HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 02 Apr 2025 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:	B48/2024
File Title:	G Global 120E T2 Pty Ltd as trustee for the G Global 120E AU
Registry:	Brisbane
Document filed:	Form 27C - Intervener's submissions (Cth A-G)
Filing party:	Interveners
Date filed:	02 Apr 2025

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

BRISBANE REGISTRY

No. B48/2024

BETWEEN: **G GLOBAL 120E T2 PTY LTD atf THE G GLOBAL 120E AUT**

Appellant

AND: **COMMISSIONER OF STATE REVENUE**

Respondent

No. B49/2024

BETWEEN: **G GLOBAL 180Q PTY LTD atf THE G GLOBAL 180Q AUT**

Appellant

AND: **COMMISSIONER OF STATE REVENUE**

Respondent

No. B50/2024

BETWEEN: **G GLOBAL 180Q PTY LTD atf THE G GLOBAL 180Q AUT**

Appellant

AND: **COMMISSIONER OF STATE REVENUE**

Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (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 of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in support of the Respondent in each appeal.

PART III: ARGUMENT

A. STATEMENT OF ISSUES

3. As in *Stott v Commonwealth of Australia & State of Victoria* (M60/2024) (***Stott***), there is no dispute that land tax at the "**Foreign Surcharge**" rate purportedly imposed on the Appellants was not validly imposed prior to 8 April 2024 by s 32(1)(b)(ii) of the *Land Tax Act 2010* (Qld) (**QLTA**). Section 109 of the Constitution rendered s 32(1)(b)(ii) inoperative by reason of its inconsistency with Art 24(4) of the **German Agreement**,[1] as given force by s 5(1) of the *International Tax Agreements Act 1953* (Cth) (**Agreements Act**). As in *Stott*, the key issue in the Special Case is whether Foreign Surcharge is now validly imposed on the Appellants. The Commonwealth submits that it is. That conclusion may be reached by paths equivalent to those identified in the Commonwealth's submissions in *Stott* (**CS Stott**). Either:

   (a) Section 5(3) of the Agreements Act is effective to limit the operation of s 5(1) of the Agreements Act *prospectively*, thereby allowing s 104 of the QLTA validly to impose Foreign Surcharge for the 2021 and 2022 financial years (that operation of s 104 being *retrospective*, not *retroactive*). If resolved in that way, it is not necessary for the Court to decide the effect and validity of s 5(3) in a *retroactive* operation; or

   (b) Section 5(3), read with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Commonwealth Amendment Act**), is effective in its *retroactive* operation (contrary to *University of Wollongong v* ***Metwally***[2]) to make room for s 32(1)(b)(ii) of the QLTA to regain the operative effect of which it had been deprived by s 109 of the Constitution. In that *retroactive* operation, s 5(3) is valid notwithstanding s 51(xxxi) of the Constitution.

---

1 Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance (done at Berlin on 12 November 2015) [2016] ATS 23.

2 (1984) 158 CLR 447.

4. Each of those paths is subject to a threshold issue that is not raised by the Special Case in *Stott*: whether s 5(3) of the Agreements Act is supported by the external affairs power in s 51(xxix) of the Constitution. The Commonwealth submits that it is.

5. The only other issue raised by this Special Case, and not by *Stott*, is whether s 10A(3) of the *Limitation of Actions Act 1974* (Qld) (**Limitation Act**) or ss 36(2) and 188(2) of the *Taxation Administration Act 2001* (Qld) (**QTAA**) extinguished any hypothetical claim for restitution by the Appellants, so as to preclude the Appellants' reliance on those hypothetical claims as "property" for the purposes of s 51(xxxi). If it is necessary to decide, the Commonwealth submits that they did, and in so doing were not invalid by reason of inconsistency with s 5(1) of the Agreements Act or s 64 of the Judiciary Act.

B. OVERVIEW OF ARGUMENT

6. As to **Question 2** of the Special Case, s 5(3) of the Agreements Act amends or partially repeals s 5(1) so far as it implements Art 24(5) of the German Agreement. The implementation of Art 24(5) being supported by s 51(xxix), its amendment or partial repeal by s 5(3) is also supported. Section 5(1) of the Agreements Act otherwise remains a law with respect to external affairs, assuming that characterisation is relevant to the validity of s 5(3): **Part E**.

7. As to the remaining questions, for the reasons given in the Commonwealth's submissions in *Stott*, it is open to the Court to determine the proper construction and validity of s 104 of the QLTA (**Questions 4A and 4B**) *on the assumption, but without deciding,* that what the Appellants describe as the "retrospective" effect given to s 5(3) of the Agreements Act by cl 2 of Sch 1 to the Commonwealth Amendment Act (correlating to what the Commonwealth describes as a "retroactive" operation in *Stott*)[3] is not effective (by reason of the principle in *Metwally*)[4] to revive the operative effect of s 32(1)(b)(ii) of the QLTA. If, on that assumption, s 104 would validly impose Foreign Surcharge on the Appellants for the 2021 and 2022 financial years, it would be unnecessary to decide whether *Metwally* should be reopened and overruled (**Question 3**) or whether the retroactive operation of s 5(3) was invalid in its application to the Appellants by reason of s 51(xxxi) (**Question 4**).[5] As in *Stott*, the Court may prefer to decide Questions 3 and 4 (in which case, unless those questions are answered adversely to the Respondent, Questions 4A and

---

3 *Stephens v The Queen* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman and Gleeson JJ).

4 (1984) 158 CLR 447.

5 The Appellants' s 51(xxxi) challenge is limited to what they describe as the "retrospective effect" of s 5(3): **AS [6]**, correlating to what the Commonwealth in *Stott* characterises as its retroactive operation.

4B would not arise); but by either path, the Commonwealth submits that the Court should hold that Foreign Surcharge for the 2021 and 2022 financial years has been validly imposed on the Appellants.

8. As to the first path, the Commonwealth submits that s 5(3) of the Agreements Act in its *prospective* application is effective to make the operation of Art 24(4) of the German Agreement subject to the imposition of Foreign Surcharge by s 104 of the QLTA after 8 April 2024: see **Part F**. Section 104 operates in a materially identical way to the provisions considered in *Stott*: it "re-imposes" Foreign Surcharge afresh in relation to the 2021 and 2022 financial years, by taking as its criterion of operation the invalidity of purported Foreign Surcharge and attaching new legal consequences to it. The Commonwealth relies on its submissions in *Stott* as to why that operation of s 5(3) and s 104 does not offend any principle for which *Metwally* stands, nor depend on any *retroactive* operation of s 5(3).

9. As to the second path, the Commonwealth submits that s 5(3) is effective *retroactively* to make the operation of Art 24(4) of the German Agreement subject to the imposition of Foreign Surcharge by s 32(1)(b)(ii) of the QLTA before 8 April 2024: see **Part G**. In that way, s 5(3) made room for s 32(1)(b)(ii) of the QLTA to regain the operative effect of which it had been deprived by s 5(1) and s 109. The Commonwealth relies on its submissions in *Stott* as to why on this path, *Metwally* should be reopened and overruled, and why s 5(3) is not invalid in its retroactive operation by reason of s 51(xxxi).[6] As in *Stott,* no "property" was affected by s 5(3) in any event: see **Part H**.

C. INCONSISTENCY BETWEEN THE GERMAN AGREEMENT AND QLTA (Q1)

10. Article 24(4) of the German Agreement, similarly to Art 24(1) of the NZ Convention in *Stott,* operates to confer an immunity;[7] here, on certain foreign-owned enterprises from taxation "more burdensome" than that to which other Australian enterprises in similar circumstances "are or may be subjected". The application of that immunity was extended by Art 24(5) of the German Agreement, like Art 24(7) of the NZ Convention in *Stott,* to "taxes of every kind and description". Section 109 inconsistency arose because s 32(1)(b)(ii) of the QLTA[8] subjected the Appellants, each an "enterprise" of a

---

6 For the first two of the three reasons identified: (i) that a Commonwealth law makes room for a State law to operate does not mean that the Commonwealth law takes its character from the effects of the State law; and (ii) the "immunity" conferred by s 5(1) and Art 24(4) was inherently susceptible to variation: **CS Stott [9]**.

7 See **[30] below**.

8 With Pt 2 of Sch 2 to the QLTA.

"contracting state" (Australia), "the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other contracting state" (Germany) in Australia, to "taxation" which was "more burdensome" than the taxation to which other similar enterprises of Australia "in similar circumstances" were subject. That was inconsistent with the immunity granted by Art 24(4) in its extended application with Art 24(5): **SCB 33-34 [41]-[42]**.

D. THE QUEENSLAND AMENDMENT ACT

11. As described in **Part C** of **CS Stott**, the Commonwealth Amendment Act commenced on 8 April 2024.

12. Separately, and subsequently, the Queensland Parliament enacted s 104 of the QLTA and a related provision dealing with assessment (s 189 of the QTAA), both commencing 28 February 2025:[9] **SCB 38 [53]**. These provisions are materially identical to the provisions of the Victorian Amendment Act described in **Part D** of **CS Stott**, save that s 104 applies in respect of Foreign Surcharge that was purportedly imposed and payable between 30 June 2019 and 8 April 2024. The description in **CS Stott [15]-[16]** is otherwise applicable to s 104 (and s 189). The Explanatory Notes stated that these amendments "aim to align with [the Commonwealth Amendment Act] and ensure the intended operation and imposition of the foreign surcharges under Queensland's revenue legislation between 1 January 2018 and 8 April 2024" by "validat[ing] the retrospective operation and imposition of the foreign surcharges arising on or after 1 January 2018 and before 8 April 2024".[10] If s 104 applies to impose Foreign Surcharge on the Appellants, the effect of s 189 is that their appeals under Pt 6 of the QTAA must be dismissed.[11]

---

9 *Revenue Legislation Amendment Act 2025* (Qld). The Act received Royal Assent on 28 February 2025.

10 Revenue Legislation Amendment Bill 2024 (Qld), Explanatory Notes for amendments to be moved during consideration in detail, pp 2-3. Foreign Surcharge commenced on 30 June 2019, hence the period stated in s 104(1)(b): see *Revenue and Other Legislation Amendment Act 2019* (Qld), s 2(1), Pt 4.

11 Section 189 applies if, relevantly, s 104 applies and "an assessment of a taxpayer's liability was made or purportedly made under [the QTAA] in relation to … purported land tax": s 189(1). If s 189 applies in this case, then: each assessment issued to an Appellant "has, and is taken to have always had, the same force and effect as if it were made in relation to" land tax imposed under s 104; the "rights and liabilities of [the Appellant] in relation to the assessment are taken to be, and to have always been, the same as if the assessment were made in relation to" land tax imposed under s 104; "[a]nything done or omitted to be done by [the Appellant] in relation to the assessment has, and is taken to have always had, the same force and effect as if it were done or omitted to be done in relation to" land tax imposed under s 104; and "[a]ny amount paid by a person in relation to the assessment is taken to be, and to have always been, paid in relation to" land tax imposed under s 104: s 189(2)-(5). Accordingly, if s 189 applies, the Appellants' appeals under Pt 6 must now be taken to relate to land tax imposed under s 104, not s 32(1)(b)(ii).

E. THE EXTERNAL AFFAIRS POWER SUPPORTS THE COMMONWEALTH AMENDMENT ACT (Q2)

13. A law will be properly characterised as a law with respect to s 51(xxix) if it is "reasonably capable of being considered appropriate and adapted to implementing the treaty".[12] That test recognises that "it is for the legislature to choose the means by which it carries into or gives effect to the treaty".[13] It is not necessary for the Court to be persuaded that particular provisions *are in fact* appropriate and adapted to implementing the treaty. "It is enough that the legislative judgment could reasonably be made or that there is a reasonable basis for making it".[14] The difference between those formulations reflects the existence of an area for legislative judgment in the domestic implementation of a treaty.

14. ***Section 5(3) amends or partially repeals s 5(1) so far as it implemented Art 24(5)***: The operation of s 5(3) of the Agreements Act can be ascertained only by reference to s 5(1), as the Appellants correctly identify: **AS [15]**. Section 5(1) gave each of the agreements there specified "the force of law according to its tenor", subject to the Agreements Act. Section 5(3) makes the operation of a provision of an agreement specified in s 5(1), including the German Agreement, subject to "anything inconsistent … contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax". The only provision of the German Agreement that applies to taxes "other than Australian tax" is Art 24, through the extended application given to it by Art 24(5). Absent Art 24(5), Art 24 would, like the rest of the German Agreement, be limited in its application in Australia to "Australian taxes".[15] However, Art 24(5) extends the reach of Art 24 to taxes of every kind and description (including State taxes: **AS [20]**). It is to that extended operation of Art 24(5), and like provisions in some of the other agreements

---

12 *Victoria v Commonwealth (**Industrial Relations Act Case**)* (1996) 187 CLR 416 at 483, 487, 490 and 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). In *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [57], French CJ described this as a "high threshold proportionality test". See also *Zurich Insurance Company Ltd v Koper* (2023) 277 CLR 164 at [19] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

13 *Industrial Relations Act Case* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

14 ***Richardson** v Forestry Commission* (1988) 164 CLR 261 at 296, also 289 (Mason CJ and Brennan J); also 300, 303-304 (Wilson J), 311-312 (Deane J), 342 (Gaudron J); *Commonwealth v Tasmania (**Tasmanian Dam Case**)* (1983) 158 CLR 1 at 232 (Brennan J); *R v **Burgess**; ex parte Henry* (1936) 55 CLR 608 at 659-660 (Starke J) (approved by Mason J in ***Koowarta** v Bjelke-Petersen* (1982) 153 CLR 168 at 232-233).

15 By Art 2 of the Agreement, read subject to s 3 of the Agreements Act. While Art 2 of the German Agreement defined "Australian tax" to include resource rent taxes, s 3(1) of the Agreement Act did not.

specified in s 5(1), that s 5(3) was directed.[16]

15. Section 5(3) confines the operation of s 5(1), so far as it implements Art 24(5) of the German Agreement (and its equivalents in other treaties), leaving s 5(1) to implement Art 24 (and the rest of the Agreement) in relation to Australian taxes (and other taxes only if the law imposing the tax so provides): see **AS [22.3], [24]**. That confinement is appropriately characterised as a partial repeal of s 5(1),[17] or as a "roll-back" mechanism.[18]

16. ***Power to implement treaties includes power partially to repeal the implementing legislation:*** The Appellants do not challenge the validity of s 5(1) in its pre-amendment form (**AS [35]**). Thus, in that form, there is no dispute that s 5(1) was a law with respect to external affairs.[19] It being within the power of the Commonwealth Parliament to enact s 5(1) so far as it implemented the German Agreement (and its equivalents), it is within its power partially to repeal or "roll back" that law.[20] That is all s 5(3) does. It is supported by the same power as supported s 5(1), as it "has no effect or operation other than reducing the ambit" of s 5(1).[21] As this Court accepted in *Shergold v Tanner*, "[t]he power which validly supports a law supports the law which amends or repeals it".[22] That reasoning is itself sufficient to conclude that s 5(3) is a law with respect to external affairs.

17. ***Section 5(1) retains its character as a law with respect to external affairs:*** The Appellants' submission that s 5(3) is not supported by s 51(xxix) rests on the proposition that the partial repeal of s 5(1) "so changed the character" of that provision that it deprived it of "constitutional support": **AS [25]**. However, even if Parliament's power partially to

---

16 Explanatory Memorandum to the Commonwealth Amendment Act, [3.2].

17 See, by analogy, ***Kartinyeri*** *v Commonwealth* (1998) 195 CLR 337 at [9] (Brennan CJ and McHugh J) and [48] (Gaudron J) and the cases there cited, describing an "indirect express amendment" which effects a partial repeal of an earlier Act, on which the Appellants rely at **AS [22] fn 28.**

18 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1 at [104], [110] (French CJ), [254]-[255] (Gummow J); see **CS Stott [39]**.

19 Section 51(xxix) empowers the Commonwealth to legislate for the purpose of implementing a treaty to which Australia is a party: *Tasmanian Dam Case* (1983) 158 CLR 1 at 129-130 (Mason J), 171-172 (Murphy J), 220-221 (Brennan J), 258-259 (Deane J); *Industrial Relations Act Case* (1996) 187 CLR 416 at 483 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Burgess* (1936) 55 CLR 608 at 644-645 (Latham CJ), 681-682 (Evatt and McTiernnan JJ); *Koowarta* (1982) 153 CLR 168 at 231-232 (Mason J), 240-241 (Murphy J), 259-260 (Brennan J); *Richardson* (1988) 164 CLR 261 at 295 (Mason CJ and Brennan J), 298 (Wilson J), 321-323(Dawson J), 332 (Toohey J), 342 (Gaudron J).

20 *Kartinyeri* (1998) 195 CLR 337 at [13]-[15] (Brennan CJ and McHugh J) and more generally [11]-[20]; see also at [47]-[49] (Gaudron J) and [57], [72], [85] (Gummow and Hayne JJ); *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 459 (Dawson J).

21 *Kartinyeri* (1998) 195 CLR 337 at [17] (Brennan CJ and McHugh J).

22 (2002) 209 CLR 126 at [26] (the Court), endorsing *Kartinyeri* (1998) 195 CLR 337 at [15] (Brennan CJ and McHugh J).

repeal a provision validly enacted pursuant to s 51(xxix) is confined in that manner,[23] that limitation has no relevance to s 5 of the Agreements Act. That is so: ***(i)*** having regard to the well-established principle that a statute can be supported by s 51(xxix) even if it only partially implements treaty obligations; and ***(ii)*** otherwise having regard to the subject matter of s 5(1), which, subject to the Agreements Act,[24] continues to incorporate into domestic law the numerous treaties identified in s 5(1) with respect to the core covered taxes identified in those treaties.

18. It is well settled that Parliament may incorporate a treaty into domestic law only partially, meaning that Parliament may leave some provisions unimplemented (notwithstanding that they remain binding on Australia as a matter of international law).[25] The contrary proposition was expressly rejected by Murphy, Brennan and Deane JJ in the *Tasmanian Dam Case*,[26] and the result in that case is consistent only with s 51(xxix) allowing partial implementation (because various obligations imposed under the World Heritage Convention had not been incorporated into domestic law). Subsequently, six members of this Court held in the *Industrial Relations Act Case* that it is not an essential requirement for validity that an Act implements all of the obligations in a treaty, holding that for a "[d]eficiency in implementation" to be "fatal to the validity of a law", that deficiency must be "so substantial as to deny the law the character of a measure implementing the Convention".[27]

19. Once it is recognised that partial implementation of a treaty is permissible, it follows that

---

23 *Cf Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at [30] (Gleeson CJ), [229]-[230] (Gummow and Hayne JJ, Callinan J agreeing at [302]); contrast the dissenting reasons at [52], [77]-[80] (Gaudron J), [168]-[169] (McHugh J) and [288] (Kirby J).

24 The Agreements Act makes certain other modifications to the agreements listed in s 5(1) or their application. See, for example, ss 5(2) (and **Respondent's Submissions (RS) [23] fn 27)**, 6B, 11F(2), 11J, 11S(3), 11ZA, 11ZF(4). See also **fn 15 above**.

25 See generally Stellios, ***Zines*** *and Stellios' The High Court and the Constitution* (7th ed, 2022) at 475-476.

26 *Tasmanian Dam Case* (1983) 158 CLR 1 at 172 (Murphy J), 233-234 (Brennan J), 268 (Deane J). In the *Tasmanian Dam Case*, the regulations implemented the supporting Convention only in part, yet were upheld as a valid exercise of the power. See also *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 361, 375 (Barwick CJ), 475-476 (Mason J), 503-504 (Murphy J), in which provisions of the relevant conventions were not implemented by the Commonwealth Act.

27 *Industrial Relations Act Case* (1996) 187 CLR 416 at 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). The observations of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 at 119, which are referred to in **AS [13] and [32]**, are to no different effect insofar as they are concerned with a law that is "inconsistent to any substantial extent" with the operation of the treaty. It may also be noted that his Honour there referred to *Viskauskas v Niland* (1983) 153 CLR 280 at 292 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ), but in that case their Honours were describing the "field" occupied by Commonwealth legislation that implemented a Convention, rather than the scope of the external affairs power (which was not in issue in *Gerhardy* or *Viskauskas*).

a statute will not be "substantially inconsistent" with a treaty simply because it does not implement that treaty to its full extent:[28] *cf* **AS [34]**. When the German Agreement was first incorporated into Australian law, it would have been within the power of the Parliament either not to implement Art 24 at all, or to implement it only partially — for example, with respect only to the "taxes covered" identified in Art 2. That latter option would have left Art 24 unimplemented to the extent that Art 24(5) extends the obligations in Art 24 to other kinds of taxes. But that would not have been "inconsistent" with the German Agreement. To the contrary, almost the entire treaty would have been incorporated into Australian law in accordance with its terms. Section 5(1) would not have been invalid, and so failed to incorporate the overwhelming majority of the German Agreement, merely because it did not incorporate the extended operation of Art 24 that results from Art 24(5).

20. That being the position when s 5(1) was first enacted, the same must be true when the same substantive position was brought about by the amendment that introduced s 5(3). Otherwise, the validity of identical statutory provisions would differ depending on the order in which the subsections in s 5 were enacted.

21. The "absolute character" of Art 24 (**AS [24.3]**) is therefore beside the point: the Commonwealth does not by s 5(3) seek to "justify" discrimination based on the "forbidden criteria" in Art 24. It has simply decided not to implement fully the extended application given to Art 24 by Art 24(5). The absence of any relevant reservations by Australia to Art 24 is similarly irrelevant, for such reservations go to the existence of obligations under a treaty as a matter of international law,[29] whereas the partial implementation argument assumes the existence of such obligations: *cf* **AS [24.2], [24.4]**.

22. Even following the commencement of s 5(3), the German Agreement is implemented in its entirety in relation to the "taxes covered" that are identified in Art 2. Even Art 24 is implemented in its entirety in relation to those taxes. All that is left unincorporated is Art 24 in its application to any additional taxes captured by Art 24(5). Furthermore, the additional taxes to which the non-discrimination article may apply (if, indeed, there are any) vary from treaty to treaty.[30] Section 5(3) accommodates that variation by allowing

---

28 *Zines* (7th ed, 2022) at 475.

29 Vienna Convention on the Law of Treaties [1974] ATS 2, Art 21.

30 See Australia Chile Tax Agreement [2013] ATS 7, Art 24(7); Australia Iceland Tax Agreement [2023] ATS 10, Art 22(6); Australia Israel Tax Agreement [2019] ATS 20, Art 24(6); Australia Turkey Tax Agreement [2013] ATS 19, Art 24(8); Australia United Kingdom Tax Agreement [2003] ATS 22, Art

those non-core taxes to operate in accordance with their terms, unless the law imposing the tax "expressly provided otherwise": *cf* **AS [31]**. But, for the reasons advanced above, that targeted partial repeal of s 5(1) — the effect of which is that a subset of the obligations imposed by Art 24 (and its equivalents in other treaties) are not incorporated into Australian domestic law — falls far short of depriving s 5(1) of the Agreements Act of its character as a law with respect to external affairs.

23. No relevant analogy can be drawn with the regulations in *Burgess* (**AS [33]**), the validity of which fell to be considered by reference to whether they were regulations for the purpose of carrying out and giving effect to the treaty. Those regulations had been made "upon the wrong assumption that the Commonwealth Parliament has full power to legislate with respect to air navigation".[31] They made provision with respect to matters that had no foundation in the treaty. There is no analogy to s 5(3), which does no more than "roll back" a law that Parliament had undisputed power to enact pursuant to s 51(xxix).

24. ***External affairs more generally:*** Section 51(xxix) is not limited to the implementation of treaties, but extends more broadly to "external affairs", including: (i) the rights and duties of foreign nationals, residents or enterprises;[32] and (ii) persons, things, or matters geographically external to Australia.[33] An Act may relate to "external affairs" in those ways even where it partially implements a treaty obligation.[34] Here, even if s 5(1) were no longer reasonably capable of being considered appropriate and adapted to implementing all or part of the German Agreement (which is denied), it nonetheless remains a law with respect to external affairs, being a law concerning the rights and duties of foreign nationals, residents, or enterprises — and specifically, in respect of Art 24(4) and this case, concerning the corporate resident of Germany that owns and controls the capital of the Appellants,[35] by reason of which any immunity conferred by Art 24(4)

25(7); see also Reimer and Rust (eds), ***Klaus Vogel*** *on Double Taxation Conventions* (5th ed, 2022) at 1957-1958.

31 *Burgess* (1936) 55 CLR 608 at 646-647 (Latham CJ), also 670 (Dixon J); as to the inconsistencies, see 647-654 (Latham CJ), 673-675 (Dixon J).

32 See, for example, *Koowarta* (1982) 153 CLR 168 at 201-202 (Gibbs CJ); and see discussion in *Zines* (7th ed, 2022) at 479.

33 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 530-531 (Mason CJ), 603 (Deane J), 696 (Gaudron J); see also 634 (Dawson J), 714 (McHugh J); *Industrial Relations Act Case* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 at [7] (Gleeson CJ), [45] (Gummow, Hayne and Crennan JJ).

34 *Seas and Submerged Lands Act Case* (1975) 135 CLR 337 see **fn 26** above; *cf Tasmanian Dam Case* (1983) 158 CLR 1 at 131-132 (Mason J).

35 **SCB 25-26 [4], [7], [14].**

applied to them. Section 5(3) has the same character.

F. LTS IS VALIDLY IMPOSED BY SECTION 104 OF THE QLTA (Q4A and Q4B)

25. Section 104 of the QLTA is relevantly identical to s 106A of the VLTA in *Stott*. For the reasons set out in **Part E** of **CS Stott**, s 5(3) of the Agreements Act in its *prospective* operation clears the way for s 104 of the QLTA to impose *fresh* Foreign Surcharge on the Appellants in respect of the 2021 and 2022 financial years and (with s 189 of the QTAA) retrospectively to impose new legal consequences on past events.

G. ALTERNATIVE PATH: SECTION 5(3) OPERATES RETROACTIVELY (Q2)

26. Separately and independently of the operation described above, s 5(3) (with cl 2 of Sch 1) is capable of applying *retroactively* in relation to State taxes that had been rendered inoperative by s 109 of the Constitution: **CS Stott Part F**. In that application, s 5(3) made the operation of s 5(1) subject to s 32(1)(b)(ii) of the QLTA insofar as it imposed Foreign Surcharge on the Appellants prior to 8 April 2024.

27. The Commonwealth relies on its submissions in *Stott* as to why, on this limb of the argument, *Metwally* should be reopened and overruled: **CS Stott [32]-[36]**. Two matters should be emphasised. ***First,*** as the Appellants accept, the reasoning of the majority is not uniform (**AS [40]**). Critically, Gibbs CJ, Brennan and Deane JJ (but not Murphy J) adopted a temporally linear view of inconsistency for the purposes of s 109, which limited the content of the laws to that at the time of intersection: see **CS Stott [21]**. That "temporal dimension" of s 109 was, as the Appellants accept, a critical step in the majority reasoning: **AS [41.2]** *cf* **AS [40]**. ***Secondly***, that s 19 of the *Native Title Act 1993* (Cth) was drafted so as *not* to offend any principle established by *Metwally* does not militate against overruling the decision in that case: *cf* **AS [39]**.

28. As in *Stott*, if *Metwally* is re-opened and the minority approach adopted, s 5(3), with cl 2 of Sch 1 to the Commonwealth Amendment Act, is effective to avoid inconsistency between Art 24(4) and s 32(1)(b)(ii) of the QLTA prior to 8 April 2024. That being so, Foreign Surcharge was validly imposed on the Appellants.

H. NO ACQUISITION OF PROPERTY (Q4)

29. The Appellants' submissions regarding s 51(xxxi) are premised on any retroactive operation that cl 2 of Sch 1 gives to s 5(3), in respect of Foreign Surcharge assessed by the Respondent (the **Commissioner**) and paid by the Appellants prior to 8 April 2024:

AS [43]; SCB 27-31 [20]-[31].[36] Contrary to the Appellants' submissions: ***(i)*** in any such retroactive operation, s 5(3) is not a law "with respect to the acquisition of property" within s 51(xxxi); and ***(ii)*** in any event, the Appellants had no "property" to acquire.

30. ***Section 5(3) is not a law "with respect to the acquisition of property":*** As to the first point, the Commonwealth relies on its submissions in *Stott*: **CS Stott [39]-[41]**. ***First***, for the reasons there explained, s 5(3) does no more than to remove an obstacle to the QLTA operating to impose Foreign Surcharge according to its terms. That obstacle removed, s 32(1)(b)(ii) of the QLTA "resumed the full force and effect which it had" from 30 June 2019 (when it commenced).[37] ***Secondly***, as with Art 24(1) of the NZ Convention in *Stott*, to the extent s 5(1) implemented Art 24(4) of the German Agreement, it conferred an immunity which of its nature was subject to modification or extinguishment.[38]

31. ***In any event, the Appellants had no "property":*** The extinguishment or modification of a vested chose in action may constitute an "acquisition" of "property".[39] However, if as a matter of fact or law a party has no cause of action, then the party has no "property" notwithstanding that the party *claims* to have that cause of action: *cf* **AS [47]**.[40] Here, the Appellants had no "property" because: ***(i)*** the Commissioner's assessments gave rise to debts that were discharged by payment, meaning no right to restitution could arise; ***(ii)*** alternatively, if s 32(1)(b)(ii) "revived" with retroactive effect, the Appellants' liability to pay Foreign Surcharge also did so, such that there could be no cause of action; ***(iii)*** alternatively, s 10A(3) of the Limitation Act, or ss 36(2) and 188(2) of the QTAA, validly extinguished any cause of action; and ***(iv)*** the Appellants' rights under Pt 6 of the QTAA are not "property".

---

36 Each of those Foreign Surcharge payments fell within both sub-clauses of cl 2 of Sch 1.

37 *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 274 (Fullagar J), 286 (Menzies J). See also *Metwally* (1984) 158 CLR 447 at 460-461 (Mason J). As to the commencement of s 32(1)(b)(ii) see **fn 10 above**. Further, as the Respondent submits, s 51(xxxi) is not concerned with a Commonwealth law that merely allows for the possibility that a State will impose or validate a tax: **RS [34]-[36]**.

38 The German Agreement does not contain a provision similar to Art 24(5)(g) of the NZ Convention: see **Stott CS fn 89**. However, either Contracting State may terminate the German Agreement by giving notice of termination at least six months before the end of any calendar year; and upon giving that notice, Art 24 would cease to have effect in accordance with the terms of Art 33.

39 ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ), 311 (Brennan J); *Industrial Relations Act Case* (1996) 187 CLR 416 at 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

40 ***Haskins*** *v Commonwealth* (2011) 244 CLR 22 at [41]-[42], [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Georgiadis* (1994) 179 CLR 297 at 304 (Mason CJ, Deane and Gaudron JJ). The assumption made in the litigation in *Morgan v McMillan Investment Holdings Pty Ltd* (2024) 98 ALJR 1200 at [40] was not determined in that proceeding and was, in any event, concerned with the notion of property for the purposes of the *Corporations Act 2001* (Cth).

32. ***(i) The assessments gave rise to debts:*** There is no dispute that the assessments by the Commissioner were "assessments" within the meaning of the QTAA.[41] As such, they were effective to create statutory debts that the Appellants were obliged to pay: QTAA, ss 30(1)(e), 45, 69(1)(b). In ***Glencore*** *Coal Queensland Pty Ltd v Queensland*, Bradley J held to the contrary, but without reference to those provisions.[42] On this point, *Glencore* is wrong and should be overruled: *cf* **AS [52]**. The assessments issued to the Appellants "created a debt when the amounts fell due that was discharged by payment", meaning "there can be no restitution."[43] The "debts" so created cannot be equated with debts "owed by one citizen to another within the sense of the general law".[44] That is sufficient to show that the Appellants had no "property" consisting of a cause of action in restitution.

33. ***(ii) Section 32(1)(b)(ii) revived with retroactive effect:*** In any event, if s 32(1)(b)(ii) revived with retroactive effect, it follows that it imposed Foreign Surcharge on the Appellants from 19 February 2021,[45] such that they must be taken never to have had a cause of action (or a valuable right of appeal under the QTAA).[46] That being so, it is unnecessary to decide the Appellants' constitutional arguments as to why they say they had a cause of action (or valuable right) prior to 8 April 2024: see **AS [54]-[61]**.[47] Nevertheless, for completeness, those arguments are addressed at **[34]-[50] below**.

34. ***(iii) Any causes of action were validly extinguished:*** The Appellants made payments of Foreign Surcharge on 27 April 2021, 6 May 2021, 2 February 2022 and 30 March 2022: **SCB 28-31 [22], [25], [28], [31]**. Although the operation of the following provisions may be supererogatory because of the matters in **[32]** or **[33]** above, if any cause of action at

---

41 Indeed, the assessments enlivened the objection and appeal provisions under which the Appellants bring these proceedings: QTAA, ss 63(1), 69(2)(a), 70; **SCB 27-32 [20]-[37]; AS [10], [58]**; *cf* **PS [16]** in *Stott*.

42 (2022) 12 QR 295 at [93]. In concluding that a restitutionary claim was not precluded by s 36 of the QTAA as it then stood, Bradley J said that the QTAA "does not contain a provision like s 39 [of the] repealed *Land Tax Act 1958* (Vic), to the effect that, once assessed, every sum payable for a royalty is deemed to be a debt due". It appears that his Honour was not referred to s 45 of the QTAA, to materially the same effect.

43 *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509 at [87] (Bell and Gordon JJ); also [11] (Kiefel and Keane JJ), [106] (Gageler J); see also *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 at [100] (Sackvillle J); compare *Haskins* (2011) 244 CLR 22 at [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See generally *Deputy Commissioner of Taxation v* ***Broadbeach*** *Properties Pty Ltd* (2008) 237 CLR 473 at [51]-[58] (Gummow ACJ, Heydon, Crennan and Kiefel JJ).

44 See, for example, *Broadbeach* (2008) 237 CLR 473 at [44], [51] (Gummow ACJ, Heydon, Crennan and Kiefel JJ); *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [51]-[57] (Nettle and Mandie JJA and Hargrave AJA); *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* (2015) 102 ATR 281 at [150]-[151] (Hansen and Tate JJA and Robson AJA).

45 When the Commissioner first issued the relevant assessment notices: **SCB 27-29 [20], [26].**

46 So much follows from the submissions in **CS Stott [39]**, which are also made in this case.

47 *Knight v Victoria* (2017) 261 CLR 306 at [32]-[33] (the Court).

common law arose upon the Appellants making those payments, then:

(a) s 10A(3) of the Limitation Act was effective to extinguish each cause of action upon the expiration of one year from the making of the relevant payment;

(b) alternatively, ss 36(2) and 188(2) of the QTAA were effective to extinguish the causes of action when those provisions commenced on 23 June 2023.

35. Unlike the extinguishing provisions considered in ***Maguire*** *v Simpson*[48] and *Commonwealth v* ***Mewett***,[49] the operation of s 10A(3) is not contingent on any potential extension of the limitation period in s 10A(1), nor on a party pleading that limitation period.[50] Accordingly, setting aside any question of validity, s 10A(3) would have extinguished the Appellants' causes of action before ss 36(2) and 188(2) of the QTAA commenced.

36. But, even if that is not correct, ss 36(2) and 188(2) (if valid) would have extinguished the causes of action when those provisions commenced. For the reasons that follow, neither s 10A(3), nor ss 36(2) and 188, were invalid by the operation of s 109: *cf* **AS [53]-[57]**.

37. **No inconsistency with s 5(1) of the Agreements Act:** Like other equivalent regimes, including the VTAA which is addressed in *Stott*,[51] the QTAA includes "validity of an assessment" and "conclusive evidence" provisions.[52] The effect of such provisions is that — subject to exceptions not alleged here — the taxpayer is confined to the applicable objection and appeal procedures, which in this case are found in Pt 6 of the QTAA.[53] Sections 36(2) and 188 of the QTAA must be understood in that context. Those provisions are part of a statutory scheme that confines taxpayers to the objection and appeal procedures, having been enacted "to ensure that the code established by the

---

48 (1977) 139 CLR 362 at 374 (Gibbs J).

49 (1997) 191 CLR 471 at 491-492 (Brennan CJ), 509-510 (Dawson J), 515-517 (Toohey J), 529-531 (Gaudron J), 556 (Gummow and Kirby JJ).

50 *cf Mewett* (1997) 191 CLR 471 at 556-557 (Gummow and Kirby J). The sole precondition to the operation of s 10A(3) is that "an action for the recovery of an amount is not brought within the period" prescribed by s 10A(1). On that precondition being satisfied, "the right to recover the amount ends". Thus, s 10A(3) must be characterised as extinguishing the right, not barring the remedy: *cf Minister for Home Affairs v DLZ18* (2020) 270 CLR 372 at [28]-[31] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).

51 **CS Stott [43]**, discussing the *Taxation Administration Act 1997* (Vic) ss 17, 127. See also *Federal Commissioner of Taxation v* ***Futuris*** *Corporation Ltd* (2008) 237 CLR 146, addressing the *Income Tax Assessment Act 1936* (Cth), ss 175 and 177(1).

52 QTAA s 132; see also ss 63(4), 77(a)–(c).

53 *Futuris* (2008) 237 CLR 146 at [24]-[25] (Gummow, Hayne, Heydon and Crennan JJ); see also [10], [45]-[48]. As to the QTAA, see *Harvey v Commissioner of State Revenue* [2014] QSC 183; [2014] ATC ¶20-466 at [111]-[116] (Jackson J).

Administration Act together with particular provisions contained in the revenue laws, continues to be the only way entitlements to refunds of amounts paid under a tax law may arise, as intended".[54] Section 36 does not prohibit refunds of amounts paid under a tax law for the purposes of the QTAA.[55] Rather, its effect is to create a statutory entitlement to a refund only "under this division": s 36(1). If a taxpayer successfully objects or appeals against an assessment under Pt 6, the Commissioner must make a reassessment of the taxpayer's liability for tax, to give effect to the decision: s 19(2). An entitlement to a refund then arises under s 37 (which is in the same division as s 36).

38. It follows that it is incorrect to say that ss 36(2) and 188, if valid, would leave the Appellants "in the same position as if the exaction of the tax or charge had been lawful": *cf* **AS [54]**. The principle in *Antill Ranger* is concerned with a statute that "attempts to bar absolutely the legal remedy to recover money" exacted under an invalid law, not with laws that "give some other remedy" or "impose a limitation of time".[56] Here, ss 36(2) and 188 are part of an orthodox set of tax administration provisions to permit statutory recovery; and s 10A permits proceedings to which it applies to be started within one year. Accordingly, those provisions were not inconsistent with s 5(1) of the Agreements Act, operating on Art 24(4) of the German Agreement, when the Commissioner issued the relevant assessments to the Appellants.[57]

39. **No inconsistency with s 64 of the Judiciary Act:** Nor were ss 36(2) and 188 of the QTAA, or s 10A(3) of the Limitation Act, inconsistent with s 64 of the Judiciary Act: *cf* **AS [55]-[56]**. The "primary purpose" of s 64 is "to deprive the Commonwealth [or a State], when it is a litigant, of the privileges that by the common law the Crown had in

---

54 Revenue Legislation Amendment Bill 2023 (Qld), Statement of Compatibility, pp 1-2; also Explanatory Notes, pp 31-32. Sections 36(2) and 188 evidently were enacted in response to *Glencore* (2022) 12 QR 295 at [98] (Bradley J), in which it was held that s 36 as it then stood was ineffective to preclude a restitutionary claim.

55 The QTAA is itself a "tax law", meaning that an amount paid in response to an assessment notice is an "amount paid, or purportedly paid, under a tax law": QTAA, s 5; sch 2 (definition of "tax law").

56 *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633 at 641 (Dixon CJ) (emphasis added), referring to *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, see esp at 99 and 103; and 659-60 (Fullagar J, Taylor J agreeing). See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 167 (Mason CJ), 175 fn 63 (Brennan J), 183 (Deane and Gaudron JJ): this is not a case where "the invalidity of the taxing statute had its origin in some want of legislative power or irremediable contravention of a constitutional prohibition".

57 Even if there was inconsistency, which is denied, it would have been removed by the retroactive effect of s 5(3), with the effect that ss 36(2) and 188 would have "revived" to extinguish any common law cause of action. In that operation, s 5(3) would not be a law with respect to the acquisition of property for the same reasons it would not have that character as explained in **[30] above**.

proceedings between it and a subject".[58] Section 64 does not operate to impose liability on the Commonwealth or States in respect of causes of action arising at common law, any such liability having its source in the common law itself.[59] However, in some circumstances it may render applicable to the Commonwealth or States general provisions in legislation that would not otherwise apply to them.[60]

40. All of the authorities in this Court concerning the operation of s 64 of the Judiciary Act pre-date this Court's decision in ***Rizeq*** *v Western Australia*.[61] In that case, the Court took the "opportunity … to resolve some doubts, which must be acknowledged regrettably to have arisen, about the sources of law in federal jurisdiction and about the operation of s 79" of the Judiciary Act.[62] The Court ultimately held that s 79 "fills a gap in the law governing the actual exercise of federal jurisdiction which exists by reason of the absence of State legislative power", and that it "has no broader operation".[63] In so holding, the Court recognised that, contrary to some earlier authority, s 79 did not need to pick up other State laws. Those laws applied to matters in both federal and non-federal jurisdiction because of the "simple constitutional truth … that State laws form part of the single composite body of federal and non-federal law".[64] In an appropriate case, that reasoning may warrant re-examination of this Court's existing jurisprudence concerning the role of s 64, which for the most part proceeds on the assumption that State laws do not apply of their own force in federal jurisdiction.[65] However, that re-examination may not be necessary or appropriate in this case, as most of the authorities concern the application of s 64 in suits involving the Commonwealth,[66] whereas these appeals

---

58 *Commonwealth v Anderson* (1960) 105 CLR 303 at 318 (Windeyer J). See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [11]-[12] (Gleeson CJ).

59 *Mewett* (1997) 191 CLR 471 at 550-551 (Gummow and Kirby JJ); ***British American Tobacco*** *Australia Ltd v Western Australia* (2003) 217 CLR 30 at [59] (McHugh, Gummow and Hayne JJ).

60 In that sense s 64 has been said to *confer* on a party a cause of action against the Commonwealth or a State which would not otherwise have existed: see, eg, ***Bass*** *v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [28]; *Commonwealth v* ***Evans Deakin*** *Industries Ltd* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). In *Commissioner for Railways (Queensland) v* ***Peters*** (1991) 24 NSWLR 407 at 435-436, Kirby P said that the "cause of action" against the Commissioner was "conferred" by general State legislation, and that s 64 operated to "[bring] the cause of action home to a State which normally, unless expressly bound, would enjoy immunity".

61 (2017) 262 CLR 1.

62 *Rizeq* (2017) 262 CLR 1 at [39] (Bell, Gageler, Keane, Nettle and Gordon JJ).

63 *Rizeq* (2017) 262 CLR 1 at [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

64 *Rizeq* (2017) 262 CLR 1 at [56] (Bell, Gageler, Keane, Nettle and Gordon JJ).

65 See, eg, *Maguire* (1977) 139 CLR 362 at 380-381 (Gibbs J). The authorities also sometimes concern whether s 64 "otherwise provides" for the purpose of s 79, in a context that assumes that s 79 operates in a way that differs to the operation recognised in *Rizeq* (2017) 262 CLR 1.

66 See, eg, *Maguire* (1977) 139 CLR 362; *Evans Deakin* (1986) 161 CLR 254 at 262, 267 (Gibbs CJ, Mason,

concern only the application of s 64 to proceedings against a State.

41. Several limitations on the operation of s 64 are apparent from its text. *First*, it does not apply until there is a "suit to which the Commonwealth or a State is a party". *Secondly*, it adjusts the "rights of parties" by reference to a hypothesised "suit between subject and subject", meaning that s 64 has no operation in a suit of a kind that cannot arise between subject and subject.[67] *Thirdly*, it adjusts rights only to be "as nearly as possible" the same as in such a hypothesised suit.[68]

42. In light of those limitations, the Appellants' claim that s 64 would have the effect that ss 36(2) and 188 of the QTAA and s 10A(3) of the Limitation Act would not have applied to their hypothetical restitution proceeding fails because: ***(i)*** those provisions operated to extinguish any causes of action before any suit was commenced that would engage s 64; ***(ii)*** the Appellants' hypothesised restitution proceeding is not an appropriate comparator suit; and ***(iii)*** the operation of s 64 for which the Appellants' contend — which would alter the substantive liability of the States — goes beyond the Commonwealth legislative power to sustain s 64. Those points are developed in turn.

43. ***First***, no case supports the proposition that s 64 operates to invalidate, by s 109 of the Constitution, a State law that has operated of its own force to extinguish a cause of action against that State. Sections 36(2) and 188 of the QTAA and s 10A(3) of the Limitation Act applied to extinguish any common law causes of action in restitution that the Appellants might otherwise have held before any suit was commenced.[69] There was therefore no common law liability to enforce in any future proceeding against the State.

Wilson, Deane and Dawson JJ); *cf*, with respect to a State, *British American Tobacco* (2003) 217 CLR 30 at [73] (McHugh, Gummow and Hayne JJ). See, more generally, *Commonwealth v Asiatic Steam Navigation Co Ltd* (1955) 96 CLR 397 at 416-417 (Dixon CJ, McTiernan and Williams JJ), 427-428 (Kitto J); *Naismith v McGovern* (1953) 90 CLR 336 at 342 (the Court); *Griffin v South Australia* (1924) 35 CLR 200; *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (2004) 217 CLR 264 at [3] (Gummow J); also *Mewett* (1997) 191 CLR 471 at 556 (Gummow and Kirby JJ).

67 See *Commonwealth v Western Australia (**Mining Act Case**)* (1999) 196 CLR 392 at [81] (McHugh J), [134] (Gummow J), [165] (Kirby J), [248] (Hayne J). See also Hill, 'Private Law Actions Against the Government — (Part 2) Two Unresolved Questions about Section 64 of the Judiciary Act' (2006) 29(3) *UNSW Law Journal* 1 at 14; Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14 at 19-20.

68 Meaning that s 64 "cannot operate to alter the nature of respective rights in relation to different subject matters": ***Austral Pacific** Group Ltd v Airservices Australia* (2000) 203 CLR 136 at [16] (Gleeson CJ, Gummow and Hayne JJ). Put another way, "it is not permissible to use s 64 to re-write State law": *Victorian WorkCover Authority v Commonwealth* (2004) 187 FLR 296 at [39] (Kaye J).

69 See, by analogy, *Austral Pacific* (2000) 203 CLR 136 at [32] (Gleeson CJ, Gummow and Hayne JJ), [68] (McHugh J), [109]-[110] (Callinan J). Alternatively, if s 79(1) of the Judiciary Act "picked up" those provisions, then s 79(2) and (3) would displace any potential application of s 64 in any event: **RS [41], [46]**.

Nothing in the cases suggests that, once a suit is commenced in federal jurisdiction, s 64 operates to revive a cause of action that has already been extinguished.[70]

44. *British American Tobacco* does not assist the Appellants: *cf* **AS [56]**. That case was concerned with a law that both conferred and limited rights to proceed against the State. It did not concern the existence of a cause of action (which there arose under the common law in its interaction with the Constitution), nor a law which curtailed or limited a right of recovery.[71] Sections 36(2) and 188, and s 10A(3), are laws of that latter kind.

45. ***Secondly,*** the Appellants' hypothesised comparator "suit between subject and subject" is a proceeding of an entirely different kind to the proceeding they might have commenced[72] against the State of Queensland because it: (i) does not relate to amounts paid by way of tax; and (ii) does not take account of State laws such as ss 36(2) and 188 of the QTAA and s 10A(3) of the Limitation Act which — in pursuit of a legitimate and peculiar governmental interest — require claims against the State concerning the recovery of tax to be brought in a particular way: *cf* **AS [55], [57]**. Section 64 operates as far as possible to equalise the rights of a subject and the State by reference to a "suit between subject and subject".[73] But, for obvious reasons, a claim for the recovery of tax could never arise in a suit between "subject and subject". If the characteristics of the suit in question are such that it could only ever be brought against a State, s 64 does not require those characteristics to be ignored by hypothesising a comparator suit at a level of generality that could arise between subject and subject (such as a suit for restitution between private parties that has nothing to do with the recovery of tax). The Appellants' argument to the contrary is akin to that which failed in the *Mining Act Case*, which erroneously involved an attempt "to make the rights of the parties … as nearly as possible the same as they would be in a suit between *the State* and a subject. This is to create rights and obligations that are not provided for by the legislation and that would not be recognised or enforced

---

70 That is distinct from the position addressed in *Evans Deakin* (1986) 161 CLR 254 at 263-266 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ), which in fact acknowledged that s 64 "does not have a retrospective operation" (at 266).

71 *British American Tobacco* (2003) 217 CLR 30 at [75], [77], [84] (McHugh, Gummow and Hayne JJ); see also at [14], [19] (Gleeson CJ).

72 But for the operation of s 188(2), which provides that "[s] 36(2) extinguishes the cause of action, right or remedy and the proceeding may not be started" (emphasis added).

73 Of course, the premise of s 64 is that the difference in parties may result in a difference in rights. But, as Brennan J said in *Evans Deakin* (1986) 161 CLR 254 at 274: "the elasticity of the test surely stops short of including rights which are substantially different in nature or extent from those to which the referential law would give rise in a suit between subject and subject".

in any proceeding between subject and subject".[74]

46. Again, *British American Tobacco* is not to the contrary. While the plurality rejected the proposition that there was any "peculiar governmental interest in the protection of public revenue against reimbursement of moneys levied and collected without valid legislative mandate",[75] their Honours did not suggest that s 64 would prevent the operation of provisions that operated not as a total bar to recovery, but rather to channel tax disputes into the objection and appeal procedure in Pt 6 in pursuit of a different and entirely legitimate governmental interest (being an interest that denies the equivalence of an action between subject and State and an action between subject and subject):[76] see **[37] above**.

10 47. ***Thirdly,*** the Appellants attribute to s 64 a field of operation that goes beyond any head of Commonwealth legislative power. The power to sustain s 64, in its application to the States,[77] derives at least predominantly (and perhaps exclusively) from s 78 of the Constitution.[78] That section empowers Parliament to make "laws conferring rights to proceed" against a State "in respect of matters within the limits of the judicial power". It was intended by the framers to authorise laws to extend the existing availability of petitions of right to other rights of action maintainable between subjects: that is, to allow Parliament, even absent some other head of legislative power, to derogate from the prerogative and so defeat the maxim that "the king can do no wrong".[79] It empowers Parliament to make laws conferring a right of access to courts to enforce a claim or

---

74 *Mining Act Case* (1999) 196 CLR 392 at [248] (Hayne J, McHugh and Kirby JJ agreeing) (original emphasis), approved in *Austral Pacific* (2000) 203 CLR 136 at [16] (Gleeson CJ, Gummow and Hayne JJ).

75 (2003) 217 CLR 30 at [78], [83]-[84] (McHugh, Gummow and Hayne JJ) (emphasis added).

76 See *Mining Act Case* (1999) 196 CLR 392 at [134] (Gummow J); *South Australia v Commonwealth* (1962) 108 CLR 130 at 139-141 (Dixon CJ); *Commonwealth v Asiatic Steam Navigation Co Ltd* (1955) 96 CLR 397 at 417, 420 (Dixon CJ, McTiernan and Williams JJ). The relevance of the Commonwealth or a State "performing a function peculiar to government" to the operation of s 64 was left open in *Evans Deakin* (1986) 161 CLR 254 at 265 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

77 The Parliament's power to make laws governing the liability of the Commonwealth is undoubted, although its source has not been the subject of detailed analysis. Plainly, however, that power may not derive solely from s 78 of the Constitution: see *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *Maguire* (1977) 139 CLR 362 at 402 (Mason J); *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [47] (Kiefel CJ, Gageler and Gleeson JJ), in the analogous context of the heads of power that support s 68(1) of the Judiciary Act.

78 *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *Maguire* (1977) 139 CLR 362 at 370-371 (Barwick CJ), 405 (Jacobs J); see also *Peters* (1991) 24 NSWLR 407 at 430-432 (Kirby P).

79 1897 Australasian Federation Conference — First Session, 20 April 1897, pp 989-990 (Barton); 1898 Australasian Federation Conference — Third Session, 1 March 1898, pp 1653-1654 (Glynn), 1657 (Higgins), 1677 (Barton); Quick and Garran at p 975; see also *Maguire* (1977) 139 CLR 362 at 371-373 (Barwick CJ); *Mewett* (1997) 191 CLR 471 at 542-545 (Gummow and Kirby JJ); *Peters* (1991) 24 NSWLR 407 at 433-434 (Kirby P), 442 (Priestley JA).

demand which some other law already constituted as a valid cause of action against the State.[80] This Court has doubted whether s 78 extends to confer a general power to legislate to affect the "substantive rights" of the States.[81] In *Rizeq*, the Court went further, stating that "the Parliament has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III."[82]

48. It is not necessary in this case to determine the precise boundaries of the constitutional support for s 64 in its application to the States. It suffices that to attribute to s 64 an operation that (in combination with s 109) denies effect to ss 36(2) and 188 of the QTAA and s 10A(3) of the Limitation Act would be to attribute to the Commonwealth Parliament "a general power to legislate to affect the substantive rights of the States in proceedings in the exercise of federal jurisdiction".[83] Section 78 of the Constitution confers no such power: see also **RS [42]-[44]**. Accordingly, if s 64 would be construed as purporting to have that effect, it would be partially disapplied to that extent.[84] That is possible even if that would result in s 64 having a differential operation vis-à-vis the States and the Commonwealth, because the possibility that s 64 may have such a differential operation has been recognised by this Court on several occasions.[85] That reasoning is sufficient to reject the Appellants' reliance on s 64 to deny effect to ss 36(2) and 188 of the QTAA and s 10A(3) of the Limitation Act, without it being necessary to chart its boundaries.

49. ***(iv) Objection and appeal rights not "property":*** The Appellants' right to invoke the objection and appeal procedures in Pt 6 of the QTAA does not constitute "property" that has been acquired for the purposes of s 51(xxxi). That is a right "to have a claim or application considered in accordance with the statute that governs its determination" on

---

80 *Maguire* (1977) 139 CLR 362 at 370 (Barwick CJ), see also at 405 (Jacobs J); *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

81 *Maguire* (1977) 139 CLR 362 at 401 (Mason J), 404-405 (Jacobs J); *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *Bass* (1999) 198 CLR 334 at [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *British American Tobacco* (2003) 217 CLR 30 at [85] (McHugh, Gummow and Hayne JJ).

82 *Rizeq* (2017) 262 CLR 1 at [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).

83 *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

84 *Industrial Relations Act Case* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Acts Interpretation Act 1901* (Cth) s 15A.

85 See *Maguire* (1977) 139 CLR 362 at 401 (Mason J); *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *British American Tobacco* (2003) 217 CLR 30 at [85] (McHugh, Gummow and Hayne JJ).

the law *as it exists at the time of the determination*, not to any particular outcome.[86] As the Commonwealth submitted in *Stott*, such rights are not "property", let alone property that is acquired by the Commonwealth Amendment Act: **CS Stott [44]**.

50. ***Reading down:*** The Appellants do not contend that s 5(3) is wholly invalid alone, or in its application with cl 2 of Sch 1: see **AS [14] fn 14, [43].** As the Commonwealth submits in *Stott,* if the retroactive operation of cl 2 of Sch 1 in relation to State taxes is invalid, then "taxes payable" in cl 2 should be read down or disapplied in its retroactive operation in relation to State taxes.[87] That would leave intact the full operation of s 5(3) with respect to Commonwealth taxes and its prospective application to State taxes (including retrospective State taxes). Section 104 would then operate: see **Part F**.

I. ANSWERS TO SPECIAL CASE QUESTIONS

51. The Questions in the Special Case should be answered: (1) Yes; (2) Yes; (3) Yes (or, if Question 4A is answered "Yes" and Question 4B is answered "No", unnecessary to answer); (4) No (or, if Question 3 is "unnecessary to answer", unnecessary to answer); (4A) Yes (or if Question 3 is answered "Yes" and Question 4 is answered "No", unnecessary to answer); (4B) No (or if Question 3 is answered "Yes" and Question 4 is answered "No", unnecessary to answer); (5) None; (6) The Appellants.

PART IV: ESTIMATED TIME

52. The Commonwealth estimates that up to 2 hours will be required for oral argument (jointly in this matter and the Stott matter).

Dated: 2 April 2025

Stephen Donaghue
Solicitor-General of the Commonwealth

Anna Lord
Owen Dixon West Chambers
T: (03) 9225 7323
anna.lord@vicbar.com.au

Glyn Ayres
Owen Dixon West Chambers
T: (03) 9225 7293
glyn.ayres@vicbar.com.au

---

86 Eg *Minogue v Victoria* (2018) 264 CLR 252 at [19] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). In an appeal under Pt 6 of the QTAA, the Supreme Court "exercises its original jurisdiction to make such judgment as it considers ought to have been given, on the facts and the law, at the time of the hearing of the appeal": *Wakefield v Commissioner of State Revenue* [2019] 3 Qd R 414 at [32] (Bowskill J).

87 *Industrial Relations Act Case* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Acts Interpretation Act 1901* (Cth) s 15A.

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B48/2024

BETWEEN: **G GLOBAL 120E T2 PTY LTD atf THE G GLOBAL 120E AUT**

Appellant

AND: **COMMISSIONER OF STATE REVENUE**

Respondent

No. B49/2024

BETWEEN: **G GLOBAL 180Q PTY LTD atf THE G GLOBAL 180Q AUT**

Appellant

AND: **COMMISSIONER OF STATE REVENUE**

Respondent

No. B50/2024

BETWEEN: **G GLOBAL 180Q PTY LTD atf THE G GLOBAL 180Q AUT**

Appellant

AND: **COMMISSIONER OF STATE REVENUE**

Respondent

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Pursuant to Practice Direction No.1 of 2024, the Commonwealth Attorney-General sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	**Description**	**Version**	**Provisions**	**Reason for providing this version**	**Applicable date or dates**
Constitutional provisions					
1.	*Constitution*	Current	ss 51(xxix), 51(xxxi), 78, 109	In force at all relevant times.	All relevant times.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
Statutory provisions					
Commonwealth statutes					
2.	*Acts Interpretation Act 1901* (Cth)	Version 38 (11 December 2024 to current)	s 15A	No material difference.	All relevant times.
3.	*Income Tax Assessment Act 1936* (Cth)	Version in force between 20 September 2004 and 31 December 2004	ss 175, 177	For illustrative purposes only.	As in force in *Futuris*.
4.	*International Tax Agreements Act 1953* (Cth)	Version 43 (29 June 2023 to 7 April 2024)	s 5	Version prior to insertion of sub-s 5(3).	Prior to 8 April 2024.
5.	*International Tax Agreements Act 1953* (Cth)	Version 45 (11 December 2024 to current)	ss 3, 5, 6B, 11F, 11J, 11S, 11ZA, 11ZF	Version includes amendment inserting sub-s 5(3).	From 8 April 2024.
6.	*Judiciary Act 1903* (Cth)	Version 51 (11 December 2024 to current)	ss 64, 78A, 78B, 79	No material difference.	All relevant times.
7.	*Native Title Act 1993* (Cth)	As made (24 December 1993 to 31 May 1995)	s 19	For illustrative purposes only.	Version as introduced.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
8.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	As made (8 April 2024 to current)	Sch 1 cl 2	Inserted sub-s 5(3) into the Agreements Act.	From 8 April 2024.
Queensland statutes					
9.	*Land Tax Act 2010* (Qld)	30 June 2019 – 30 June 2022	ss 32, Sch 2 Pt 2	Version in force when the land tax was imposed on the Appellants.	The Commissioner issued the relevant assessment notices on 19 February 2021, 3 November 2021 and 14 February 2022.
10.	*Land Tax Act 2010* (Qld)	Current (28 February 2025 to current)	ss 32, 104, Sch 2 Pt 2	Version as amended by the *Revenue Legislation Amendment Act 2025* (Qld).	All relevant times.
11.	*Limitation of Actions Act 1974* (Qld)	Current (20 September 2023 to current)	s 10A	No material difference.	All relevant times.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
12.	*Revenue and Other Legislation Amendment Act 2019* (Qld)	As made (17 June 2019 to current)	s 2, Pt 4	Amended s 32(1)(b), Sch 2 and Sch 4 of the QLTA.	All relevant times.
13.	*Revenue Legislation Amendment Act 2025* (Qld)	As made (28 February 2025 to current)	ss 26B, 32	Introduced s 104 of the QLTA and s 189 of the QTAA.	All relevant times.
14.	*Taxation Administration Act 2001* (Qld)	Current (28 February 2025 to current)	ss 5, 19, 30, 36, 37, 45, 61, 63, 69, 70, 77, 132, 188, 189, Pt 6, Sch 2	No material difference, save insertion of ss 36(2), 188 and 189.	All relevant times.
15.	*Taxation Administration Act 2001* (Qld)	1 October 2020 to 2 October 2022	ss 36, 45	For illustrative purposes only.	As in place in *Glencore*.
Victorian Statutes					
16.	*Land Tax Act 2005* (Vic)	Version 81 (1 January 2025 to current)	s 106A	For illustrative purposes only.	From 3 December 2024.
17.	*Taxation Administration Act 1997* (Vic)	Version 88 (1 January 2025 to current)	ss 17, 127	No material difference, save insertion of s 135A.	All relevant times.