

WIDER IMPLICATIONS OF THE HIGH COURT'S DECISION IN VANDERSTOCK

Introduction

Always two ways look at High Court decision

First – Technical: this context, constitutional meaning “excise”

Broadly – what wider implications decision for constitutional interpretation generally

My presentation mainly about second aspect

Approach of paper: 1) technical implications section 90 term “excise”; 2) implications of Vanderstock for future interpretative method; 3) widest impact of decision, especially regarding federal

Technical outcomes of Vanderstock

Meaning section 90 “excise” always vital element of Australian federalism

Wider the meaning, less taxation options for States – i.e. Vertical fiscal imbalance

Historically, High Court move between restricted interpretation to protect federalism, and technical construction term “excise” which confines State power

Triple judgement in Vanderstock shows no interest in securing federal balance of revenues: purist judgement regardless of practical consequences

This context, strikingly similar to indefinite detention decision in XYNZ

Note: no actual majority so value as precedent limited

But Gordon J in dissent right: under majority hard imagine any State tax in respect good that not excise

Including consumption tax

Effectively, and tax that bears close relationship with good

Relationship could be on market generally, price, sales, consumption

Realistically, means determining whether impost is “excise” becomes “practical matter” of economics

Obvious question what other State taxes be caught under this approach

Obviously consumption tax

Possibly wider car licensing: affect demand supply, price etc.

Differential price licensing between different objects in same class: e.g. plastic versus disposable bottles

Consequently, scope exercise in Vanderstock extremely unclear

Implication for Wider interpretative approach

Most striking is “No prisoners approach” – uninterested in practical federal outcome

Virtually impossible find actual ratio

Notable extensive use of Convention Debates by majority

But really used to confuse, rather than illuminate meaning of “excise” – no contemporary meaning in 1890s

Extremely significant: determination of majority to understand excise in terms grand constitutional scheme

Regarding “excise”, grand constitutional scheme is Customs Union created by section 92

Never allow be undermined by State excises

This reason that Court interprets section 90’s restriction of powers with same breath gives to positive Commonwealth powers under section 51

Remarkable reliance in triple judgement on practical economic effect of exaction

But judgement’s economic analysis is amateurish and impossible to follow

Reality: Judges trained in law, not economics, and are not qualified to make complex economic assessments

Same difficulty seen in cases like *Cole v Whitfield* regarding discriminatory burden under section 92

Does leave term “excise” with extraordinary breadth – bit like very expansive interpretation of section 109 inconsistency.

Striking: High Court prepared rely on great overarching theme of customs union, while ignoring far greater scheme of federalism itself

Decision not fit usual categories of interpretation: e.g. literalism, originalism, progressivism.

Combination of all to reach same result

Wider directions of Court

Clear, very limited interest in federalism as interpretative principle

Grim news for States

With *XYNZ* suggests Court returning to two historic obsessions – expansion of Commonwealth power and separation judicial power

“Grand Scheme” approach very interesting – where go?

E.g. could it be used to justify implied constitutional rights, as in *Cable*?

Has similarities to Sir William Deane’s “holistic approach”

Significantly, much use of history (especially convention Debates” to justify “Grand Scheme approach”

Demonstrates real problems of Judges delving into economics

Irony that triple judgement emphasizes practical assessment, but shows no interest in practical federal effects

Conclusion

Gordon J right – decision effectively amendment of Constitution

From banning State “excises” to banning any State tax connected to goods

But in longers term, “Grand Scheme” approach most interesting