



HIGH COURT OF AUSTRALIA

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

BETWEEN:

No B48/2024

G GLOBAL 120E T2 PTY LTD *atf* **THE G GLOBAL 120E AUT**
Appellant

and

COMMISSIONER OF STATE REVENUE
Respondent

BETWEEN:

No B49/2024

G GLOBAL 180Q PTY LTD *atf* **THE G GLOBAL 180Q AUT**
Appellant

and

COMMISSIONER OF STATE REVENUE
Respondent

BETWEEN:

No B50/2024

G GLOBAL 180Q PTY LTD *atf* **THE G GLOBAL 180Q AUT**
Appellant

and

COMMISSIONER OF STATE REVENUE
Respondent

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
(INTERVENING)**

PARTS I, II & III: CERTIFICATION AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.
2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent (**Queensland**) in each of these proceedings.

PART IV: ARGUMENT

A. OVERVIEW

3. Victoria is the second defendant in *Stott v Commonwealth* (M60/2024), which concerns many of the same issues as arise in these proceedings. Victoria adopts its submissions in *Stott* (VS). Further to the submissions made by Queensland in these proceedings (QS), Victoria makes the following supplementary submissions:
 - (1) *first*, as in *Stott*, it is unnecessary for the Court to reach the question of whether s 51(xxxi) is engaged by the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Commonwealth Amendment Act**) (**Part B**); and
 - (2) *second*, in the alternative, if the Court considers that it is necessary to reach that question, the Commonwealth Amendment Act did not acquire property other than on just terms within the meaning of s 51(xxxi) (**Part C**).

B. SECTION 51(xxxi) DOES NOT ARISE FOR CONSIDERATION

4. The potential application of s 51(xxxi) could only arise in these proceedings if: s 5(3) of the *International Tax Agreements Act 1953* (Cth) (**ITA Act**) is given retroactive effect by cl 2 of Sch 1 of the Commonwealth Amendment Act; and if *University of Wollongong v Metwally*¹ is overruled: VS [48]-[50]. However, in those circumstances, even if s 5(3) was invalid in its retroactive application to State taxes by reason of s 51(xxxi), cl 2 of Sch 1 would be severable: VS [35]. Section 5(3) would thus remain valid in its prospective operation and would be sufficient in that operation to “clear the way” for a State Parliament to legislate in the manner contemplated in *Metwally* and the *Native Title Act Case*:² VS [36]-[38].

¹ (1984) 158 CLR 447.

² *Western Australia v Commonwealth* (1995) 183 CLR 373. Alternatively, cl 2 of Sch 1 could be read down so that it had a retrospective (but not retroactive) operation in relation to State taxes, which would also be sufficient to clear the way for a State Parliament to legislate: VS [39].

5. That is what the Queensland Parliament did by enacting the *Revenue Legislation Amendment Act 2025* (Qld) (**Queensland Amendment Act**), which is in materially the same terms to the *State Taxation Further Amendment Act 2024* (Vic) (**Victorian Amendment Act**). The Queensland Amendment Act imposed new land tax and defined a person’s liability for the new tax by reference to the purported but invalid imposition of “Foreign Surcharge”³ in the past: VS [42]-[45]. As a result, the ultimate position of the GG Entities is the same regardless of whether or not s 51(xxxi) applies: either they are liable for the Foreign Surcharge as originally imposed, or they are liable in the same amount and circumstances for the new tax as re-imposed (with retrospective effect) by the Queensland Amendment Act: VS [47].
6. Therefore, the Court should refrain from resolving the potential application of s 51(xxxi), consistently with its longstanding prudential approach of only deciding constitutional questions which are necessary to do justice between the parties: VS [46].

C. SECTION 51(XXXI) IS NOT ENGAGED

7. In the alternative, if the Court considers it necessary to reach the potential application of s 51(xxxi), that provision is not engaged. In this respect, Victoria principally relies on VS [50]-[63] and QS [31]-[49]. In addition, Victoria makes the following submissions in relation to s 64 of the Judiciary Act.

C.1 Section 79(2)-(4) rolls back the operation of s 64 of the Judiciary Act

8. The GG Entities submit that certain provisions of the *Taxation Administration Act 2001* (Qld) (**Queensland Administration Act**) and the *Limitation of Actions Act 1974* (Qld) (**Queensland Limitation Act**) did *not* apply to extinguish their claims in restitution before the commencement of the Commonwealth Amendment Act because s 64 of the Judiciary Act prevents those provisions from being applied in federal jurisdiction: appellants’ submissions (AS) [55]-[57]. That submission fails to account for the operation of s 79(2)-(4) of the Judiciary Act and should be rejected.
9. It may be assumed that ss 36(2) and 188 of the Queensland Administration Act, which create an exclusive statutory procedure for taxpayers to seek refunds of amounts paid as taxes, and s 10A(3) of the Queensland Limitation Act, which imposes a one-year limitation period on actions to recover amounts paid as taxes, are laws governing the

³ *Land Tax Act 2010* (Qld), s 32(1)(b)(ii).

exercise of jurisdiction by courts, and so can only apply in federal jurisdiction if they are “picked up” and “applied” by s 79 of the Judiciary Act.⁴ It may also be accepted that, subject to the constitutional limits described at [14]-[17] below, s 64 of the Judiciary Act prevents s 79 from picking up and applying State laws which transgress the requirement that, “[i]n any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject”.⁵ That is why, in *British American Tobacco Australia Ltd v Western Australia*, this Court held that s 6(1) of the *Crown Suits Act 1947* (WA) — which required a party proposing to take action against the Crown in right of Western Australia to give written notice of its intention to do so within three months of the cause of action accruing — was contrary to s 64 and not picked up by s 79.⁶

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10. However, in response to *British American Tobacco*, the Commonwealth Parliament enacted the *Judiciary Amendment Act 2008* (Cth), which inserted s 79(2)-(4) into the Judiciary Act. Section 79(2)-(4) clarifies the operation of s 79(1) of the Judiciary Act, which relevantly provides that “[t]he laws of each State ... shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State ... in all cases to which they are applicable”. Against that background, s 79(2) relevantly provides that “[a] provision of this Act does not prevent a law of a State or Territory covered by [s 79(3)] from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose”. Section 79(3), in turn, relevantly covers “a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law ... limiting the period for bringing the suit to recover the amount”. Section 79(4) then gives four examples of “amount[s] paid in connection with a tax” for the purposes of s 79(2).

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11. The combined effect of those provisions is relevantly that, in any suit relating to the recovery of an amount paid in connection with a State tax, *other* provisions of the Judiciary Act — including s 64 — do *not* prevent State laws from being picked up and applied by s 79(1). In other words, s 79(2)-(4) affects the operation of s 64 in any suit

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⁴ *Rizeq v Western Australia* (2017) 262 CLR 1 at [63], [89] (Bell, Gageler, Keane, Nettle and Gordon JJ).

⁵ *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [68] (McHugh, Gummow and Hayne JJ).

⁶ (2003) 217 CLR 30 at [68]-[87] (McHugh, Gummow and Hayne JJ).

relating to State taxes in a way that achieves the stated purpose of the provisions, which was to “restor[e] the States and Territories to the position it was thought they were in” prior to the *British American Tobacco* case.⁷

12. Applying s 79(2)-(4) in these proceedings is straightforward. Any restitution claim that might have been brought by the GG Entities to recover amounts paid as “Foreign Surcharge” would have constituted a “suit relating to the recovery of an amount paid in connection with a tax that a law of a State ... invalidly purported to impose” (s 79(2)). In any such suit, s 64 of the Judiciary Act would *not* have prevented s 79 from picking up and applying in federal jurisdiction State laws “that would be applicable to the suit if it did not involve federal jurisdiction” (s 79(3)). Sections 36(2) and 188 of the Queensland Administration Act and s 10A(3) of the Queensland Limitation Act are evident examples of such State laws. Therefore, as those laws govern the exercise of jurisdiction by courts, they are picked up and applied in federal jurisdiction by s 79(1) in the ordinary way, unencumbered by s 64.
13. Further, and in any event, s 64 would not be engaged on its terms where a State law would apply equally, or as nearly as possible, in a suit to which the State is a party as in a suit between subject and subject.⁸ Section 64 would therefore not stand in the way of such a law being picked up and applied in federal jurisdiction by s 79.

C.2 Proper construction of section 64 of the Judiciary Act

14. If, contrary to the premise of the submissions at [8]-[12] above, ss 36(2) and 188 of the Queensland Administration Act and s 10A(3) of the Queensland Limitation Act are *not* laws governing the exercise of jurisdiction by courts, those provisions would apply of their own force, as State laws, to a proceeding in federal jurisdiction. There would be no inconsistency with s 64.
15. Although it has been established that “in every suit to which the *Commonwealth* is a party s 64 requires the rights of the parties to be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, statutory and otherwise, as would apply if the Commonwealth were a subject”,⁹ the question whether it has a commensurate operation

⁷ Judiciary Amendment Bill 2008 (Cth), Explanatory Memorandum at 1.

⁸ See, eg, s 20A(2)-(2A) of the *Limitation of Actions Act 1958* (Vic), which apply to proceedings “between parties of any kind” concerning a tax or “an amount that is attributable to tax or purported tax”.

⁹ *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 262-263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) (emphasis added).

in a suit to which a *State* is a party has been left open.¹⁰ If it is necessary to determine that question in this proceeding, it should be held that, following *Rizeq v Western Australia*,¹¹ s 64 should be read down in its application to suits in which a State is a party¹² such that it does not extend to State laws which operate, independently of anything done by a court, to create or define a person's rights and liabilities.

16. *Rizeq* established that “[t]he [Commonwealth] 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.”¹³ Section 79 of the Judiciary Act thus applies only to State laws which regulate the exercise of jurisdiction by courts. State laws which do not purport to regulate the exercise of jurisdiction, and which operate independently of anything done by a court, apply of their own force.
17. Following *Rizeq*, the power conferred by ss 51(xxxix) or 77 of the Constitution could also not support a construction of s 64 of the Judiciary Act that would affect the operation of State laws of that kind in federal jurisdiction. Further, s 78 of the Constitution does not support such a construction. The power conferred by s 78 to make laws conferring rights to proceed against a State in respect of matters within federal jurisdiction must, consistently with *Rizeq*, extend only to laws overcoming the immunity from suit¹⁴ and laws that would affect the exercise of a court's jurisdiction or powers in any suit where the right to proceed has been conferred. Section 64 can have no wider operation in respect of a State party.

¹⁰ *Evans Deakin* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). *British American Tobacco* (2003) 217 CLR 30 did not decide that question. The Court proceeded on the basis that ss 5 and 6 of the *Crown Suits Act 1947* (WA) were laws of a kind to which s 79(1) of the Judiciary Act applied, but held that s 39(2) or s 64 of the Judiciary Act “otherwise provided”: (2003) 217 CLR 30 at [67]-[68] (McHugh, Gummow and Hayne JJ). The argument that s 64 could not be read down other than by excluding the State from its field of operation was rejected: at [86]-[87] (McHugh, Gummow and Hayne JJ). (2017) 262 CLR 1.

¹¹ See *British American Tobacco* (2003) 217 CLR 30 at [87] (McHugh, Gummow and Hayne JJ).

¹³ *Rizeq* (2017) 262 CLR 1 at [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁴ See, eg, Judiciary Act, s 39(2).

PART V: ESTIMATE OF TIME

18. As this proceeding is being heard together with *Stott*, Victoria does not require any additional time for the presentation of oral submissions in this proceeding.

Dated: 2 April 2025



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ANNEXURE TO THE SECOND DEFENDANT’S SUBMISSIONS

Pursuant to paragraph 4 of *Practice Direction No 1 of 2024*, the Second Defendant 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 version	Applicable date(s)
Constitutional provisions					
1.	Commonwealth <i>Constitution</i>	Current	ss 51(xxxi), 51(xxxix), 77, 78	In force at all relevant times.	All relevant times.
Statutory provisions					
2.	<i>Crown Suits Act 1947</i> (WA)	Reprinted date 14 April 1971	ss 5, 6	For illustrative purposes.	In force in <i>British American Tobacco</i> .
3.	<i>Judiciary Act 1903</i> (Cth)	Current C2024C00864	ss 39, 64, 79	No material difference between versions.	All relevant times.
4.	<i>Judiciary Amendment Act 2008</i> (Cth)	Current C2008A00071	All	Inserted s 79(2)-(4) into the Judiciary Act.	All relevant times.
5.	<i>International Tax Agreements Act 1953</i> (Cth)	Current C2024C00814	s 5(3)	Version includes s 5(3).	From 8 April 2024.
6.	<i>Land Tax Act 2010</i> (Qld)	Current (28 Feb 2025 – current)	ss 32(1)(b)(ii), 104	Version includes s 104.	From 28 Feb 2025 onwards.
7.	<i>Limitation of Actions Act 1974</i> (Qld)	Current (20 Sep 2023 – current)	s 10A	No material difference between versions.	All relevant times.
8.	<i>Limitation of Actions Act 1958</i> (Vic)	Current 110	s 20A	In force at all relevant times.	All relevant times.
9.	<i>Revenue Legislation Amendment Act 2025</i> (Qld)	Current (28 Feb 2025 – current)	ss 26B, 32	Inserted s 104 into Land Tax Act and s 189 into Qld Administration Act.	From 28 Feb 2025 onwards.
10.	<i>State Taxation Further Amendment Act 2024</i> (Vic)	As enacted 50/2024	ss 42, 54	Inserted s 106A into the Land Tax Act and s 135A into the Administration Act.	All relevant times.
11.	<i>Taxation Administration Act 2001</i> (Qld)	Current (28 Feb 2025 – current)	ss 36(2) and 188	Version includes s 188.	From 28 Feb 2025 onwards.
12.	<i>Treasury Laws Amendment (Foreign Investment) Act 2024</i> (Cth)	Current C2024A00018	Sch 1, cl 2	Inserted s 5(3) into ITA Act.	From 8 April 2024.