Vanderstock v Victoria: Fiscal Federalism Meets Environmental Constitutionalism?

Lael K Weis*1

ABSTRACT

This analysis critically examines the High Court of Australia’s recent decision in Vanderstock & Anor v The State of Victoria [2023] HCA 30 as an instance of environmental impact litigation (‘EIL’). The Vanderstock plaintiffs successfully challenged a state tax on low-emissions and electric vehicles on the basis that it was a duty of excise: a tax that can only be imposed by the federal parliament under s 90 of the Australian Constitution. However, the analysis cautions against viewing the decision as a victory for the environment. The High Court’s ruling has significant consequences for federal fiscal relations. At best, these have ambivalent implications for environmental policy. At worst, they may hamper or defeat environmental policy initiatives. Vanderstock thus offers a cautionary lesson for constitutional EILs, suggesting that any evaluation of the ‘impact’ of such litigation must have regard for structural implications of the legal norms involved.

1. INTRODUCTION

On 18 October 2023, the High Court of Australia announced its much anticipated decision in Vanderstock v Victoria.1 The case involved a constitutional challenge to the State of Victoria’s Zero and Low-Emissions Vehicle Distance-based Charge Act 2021 (the ‘ZLEV Act’). The Act was challenged on the basis that the charge it imposes is a duty of excise within the meaning of s 90 of the Australian Constitution. Section 90 confers the exclusive ‘power...to impose duties of customs and of excise’ on the Parliament of the national government (‘the Commonwealth of Australia’), and thus prohibits the States from imposing this form of taxation. By a majority of four to three, the High Court agreed that the charge is an excise and therefore constitutionally invalid.

The Vanderstock judgments are lengthy and complex—five in total, cumulatively around 400 pages in length—with detailed consideration of the High Court’s s 90 jurisprudence dating back to 1904. They are a feast for fiscal federalism and taxation scholars in particular,

* Associate Professor, University of Melbourne (email: lweis@unimelb.edu.au). My sincere thanks to Selena Bateman, Michael Crommelin, Kathryn James, Rebecca Nelson, an anonymous reviewer and an anonymous interlocutor for helpful feedback and valuable suggestions. The views expressed in this analysis are the author’s own.
1 Vanderstock & Anor v The State of Victoria [2023] HCA 30 (‘Vanderstock’).
traversing economic theory, the nature of federal economic union, and the market effects of fiscal burdens. Moreover, they are of great general interest to Australian constitutional law scholars for what they say about the High Court’s use of precedent, history and practice as sources of constitutional meaning, and for aspirations of collegiality and consensus in constitutional law cases. Beyond the Australian public law community, Vanderstock has also attracted national and international interest from a climate-conscious audience due to the policy issue at stake. The Victorian legislation was criticised as potentially discouraging the take-up of electric vehicles (‘EVs’), which is thought to be a necessary step toward reducing carbon emissions. As discussed below, it is this set of concerns that lies behind the constitutional challenge. In this respect, the case can also be understood and analysed as an instance of environmental impact litigation (‘EIL’). Viewed from this perspective, the Vanderstock decision looks like a victory for the environment and exemplary of ‘environmental constitutionalism’ in action.

This analysis will question that premise. In doing so, it sounds a note of caution about constitutional EIL by ‘strategic means’. By this, I mean constitutional litigation aimed at invalidating an environmentally undesirable law or decision through a legal rule that is unrelated to the state’s environmental duties, and invoked solely for the purpose of defeating that law or decision. Uncritically viewing such litigation as advancing environmental constitutionalism, I argue, is a mistake. Any evaluation of the ‘impact’ of constitutional EIL must have regard for the structural implications of the new legal norms created by the court’s decision: particularly so in ‘strategic means’ cases. Decisions in these cases may have ambivalent, at best, consequences for environmental policy. At worst, they may hamper or defeat environmental policy initiatives. Vanderstock, it is suggested, offers such a cautionary tale.

Following this introduction, the analysis proceeds as follows. Section 2 provides an overview of the legislation and the basis of the constitutional challenge. Section 3 provides a brief summary of the High Court’s conclusions and essential reasoning on the substantive constitutional question. Section 4 critically examines the implications of Vanderstock for environmental policy in Australia. Section 5 concludes.

2. THE LEGISLATION AND THE LEGAL CHALLENGE

In 2021, the State of Victoria enacted the ZLEV Act, which imposes a charge on the use of zero and low-emission vehicles (‘ZLEVs’), including electric, hydrogen and plug-in hybrid vehicles. The ZLEV charge is payable by the ‘registered operator’ of the ZLEV (that is; the person who is responsible for the vehicle, typically the owner, and not the driver), and is calculated based on the distance travelled in kilometres on ‘specified roads’. The Act broadly defines ‘specified roads’: effectively, any public road including roads outside of Victoria, but excluding private roads. Consequences for failure to pay the ZLEV charge include suspension or cancellation of registration.

References:
3 The case is listed on several environmental and climate change law databases: see, eg, Sabin Center for Climate Change Law, Climate Litigation Database (https://climatecasechart.com/non-us-case/vanderstock-anor-vs-the-state-of-victoria/) accessed 1 February 2024.
4 On the varied meaning of this term, see Sam Bookman, ‘Demystifying Environmental Constitutionalism’ (2024 forthcoming) 54 Environmental Law.
5 ZLEV Act s 7.
6 ibid s 3.
7 Road Safety Act 1986 (Vic) s 3(1).
8 ZLEV Act s 8.
9 ibid s 3.
10 ibid s 29, s 35.
The Act’s stated purpose is simply ‘to require registered operators’ of ZLEVs ‘to pay a charge for use of the vehicles on certain roads’. However, the rationale advanced by Victoria, as stated in the Second Reading Speech and press releases, was to make up for losses to revenue from the taxation of fuel used in conventional motor vehicles. In this respect, the ZLEV charge is arguably distinguishable from the registration fees paid in respect of motor vehicles generally, which have regulatory as well as revenue-raising objectives. It is arguably also distinguishable from highway tolls and other road-user fees, which are specific to the use of certain roads as opposed to road usage generally.

As discussed below, however, efforts to characterise the ZLEV charge as a pure revenue raising measure may be overstated. All taxation raises revenue, and taxation often serves a combination of regulatory and redistributive functions in addition to its core revenue-raising function. In the present context, these non-revenue raising functions included funding measures designed to support the uptake of EVs and EV infrastructure. Although the ZLEV charge was not hypothesised to these measures, this is not exceptional: taxes are usually collected in a general revenue fund, and rarely hypothesised to particular spending measures.

The two plaintiffs who brought the legal challenge, Chris Vanderstock and Kath Davies, are owners of electric and plug-in hybrid vehicles, respectively, who were liable to pay the ZLEV charge. Vanderstock is an enthusiast of electric vehicles, with a YouTube Channel (‘Electric Chris’) that is devoted to ‘covering technologies like electric vehicles, gadgets, home theatre and more’. Davies is active in promoting environmental causes, including climate initiatives. Both parties were represented in the proceedings by Equity Generation Lawyers, a EII law firm that specialises in climate change. Equity Generation Lawyers also led the Sharma case, a class action that a group of students brought against the Commonwealth Minister for the Environment in 2020. The legal basis of the Sharma litigation was a common law negligence claim, arguing that governments have a duty of care to prevent climate harms. By contrast, the legal basis of the Vanderstock litigation was not a claim about the environmental duties of governments. Rather, the argument had to do with the division of federal taxation powers effected by s 90 of the Constitution.

The challenge to the ZLEV charge was timely. At the time of the litigation, many other States (including South Australia, New South Wales and Western Australia) had plans to impose similar charges. From a public policy perspective, this may seem surprising: democratic governments throughout the world face growing pressure from members of the public to take urgent measures toward decarbonisation, and Australia is no exception. However, from a fiscal federalism perspective, these State initiatives are understandable.

Partly as a matter of historical contingency, and partly as a matter of constitutional design, the Australian States currently have very few revenue-raising options available,
3. SUMMARY OF THE HIGH COURT’S DECISION AND ITS SIGNIFICANCE

The Vanderstock decision has wide-ranging implications for State revenue-raising capacity and federal fiscal relations. It joins two other closely contested four to three High Court decisions on s 90—Capital Duplicators Pty Ltd v Australian Capital Territory [No. 2] (1993), and Ha v New South Wales (1997)—that are widely regarded as effecting a significant reallocation of taxation powers within the Australian federation. This change in fiscal federal relations occurred in two ways. First, it occurred in terms of the High Court’s conclusions about the constitutional purpose of s 90, resulting in a more expansive definition of ‘excise’—and therefore a corresponding contraction in State taxation powers. Second, it occurred in consequence of the legislative arrangements that were subsequently enacted to address substantial losses in State revenue as a direct result of those decisions.

The impact of Vanderstock itself on State revenue-raising capacity may prove to be less radical than these decisions. However, this remains to be seen, as there is a degree of uncertainty about which State taxes may now be vulnerable under the new ruling. Either way, it is fair to say that the High Court’s decision amplifies these previous authorities, both further


22 See Burton, Dollery & Wallis, ibid, at 39-41; Fenna, ibid, at 512-523.

23 (1993) 178 CLR 561 (‘Capital Duplicators [No. 2]’).

24 (1997) 189 CLR 465 (‘Ha’).

25 Following Ha, ibid, the Commonwealth enacted a set of arrangements to collect, and redistribute to the States and Territories, a Goods and Services Tax: see discussion in Burton, Dollery & Wallis (n 21) 37; McLeish (n 21) 798.
widen the scope of s 90, and also signalling that there may now be no turning back the tide.26

3.1 The Constitutional Meaning of ‘Excise’ Prior to Vanderstock

To understand the significance of Vanderstock, it is first necessary to briefly explain the state of the law prior to the decision. The essential meaning of an excise as a ‘tax on goods’ has never been in dispute. The question has always been, what kind of relationship between the tax and the good is required? The history of the High Court’s interpretation of s 90 has been one of increasing breadth. As the meaning of ‘excise’ has expanded, State taxation powers have correspondingly contracted.

The Commonwealth’s exclusive power to levy duties of excise was once thought only to encompass taxes on goods of Australian origin, a view based on a more limited conception of the purpose of s 90 as protecting Commonwealth tariff policy.27 This ‘tariff policy’ understanding would limit the meaning of ‘excise’ to taxes on steps in the production and manufacture of goods. This view was abandoned by the High Court in 1949,28 although not without persistent lines of dissent.29 Since then, the prevailing view has been that an excise is an inland tax on goods, regardless of origin, that has a tendency to affect purchase price—meaning that an excise extends to taxes on the distribution and sale of goods as well. This position is based on a more expansive ‘free trade’ understanding of s 90, as ensuring that the Commonwealth has ‘real control over the taxation of commodities’ in order to protect free trade within Australia.30

Under established s 90 doctrine prior to Vanderstock, then, a duty of excise was understood to be a tax on goods levied in relation to any step leading up to and including the point of retail sale. Judicial analysis focused on two interrelated sets of enquiries. First, courts would consider the relationship between the impost and one or more of these steps: production, manufacture, distribution or sale. This was treated as a matter of substance and not mere form,31 meaning that the legislative nomination of a given step as the criterion of tax liability was one factor but not determinative. Second, courts would consider whether the impost would have a ‘natural tendency’ to increase the price of the good.32 This included factors such as whether the impost was calculated based on the number or quantity of goods, as well as the overall size of the impost.

This definition of excise was already of considerable breadth. However, a potentially important limitation was taxation on activities involving goods after the point of retail sale. In particular, a tax on the consumption (as distinct from sale), use or ownership of a good was understood to fall outside of this constitutional description.33 The High Court had only a single occasion to consider this issue prior to Vanderstock.34 Nevertheless, the basic rationale for the distinction would appear to be that imposts on activities involving goods after the point

26 Although two judges suggest that they may reconsider the issue in a future case if the new rule established in Vanderstock proves unworkable, see Vanderstock [612] (Edelman J, dissenting), [825] (Steward J, dissenting).
27 See Peterswald v Bartley (1964) 1 CLR 497, 509 (Griffith CJ) (‘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 or personal tax’).
28 Parton v Milk Board (Vic) (1949) 80 CLR 229.
29 This was the position taken by the dissenting judges in Capital Duplicators [no 2] (n 23) and Ha (n 24). See also Vanderstock [496]-[504] (Edelman J, dissenting), [713] (Steward J, dissenting).
30 Ha (n 24) [491] (Brennan CJ, McHugh, Gummow and Kirby JJ).
31 Capital Duplicators [no 2] (n 23) [583] (Mason CJ, Brennan, Deane and McHugh JJ); Ha (n 23) [498] (Brennan CJ, McHugh, Gummow and Kirby JJ).
32 Capital Duplicators [no 2] ibid [586].
33 Dickenson’s Arcade Pty Ltd v Tasmania (1974) 130 CLR 177 (holding that a consumption tax is not an excise within the meaning of s 90).
34 Dickenson’s Arcade ibid. The issue of ‘consumption taxes’ did not arise for decision on the facts in either Capital Duplicators [no 2] (n 23) or Ha (n 24). The majorities in both cases simply accepted the longstanding definition, based on Dixon J’s judgment in Parton (n 28), which drew the line at the point of retail sale.
of retail sale are generally borne by the individual (and in that sense said to constitute a ‘direct’ or ‘personal’ tax), whereas imposts on activities related to bringing goods to market are generally passed on to the purchaser in the price of the good (and in that sense said to constitute a tax ‘on goods’).

3.2 The Decision in Vanderstock

In Vanderstock the High Court held, for the first time, that a tax on the use or consumption of goods is a duty of excise. In doing so, the Court overruled previous authority on this issue, and adopted an even wider definition of ‘excise’ as ‘any tax on... goods... whether imposed at the stage of their production, manufacture... or at any subsequent stage of their distribution, sale, ownership, control, use, resale, reuse or destruction’. In short: an excise is simply an inland tax ‘on’ goods. A tax will meet this description if it has: (1) a sufficient connection to goods (versus a connection to activities related to bringing goods to market or retail sale, as per the previous approach); and (2) a tendency to affect a market for goods (in terms of general effects on supply and demand, and not limited to effects on purchase price, as per the previous approach).

Two key observations can be made about the new approach. First, the Vanderstock majority appeared to amplify the ‘free trade’ understanding of the purpose of s 90, placing even greater emphasis on the idea of the Australian federation as a uniform national market. After Vanderstock, ‘any tax on goods... can be imposed only by uniform national legislation’. Second, the distinction between taxes imposed prior to versus after the point of retail sale no longer has analytical relevance: the central distinction is now between inland taxes (duties of excise) versus border taxes (customs duties). A crucial aspect of the majority reasoning lies in accepting that these two types of taxation ‘exhaust’ the categories of taxation on goods. Because they are exhaustive, the majority reasoned, it is ‘anomalous and unsustainable’ to categorically exclude taxes on the consumption or use of goods as duties of excise.

Applying the approach just outlined, the majority found that the ZLEV charge was an excise. In addressing the first question, the majority rejected the argument that the ZLEV charge was a tax on an activity (that is; driving a ZLEV) as opposed the consumption of a good (here; the ZLEV). The breadth of ‘specified roads’ that attracted the charge, and the fact that liability for the charge was imposed on the registered operator of the ZLEV and not the driver, were important factors in the reasoning. In addressing the second question, the majority found that the ZLEV charge would have a ‘natural tendency to dampen demand for ZLEVs’, reasoning that this ongoing cost would factor into a purchaser’s decision as to whether to purchase a ZLEV versus a conventional fuel vehicle.

35 See discussion of this point in the reasons of Edelman J [640]–[642].
36 See Vanderstock (n 1) [10], [128]–[134] (Kiefel CJ, Gageler & Glesson JJ) (‘joint reasons’), [948] (Jagot J) (overruling Dickenson’s Arcade (n 33)).
37 ibid [197] (joint reasons), [949] (Jagot J).
38 ibid [147], [148], [150], [197] (joint reasons); [920], [943], [945], [949] (Jagot J).
39 To be clear: although the approach is new, the position of the majority is that this is not a new legal rule but rather simply a cleaner articulation of the existing rule. This forms the central point of disagreement with the dissenting judges: see, eg. ibid [202], [204] (Gordon J) (describing the majority decision as ‘new rule’ that ‘marks a departure from long established and fundamental principle and authority’ over ‘more than a century’, and that ‘amends the Constitution.’)
40 Here, the majority relied on section 92, which guarantees the freedom of interstate trade, and the decision in Betfair Pty Limited v Western Australia (2008) 234 CLR 418 in particular, where the High Court cast doubt on the validity of State regulation of ‘local’ or ‘intraestate’ markets given an interconnected national economy and the rise of e-commerce: see ibid at [196]–[197] (joint reasons); see also [854], [929], [949] (Jagot J).
41 ibid [197] (joint reasons), [949] (Jagot J).
42 ibid [5], [9], [197] (joint reasons) [920], [930], [949] (Jagot J). This was said to be established by the majority reasoning in Capital Duplicators [no 2] (n 23) and Ha (n 23).
43 ibid [10] (joint reasons), see also [937] (Jagot J).
44 ibid [188]:[191] (joint reasons).
45 ibid [192] (joint reasons).
4. EVALUATING VANDERSTOCK AS ENVIRONMENTAL IMPACT LITIGATION

Commentary on Vanderstock has understandably focused on its implications for fiscal federal relations, including potential litigation over other State taxes, which could result in further loss of revenue-raising capacity.46 Other State taxes that are potentially vulnerable after Vanderstock include: taxes on gifts or inheritances of goods; payroll taxes on companies producing goods, land transfer taxes that include the value of goods in assessing land value; industrial land taxes where the land is used for producing goods; licences to carry on businesses dealing in goods; gaming and gambling taxes; and potentially also royalties for natural resource extraction.47

This section offers a different critical perspective. It examines Vanderstock as an instance of EIL, analysing its implications for environmental concerns. In doing so, both the social policy dimensions as well as the juridical dimensions of the decision are considered. Following the High Court’s decision, the news outlets around Australia declared victory for the environment.48 However, it is suggested, while ZLEV owners may celebrate a symbolic victory (plus a few extra hundred dollars in their pockets), it is far from obvious that the decision is a win for climate policy.

4.1 Social Policy Dimensions

In evaluating the ‘impact’ of EIL, one important dimension is the difference that it makes to the substantive social policy issue motivating the litigants. In the present context, this means the likely impact of the Vanderstock decision on encouraging the take-up of EVs and, more broadly, on decarbonising transportation.

Starting with the narrower policy issue, the impact of the ZLEV charge on decisions to purchase EVs is questionable. At around $260–330 per year, the tax was small in comparison to what the average Australian pays in fuel excise for driving a conventional motor vehicle, which is around $1,210 per year.49 It is negligible when viewed in light of the cost of purchasing an EV, with the most affordable models starting at around $45,000.50 The majority’s premise that the ZLEV charge would ‘dampen demand’ for EVs therefore seems speculative at best.51 Indeed, current studies by market analysts suggest that EV purchase price and the lack of charging infrastructure (associated with ‘range anxiety’) — which the ZLEV charge was said to have been enacted to help fund52 — are the predominant deterrents.53

Turning to the wider policy issue, which concerns decarbonising transport, one may well question the dedication of resources, including the time and cost of litigation, to removing a potential barrier to purchasing EVs (assuming that the ZLEV charge had such an impact). As many environmental policy analysts have observed, EVs are not a ‘silver bullet’.54 Moreover,

46 See Michael Pelly, ‘High Court’s EV decision threatens state taxes’, Australian Financial Review (18 October 2023); Josh Gordon and Mikki Perkins, ‘High Court’s EV tax ruling reinvents taxes, claims Pallas’ The Age (19 October 2023); Anne Twomey, ‘Re-Writing Section 90: and the new meaning of “excise”’ AusPubLaw Blog (12 December 2023).
47 See Vanderstock (n 1) [672]–[678] (Edelman J, dissenting); see also Pelly, ibid.
48 See, eg, Adeshole Ore, ‘Charged up: how two EV owners took on Victoria’s electric vehicle tax – and won’, The Guardian (20 October 2023).
51 This is a point raised in the dissenting judgments. See, eg, Vanderstock (n 1) at [722], [726], [778] (Steward J, dissenting).
52 See Second Reading Speech (n 12), Press Release (n 12).
there are also good reasons to be wary about the forces of ‘green capitalism’ in play, pushing the acquisition and consumption of more ‘gadgets’, even when they promise environmentally-friendly alternatives. 55 Other policy measures—such as better urban planning, improving public transport infrastructure and other measures that encourage moving away from a private vehicle ownership model—may be more desirable than promoting the purchase of EVs. Implementing these policies requires revenue.

This critical perspective calls to mind well-known concerns about public interest litigation (‘PIL’) generally as a vehicle for social change. Empirical studies have demonstrated that PIL remedies often divert resources from essential services, making it more difficult for states to fulfil other obligations to promote public welfare. 56 Studies also indicate that PIL remedies, particularly individual remedies, may favour those who are more affluent at the expense of the more vulnerable. 57 A parallel set of critiques is sometimes made about seeking carve-outs from general taxation on public interest-motivated grounds. Doing so not only leaves underlying structural injustices intact, critics argue, but also ‘risks magnifying structural injustices because it adopts the same playbook as anti-tax campaigners’. 58

It is not implausible to view the Vanderstock litigation in these terms. The most straightforward beneficiaries of eliminating the ZLEV charge are EV owners: mainly wealthy (and college-educated, urban-dwelling, male) Australians. 59 Unlike other road users, EV owners do not contribute to a significant source of general revenue (fuel taxation) that is used to fund that infrastructure.

4.2 Juridical Dimensions

But there is another, and arguably more significant, critical perspective. This has to do with the juridical dimensions of Vanderstock as an instance of EIL: its impact on the development of legal norms, and the implications of those legal norms for environmental concerns.

In holding that all taxes on goods require uniform national legislation, the Vanderstock decision effects a set of structural changes that further entrench, and arguably also exacerbate, the Commonwealth’s fiscal dominance. These changes increase the Commonwealth’s power to raise revenue and dictate environmental policy, and put the onus predominantly on the Commonwealth to fund environmental policy initiatives. It is true that some environmental policy does not require significant revenue (for example, command and control forms of regulation). However, other areas, such as climate adaptation, clearly do.

The Vanderstock decision impacts these areas. It creates a further disconnect between policy-setting, which is dominated by the Commonwealth dictating funding terms and conditions, and policy-implementation on the ground, which rests primarily with the States. This disconnect is among the most undesirable features of Commonwealth fiscal dominance and hampers the delivery of social goods in other areas, such as health and education. 60 It can lead to a lack of transparency, problems with accountability and responsiveness, and—perhaps more

56 For an excellent summary that presents these criticisms in their most compelling light, although ultimately for the purpose of defending individual remedies in public international law, see Edward Béchard-Torres, ‘Giving Individual Remedies in Social Rights Litigation ‘Their Due’’ (forthcoming; manuscript on file with author). These studies include jurisdictions in the Global South, such as Brazil: see Octavio Luiz Motta Ferraz, Health as a Human Right: The Politics and Judicialisation of Health in Brazil (CUP 2021).
57 Béchard-Torres, ibid.
58 Kathryn James, ‘Removal of the Tampon Tax: A Costless or Pyrrhic Victory?’ Austaxpolicy: Tax and Transfer Policy Blog (2 May 2023); see also Kathryn James, ‘Removal of the Tampon Tax: A Costless or Pyrrhic Victory?’ 48 (2022) Australian Feminist Law Journal 193.
60 See references in (n 21).
4.2.1 The instrumental value of subsidiarity for national environmental policy

The first point begins with acknowledging that some environmental problems are better tackled through uniform national legislation and a more centralised, top-down approach. This includes environmental problems that can be characterised as public goods in the classic economic sense. Addressing greenhouse gas emissions, including specific policies around EVs, are plausibly among these.

Nevertheless, the fiscal capacity of sub-national governments to take independent action has instrumental value for achieving uniform national solutions. For a variety of reasons, national governments in federal systems can be slower to act than their sub-national counterparts. In these circumstances, the ability of sub-national governments to independently fund and move ahead with policy initiatives can assist with initial steps towards a national approach.

The wider legislative and policy context of the ZLEV Act is arguably a case in point. As discussed in the joint reasons, in 2017 Victoria legislated Australia’s Paris Agreement to achieve the target of net zero emissions in the State by 2050, and created a framework for achieving that target. This included a set of measures designed to support the uptake of EVs (such as charging infrastructure), which the ZLEV charge was said to be enacted to help fund. In the Second Reading Speech for the ZLEV Bill, the State Treasurer stated that Victoria was joining other sub-national governments in ‘international jurisdictions, including California, Utah, Oregon and Washington states in the United States, in implementing or trialling road-user charging systems that incorporate ZLEVs. Although some measures (such as subsidies for purchasing EVs) were wound back while the outcome of the litigation was pending, this does not undermine the characterisation of the ZLEV charge as serving regulatory and redistributive functions in addition to a revenue-raising function.

By contrast, the Commonwealth did not legislate Australia’s Paris Agreement targets until 2022, after the Albanese Labor government took over from a Liberal-Coalition government in an election that was won, in part, due to the incumbent government’s poor record on climate policy. In July 2022, the Commonwealth indicated its intention to legislate a national EV strategy and took initial steps (such as altering the luxury vehicle tax and fringe benefits tax for EVs) to make EVs more affordable. To date, however, there is no uniform national legislation that deals with the transition away from the fuel excise and the take-up of EVs.

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61 i.e., goods that are non-excludable (available to all) and non-rivalrous (not diminished by use).
62 Vanderstock (n 1) [163]-[165] (joint reasons).
63 Climate Change Act 2017 (Vic). As a dualist system, treaties do not have domestic legal effect in Australia until they are implemented by legislation: whether by a State or by the Commonwealth.
65 (n 12) 1184.
66 See Ben Zachariah, ‘Victoria quietly axes $3000 electric-vehicle subsidy’, Drive.com.au (07 June 2023). It is unclear whether the subsidy was removed because of low uptake (as suggested in the State Budget Papers), or due to cost (as suggested in the article) see <https://www.drive.com.au/news/victoria-quietly-axes-3000-electric-vehicle-subsidy/> accessed 1 February 2024.
67 The Climate Change Act 2022 (Cth).
68 Former Liberal Prime Minister Scott Morrison is infamous, among other reasons, for bringing a lump of coal into Parliament during question time while serving as Treasurer under his predecessor Malcolm Turnbull to ridicule Labor’s climate policy: see Clive Hamilton, ‘That Lump of Coal’ The Conversation (15 February 2017).
69 See discussion in Vanderstock (n 1) [163]-[165] (joint reasons).
The possibility of overlapping national and sub-national legislation can, of course, create its own set of difficulties. As with other federal systems, the Australian Constitution has a mechanism for resolving potential conflicts: s 109, which provides that Commonwealth legislation prevails over inconsistent State legislation. Although messy and imperfect, by design s 109 allows States to play a ‘first mover’ role in tricky policy areas whilst giving priority to national uniform legislation of the kind contemplated by the majority in Vanderstock. In applying s 109, the High Court has held that where the Commonwealth Parliament expresses an intention to comprehensively regulate a topic—to ‘cover the field’—and the law is otherwise supported by a head of legislative power, then any inconsistent State legislation is inoperative. Thus, any legislation that the Commonwealth Parliament does—and, inevitably, must—enact for replacing the fuel excise with an EV tax and measures supporting EVs could simply state that it is intended to operate to the exclusion of any State legislation.70

Even where uniform national legislation is desirable, then, preserving the fiscal capacity of the States to pursue policy initiatives can help make progress on pressing environmental problems where the Commonwealth has stalled or deadlocked. Moreover, experimentation at the state level can also play an informational role that assists with devising better national solutions. Through trial and error on a smaller scale, and by ‘being closer to the workplace’, initiatives by sub-national governments are arguably ‘in a better position than a national government to assess the costs as well as the benefits of particular policies’.71 This is thought to be especially important in addressing new social problems and ‘in times of rapid social change’,72 which describes many environmental challenges.

So, in short, by ‘getting the ball rolling’ and ‘testing’ possible policy solutions, the States have an important instrumental role to play in achieving uniform national solutions to environmental problems that demand such a response. And, when the Commonwealth does take action, conflicts will be resolved in its favour.

The Vanderstock decision diminishes this capacity of States. Indeed, the joint reasons go so far as to express concern about the potential for any State policy initiatives taken ahead of Commonwealth action ‘to distort the intended practical operation of such uniform laws of trade or commerce or taxation as the Commonwealth Parliament might choose to enact’.73 But, as some of the dissenting judges observe,74 this reasoning inverts the usual operation of s 109 by pre-emptively ‘clearing the field’. When the environmental policy tool of choice involves the taxation of goods, then the States are prevented from taking action.

### 4.2.2 The independent value of subsidiarity for environmental policy

This leads to a second point. Whereas the first point emphasizes the instrumental value of subsidiarity in achieving national solutions, subsidiarity is also an important principle of environmental policy in its own right. The principle of subsidiarity helps ensure that decisions are made at an appropriate ‘level’ of governance.75 It also ensures that policy is informed by accurate informational ‘inputs’ (for example patterns of use), and designed to accommodate salient variation (for example physical geography). Considerations of subsidiarity therefore suggest that at least some environmental problems are better tackled through a less centralised, bottom-up approach that permits a degree of diversity and variation.76 Managing common pool resources,

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70 See Western Australia v Commonwealth (‘Native Title Case’) (1995) 183 CLR 373, 467–468; Botany Municipal Council v Federal Airport Corporation (1992) 175 CLR 453. Again, this is assuming that the legislation is otherwise supported by a head of legislative power.


72 ibid.

73 Vanderstock (n 1) [155] (joint reasons) (emphasis added).

74 ibid [418]–[420] (Gordon J, dissenting), [631]–[634] (Edelman J, dissenting).

75 See Nicholas Barber, The Principles of Constitutionalism (Oxford 2018) ch 7.

such as water, are plausibly among these because they require information-gathering and forms of monitoring that are tied to practice on the ground.

The structural changes outlined at the outset of this section, which all tend toward greater Commonwealth fiscal dominance, also tend toward the centralisation of decision-making. This is clearly in tension with giving the principle of subsidiarity its due in environmental policymaking.

But there is a further point. In evaluating the juridical dimensions of the Vanderstock decision and their implications for environmental problems that do not lend themselves to uniform national solutions, it is important to bear in mind that the taxation of goods is not only about revenue-raising capacity. It is also about the power to change behaviours by making undesirable activities involving goods, or undesirable goods, more costly, and may also serve an important redistributive function. Carbon pricing is a textbook example. Although it is true that Vanderstock leaves open the possibility of taxing the relevant activity involving the good, rather than the good itself, the dividing line between these is unclear.

The Vanderstock decision diminishes the capacity to use taxation for regulatory and redistributive functions because it undermines structural features of the Constitution designed to give effect to the principle of subsidiarity. After Vanderstock, only the Commonwealth can tax activities involving goods. But the Constitution prohibits the Commonwealth from enacting taxes that treat different States differently. And yet, there are a range of circumstances where differential taxation of activities involving goods may be helpful, or even potentially necessary, in transitioning to a green economy. Different States may require different taxes owing (for example) to differences in physical geography that affect the environmental costs of activities involving goods.

By creating a new legal rule that gives the Commonwealth the exclusive power over the taxation of goods, the decision in Vanderstock therefore not only diminishes State capacity to address environmental problems that favour more decentralised approaches. It also diminishes the capacity of Australia as a whole to use taxation as a regulatory tool by eliminating the possibility of differential taxation in relation to goods.

5. CONCLUSION

This case analysis has summarised the High Court of Australia’s judgment in the Vanderstock decision, offering a critical perspective on the decision as an instance of EIL. The social policy dimensions of EIL often receive the most attention when evaluating the ‘impact’ of litigation. This analysis has demonstrated the importance of a juridical perspective, which draws attention to questions concerning the development of legal norms.

Although Vanderstock was a win for the litigants, the decision appears to be, at best, a ‘net zero’ for the environmental policies that motivated the litigation. However, when consideration is given to the decision’s juridical dimensions, the Vanderstock decision’s environmental credentials seem far more dubious. The structural changes to the constitutional order effected by the

78 A point to this effect was made in the course of argument in relation to the taxation of alcohol: see Vanderstock & Anor v The State of Victoria [2023] HCATrans 11 (16 February 2023).
79 This is a point made in the dissenting judgments regarding the uncertainty about the application of the new approach: see, eg, Vanderstock (n 1) [416] (Gordon J), [476] (Edelman J).
80 The Australian Constitution s 51(ii), s 99.
81 See discussion in Vanderstock (n 1) [648] (Edelman J, dissenting), making this point in relation to ‘variations in levels of demand within a State and across States’.
decision appear to undermine, rather than enhance, the capacity of Australian governments to tackle climate change and other pressing environmental issues.

The juridical perspective offered in this analysis thus brings Vanderstock and other EIL cases into conversation with a growing literature on environmental constitutionalism, understood as the project of developing constitutional norms in a manner that reflects environmental values and concerns. Viewed in this light, it is suggested that Vanderstock holds a cautionary lesson for the pursuit of constitutional EIL in particular, and especially when pursued by ‘strategic means’: which is to say, for the sole purpose of defeating environmentally undesirable legislation, rather than with a view toward developing the content of constitutional norms concerning state environmental obligations.

Even accepting that the ZLEV Act’s road user charge and the measures that it was intended to support amounted to ‘the worst EV policy in the world,’ and that Victorians are better off without it, there is a question of tactics. Pursuing the defeat of legislation through constitutional litigation can have profound consequences for the structure of governance. This possibility reflects the nature of constitutional law as fundamental law, defining the basic powers and institutions of the state. However, it is a possibility that may not appreciated by EIL litigants. EIL litigants are, quite understandably, focused on a cause and the immediate outcome of litigation (viz, defeating the legislation seen as an obstacle to that cause), and not on the constitutional rule being invoked for that purpose. And while EIL lawyers are in a position to appreciate this possibility, they nevertheless have a professional duty to their clients.

There is, of course, a sense in which all constitutional litigation poses risks to the legal order, and even the most considered and conscientious pursuit of impact litigation can have unintended consequences. However, this concern seems particularly acute when impact litigation is pursued by ‘strategic means.’ That is because the development of constitutional norms is ancillary to the objective being pursued, rather than front-and-centre as the main litigation agenda. It is suggested that this orientation of litigation toward the law — rather than the motivations driving the legislation — may provide a more useful perspective for evaluating the ‘impact’ of constitutional EIL in particular and its implications for the project of environmental constitutionalism.

It is therefore instructive to conclude by recalling the contrast between Vanderstock and the Sharma case (discussed in section 2). Reading about the Sharma case is what led the Vanderstock plaintiffs to approach Equity Generation Lawyers about challenging the ZLEV Act. But Sharma had the explicit aim of developing the content of legal norms concerning state environmental duties. By contrast, the Vanderstock litigation had no such aim.

83 See Kurmelovs (n 2).
84 See Ore (48).