HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIS
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of submissions

1. These submissions are in a form suitable for publication on the internet.

Part II Basis of intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of Victoria.

Part III Argument

3. The NSW Attorney adopts the submissions of Victoria and makes the following supplementary submissions:

a. First, the plaintiffs and the Commonwealth require, but should not be granted, leave to re-open Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177 (**Dickenson's Arcade**).

b. Second, even if leave were granted, the Court should conclude that s 90 does not apply to taxes on the consumption of goods. The plaintiffs' and the Commonwealth's argument, which finds no support in the text or context of s 90, wrongly assumes that s 90 was intended to pursue a general purpose "at all costs" (Carr v Western Australia (2007) 232 CLR 138 (**Carr**) at 142-143 [5]-[7] per Gleeson CJ); and it engages in a speculative exercise as to the

economic effect of "consumption taxes", wrongly treated as a monolithic concept, without the benefit of any expert evidence on that topic.

Dickenson's Arcade

Leave to re-open is required

4. For the following reasons, Dickenson's Arcade forecloses the plaintiffs' and the Commonwealth's argument that s 90 applies to taxes on the consumption of goods. Leave to re-open is required.

5. Relevantly for present purposes, the plaintiff challenged Pt II of the Tobacco Act 1972 (Tas). It imposed a tax on the consumption of tobacco at the rate of 7.05% of the value of the tobacco calculated on the amount consumed according to the price at which tobacco of the kind in question was ordinarily sold by retail. A person who consumed tobacco, and within 7 days did not pay the tax, was guilty of an offence.

6. A majority concluded Pt II was valid:

   a. Menzies, Gibbs, Stephen and Mason JJ each held that Pt II did not infringe s 90 because it imposed a tax on the consumption of tobacco and such a tax was not an excise for the purposes of s 90.

   b. While Barwick CJ expressed doubt about the exclusion of consumption taxes from s 90 (at 185), he accepted that that was the position based on the authorities: at 185-186. However he concluded Pt II was invalid because he characterised the tax as being imposed "on the movement of the tobacco into consumption", as opposed to a tax on the consumption of tobacco itself: at 193.

   c. McTiernan J was alone in concluding that s 90 applies to consumption taxes and that Pt II was invalid on that basis: at 204.

7. The collection of the tax imposed by Pt II was addressed in the Tobacco Regulations 1972 (Tas). The Regulations allowed a purchaser of tobacco to pay to the occupier of the premises at which the retail tobacco business was carried on, or the person carrying on the business, the tax the purchaser would otherwise be liable to pay on the consumption of the tobacco. The Court was evenly divided on the question whether the Regulations were valid (and accordingly the view of Barwick CJ, that the Regulations were invalid, prevailed):

a. Menzies, Gibbs and Stephen JJ concluded that the Regulations did not affect their characterisation of the tax imposed by Pt II, and so concluded that the Regulations were authorised by the Act.

b. Mason J concluded that the practical operation of the Regulations was to convert the tax imposed by Pt II into a tax on the sale of tobacco before it reached the hands of the consumer, and therefore into an excise, and the regulation-making power could not validly authorise such a regulation.

c. Barwick CJ and McTiernan J, having held that Pt II was invalid, accordingly held that the Regulations were inoperative.

10 8. As such, the reasoning of Menzies, Gibbs, Stephen and Mason JJ on the Regulations was consistent with their conclusion reached on the question of principle in respect of Pt II: namely, that s 90 does not extend to consumption taxes. Their conclusion on that question constitutes part of the ratio decidendi: it was a statement of principle which, applied to the material facts, was sufficient to explain the result in respect of Part II: Oxford Companion to Law (1980) (entry on "ratio decidendi").

9. The plaintiffs submit that it is "not clear" that the broader proposition they now advance was advanced in Dickenson's Arcade: Plaintiffs' submissions (**PS**) at [38]. That suggestion should be rejected given the description of counsel's argument at 180 of the report: "Once it is accepted that an excise duty is a tax on production or manufacture
20 and that a tax on retail sale is a tax on production or manufacture, it follows that a tax on consumption is an excise, because it is a tax on production or manufacture. *Atlantic Smoke Shops Ltd v Conlon* [[1943] AC 550] is of no relevance to s 90 of the Constitution". The plaintiffs' argument in these proceedings is to a large extent a "re-agitation" of those arguments: see further at [11] below.

10. Even if the argument were narrower than the one made here, the fact remains that Menzies, Gibbs, Stephen and Mason JJ rejected the argument *because* their Honours accepted the general principle that consumption taxes cannot be excises. That principle is therefore part of the ratio of the decision.

Leave should not be granted

30 11. Resolution of an application to re-open is informed by a "strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken": Wurridjal v Commonwealth (2009) 237

CLR 309 at 352 [70] per French CJ. That principle acknowledges the damage that can be done to the Court's authority and the stability of the justice system by re-opening a previous decision of this Court. It should be done "only with great caution and for strong reasons": Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 554 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ, citing inter alia Queensland v Commonwealth (Second Territory Senators Case) (1997) 139 CLR 585 (**Second Territory Senators**) at 620 per Aickin J. A decision should not be re-opened merely to "allow the re-agitation of arguments which did not prevail in the earlier decision": North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569 at 629-630 [162] per Keane J. The Court reaching a different conclusion on an issue on which reasonable minds might differ is insufficient. Even concluding a previous decision was "wrong" is not necessarily enough to re-open it: Second Territory Senators at 625 per Aickin J.

12. In that context, the Plaintiffs' and Commonwealth's arguments fall short of demonstrating that leave should be granted.

13. *First,* the decision rested on a principle carefully worked out in a series of cases: John v Federal Commissioner of Taxation (1989) 166 CLR 417 (**John**) at 438 per Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ. It is not an isolated decision but rather forms part of a definite stream of authority: Second Territory Senators at 630 per Aickin J. As Mason J observed in Dickenson's Arcade, "[w]hatever differences may be detected in the judgment of members of this Court in recent decisions, they all agree in defining or describing an excise duty in such terms as would exclude a tax imposed on goods after they have passed into the hands of a consumer…These statements must…be regarded as establishing at this time that a tax on consumption of goods is not an excise": at 239; see also at 221 per Gibbs J.

14. Such statements preceding Dickenson's Arcade included Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529 (**Dennis Hotels**) at 540-541 per Dixon CJ, 559 per Kitto J, 573 per Taylor J, 588-590 per Menzies J; Bolton v Madsen (1963) 110 CLR 264 at 273 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer, Owen JJ; Anderson's Pty Ltd v Victoria (1964) 111 CLR 353 at 364-5 per Barwick CJ, at 373 per Kitto J (with whom Taylor J agreed at 376), at 377 per Menzies J; Western Australia v Chamberlain Industries Pty Ltd (1970) 121 CLR 1 at 13 per Barwick CJ, at 28 per Windeyer J, at 35 per Walsh J. While, as the Plaintiffs note, those expressions of opinion are not binding

because in those cases it was unnecessary to decide whether a consumption tax was an excise, "the very greatest weight should be given to the fact that on this issue unanimity has been reached after fluctuation of judicial opinion": Dickenson's Arcade at 221 per Gibbs J.

15. The Commonwealth submits that the majority in Dickenson's Arcade reached the conclusion "reluctantly": Commonwealth submissions (**CS**) at [4]. That is overstating the position:

a. Menzies J outlined the relevant authorities: at 209. His Honour expressed no doubt about them and proceeded to accept and apply them: at 209.

b. Gibbs J noted that if a tax on the sale of goods can be regarded as a method of taxing their production or manufacture, as recognised in Parton v Milk Board (Vic) (1949) 80 CLR 229 (**Parton**), then "it is difficult to see why a tax on their consumption should not be similarly regarded": at 218. He also accepted that "if" it were permissible to consider the economic effect of the tax, it would be "impossible…to draw a line between the last retail sale and the act of consumption": at 219. However, his Honour, having considered various definitions, went on to conclude that the "established usage (notwithstanding some divagations) favours the conclusion that a tax on the consumption of goods is not a duty of excise" and that to say that "control by the Commonwealth Parliament of the taxation of goods will not be complete, or that its fiscal policy may be hampered, if the States can impose a tax at the point of consumption, is in my opinion not decisive against this view": at 222. He continued at 222:

> The question cannot be answered by having regard to the position of the Commonwealth alone. The Constitution is a federal constitution, and s 90 is intended to effect a distribution of the power to impose taxation between the Commonwealth and the States. Of course, the section confers no power on the Commonwealth…it denies power to the States. The extent of the denial must be found in the words of the section themselves rather than in economic, social or political theory. Section 90 does not refer to taxes on goods but to duties of customs and excise. Upon its proper construction s 90 stops short of denying power to the States to impose taxes on consumption.

In this way, Gibbs J considered the matter for himself and formed the view that consumption taxes were excluded. His Honour did not "reluctantly" follow the authorities.

c. Stephen J said at 230 that the "degree of certainty which has been conferred upon the phrase...has been hard won and should not lightly be disturbed in this important aspect of constitutional law concerned with the delineation of the boundary between State and federal legislative competence in the taxation of the citizen". He said "no convincing reasons" had been advanced for the adoption of any new meaning of the phrase "duty of excise" so as to include a tax on consumption and the "economic effect cannot constitute any conclusive determinant of the character of a tax as an excise": at 230.

d. Mason J recognised that the exclusion of consumption taxes "*might* be thought *perhaps* to constitute an unacceptable limitation" (emphasis added) on the power of the Commonwealth to control the taxation of commodities, but said such a tax is infrequently encountered and so s 90 still affords the Commonwealth "a large measure of control": at 238-239. His Honour articulated the justification for the restriction as being "evidently based on the notion that consumption is not sufficiently proximate to the production and manufacture of goods – a concept of proximity which it derives from the reference in s 93 to 'taxes paid on the production and manufacture of goods' and from the circumstance that s 90 deals with bounties on production as well as duties of excise": at 239.

16. Even if aspects of the reasoning in previous decisions can be criticised, "the inherent difficulty of determining what is an excise…makes it extremely hard to say that a particular decision is wrong, notwithstanding that the reasoning on which it is based may not appear to be persuasive": HC Sleigh Ltd v South Australia (1977) 136 CLR 475 (**HC Sleigh**) at 501 per Mason J, where a similar attempt was made to re-open Dennis Hotels and Dickenson's Arcade (albeit on a different issue):

17. *Secondly*, the differences between the reasoning of the four Justices were immaterial. On the relevant issue – whether a consumption tax is an excise – all four Justices adopted substantially the same reasoning. Contrary to the Plaintiffs' and Commonwealth's submissions:

a. The fact that Mason J adopted a different approach on the "criterion of liability" issue is beside the point: cf PS [40.1]; CS [30]. That related to a different

question of principle (how to characterise the legislation in question) not the question whether s 90 applies to consumption taxes.

b. There was no significant difference between Menzies, Gibbs, Stephen and Mason JJ in identifying purpose of s 90: cf PS [40.2]. Mason J adopted Dixon J's view of s 90 – that it was intended to give Parliament a "real control over the taxation of commodities": Dickenson's Arcade at 238, citing Parton at 260. Contra PS [40.2], Menzies J did not go so far as to reject that view. What his Honour did was reject the view expressed by Rich J in The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia (the Petrol Case) (1926) 38 CLR 408 at 437 that s 90 covered "all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term 'customs and excise'": Dickenson's Arcade at 212-213. His Honour also rejected the idea that the subject of s 90 was "indirect taxation [or] control of the economy of Australia": at 213.

c. The plaintiffs rely at PS [40.3] on Menzies J's observation that the tax fell upon "all consumption in Tasmania whether of tobacco of Australian or overseas manufacture": Dickenson's Arcade at 210. His Honour made that observation in the context of deciding whether to characterise the tax as a tax "upon a step in the distribution of, rather than a tax upon consumption of, tobacco": at 209. It was not an aspect of his Honour's reasoning on the question of principle as to whether a consumption tax is an excise.

d. The plaintiffs also rely at PS [40.3] on the fact that Stephen J referred to the (now discarded) distinction between direct and indirect taxes. However, his Honour did not seek to revive the distinction as being *determinative* of whether a tax is an excise. Rather, his Honour observed that "[w]hatever may now be thought to be the relevance" of that distinction, "direct taxes are inherently less closely related to goods than are indirect taxes and are to that extent *less likely* to be found to be duties of excise": Dickenson's Arcade at 230-231 (emphasis added). All his Honour was suggesting was that a consumption tax, being placed directly on consumers rather than being passed on to them, is less closely related to the goods.

18. *Thirdly,* while the plaintiffs submit Dickenson's Arcade achieved "no useful result", that is too narrow a characterisation of the relevant question: cf PS [41]. The factor referred to in John was that the earlier decision "had achieved no useful result but on the contrary had led to considerable inconvenience": at 438 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ, citing Commonwealth v Hospital Contribution Fund of Australia (1982) 150 CLR 49 at 56-58. Thus, on a re-opening application, it is not simply a matter of asking whether the result of the earlier decision was "useful". That would invite the Court to express a view on how desirable a particular policy objective is and whether the decision promoted or undermined it. The more pertinent question is whether the decision has led to "considerable inconvenience".

19. No such inconvenience can be illustrated here. The plaintiffs can only point to an alleged "anomaly" (PS [22]-[28]), namely a supposed disconnect between the alleged purpose of s 90 and its scope of operation. In other words, the "anomaly" is that s 90 does not give the Commonwealth the extent of control over the taxation of commodities which the plaintiffs say was intended. That argument assumes the correctness of the submissions the plaintiffs would make if Dickenson's Arcade *were* to be re-opened (as to which, see from [25] below). It is not a factor in *favour* of re-opening.

20. *Fourthly*, the decision has been independently acted upon. While the plaintiffs suggest that taxes on consumption are rare, as Victoria submits there are a number of taxes that could be so characterised: Victoria's Submissions (**VS**) at [29]. As Mason J observed in HC Sleigh at 501:

> Generally speaking, the Court should be slow to depart from its previous decisions, especially in constitutional cases where the overturning of past decisions may well disturb the justifiable assumptions on which legislative powers have been exercised by the Commonwealth and the States and on which financial appropriations, budget plans and administrative arrangements have been made by governments.

21. To a similar effect, in Capital Duplicators Pty Ltd v Australian Capital Territory [No 2] (1993) 178 CLR 561 (**Capital Duplicators**), in rejecting an application to re-open Dennis Hotels and Dickenson's Arcade (albeit in relation to the different question of whether licensing fees are excises), Mason CJ, Brennan, Deane and McHugh JJ observed that the States and Territories had "relied" on the decisions in imposing licence fees in order to "finance the operations of government" and that "[f]inancial arrangements of great importance to the governments of the States have been made for

a long time on the faith of these decisions": at 593. Their Honours observed that that "considerations of certainty and the ability of legislatures and governments to make arrangements on the faith of the Court's interpretation of the Constitution are formidable arguments against a reconsideration of *Dennis Hotels* and *Dickenson's Arcade*". The same can be said here.

Consumption taxes are excluded from s 90

22. As Victoria submits, it is wrong to start from the premise – as the Commonwealth does – that s 90 should be construed "with all the generality that the word permits": CS [9]. That is a proposition drawn from observations in Allders International Pty Ltd v Commissioner of State Revenue (Vict) (1996) 186 CLR 630 at 638 per Brennan CJ and New South Wales v Commonwealth (2006) 229 CLR 1 at [185], [194]-[195] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. In both cases, the observations concerned the grant of legislative powers to the Commonwealth (under s 52(i) and s 51 respectively). It may be appropriate to construe a grant of power in that way, but s 90 is more in the nature of a limitation on power. While s 51(ii) gives the Commonwealth the power to impose taxes, the effect of s 90 is to make that power exclusive in a certain respect and thereby deny that power to the States and Territories: Ha v New South Wales (1997) 189 CLR 465 (**Ha**) at 506 per Dawson, Toohey and Gaudron JJ (in dissent, but not on this point); Dickenson's Arcade at 222 per Gibbs J.

23. The NSW Attorney otherwise adopts Victoria's submissions at VS [30]-[37], which illustrate that there are compelling textual, contextual and purposive reasons why the word "excise" in s 90 does not extend to taxes on the consumption of goods.

24. The plaintiffs and the Commonwealth, finding no support for their argument in the text of s 90 or its context, rely heavily on: a) the asserted purpose of s 90; and b) the alleged "economic effect" of consumption taxes being the same as taxes on the production, manufacture, distribution or sale of goods. Each is addressed in turn.

The purpose of s 90

25. The plaintiffs and the Commonwealth refer to Dixon J's statement in Parton that s 90 was intended "to give the [Commonwealth] Parliament a real control of the taxation of commodities": at 260. The full context of Dixon J's statement was as follows:

> In making the power of the Parliament of the Commonwealth to impose duties of customs and 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 its manufacture or production.* If the exclusive power of the Commonwealth with respect to excise *did not go past manufacture and production* it would with respect to many commodities have only a formal significance. (emphasis added)

26. Dixon J's "assumption" as to the purpose of s 90 was made in order to reject the narrow meaning of "excise" (applying only to taxes on the production or manufacture of commodities) and extend it to taxes on the distribution of a commodity "before it reaches the consumer". The statement appeared just before his Honour's conclusion at 261 that consumption taxes are not excises. His Honour obviously did not consider that conclusion to be inconsistent with the purpose he had just articulated. As Victoria submits, for those reasons it would be inappropriate to use Dixon J's statement to support the contrary conclusion that consumption taxes are excises: VS [36]-[37].

27. Dixon J's statement was adopted in Capital Duplicators at 586, 589-590 per Mason CJ, Brennan, Deane and McHugh JJ and Ha at 488 per Brennan CJ, McHugh, Gummow and Kirby JJ. However, in both cases, it was again used to explain why there should not be a return to the narrow meaning of "excise" as a tax on the production or manufacture of goods. Both decisions expressly left open the question whether s 90 applies to consumption taxes: Capital Duplicators at 590 per Mason CJ, Brennan, Deane and McHugh JJ; Ha at 499-500 per Brennan CJ, McHugh, Gummow and Kirby JJ. For the same reason, little weight can be given to the observation in Capital Duplicators at 590 that s 90 "must be construed as exhausting the categories of taxes on goods": cf PS [23]; CS [15], [21]. In circumstances where the majority was expressly not deciding whether s 90 applies to consumption taxes, the statement cannot possibly be read as suggesting that s 90 does apply to such taxes.

28. The other vice in the plaintiffs' and the Commonwealth's submissions is that they assume s 90 intended to pursue this very broad purpose "at all costs": Carr at 142-143 [5]-[7] per Gleeson CJ, cited in CFMEU v Mammoet Australia Pty Ltd (2013) 248 CLR 619 at [40]. On one view, "real control" is not a purpose at all; it is rather a "means…by which an unstated or assumed objective is to be achieved": see Hanks, "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity" (1986)

Adelaide Law Review 365 at 371; see also Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 Melbourne University Law Review 296 at 308.

29. In any event, the statement is so broad as to be of little assistance in working out the specific question of whether s 90 extends beyond taxes on production, manufacture, sale and distribution to taxes on the consumption or use of commodities. That is especially so given s 90 reflects a compromise between "competing interests": see Carr at [5] per Gleeson CJ. As noted at [15b] above, in Dickenson's Arcade Gibbs J observed that the Constitution is a "federal constitution" and s 90 "is intended to effect a distribution of power to impose taxation between the Commonwealth and the States": at 222. The exclusivity given to the Commonwealth by s 90 necessarily involved a denial of power to the States and Territories. Where the "problem is one of doubt about the extent to which the legislation pursues a purpose" – here, the problem being the *extent* to which s 90 was intended to give the Commonwealth "control" over taxes on goods – "stating the purpose is unlikely to solve the problem": Carr at [5] per Gleeson CJ.

The economic effect of consumption taxes

30. Having invoked the general purpose of s 90, the plaintiffs and the Commonwealth then argue that the ability to impose consumption taxes would undermine the desired level of "control" because, like taxes on production, manufacture, sale and distribution up to the point of receipt by the consumer, taxes on consumption can affect the price of and demand for the product: PS [24]-[28], CS [22].

31. Such an argument is speculative and would be dangerous to accept in the absence of any expert evidence. Even Dixon J's statement in Parton – that 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 its manufacture or production" (the effect being to enter into the cost of the good and affect the retail price payable by the consumer) – has been critiqued as based on "unresearched economic theory": G Sawer, 'The Future of State Taxes: Constitutional Issues' in RL Mathews (ed), Fiscal Federalism: Retrospect and Prospect (1974) at 199; see also Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 Melbourne University Law Review 296 at 317.

32. In relation to Dixon J's statement, Sawer has observed (at 200):

> Obviously the most that can be said about [a tax on sale or distribution] is that it may have an effect for the same commodity at the manufacturing end, but its effect may be on some other commodity (beer instead of cigarettes) or on some other feature of the behaviour of the person taxed or on the consumer (cheaper other ingredients sought, wife [or other domestic partner] goes out to work), or it may be absorbed in a real increase in gross national product though resource or technology discoveries or innovations, etc. (underlining in original)

33. In Capital Duplicators, Toohey and Gaudron JJ observed at 627:

> ..it is apparent that a tax upon the distribution of goods may have different consequences from a tax upon their production. For example, a tax upon production has an impact only on goods produced locally, thereby affecting the price of those goods as compared with goods produced overseas; a tax on the sale of goods impacts on both and, if non-discriminatory, on both equally.

34. Of course Toohey and Gaudron JJ were in dissent in concluding that s 90 should be confined to taxes on the local production or manufacture of goods. However the point about the economic effect of different taxes remains a sound one. The differential effects of taxes on production, manufacture, distribution and sale have also been addressed in Ha at 509 (Dawson, Toohey and Gaudron JJ, again in dissent on the scope of s 90); and see also Puig and Chaile, "For a Narrow Interpretation of Section 90 of the Australian Constitution: The Excise Duty System as a Guarantee of Free Trade in an Internal Market" (2010) 29(2) University of Queensland Law Journal 319 at 325.

35. While the Court need not re-examine the economic effect of taxes on sale and distribution in these proceedings (except perhaps if Capital Duplicators or Ha were to be re-opened), to take the *further* step of holding that any sort of consumption tax will affect the demand for and price of goods in the same way as a tax on production, manufacture, sale or distribution would be a large step indeed.

36. No authority is cited for that proposition. Mason J's observation in Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599 at 632 (relied on at PS [24]) did not apply to consumption taxes: his Honour's was referring only to taxes on production, manufacture, sale or distribution in saying that such a tax enters the price of the goods and, by increasing the price, "diminishes or tends to diminish demand for goods".

37. The argument cannot be made by analogy with taxes on production, manufacture, sale or distribution. As explained above, Dixon J's reasoning was based on the assumption that taxes on sale or distribution will enter the price of the goods just like taxes on production or manufacture. It was implicitly based on the now discarded notion of

indirect taxation – that is, "two taxes producing the same effect of passing a burden onto the finished product": Caleo, "Section 90 and Excise Duties: A Crisis of Interpretation" (1987) 16 Melbourne University Law Review 296 at 308. However, as Victoria submits, consumption taxes are conceptually distinct: VS [32]-[33]. Taxes on production, manufacture, sale or distribution can be conceived of as a defined part of the purchase price, whereas a tax on consumption may result in a payment (the precise amount unknown at the time of purchase) long after the purchase has taken place.

38. Making assumptions about the economic effects of consumption taxes is dangerous given the different types of taxes that might fall into that category. While the plaintiffs' and the Commonwealth's submissions treat "consumption taxes" as a monolithic concept, they in fact sit on a spectrum:

a. At one end of the spectrum sits a consumption tax paid at the point of sale, like the one considered in Dickenson's Arcade which was payable to the retailer at the time of the purchase of the tobacco as a fixed percentage of value. In such a case, there are some similarities between a tax on sale and a tax on consumption. While the plaintiffs rely on observations in Dickenson's Arcade equating consumption taxes to other taxes on goods, no doubt those observations were informed by this particular factual context: cf PS [25]-[27].

b. Further down the spectrum may be an amount payable upon registration of a good (such as stamp duty on registration of a motor vehicle).

c. Further down the spectrum again may be a tax that is payable by reference to *how much* the good is used in *certain contexts* over the *life time* of the good. Such a tax might be payable soon after purchase and/or registration as a fixed amount, perhaps with a refund for unused credit (a "pre-paid" system), or payable at some later stage after the consumer has used the good for a period of time and at regular intervals thereafter (a "post-paid" system): compare Electric Vehicles (Revenue Arrangements) Act 2021 (NSW), s 16. Such payments may continue for many years after purchase, depending on the life of the good.

39. While the plaintiffs assert that a consumer can "naturally be expected to account for any future cost that may be borne by them" (PS [24]), there is a real question as to how a consumer might do that in circumstances where, at the point of purchase, the consumer may not know what the likely cost will be over time. For example, it may be

unclear how much the consumer will use the vehicle, for how long the consumer will own the vehicle, or what the consumer's financial circumstances will be over the potential life time of the good. In this way, different "consumption taxes" may well have very different impacts on demand and price. The Court is not able to conclude that all "consumption taxes" would have the same economic effect as taxes on the production, manufacture, sale or distribution of goods, at least in the absence of expert evidence on that topic.

Part IV Estimate of time

40. It is estimated that oral argument on behalf of the NSW Attorney will take 15 minutes.

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Date: 7 November 2022

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ANNEXURE

Constitutional provisions, statutes and statutory instruments referred to in the intervener's submissions

	Provision	**Version**
1.	Constitution of Australia, s 51(ii), 90	Current
2.	Electric Vehicles (Revenue Arrangements) Act 2021 (NSW), s 16	Current
3.	Tobacco Act 1972 (Tas), Pt II and III	As enacted
4.	Tobacco Regulations 1972 (Tas)	As enacted