



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Sep 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: M61/2021
File Title: Vanderstock & Anor v. The State of Victoria
Registry: Melbourne
Document filed: Form 20 - Writ of summons
Filing party: Plaintiffs
Date filed: 16 Sep 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.



**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

CHRIS VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

THE STATE OF VICTORIA
Defendant

WRIT OF SUMMONS

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other
Realms and Territories, Head of the Commonwealth:

TO THE DEFENDANT

The State of Victoria

Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street
MELBOURNE VIC 3000

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the
claim set out in this Writ.

IF YOU INTEND TO DEFEND the proceeding you must file a notice of appearance.

IF YOU ARE WILLING TO SUBMIT to any order that the Court may make, save as to
costs, you may file a submitting appearance.

THE TIME FOR FILING AN APPEARANCE is as follows:

- (a) where you are served with the application within Australia — 14 days from the date
of service;

- (b) in any other case — 42 days from the date of service.

STATEMENT OF CLAIM

A JURISDICTION

- 1 This proceeding involves a matter arising under the Constitution or involving its interpretation, and is therefore within the original jurisdiction conferred upon the High Court by s 30(a) of the *Judiciary Act 1903* (Cth).

B PARTIES

B.1 The First Plaintiff

- 2 Since 30 December 2020, the First Plaintiff has been the “registered operator”, within the meaning of the *Road Safety Act 1986* (Vic) (**Road Safety Act**), of the vehicle with registration number BKU562 (the **First Plaintiff’s ZLEV**).

Particulars

VicRoads’ Registration Check for BKU562 as at 4 August 2021 at 3:33pm.

- 3 The First Plaintiff’s ZLEV:
- 3.1 is an “electric vehicle” within the meaning of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**ZLEV Charge Act**);
- 3.2 is not an “excluded vehicle” within the meaning of the ZLEV Charge Act; and
- 3.3 therefore, is a “ZLEV” within the meaning of the ZLEV Charge Act.
- 4 The ZLEV Charge Act commenced on 1 July 2021 (**commencement date**).
- 5 Upon the commencement date, the First Plaintiff was required by s 10(1)(a) of the ZLEV Charge Act to lodge with the Secretary to the Department of Transport (**Secretary**), within 14 days after 1 July 2021, an initial declaration in relation to the First Plaintiff’s ZLEV.
- 6 In accordance with that obligation, the First Plaintiff lodged an initial declaration with the Secretary on 13 July 2021.

Particulars

Email from VicRoads to Mr Vanderstock, “Thanks for declaring your odometer reading for BKU562”, dated 13 July 2021 at 6:36pm.

7 Since the commencement date the First Plaintiff's ZLEV has been used on "specified roads" within the meaning of the ZLEV Charge Act.

8 The last day of the current registration period for the First Plaintiff's ZLEV is 30 December 2021.

Particulars

VicRoads' Registration Check for BKU562 as at 4 August 2021 at 3:33pm.

9 The First Plaintiff does not presently intend to transfer the registration of the First Plaintiff's ZLEV to another person before that date.

10 If the Second Plaintiff acts in accordance with that present intention, by reason of s 11(1)(b) of the ZLEV Charge Act, the First Plaintiff will be obliged to lodge a subsequent declaration in relation to the First Plaintiff's ZLEV on or before 14 days after 30 December 2021 (subject to s 11(1)(a), (c) and (2) and s 14).

B.2 The Second Plaintiff

11 Since 29 August 2017, the Second Plaintiff has been the "registered operator", within the meaning of the *Road Safety Act 1986* (Vic) (**Road Safety Act**), of the vehicle with registration number APM666 (the **Second Plaintiff's ZLEV**).

Particulars

VicRoads Website, "Vehicle details – APM666".

12 The Second Plaintiff's ZLEV:

12.1 is a "plug-in hybrid electric vehicle" within the meaning of the ZLEV Charge Act;

12.2 is not an "excluded vehicle" within the meaning of the ZLEV Charge Act; and

12.3 therefore, is a "ZLEV" within the meaning of the ZLEV Charge Act.

13 Upon the commencement date, the Second Plaintiff was required by s 10(1)(a) of the ZLEV Charge Act to lodge with the Secretary within 14 days after 1 July 2021 an initial declaration in relation to the Second Plaintiff's ZLEV.

14 In accordance with that obligation, the Second Plaintiff lodged an initial declaration with the Secretary on 1 July 2021.

Particulars

Email from VicRoads to Ms Davies, "Thanks for declaring your odometer reading for APM666", dated 1 July 2021 at 5:39pm.

15 By reason of s 11(1)(b) of the ZLEV Charge Act, the Second Plaintiff was obliged to lodge a subsequent declaration in relation to the Second Plaintiff's ZLEV on or before 14 days after 29 August 2021.

16 In accordance with that obligation, the Second Plaintiff lodged a subsequent declaration on 29 August 2021.

Particulars

Email from VicRoads to Ms Davies, "Thank you for declaring your odometer reading for vehicle APM666", dated 29 August 2021 at 12:48pm.

17 Following lodgement of that declaration, an invoice was issued to the Second Plaintiff pursuant to s 18 of the ZLEV Charge Act.

Particulars

Email from VicRoads to Ms Davies, "Thank you for declaring your odometer reading for vehicle APM666", dated 29 August 2021 at 12:48pm.

18 By reason of s 19(1) of the ZLEV Charge Act, the Second Plaintiff was obliged to pay that invoice.

19 The Second Plaintiff paid the invoice on 29 August 2021.

Particulars

Email from VicRoads to Ms Davies, "Thank you for paying your road-user charge for vehicle APM666", dated 29 August 2021 at 1:06pm.

20 Since 29 August 2021, the Second Plaintiff's ZLEV has been used on "specified roads" within the meaning of the ZLEV Charge Act.

21 The last day of the current registration period for the First Plaintiff's ZLEV is 29 August 2022.

Particulars

VicRoads Website, "Vehicle details – APM666".

22 The Second Plaintiff does not presently intend to transfer the registration of the Second Plaintiff's ZLEV to another person before that date.

23 If the Second Plaintiff acts in accordance with that present intention, by reason of s 11(1)(b) of the ZLEV Charge Act, the Second Plaintiff will be obliged to lodge a subsequent declaration in relation to the Second Plaintiff's ZLEV on or before 14 days after 29 August 2022 (subject to s 11(1)(a), (c) and (2) and s 14).

B.3 The Defendant

24 The Defendant is a body politic capable of being sued in its name.

Particulars

Crown Proceedings Act 1958 (Vic), Pt II.

C ZLEV CHARGE ACT

25 By s 7(1) of the ZLEV Charge Act, the registered operator of a ZLEV must pay a charge for use of the ZLEV on specified roads (**ZLEV charge**), which is to be determined and paid in accordance with the Act and the regulations.

26 By s 8(1)(a), the rate of the ZLEV charge is, for each kilometre travelled on specified roads during the financial year starting on 1 July 2021:

26.1 2.5 cents for a ZLEV that is an that is an electric vehicle or hydrogen vehicle; or

26.2 2.0 cents for a ZLEV that is a plug-in hybrid electric vehicle.

27 The Secretary must determine the amount of the ZLEV charge payable by a registered operator of a ZLEV in accordance with the formula set out in s 15(1).

28 The formula is as follows:

$$C = (TD - NRD) \times R$$

where—

C is the ZLEV charge to which the determination relates;

NRD is the distance, if any, travelled by the ZLEV that was not on specified roads in the period to which the determination relates;

R is the applicable rate of the ZLEV charge under section 8;

TD is the total distance travelled by the ZLEV in the period to which the determination relates.

29 By s 15(2), the Secretary must determine the amount of the ZLEV charge from the declarations lodged by the registered operator, except in the circumstances specified in s 15(2)(a)-(c).

- 30 By s 15(3), in determining the amount of the ZLEV charge, the Secretary may assume, in the absence of evidence to the contrary, that all distances travelled by a ZLEV are travelled on specified roads.
- 31 By s 18(1), after determining an amount of the ZLEV charge payable by the registered operator of a ZLEV, the Secretary must issue an invoice to the registered operator for payment of the amount.
- 32 By s 19(1), the registered operator of a ZLEV must pay an invoice issued to the registered operator by the date for payment stated in the invoice.
- 33 If a registered operator does not lodge a declaration as required, or does not pay an invoice as required, the Secretary may suspend the registration of a ZLEV and, ultimately, may cancel the registration of a ZLEV (ss 29, 35).
- 34 The ZLEV charge and any interest payable under Pt 2 of the ZLEV Charge Act are debts due to the Defendant, which, if not paid by the date for payment, may be recovered by the Secretary on behalf of the Defendant in a court of competent jurisdiction (s 58).
- 35 The money collected by the Secretary for the ZLEV charge, and any interest payable, is to be credited to the Consolidated Fund by reason of s 9(2) of the *Financial Management Act 1994* (Vic).
- 36 Other than the ZLEV Charge Act, no other Victorian law imposes a charge on any other type of vehicle calculated by reference to the distance travelled by the vehicle on specified roads.

D ZLEVs AND SPECIFIED ROADS

- 37 A “ZLEV” means any of the following that is not an excluded vehicle (s 3):
- 37.1 an electric vehicle;
 - 37.2 a hydrogen vehicle;
 - 37.3 a plug-in hybrid electric vehicle.
- 38 A “specified road” means (s 3):
- 38.1 a public road within the meaning of the *Road Management Act 2004* (Vic) (**Road Management Act**); or
 - 38.2 a road related area within the meaning of the Road Safety Act; or

- 38.3 a highway at common law in Victoria that is not a public road or road related area referred to in paragraph 38.1 or 38.2; or
- 38.4 a highway at common law outside Victoria; or
- 38.5 a road within the meaning of the Road Management Act, other than a private road, prescribed by the regulations.

E ZLEV CHARGE IS INVALID

- 39 Section 90 of the Constitution gives to the Commonwealth Parliament the exclusive power to impose duties of excise.
- 40 It is therefore beyond the power of the State Parliaments to impose a duty of excise within the meaning of s 90 of the Constitution, and a law that purports to do so will be invalid.
- 41 For the purposes of s 90 of the Constitution, a duty of excise is an inland tax on the production, manufacture, sale, distribution, consumption or use of goods, whether of foreign or domestic origin.
- 42 ZLEVs are goods.
- 43 Section 7(1) of the ZLEV Charge Act:
- 43.1 imposes an inland tax;
- 43.2 has, as a criterion of liability, the consumption and/or use of ZLEVs; and
- 43.3 in its practical operation, imposes an inland tax on the consumption and/or use of ZLEVs.

Particulars for paragraph 43.1

Section 7(1) effects a compulsory exaction of money for public purposes, which is enforceable by law. That money is to be credited to the Consolidated Fund and therefore forms part of the general revenue stream of the State: see paragraph 35 above.

Further particulars may be provided.

Particulars for paragraph 43.3

The rate of the ZLEV charge varies depending on the type of ZLEV. The differential rate is by reference to the type of good.

Section 7(1) singles out ZLEVs for imposition of a charged based on use of vehicles on specified roads. No other Victorian law imposes a charge on any

other type of vehicle calculated by reference to the distance travelled by the vehicle on specified roads: see paragraph 36 above.

The expansive definition of “specified roads” in s 3 means that, to the extent that use on specified roads also constitutes part of the criterion of liability for the imposition of the ZLEV charge, its legal and practical effect is that the impost relates to use on all public roads both within and outside Victoria because those roads are “specified roads”. Further, the presumption underlying s 15(3) is that all use of ZLEVs occurs on specified roads. Accordingly, the legal and practical effect of s 7(1) is that it imposes an impost upon all consumption and/or use of ZLEVs, save for those limited circumstances in which a person takes active steps to record the use of a ZLEV on a private road

Further particulars may be provided.

- 44 Accordingly, s 7(1) of ZLEV Charge Act imposes a tax on the consumption and/or use of ZLEVs, and therefore imposes a duty of excise within the meaning of s 90 of the Constitution and is invalid.

F RELIEF CLAIMED

45 The Plaintiffs claim the following relief:

- (1) A declaration that s 7(1) of the ZLEV Act imposes a duty of excise within the meaning of s 90 of the Constitution and is therefore invalid.
- (2) Costs.
- (3) Such further or other order as the Court sees fit.

This Statement of Claim was prepared by Thomas Wood of counsel and settled by Ron Merkel QC.

Date: 16 September 2021



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The Plaintiffs are represented by Equity Generation Lawyers.