

Before the High Court

Vanderstock v Victoria: Are “True” Consumption Taxes Forbidden to the States by Section 90 of the Australian Constitution?

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Abstract

The High Court of Australia will soon consider a constitutional challenge to recent Victorian legislation that imposes a fee on the use of a zero or low-emission vehicle. The challenge argues that such a fee is an excise tax, prohibited to the States by s 90 of the *Australian Constitution*. The Court will need to consider the current orthodoxy that a consumption tax is not an excise, and its longstanding interpretation of s 90. This column submits the High Court should extend the existing definition of excise to include true taxes on consumption. This would be most consistent with the view of the purpose of s 90 accepted by the High Court since 1949, and would remove an anomaly from existing law.

Please cite as:

Anthony Gray, ‘*Vanderstock v Victoria: Are “True” Consumption Taxes Forbidden to the States by Section 90 of the Australian Constitution?*’ (2022) 44(4) *Sydney Law Review* 591.



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I Introduction

The Victorian Parliament enacted the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (*'ZLEV Act'*). As the name suggests, the legislation imposes a charge on those using a zero and low-emission vehicle (*'ZLEV'*) on public roads. The charge paid depends on the extent of use of such roads in a given period. A current constitutional challenge, *Vanderstock v Victoria*,¹ argues that the *ZLEV Act* infringes s 90 of the *Australian Constitution*. Other Australian States and Territories have intervened to support Victoria, the Commonwealth has intervened,² and the Australian Trucking Association (*'ATA'*) seeks to intervene as *amicus curiae*, to support the challenge.³ Victoria defends the constitutionality of the legislation.⁴ Section 90 prohibits States from imposing customs duties and excise taxes. The challenge argues the legislation imposes an excise. As outlined below in Parts III–IV of this column, the High Court of Australia has struggled to interpret the excise prohibition. There has been disagreement over the definition of excise, the purpose of the provision, and the correct approach. The High Court has not interpreted s 90 since 1997 in *Ha v New South Wales*, a 4:3 decision.⁵

The term *'consumption tax'* can refer to different kinds of tax. A consumption tax may be intended to mean a simple sales tax,⁶ like the Goods and Services Tax (*'GST'*). This is *not* how the term consumption tax is used here. The GST is Commonwealth-imposed. The fact that all revenue raised from it flows to the States is irrelevant to constitutional validity. It is constitutionally valid as a tax imposed by the Federal Parliament pursuant to s 51(ii) of the *Australian Constitution*.⁷ Clearly, if the States sought to impose a tax on goods like the GST, this would offend s 90.⁸

The Victorian provision imposes a *'true'* consumption tax because it is imposed on the act of consumption of something. This differs from a tax imposed on the sale of something. The High Court has only twice directly answered whether a true consumption tax is an excise, and each time reached a different conclusion.⁹

¹ *Vanderstock v Victoria* (High Court of Australia, Case No M61/2021) (*'Vanderstock'*).

² Attorney-General (Cth), *'Submissions of the Attorney-General of the Commonwealth (Intervening)'*, Submission in *Vanderstock v Victoria*, Case No M61/2021, 4 October 2022 (*'Commonwealth's Submissions'*).

³ Australian Trucking Association (*'ATA'*), *'Proposed Submissions of the Australian Trucking Association'*, Seeking leave to be heard as *amicus curiae* in *Vanderstock v Victoria*, Case No M61/2021, 4 October 2022 (*'ATA's Submissions'*).

⁴ Victoria, *'Defendant's Submissions'*, Submission in *Vanderstock v Victoria*, Case No M61/2021, 19 September 2022 (*'Victoria's Submissions'*).

⁵ *Ha v New South Wales* (1997) 189 CLR 465 (*'Ha'*). *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 raised s 90, but it was decided on grounds that meant there was no substantive consideration of the section.

⁶ Eg, the mooted consumption tax of the mid-1980s was described as a *'sales tax'*: Treasury (Cth), *Reform of the Australian Tax System: Draft White Paper* (June 1985) [13B.1].

⁷ Justice Michelle Gordon *'The Commonwealth's Taxing Power and its Limits — Are We There Yet?'* (2013) 36(3) *Melbourne University Law Review* 1037, 1039–44.

⁸ *Commonwealth v South Australia; Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 (*'Oil Refineries Ltd'*).

⁹ The fee was held to be an invalid excise in *Oil Refineries Ltd* (n 8). The consumption tax was held not to be an excise in *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 (*'Dickenson's Arcade'*).

Further, there is doubt whether the more recent of these two decisions remains good law, as will be shown below in Part III. In *Vanderstock*, the plaintiffs argue that the Victorian legislation imposes a consumption tax, and as such is an ‘excise’ and invalid.¹⁰

II Outline of the *ZLEV Act*

Section 7 of the *ZLEV Act* requires the registered operator of a ZLEV to pay a charge for using it on specified roads. ‘Specified roads’ is defined in s 3 of the Act mainly to mean Victorian public roads. Section 8(1) states the rate charged is 2.5 cents per kilometre travelled during a financial year for a ZLEV that is an electric vehicle or hydrogen vehicle, and 2 cents per kilometre travelled during that year for a ZLEV that is a hybrid plug-in electric vehicle. Rates are indexed for inflation (s 9). The registered operator will make a declaration 14 days after the financial year (earlier if they sell the vehicle) indicating with evidence their odometer readings, so the required fee can be calculated and charged (ss 10–11).

Clearly, (a) this legislation imposes ‘a tax’; and (b) imposes it on consumption. The classic definition of a tax for constitutional law purposes is provided by Latham CJ in *Matthews v Chicory Marketing Board (Vic)* as a compulsory exaction of money by public authority for public purposes, and not a fee for services.¹¹ It is not exhaustive.¹² The charge in the *ZLEV Act* is compulsory for all who operate ZLEV vehicles on specified roads. Practical compulsion is sufficient; it is irrelevant a person could avoid the fee by not operating such a vehicle.¹³ The fee is charged by the Victorian Parliament and payable to the Department of Transport, a public authority, and for public purposes. No particular services are provided by the Department in return. This is a tax.

It is a tax *upon consumption*. Consumption of something typically means its use — in the case of something that is inedible, it means use or enjoyment of something.¹⁴ Thus, the Victorian legislation imposes a tax on consumption, because it is levied based on usage of a vehicle, reflected in kilometres travelled.¹⁵ Victoria disputes this, arguing it is a tax on an activity (albeit relating to goods), rather than a tax on the goods themselves.¹⁶ This is a technical and legalistic argument, given the activity relates directly to the use of goods, and the definition of ‘consumption’. A tax based on the quantity of a good planted has been held to be an excise; that tax was not seen to be based on the activity of planting.¹⁷ By similar reasoning, this tax is not a tax on activity, but in substance a tax on goods. As will be seen below in

¹⁰ Christopher Vanderstock and Kathleen Davies, ‘Submissions of the Plaintiffs’, Submission in *Vanderstock v Victoria*, Case No M61/2021, 19 September 2022, [3] (‘Plaintiffs’ Submissions’).

¹¹ *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 (‘*Matthews*’).

¹² *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 (all members of the Court).

¹³ *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390, 400 (Latham CJ).

¹⁴ In *Dickenson’s Arcade* (n 9), Barwick CJ (partly dissenting in the result) indicated that, in this context, consumption of goods meant ‘using them or in destroying them by use’: at 187.

¹⁵ Plaintiffs’ Submissions (n 10) [3], [46].

¹⁶ Victoria’s Submissions (n 4) [10]–[15].

¹⁷ *Matthews* (n 11) 281 (Rich J), 286 (Starke J), 303 (Dixon J).

Part V, the High Court now favours a substantive approach to questions regarding s 90 interpretation.

The remaining, much more complex question for the High Court is whether such tax on consumption is an ‘excise’ and constitutionally forbidden to the States. One way to make sense of the mass of case law concerning s 90 is to divide it according to the definition of ‘excise’ and the purpose of prohibiting States from levying excise duties, given most cases have discussed these issues. It is also how the plaintiffs’ claim has been developed in *Vanderstock*. Of course, definitional and purposive angles are not mutually exclusive — the cases generally discuss *both* matters in resolving whether a given fee is an excise. Nor are the matters entirely independent — generally, those who have taken a broader view of the definition of excise have also taken a broader view of the provision’s purpose; those who have taken a narrower view of the definition of excise have taken a narrower view of the provision’s purpose. This is demonstrated by the most recent High Court decision of *Ha*.¹⁸ The other issue addressed in the plaintiffs’ submissions concerns whether a formalistic or substantive view should be taken to s 90 of the *Australian Constitution*, which will be addressed below.

III Excise Definition

In the first s 90 case, *Peterswald v Bartley*, the High Court defined an excise as a tax on production or manufacture of goods.¹⁹ This view derives support from Quick and Garran,²⁰ authors of a noted early 20th century constitutional book and participants in the Convention Debates leading to the creation of the *Australian Constitution*, as well as from the surrounding context in which s 90 appears.²¹ The *Peterswald* definition is narrow, minimising the extent to which s 90 curbs States’ taxing power. At this time, the High Court applied ‘reserved powers’ reasoning, under which Commonwealth powers were read narrowly having regard to the position of the States. Clearly, s 90 concerns *State* power, but a narrow reading of the section effectively grants States more power. Reserved powers reasoning was abandoned by the High Court in 1920.²² *The Engineers’ Case* casts a long shadow over prior constitutional law decisions. It did not overrule them, but they are vulnerable to challenge on the basis they are irredeemably tainted by reserved powers reasoning, even if not explicitly.

¹⁸ In *Ha* (n 5) the majority (Brennan CJ, McHugh, Gummow and Kirby JJ) defined an excise broadly to include taxes on production, manufacture, distribution and sale and accepted the broad view of the purpose of s 90 first articulated in *Parton v Milk Board (Vic)* (1949) 80 CLR 229 (*‘Parton’*): *Ha* (n 5) 499. Whereas the *Ha* minority (Dawson, Toohey and Gaudron JJ) defined an excise narrowly to include taxes on production and manufacture, and accepted a narrow view of the purpose of s 90 related to control of tariff policy: *Ha* (n 5) 507 and 514.

¹⁹ *Peterswald v Bartley* (1904) 1 CLR 497 (*‘Peterswald’*).

²⁰ ‘The fundamental conception of the term is that of a tax on articles produced or manufactured in a country.’: John Quick and Robert Randolph Garran *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 837. See also 838.

²¹ *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561, 606–8 (Dawson J dissenting) (*‘Capital Duplicators’*); *Ha* (n 5) 505–6 (Dawson, Toohey and Gaudron JJ dissenting).

²² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*‘The Engineers’ Case’*).

There were other ways in which the early High Court view of excise was narrow. It required a direct relation exist between the fee charged and the quantity or value of goods produced or sold, to be considered a tax on goods.²³ Further, it considered an excise to be a tax on locally produced goods.²⁴ In this way, it was complementary to the concept of a customs duty, imposed on *imports*.

However, this narrow view of excise was eroded. In *Commonwealth Oil Refineries Ltd v South Australia*, the High Court determined taxes on *both* sale and consumption were excises.²⁵ This was contrary to the *Peterswald* definition that limited excises to taxes on production and manufacture. In *Matthews*, the need for a strict relation between the tax imposed and the quantity of goods produced or sold was loosened — a tax was held an excise there although imposed on land upon which a crop was planted.²⁶ There was no direct relationship between the tax and quantity of goods produced or sold, but a majority held the fee was an excise.²⁷ Further, it was suggested that an excise was not limited to taxes on domestic goods, as *Peterswald* had indicated.²⁸ Moreover, in *Matthews*, Dixon J held that a tax on consumption could be an excise.²⁹ Latham CJ agreed.³⁰ There was historical support for this, including Blackstone.³¹

However, after *Matthews*, the Privy Council in *Atlantic Smoke Shops Ltd v Conlon* considered an appeal from a Canadian decision that a consumption tax was not an excise.³² Although the position is not entirely clear (see further below) *Atlantic Smoke Shops* was considered to stand for the proposition that a consumption tax was not an excise. At that time, the High Court considered itself bound by Privy Council decisions, a position that only changed in 1978.³³ Thus, as a result of *Atlantic Smoke Shops*, Dixon J believed he had to alter the view expressed in *Matthews*. In *Parton v Milk Board (Vic)*³⁴ and the unanimous *Bolton v Madsen*,³⁵ it was accepted that an excise was a tax on production, manufacture, sale or

²³ *Peterswald* (n 19) 509.

²⁴ *Ibid* 508.

²⁵ Higgins J and Rich J defined excise duties to include taxes on sale and consumption: *Oil Refineries Ltd* (n 8) 435 (Higgins J), 437 (Rich J).

²⁶ *Matthews* (n 11).

²⁷ *Ibid* 281 (Rich J), 286 (Starke J), 287 (Dixon J). See also 279 (Latham CJ dissenting), 304 (McTiernan J dissenting).

²⁸ *Ibid* 299 (Dixon J). See also Rich J in *Oil Refineries Ltd* (n 8) 437.

²⁹ ‘There is no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption’: *Matthews* (n 11) 300.

³⁰ *Ibid* 277 (but dissenting in the result).

³¹ William Blackstone, *Commentaries on the Laws of England 1765–1769* (Clarendon Press, 1st ed, 1765) vol 1, 318–20.

³² *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 (‘*Atlantic Smoke Shops*’).

³³ *Viro v The Queen* (1978) 141 CLR 88, 93 (Barwick CJ), 120 (Gibbs J), 129 (Stephen J), 135 (Mason J), 151 (Jacobs J), 166 (Murphy J).

³⁴ *Parton* (n 18) 260 (Dixon J).

³⁵ *Bolton v Madsen* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ) (‘*Bolton*’).

distribution. Dixon J removed consumption taxes from his definition of excise, expressly because of *Atlantic Smoke Shops*.³⁶

This Canadian case therefore played a pivotal role in the constitutional question that the High Court of Australia will consider in *Vanderstock*. First, however, the different constitutional context in which the issue arose in *Atlantic Smoke Shops* must be acknowledged. Section 92 of the *British North America Act 1867* (UK) sets out matters over which provincial legislatures have exclusive power. One is direct taxation (s 92(2)). Provincial legislatures can enact direct, not indirect, taxation.³⁷ This distinction between direct and indirect taxation was important in the mid-19th century, under the influence of John Stuart Mill.³⁸ A direct tax was one demanded from the very persons whom it was intended would bear it. An indirect tax was one demanded from persons with the expectation that it be passed on to another. Mill noted an example of an indirect tax was an excise duty.³⁹ The Privy Council cited Mill and adopted this distinction in interpreting s 92.⁴⁰

In *Atlantic Smoke Shops*, the Privy Council considered the constitutional validity of a retail sales tax on tobacco, and a consumption tax payable by a person who brought tobacco into the province, or received delivery of it for consumption.⁴¹ It determined both were direct taxes, and valid. The Privy Council noted excise taxes were ‘usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise is plainly indirect’.⁴² This judgment has been read as having determined consumption taxes were not excises, because the consumption tax there was *direct* (imposed on the person expected to bear its incidence), and the Privy Council noted excise taxes were *indirect*. However, these comments were qualified with the word ‘usually’,⁴³ and an earlier Privy Council decision (also an appeal from Canada) had determined an excise tax *could* be direct.⁴⁴

Dixon J interpreted *Atlantic Smoke Shops* as requiring that Australian law no longer regard consumption taxes as excises. Notably, although his Honour changed his position to that extent, he did not change it in light of other observations in the passage from Viscount Simon.⁴⁵ That is, Dixon J (and Australian law)⁴⁶ did *not* accept excises were confined to taxes on home manufactured articles, and did *not*

³⁶ Ibid 261. In *Parton*, Rich and Williams JJ expressly adopted the wide definition, including consumption taxes, articulated by Dixon J in *Matthews* (n 11): *Parton* (n 18) 252–3.

³⁷ This is subject to s 122 of the *British North America Act 1867* (UK), preserving provincial customs and excise duties in place at the time of confederation.

³⁸ John Stuart Mill, *Principles of Political Economy* (John W Parker, 1848).

³⁹ *Atlantic Smoke Shops* (n 32) 568.

⁴⁰ *Attorney-General for Manitoba v Attorney-General for Canada* [1925] AC 561, 566, 568.

⁴¹ *Atlantic Smoke Shops* (n 32).

⁴² Ibid 565 (Viscount Simon for the Council).

⁴³ Ibid.

⁴⁴ *Attorney-General for British Columbia v Kingcome Navigation Co Ltd* noting that if a tax is demanded from the person intended to pay it, it was direct ‘and that it is none the less direct even if it might be described as an excise tax ... or collected as an excise tax’: [1934] AC 45, 55 (Lord Thankerton, for the Council).

⁴⁵ See above n 42 and text accompanying.

⁴⁶ Obviously, Dixon J was (and is) an extremely persuasive figure on the High Court, especially in matters of constitutional law, where his Honour’s view would typically (but not always) prevail: see, eg, John Eldridge and Timothy Pilkington *Sir Owen Dixon’s Legacy* (Federation Press, 2019).

confine excises to taxes on articles ‘in the course of manufacture’. Six years after *Atlantic Smoke Shops*, the High Court (with Dixon J in a leading role) reaffirmed taxes on the distribution of goods *were* excises,⁴⁷ contrary to the above passage. This position of the Court is the current orthodoxy.⁴⁸ His Honour did not resile from his previous position that excises were *not* limited to taxes on domestic goods. This position of the Court is also the current orthodoxy. Thus, of the three points made in the above passage by Viscount Simon, a majority of the High Court felt bound to accept only one.

It is regrettable that the High Court of Australia was so influenced by a decision (on one point) of the Privy Council on the interpretation of another nation’s Constitution, particularly where it made a distinction with no parallel here. The *Australian Constitution* makes no distinction between direct and indirect taxes. By the 1890s, when the *Australian Constitution* was being drafted, dissatisfaction with the direct/indirect taxation distinction was evident, leading to the drafters avoiding it in favour of using the word ‘excise’.⁴⁹ Though some s 90 decisions utilised the distinction,⁵⁰ hostility towards it grew over the years.⁵¹ Economic discourse no longer favours the distinction.⁵² The plaintiffs’ submissions in *Vanderstock* refer to ‘unwarranted deference’ afforded to *Atlantic Smoke Shops*.⁵³ Notably, Victoria’s submissions do not discuss the case or acknowledge its influence on the direction of the Australian jurisprudence.⁵⁴

⁴⁷ *Parton* (n 18).

⁴⁸ *Ha* (n 5) 499.

⁴⁹ Barry Gordon, ‘What is an Excise Duty? Nineteenth Century Literature and the *Australian Constitution*’ (1989) 11(1) *History of Economics Review* 22, 31.

⁵⁰ *Peterswald* (n 19) 511 (Griffith CJ for the Court: ‘it was contended for the respondent that the tax is in substance an indirect tax and *therefore* obnoxious to the restrictive provision in the *Constitution*’ (emphasis added)); *Matthews* (n 11) 277–8 (Latham CJ held an excise was an indirect tax), 285 (Starke J noted the Canadian cases, but pointedly refused to accept that they meant an excise had to be indirect in nature).

⁵¹ ‘There can be no such justification for “the use of Mill’s analysis”, or 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’: *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 554 (Fullagar J) (*‘Dennis Hotels’*). Clearly Mill’s analysis includes his classification of taxation as being direct or indirect. In *Ha*, Dawson, Toohey and Gaudron JJ (dissenting in the result) concluded ‘it is not possible to draw any practical distinction between direct and indirect taxes’: *Ha* (n 5) (509). The majority made no use of the distinction.

⁵² See, eg, Gordon (n 49) 31: ‘by the 1890s informed students of public finance were well aware of the ambiguities surrounding the terms ‘direct’ and ‘indirect’. Their writings suggested ... that the inclusion of such terms in the constitution ... was not ... recommended’; HW Arndt ‘Judicial Review under Section 90 of the *Constitution: An Economist’s View* (Pt 1)’ (1952) 25(11) *Australian Law Journal* 667, 674:

the distinction between ‘direct’ and ‘indirect’ taxes has .. been a source of endless confusion to lawyers and economists alike ... As an aid to judicial interpretation, the classical distinction had the great disadvantage that ... its application demanded an inquiry by the Court into the ‘intentions’ or ‘desires’ of the taxing authority [but because the distinction rested on ultimate incidence of the tax] the legislature usually did nothing to reveal its intentions or desires, for the simple reason that it was often indifferent as to who paid the tax. The inevitable next step for the Court was to try to gauge the ‘intentions’ of the legislature by trying to assess the probable economic effects of the tax ... and with that step it plunged deep into purely economic analysis, and found itself floundering in the morass into which the classical distinction and its implicit theory of the ‘incidence’ of taxation had led public finance theorists.

⁵³ Plaintiffs’ Submissions (n 10) [16].

⁵⁴ Victoria’s Submissions (n 4).

Subsequently, the High Court considered legislation similar to that in *Atlantic Smoke Shops* in *Dickenson's Arcade*.⁵⁵ The majority applied the *Parton* and *Bolton* view that a consumption tax was not an excise.⁵⁶ Barwick CJ and McTiernan J dissented. Barwick CJ said there was 'no logical reason' for confining excise so as to exclude consumption taxes,⁵⁷ and the Canadian decision (*Atlantic Smoke Shops*) that apparently established this point was made in the context of a distinction between direct and indirect taxation not recognised in the *Australian Constitution*.⁵⁸ McTiernan J said the Canadian cases were descriptive, not definitive, of the nature of excise, and nothing in them required the High Court to alter its previous definition of excise including consumption taxes.⁵⁹ Mason and Gibbs JJ both noted the illogical nature of the exclusion of consumption taxes from the definition.⁶⁰

Dickenson's Arcade was heavily influenced by then-prevailing 'criterion of liability' approach to s 90, an approach that would later fall out of favour (as discussed below in Part V(C)). The challenged legislation featured a backdating device, which at the time was accepted as compatible with s 90. Essentially, it involved charging a business owner licence fees based on turnover in a prior period. Members of the High Court accepted that such schemes did not impose excise — fees were imposed for the privilege of conducting a business, and calculation by reference to a prior period of trade broke the required connection between the tax and the quantity of goods produced or sold. As will be seen, neither aspect of the reasoning in *Dickenson's Arcade* is fully accepted today. While the High Court did not expressly overrule the decision in *Ha*, the Court essentially confined the decision to its facts.⁶¹ Thus, the authority of the decision in *Dickenson's Arcade* is weak.⁶² Submissions for both the plaintiffs and the Commonwealth in *Vanderstock* call for

⁵⁵ *Dickenson's Arcade* (n 9).

⁵⁶ *Ibid* 209 (Menzies J), 221 (Gibbs J), 231 (Stephen J), 239 (Mason J).

⁵⁷ *Ibid* 185.

⁵⁸ *Ibid* 186.

⁵⁹ *Ibid* 200–2.

⁶⁰ *Ibid* 238–9 (Mason J), 219 (Gibbs J). See also Commonwealth's Submissions (n 2) [29]: 'four of the six Justices who sat in *Dickenson's Arcade* recognised that the logic of the Court's authorities on s 90 meant that a consumption tax was not an excise'.

⁶¹ '[T]he decision of this Court is not to overrule *Dennis Hotels* or *Dickenson's Arcade*. They may stand as authorities for the validity of the imposts therein considered.': *Ha* (n 5) 504 (emphasis added) (Brennan CJ, McHugh, Gummow and Kirby JJ).

⁶² Cf '*Dickenson's Arcade* rests upon a principle carefully worked out in a significant succession of cases': Victoria's Submissions (n 4) [22], citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) ('*John*'). With respect, this statement does not acknowledge: the influence of *Atlantic Smoke Shops* on the High Court's views regarding consumption taxes; that a High Court decision prior to it (*Oil Refineries Ltd*) and significant obiter dicta in cases such as *Matthews*, were to the contrary of what was held in *Dickenson's Arcade*; that several members of the Court in *Dickenson's Arcade* expressed hesitation and/or dissatisfaction with the classification of consumption taxes being applied in the case; that the decision was infected with the criterion of liability approach that would fall into disfavour as an exclusive test; and that a majority of the High Court in *Ha* essentially confined the *Dickenson's Arcade* decision to its facts, which is surely very near to a complete overrule.

it to be overruled,⁶³ based on High Court guidelines for when an earlier case should be reconsidered as determined in *John v Federal Commissioner of Taxation*.⁶⁴

Subsequent cases indicated it was unnecessary to decide whether it remained the case that consumption taxes were not excises.⁶⁵ However, three justices (dissenting in the result) in *Ha* called the carve out of consumption taxes from the definition illogically continued.⁶⁶ In addition, the position taken by two justices in *Hematite Petroleum Pty Ltd v Victoria*,⁶⁷ to the effect that the tendency of an impost to be reflected in the final price of the goods to the consumer points towards the impost being an excise, supports the view that a tax on consumption is an excise.

IV The Purpose of Section 90

Related to a divergence of views as to the definition of excise is a divergence of views as to s 90's purpose. The current orthodoxy is that espoused by Dixon J in *Parton*:

In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was 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. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon the manufacture or production.⁶⁸

The High Court has noted that taxes on goods tend to increase the cost of the goods in the hands of the consumer, thus reducing demand for the goods.⁶⁹ Hanks has noted how the price of commodities can significantly contribute to inflation, and affect wages policy, credit and monetary conditions, and money supply.⁷⁰ Individuals often expect the Commonwealth to manage these policy areas. He concludes 'it is, at least, strongly arguable that the Commonwealth cannot discharge its responsibility for these policy areas unless it is conceded control over commodity taxation'.⁷¹ The judgment of Mason J in *Hematite Petroleum* reflects acceptance of these economic management arguments.⁷²

⁶³ Plaintiffs' Submissions (n 10) [16]; Commonwealth's Submissions (n 2) [4].

⁶⁴ *John* (n 62) 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). Guidelines included: whether the previous principle had been discerned over a significant number of cases; whether there is a difference of opinion in the reasoning of the majority justices in the relevant case; whether the earlier decision had achieved a useful result or caused inconvenience; and whether the earlier decision had been acted upon.

⁶⁵ *Capital Duplicators* (n 21) 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (n 5) 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

⁶⁶ *Ha* (n 5) 510 (Dawson, Toohey and Gaudron JJ).

⁶⁷ *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 632 (Mason J), 666 (Deane J) ('*Hematite Petroleum*').

⁶⁸ *Parton* (n 18) 260; quoted with approval in *Ha* (n 5) 495 (Brennan CJ, McHugh, Gummow and Kirby JJ). Victoria challenges this orthodoxy: Victoria's Submissions (n 4) [49].

⁶⁹ *Capital Duplicators* (n 21) 586 (Mason CJ, Brennan, Deane and McHugh JJ).

⁷⁰ Peter Hanks 'Section 90 of the *Commonwealth Constitution*: Fiscal Federation or Economic Unity?' (1986) 10(3) *Adelaide Law Review* 365, 383.

⁷¹ *Ibid.*

⁷² *Hematite Petroleum* (n 67) 631–2.

On the other hand, others believe that s 90 has a narrower purpose — to secure Commonwealth control over tariff policy. To do so, the section merely prohibits States from enacting taxation that discriminates against Australian produced goods. In this way, excise duties are the opposite of customs duties. This view derives support from Quick and Garran,⁷³ may reflect the intention of (some) drafters,⁷⁴ was accepted in earlier cases,⁷⁵ and attracted dissenting justices in the most recent s 90 decisions.⁷⁶ It forms the main basis of the Victorian Government's argument in *Vanderstock*.⁷⁷ However, the High Court eventually discarded a requirement that a tax, in order to be an excise, had to be imposed on locally produced goods,⁷⁸ and the language of 'discrimination' against Australian goods in excise discourse has mainly appeared in the last two s 90 judgments, from dissentients.⁷⁹ The majority in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* claimed there had been 'little support' for this view since *Parton*.⁸⁰ Further, there was little discussion of 'excise' at the Convention Debates, and no agreement as to its meaning.⁸¹ Removal of particular words at the 1897 Convention can suggest an intention that excises not be confined to discriminatory taxes.⁸² Caleo notes this claimed narrow purpose of s 90 was 'never explicitly addressed' at the Conventions.⁸³

V Critique

A *Incoherence in Application of the Two Aspects*

Both the broad and narrow views of definition and purpose are incoherent as currently implemented. The broad view is incoherent because, if one accepts that s 90 of the *Australian Constitution* is designed to give the Commonwealth control over commodity taxation for economic management, there is no logical reason to

⁷³ Quick and Garran (n 20) 837–8.

⁷⁴ Gordon (n 49) 37–8.

⁷⁵ *Oil Refineries Ltd* (n 8) 426 (Isaacs J), 438 (Starke J); *Dennis Hotels* (n 51) 590 (Menzies J), 556 (Fullagar J).

⁷⁶ *Capital Duplicators* (n 21) 606–8 (Dawson J), 624 (Toohey and Gaudron JJ); *Ha* (n 5) 506 (Dawson, Toohey and Gaudron JJ).

⁷⁷ Victoria's Submissions (n 4) [38]–[50].

⁷⁸ *Matthews* (n 11) 299 (Dixon J) (quoted with evident approval in *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ)). Some of the tax that the majority invalidated in *Ha* fell on imported goods, and they were not carved out from the decision regarding invalidity. There is no mention of a requirement that the goods be locally produced in the definition of excise agreed to unanimously in *Bolton* (n 35) 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

⁷⁹ *Capital Duplicators* (n 21) 629–630 (Toohey and Gaudron JJ); *Ha* (n 5) 511–12 (Dawson, Toohey and Gaudron JJ dissenting).

⁸⁰ *Capital Duplicators* (n 21) 587 (Mason CJ, Brennan, Deane and McHugh JJ).

⁸¹ *Ha* (n 5) 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).

⁸² *Ibid* 495–6 (Brennan CJ, McHugh, Gummow and Kirby JJ). In an earlier draft of s 90, the Commonwealth's exclusive power with respect to excised duties was confined to goods upon which customs duties had been paid. That restriction was removed at the 1897 Convention. The majority in *Ha* concluded this precluded a view that the purpose of s 90 was confined to implementing tariff policy.

⁸³ Chris Caleo 'Section 90 and Excise Duties: A Crisis of Interpretation' (1987) 16(2) *Melbourne University Law Review* 296, 307.

not apply this to consumption taxes,⁸⁴ as noted by Barwick CJ in *Dickenson's Arcade*,⁸⁵ Mason J in *Hematite Petroleum*,⁸⁶ and the dissenters in *Ha*.⁸⁷ This is also the view taken by the Commonwealth in its submissions in *Vanderstock*.⁸⁸ A consumption tax can have just as much impact on the economy as a tax earlier in the supply chain. It increases prices in the hands of the consumer, just as a tax on production, manufacture or distribution does.⁸⁹ For example, by taxing the consumption of ZLEV, a government reduces demand for them, just as a tax on the production of such vehicles would, as noted by the plaintiffs and Commonwealth in *Vanderstock*.⁹⁰ Further, adherents of the broad view insist that the terms 'excise' and 'customs' exhaust the categories of taxes on goods.⁹¹ A tax on goods must be one or the other. The ZLEV charge is a tax on goods. It is not a customs duty; logically then, it must be an excise.

The narrow view is also incoherent. It insists only taxes discriminatory against Australian produced goods can be excises. Clearly, such a tax could be imposed at the production or manufacture stage, or at distribution or sale. However, this view also seeks to confine excise taxes to taxes on production or manufacture. It is possible that a tax imposed at distribution or consumption could discriminate on the basis of the origin of the goods.⁹² Thus, there is a misalignment between the purpose of the section as espoused by the adherents of the narrow view and the definition they apply to the word 'excise' in the section. One way or the other, this incoherence should be resolved.

Assuming the purpose of s 90 accepted by the High Court since 1949 continues to prevail, involving Commonwealth real control over commodity taxation, that incoherence will most likely be resolved by extending the excise definition to include consumption taxes. This would mean the Victorian ZLEV

⁸⁴ *Ibid* 304–5:

Logically, the one reason for excluding consumption taxes from the reach of s90 is that indirectness of the tax is an essential requirement. But we have seen that this position is no longer tenable ... Once this is conceded, the coherence of the reasons for extending *Peterswald* can scarcely be maintained if consumption taxes are made an exception. Principle is thus compromised.

⁸⁵ *Dickenson's Arcade* (n 9) 185.

⁸⁶ *Hematite Petroleum* (n 67) 631.

⁸⁷ *Ha* (n 5) 510 (Dawson, Toohey and Gaudron JJ).

⁸⁸ Commonwealth's Submissions (n 2) [4], [21].

⁸⁹ *Dickenson's Arcade* (n 9) 218–19 (Gibbs J); similarly 230 (Stephen J).

⁹⁰ Plaintiffs' Submissions (n 10) [16]: 'the exclusion from s 90 of taxes imposed on the consumption of goods is anomalous, because it is inconsistent with the proposition that s 90 exhausts the categories of taxes on goods and undermines the purpose of s 90'; Commonwealth's Submissions (n 2) [22]: 'a tax on the use or consumption of goods equally tends to increase the costs to the consumer of goods over their life cycle (which is apt to reduce the demand for, and the level of production of those goods)'. This is equivalent reasoning to the position of the majority in *Capital Duplicators* that 'a tax on distribution, like a tax on production or manufacture, has a natural tendency to be passed on to purchasers down the line of distribution and thus to increase the price of, and to depress demand for, the goods on which the tax is imposed': *Capital Duplicators* (n 21) 586 (Mason CJ, Brennan, Deane and McHugh JJ). Similarly, see *Capital Duplicators* (n 21) 602 (Dawson J). See also Anthony Gray, 'Excise Taxation in the Australian Federation' (PhD Thesis, University of New South Wales, 1997) 280: 'there is no economic justification for the High Court's distinction, in excise cases, between consumption taxes and other taxes on goods'.

⁹¹ *Capital Duplicators* (n 21) 590 (Mason CJ, Brennan, Deane and McHugh JJ).

⁹² Cf *ibid* 617–18, where Dawson J claimed it was not possible.

charge would be struck out as invalid. As the ATA's submissions note, the Victorian charge impacts on the Commonwealth's control over the taxation of road users.⁹³ Illogicality in the current law would be removed if the definition of excise was extended to include consumption taxes.

B *Improper Influence of Privy Council Decision*

The High Court of Australia erred in believing *Atlantic Smoke Shops* required it to abandon its previous position that the definition of excise could include consumption taxes. That case was itself contrary to earlier Privy Council decisions. It was based on a constitutional provision without equivalence in Australia. The High Court is no longer bound by Privy Council decisions, and to continue to accept that precedent would maintain an anomaly in the law. In terms of the grounds for reconsideration of decisions espoused in *John*, the view a consumption tax was an excise was not worked out over a series of cases — rather, there was an abrupt change in Australian law as a result of a Privy Council decision. States have not relied on the decision, because true taxes on consumption are rare.

C *Other Aspects*

The High Court has insisted in the past that, to be an excise, a tax must bear some relationship with the quantity or value of goods produced or sold. This was when excise taxes were confined to production, manufacture, sale or distribution. If the definition of excise were extended to consumption, the question would be whether the tax bears some relationship with the quantity or value of goods produced, *sold or consumed*. This requirement would be met here — as noted in Part II above, the tax is calculated by direct reference to the extent to which the vehicle is used.

The plaintiffs' submissions in *Vanderstock* refer to the criterion of liability approach to s 90 of the *Australian Constitution*.⁹⁴ That approach focused on the form of the challenged provision, rather than its substance.⁹⁵ It permitted circumvention of s 90, assisting States in defending the constitutional validity of licence fee/permit type schemes relating to business, enabling the High Court to conclude the imposed tax was not 'on goods', but for the privilege of running a business, including where the fee was based on a prior period's turnover (the 'backdating device'). This loophole was substantially utilised.⁹⁶ The criterion of liability approach was eventually discarded as an exclusive test in favour of a practical approach focused

⁹³ ATA's Submissions (n 3). After noting at [20] that the Commonwealth fuel excise and *ZLEV Act* tax are 'functionally equivalent', the submissions state at [25] that

[t]he ability of the Commonwealth Parliament to execute any policy whereby *all* road users are required to pay some form of distance-based tax would be hampered or defeated if the [Victorian legislation] is valid. In that event, Parliament would be attempting to execute a policy that affects all road users in a context where a subset of those road users would already be subject to State taxes calculated by reference to distance travelled. For that reason, it would not have 'real control over the taxation of commodities', as it would not have the same control with respect to ZLEVs as it has with respect to fuel powered vehicles.

⁹⁴ Plaintiffs' Submissions (n 10) [49]–[50].

⁹⁵ *Bolton* (n 35) 271 (all members of the Court).

⁹⁶ *Dennis Hotels* (n 51); *Dickenson's Arcade* (n 9).

on substance.⁹⁷ Given the challenged ZLEV charge is clearly imposed on use of a good, even the criterion of liability approach would be unlikely to be availing to Victoria. That the fee charged relates to a period of use ending two weeks prior to the due date for payment of the fee does not sever the connection between the fee and activity relating to the goods being taxed. The proximity of the due date for payment and the relevant period is close.⁹⁸ It is not really a backdating device, and anyway this loophole was closed in *Ha*, with cases that created or perpetuated it effectively confined to their statutory contexts.⁹⁹ Given how the tax is calculated, based directly on usage, it is not a fee for the privilege of driving a vehicle, as might be a flat fee or a fee calculated in a more obscure way, which the plaintiffs in *Vanderstock* note.¹⁰⁰ Nor is it part of a regulatory scheme.¹⁰¹

I do not consider in this column financial implications for the States if the High Court were to extend the definition of excise to consumption taxes. Given these taxes are rare, such implications are likely limited. Though the Australian federal tax system is characterised by high vertical fiscal imbalance,¹⁰² involving mismatch between revenue-raising ability and expenditure responsibilities, this has typically not figured (expressly) in reasoning in s 90 cases.¹⁰³ It was not discussed by (dissenting) adherents of the narrow view of excise in *Ha*. The financial implications for the States of a broad view were noted by the majority, but this did not affect their decision.¹⁰⁴

VI Conclusion

The High Court of Australia should better align the definition of excise with the purpose of the constitutional provision referring to it. It should do this by extending the definition to include consumption taxes like the one imposed by the *ZLEV Act*. This would return Australian law to the position taken prior to *Atlantic Smoke Shops*. Australian law took a wrong turn by accepting that Privy Council precedent in a different constitutional context, and itself contrary to its earlier comments on point in *Matthews*. The tax imposed by the *ZLEV Act* bears a close relation to consumption of a good, and ought to be regarded as an excise.

⁹⁷ *Capital Duplicators* (n 21) 583 (Mason CJ, Brennan, Deane and McHugh JJ). All members of the High Court embraced a practical approach in *Ha* (n 5): 498 (Brennan CJ, McHugh, Gummow and Kirby JJ), 514 (Dawson, Toohey and Gaudron JJ).

⁹⁸ This was considered relevant to a tax being held to be an excise in *Ha* (n 5) 501–2 (Brennan CJ, McHugh, Gummow and Kirby JJ).

⁹⁹ *Ibid* 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

¹⁰⁰ Plaintiffs' Submissions (n 10) [50]: 'the amount of the ZLEV charge is linked to the amount that the ZLEV is used. It is not a fixed amount, nor calculated by reference to some external factor — those being factors that might tend towards a charge being characterised as a "fee for a privilege" or "fee for service"'.¹⁰¹

¹⁰¹ This was considered relevant in *Ha* (n 5) 501–2 (Brennan CJ, McHugh, Gummow and Kirby JJ) and noted in the Commonwealth's Submissions (n 2) [49].

¹⁰² Anne Twomey and Glenn Withers, *Federalist Paper I: Australia's Federal Future* (Report for The Council for the Australian Federation, April 2007) 37–8.

¹⁰³ A notable exception is Gibbs CJ (dissenting) in *Hematite Petroleum* (n 67) 617–18.

¹⁰⁴ *Ha* (n 5) 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

