

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B60 of 2017

BETWEEN:

THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA



Appellant

and

MARTIN ANDREW THOMAS

Respondent

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B61 of 2017

BETWEEN:

THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA

Appellant

and

MARTIN ANDREW PTY LTD  
ACN 063 993 055

Respondent

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**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE  
STATE OF QUEENSLAND (INTERVENING)**

Outline of oral argument  
Of the Attorney-General for the  
State of Queensland  
Form 27F

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Dated: 10 April 2018  
Per: James Potter  
Ref PL8/ATT110/3685/PXJ  
Document No: 7946875

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**Part I:**

1. This outline is in a form suitable for publication on the internet.

**Part II:**

2. The Attorney-General for the State of Queensland (**Queensland**) intends to advance the following propositions in oral argument.
- 10 3. Like submissions are made by both Queensland and the Attorney-General of the Commonwealth (**Commonwealth**) as to the interpretation of s 118 of the Constitution and its operation in this case.
4. Queensland and the Commonwealth each submit that:
  - a. s 118 requires nothing more than that orders of a State court be recognized throughout the Commonwealth on the same basis as they would be recognised in the State in which they were made;<sup>1</sup> and
  - 20 b. an important issue in the appeals is the effect of the Supreme Court of Queensland's orders of 12 November 2010. Section 118 does not assist the resolution of that issue, because s 118 is not concerned with the 'degree of finality or conclusiveness' which the orders of State courts have within that State.<sup>2</sup>
5. An appropriate starting point for the analysis of the effect of that order is the order itself. Here, because of the particular nature of the jurisdiction exercised in making the order, it is also necessary to consider its juridical foundations. Only by doing so can the effect or character of the order within the State of Queensland be identified.
- 30 6. Thus, the question is not whether, on an application for directions pursuant to s 96 of the *Trusts Act 1973* (Qld), or any of its analogues, a court is entitled to interpret the *Income Tax Assessment Act 1997* (Cth), or any other legislation for that matter – it being difficult to see how a particular species of legislation can be excluded from interpretation if relevant to the giving of such direction – but rather, what is the effect, if any, outside the trustee and the beneficiary, of advice predicated upon such construction.
- 40 7. It now does not matter to the resolution of the constitutional issue whether the Supreme Court was exercising State jurisdiction or Federal jurisdiction, as this enquiry is only relevant to the question of whether s 118 of the Constitution operates subject to an exception where an order is made without jurisdiction.<sup>3</sup> No party seems to submit that the Supreme Court did not have jurisdiction to make the orders it made, so the need to consider such an

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<sup>1</sup> Submissions for the Attorney-General for the State of Queensland (Intervening) dated 18 January 2018 ('SAGQ'), paragraphs [39]-[42], submissions of the Attorney-General of the Commonwealth (Intervening) dated 25 January 2018 ('SAGC'), paragraph [29].

<sup>2</sup> SAGQ, paragraph [43], SAGC, paragraph [29].

<sup>3</sup> SAGQ, paragraph [49].

exception does not expressly arise in this case, and thus need not be determined.

8. Even if the effect or character of the Supreme Court's order of 12 November 2010 is as the Respondents contend, it may not be necessary for the Court to determine the Constitutional issue to decide the appeals, because of:<sup>4</sup>
- 10 a. s 185 of the *Evidence Act 1995* (Cth), which requires that judicial proceedings of a State or Territory proved in accordance with the Act be given in every court and public office in Australia 'such faith and credit as they have by law or usage in the courts and public offices of that State or Territory';
  - b. the reasons of various members of this court in *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxation (SA)*,<sup>5</sup> if it is decided that the Supreme Court's order of 12 November 2010 established taxable facts; or
  - 20 c. the principle recognized in *Cameron v Cole*<sup>6</sup> referred to by Perram J in the Full Court of the Federal Court in the decision under appeal.
9. Queensland submits that if it is not necessary to determine the Constitutional issue, the Court should not do so.
10. If it is necessary to determine the Constitutional issue, Queensland makes the following submissions about the scope of the requirement in s 118 of the Constitution that full faith and credit be given throughout the Commonwealth to, relevantly, the judicial proceedings of every State:

- 30 a. A narrow reading of s 118, which would confine its utility to facilitating the proof of the judicial proceeding of one State in some other area of the Commonwealth, should be rejected. Rather, it is a substantial provision of the Constitution, and an important one in the context of a federation with an integrated legal system.<sup>7</sup>
- b. The broader approach of Fullagar J in *Harris v Harris*<sup>8</sup> should be preferred. Under that approach, s 118 renders a judgment or order of a State court effective throughout the Commonwealth with the same degree of finality and conclusiveness as it would have within the State it was made.<sup>9</sup>

40 True it is that, as the Commonwealth submits,<sup>10</sup> Fullagar J in *Harris v Harris* decided the case on the predecessor of s 185 of the *Evidence*

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<sup>4</sup> SAGQ, paragraph [8].

<sup>5</sup> (1939) 62 CLR 545.

<sup>6</sup> (1944) 68 CLR 571, 585.

<sup>7</sup> SAGQ, paragraph [33].

<sup>8</sup> [1947] VLR 44.

<sup>9</sup> SAGQ, paragraph [39]-[42].

<sup>10</sup> SAGC, paragraph [27].

*Act 1995* (Cth) rather than on s 118 of the Constitution. His Honour did however leave open the possibility that s 118 could be interpreted in the same way. Queensland submits it should be.

- c. The exact consequence of giving full faith and credit to judicial proceedings will depend on the nature of the judicial proceeding which faith and credit are to be given to.<sup>11</sup>

10 11. Queensland's submissions as to the scope of s 118, and the preferred interpretation of it, concern how the existence of s 118 modifies the common law only in relation to the recognition of a foreign or interstate judgment.<sup>12</sup> Queensland does not make some broader, general proposition about the enforceability of the judgment at common law per se.<sup>13</sup> The concerns expressed at SAGC [28] and onwards do not arise.

20 12. *Finally*, Queensland does not ask the Court to decide the matters identified in paragraph 46 of the Commonwealth's submissions, relating to covering cl 5 and s 77 of the Constitution. The Commonwealth has not sought to prevent the Supreme Court from interpreting Commonwealth legislation in this case.

These submissions were settled by Mr Peter Dunning QC and Mr David Chesterman.

Dated: 10 April 2018



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Name: Peter Dunning QC  
Solicitor-General for the State of Queensland

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<sup>11</sup> SAGQ, paragraph [7(a)(iii)].

<sup>12</sup> SAGQ, paragraph [36].

<sup>13</sup> SAGQ, paragraph [43].