
68 See, eg, *Dickenson's Arcade* (n 6) 187, 190–2 (Barwick CJ), 218–19 (Gibbs J).

By way of example, the ZLEV Charge is only imposed for use on public roads.[69] It must then follow that the ZLEV Charge is a tax attached to the *activity* of using a ZLEV on public roads, and not *use* of the ZLEV itself.

IV CONCLUSION

Whether Dixon CJ was correct to apply Canadian precedents is settled, subject to the High Court re-opening *Dickenson's Arcade*. Whether it does so is subject to a multitude of considerations. This essay has raised three key arguments that examine whether duties of excise should include taxes on the consumption of goods.

The argument of fiscal unity across the Commonwealth tends to favour overturning *Dickenson's Arcade*, finding that duties of excise include consumption taxes. That position gives complete control over the taxation of goods to the Federal Parliament.

On the contrary, it is long considered that a duty of excise is fundamentally a trading tax imposed upon commodities.[70] The practical application of such a duty – affecting demand for the relevant goods through imposing of the duty, and the attachment of the duty to the goods themselves and not the activity engaged in – tend to suggest that a consumption tax is fundamentally no excise. Thus, while the later Court may have been correct to criticise Dixon CJ's reliance on foreign precedents – especially in light of the expansion of s 90 since *Peterswald* – a consumption tax is not of the kind of an excise duty.

In conclusion, it the author's view that in consideration of these arguments, the High Court should answer the first question posed in *Vanderstock v Victoria* in the negative, or in the

69 *ZLEV Charge Act* ss 3, 7(1).
70 Dating back as far as 1753: see *Blackstone's Commentaries* (n 8) Book 1, Ch 8, 308–10.

alternative, find that excise duties on consumption should be confined to goods that are *destroyed* by their use. The ZLEV Charge is, on this view, no excise.

V BIBLIOGRAPHY

A *Articles / Books / Reports*

Heinz W Arndt, 'Judicial review under section 90 of the Constitution: An economist's view' (1952) 25(11) *Australian Law Journal* 667

Joseph Bateman, *The Laws of Excise* (A. Maxwell & Son, 1843) 6.

William Blackstone, *Commentaries on the Laws of England* (Oxford Clarendon Press, 1st ed, 1753) Book I.

Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910)

Official Record of the Debates of the Australasian Federal Convention, Melbourne, 15 February 1898

Official Record of the Debates of the Australasian Federal Convention, Sydney, 7 April 1891

John Owens, *A History of the Excise* (Fb&c Limited, 1879) 1.

Robert Harry Inglish Palgrave, *Dictionary of Political Economy Volume 1* (Cornell University Library, 1894)

John G Wilkin, '*Dennis Hotels Pty Ltd v Victoria*' (1960) 2(4) *Melbourne University Law Review* 543

B *Cases*

Atlantic Smoke Shops Ltd v Conlon [1943] AC 550

Attorney-General for British Columbia v Kingcome Navigation Co [1934] AC 45

Attorney-General for British Columbia v McDonald Murphy Lumber Co [1930] AC 357

Attorney-General for Manitoba v Attorney-General for Canada (No 2) [1925] AC 561

Bolton v Madsen (1963) 110 CLR 264

Capital Duplicators Pty Ltd v Australian Capital Territory (No 2) (1993) 178 CLR 561

City of Halifax v Fairbanks' Estate [1928] AC 117

Commissioner for ACT Revenue v Kithock Pty Ltd (2000) 102 FCR 42

Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529

Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177

Lawson v Interior Tree Fruit and Vegetable Committee of Direction [1931] SCR 357

Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd [1933] AC 168

Matthews v Chicory Marketing Board (Vic) (1938) 60 CLR 263

Ngo Ngo Ha v New South Wales (1997) 189 CLR 465

Parton v Milk Board (Vic) (1949) 80 CLR 229

Peterswald v Bartley (1904) 1 CLR 497

Philip Morris Ltd v Commissioner of Business Franchises (Vict) (1989) 167 CLR 399

C *Legislation*

Australian Constitution

Constitution Act 1867 (Imp) 30 & 31 Vict, c 3

Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic)

D *Other*

Australian Trucking Association, 'Proposed Submissions of the Australian Trucking Association', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 4 October 2022

Christopher Vanderstock and Kathleen Davies, 'Writ of Summons', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 16 September 2021.

Christopher Vanderstock and Kathleen Davies, 'Submissions of the Plaintiffs', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 19 September 2022

Commonwealth of Australia, 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Vanderstock & Anor v. The State of Victoria*, M61/2021, 4 October 2022