



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

B48 of 2024

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

Appellant

and

COMMISSIONER OF STATE REVENUE

Respondent

B49 of 2024

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

Appellant

and

COMMISSIONER OF STATE REVENUE

Respondent

B50 of 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 FOR THE STATE OF
WESTERN AUSTRALIA (INTERVENING)**

PART I: CERTIFICATION

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

PART II: INTERVENTION

2. The Attorney General for **Western Australia** intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent.

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: ARGUMENT

Introduction and adoption of Western Australia's submissions in *Stott*

4. Consistent with the precept followed by the Court for more than a century, if it is unnecessary to decide a constitutional question it is necessary not to decide it. As Hayne, Kiefel and Bell JJ further observed in *ICM Agriculture v Commonwealth*, "constitutional questions should not be decided unless it is necessary 'to do justice in the given case and to determine the rights of the parties'".¹
5. In the absence of any application to re-open *University of Wollongong v Metwally*,² it is only necessary for the Court to consider whether:
 - (a) *Metwally* should be re-opened and overruled; and
 - (b) section 5(3) of the *International Tax Agreements Act 1953* (Cth) (**ITA Act**) is a law with respect to the acquisition of property from a person otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution, if the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Commonwealth Amendment Act**) did not clear the way for the *Revenue Legislation Amendment Act 2025* (**Queensland Amendment Act**) to impose the foreign surcharge on land tax retrospectively³ on a foreign company or trustee, in the same amount and circumstances in which they were purportedly imposed by s 32(1)(b)(ii) of the *Land Tax Act 2010* (Qld) (**Queensland Land Tax Act**).

¹ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 [141] (footnotes omitted).

² *University of Wollongong v Metwally* (1984) 158 CLR 447.

³ That is, for the future only, the Queensland Amendment Act changed the law from what it otherwise would have been with respect to a prior event: *Stephens v The Queen* (2022) 273 CLR 635 [29] (Keane, Gordon, Edelman and Gleeson JJ).

6. The Queensland Amendment Act operates in materially the same way as the *State Taxation Further Amendment Act 2024* (Vic) (**Victorian Amendment Act**), which with the Commonwealth Amendment Act and s 5 of the ITA Act is the subject of Western Australia's submissions in *Stott v Commonwealth and Victoria* (M60 of 2024).
7. The Queensland Amendment Act and the Victorian Amendment Act insert new provisions into their land tax and taxation administration legislation which are materially to the same effect. The counterpart to:
 - (a) s 104 of the Queensland *Land Tax Act* is s 106A of the *Land Tax Act 2005* (Vic); and
 - (b) s 189 of the *Taxation Administration Act 2001* (Qld) is s 135A of the *Taxation Administration Act 1997* (Vic).
8. However, in this case the international tax agreement to which effect is given by s 5(1) of the ITA Act is the Australia-Germany double-taxation agreement, rather than the New Zealand Convention as in *Stott*.
9. Given the materially identical provisions inserted into Queensland and Victoria's land tax and tax administration legislation and that they engage with s 5 of the ITA Act and the Commonwealth Amendment Act in materially identical ways, the submissions made by Western Australia in *Stott* are adopted in this case, subject to the modifications and additional submissions made herein.
10. Western Australia submits that the following answers should be given to Questions 1 to 4B of the Amended Special Case (**ASCB 38-39**).
 - (a) Question 1 should be answered "yes".
 - (b) Question 2 should be answered "yes".
 - (c) Question 3 is unnecessary to answer or, if *Metwally* is re-opened and overruled, should be answered "yes".
 - (d) Question 4 is unnecessary to answer or, if *Metwally* is re-opened and overruled, should be answered "no".
 - (e) Question 4A should be answered "yes".
 - (f) Question 4B should be answered "no".

Question 1: there was inconsistency before 8 April 2024

11. It is common ground that before the Commonwealth Amendment Act came into operation on 8 April 2024, s 32(1)(b)(ii) of the Queensland *Land Tax Act* was inconsistent with the Australia-Germany double-taxation agreement given effect as Commonwealth law by s 5(1) of the ITA Act, and thereby inoperative pursuant to s 109 of the Constitution.

Question 2: the Commonwealth Amendment Act is supported by the external affairs power

12. Western Australia adopts Queensland's submissions⁴ and makes the following submissions.
13. The external affairs power in s 51(xxix) of the Constitution "extends to the enactment of laws implementing the provisions of treaties entered into by the Executive".⁵
14. The appellants accept that, before the Commonwealth Amendment Act inserted s 5(3) into the ITA Act, the ITA Act was supported by the external affairs power in s 51(xxix) of the Constitution.
15. The appellants also acknowledge⁶ that, as a general proposition, a law which amends or repeals a valid Act is supported by the head of power which supported the law amended.⁷ Accordingly, subject to any qualification to that proposition, the Commonwealth Amendment Act is supported by the external affairs power.
16. The appellants seek to call in aid the qualification identified by Gaudron J in *Kartinyeri* where a law, as it stands after alteration, no longer retains its character as a law with respect to a matter within Commonwealth legislative power.⁸

⁴ Respondent's (Queensland's) Submissions (QS) [12]-[26].

⁵ *Victoria v Commonwealth* (1996) 187 CLR 416 (*IR Act Case*), 476 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

⁶ Appellants' Submissions (AS) [25].

⁷ *Kartinyeri v Commonwealth* (1998) 195 CLR 337 [15] (Brennan CJ and McHugh J), [47] (Gaudron J).

⁸ AS [25]; *Kartinyeri* [47] (Gaudron J). Similarly, at [15], Brennan CJ and McHugh J referred to, but did not need to consider, a hypothetical case of a repealing or amending Act which so changed the character of an earlier Act as to deprive that Act of its constitutional support.

17. In considering that contention, it is necessary to consider whether the ITA Act as amended by the Commonwealth Act, considered *as a whole*, is a law with respect to external affairs.
18. The ITA Act, as amended by the Commonwealth Amendment Act, among other matters:
- (a) relevantly defines the term "Australian tax" to mean income tax or fringe benefits tax (s 3(1));
 - (b) provides that, subject to the Act, certain specified agreements have the force of law (s 5(1));
 - (c) provides that s 5(1) does not apply to Article 23 of the United States convention (s 5(2));
 - (d) provides that the operation of a provision of an agreement provided for by s 5(1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax, unless expressly provided otherwise in that law (s 5(3));
 - (e) provides that the provisions of each of certain specified earlier agreements, so far as those provisions affect Australian tax, continue to have the force of law for tax in respect of income or fringe benefits in relation to which the agreement remains effective (s 5A);
 - (f) provides that other specified agreements, so far as those provisions affect Australian tax, have the force of law (ss 6A, 7, 10A, 11, 11C-11F, 11G, 11H, 11K-11N, 11R);
 - (g) provides for the rebate of Australian tax paid in excess of the limit applicable under the provisions of an agreement limiting the amount of Australian tax payable (s 16); and
 - (h) provides for the liability of taxpayers for withholding tax to be reduced where the amount of withholding tax payable exceeds the limit specified in an agreement (s 17A).

19. Accordingly, insofar as the agreements referred to in the ITA Act affect Australian tax, those agreements have the force of law.⁹ As demonstrated by the result in *Addy v Federal Commissioner of Taxation*,¹⁰ nationals of contracting countries are protected from any income tax which is more burdensome than the tax to which Australian nationals may be subjected.
20. Insofar as the agreements referred to in the ITA Act concern the imposition of taxes other than Australian tax:
- (a) in respect of the agreements referred to in ss 5A, 6A, 7, 10A, 11, 11C-11F, 11G, 11H, 11K-11N, 11R, the provisions are not given the force of law; or
 - (b) in respect of the agreements referred to in s 5(1), pursuant to s 5(3) the operation of the provision is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax, unless expressly provided otherwise in that law.
21. It is not the case that a law which gives effect to Australia's obligations under a treaty can only be supported by s 51(xxix) if it gives effect to all obligations under that treaty. As long as the legislation can reasonably be regarded as appropriate for implementing the provisions of the treaty, it will be valid, irrespective of whether the legislation constitutes a breach of Australia's obligations under a Convention.¹¹
22. Contrary to AS [33], the ITA Act is not analogous to the legislation considered in *R v Burgess; Ex parte Henry*.¹² In *Burgess*, the regulations were fundamentally inconsistent with the relevant convention in various respects and dealt with matters that did not give effect to any terms of the convention, due to an incorrect assumption that the Commonwealth Parliament had full power to legislate with respect to air navigation.¹³

⁹ ITA Act ss 5(1), 5(3), 5A, 6A, 7, 10A, 11, 11C-11F, 11G, 11H, 11K-11N, 11R.

¹⁰ *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613.

¹¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 74-75 (McHugh J); *The Commonwealth v Tasmania (the Tasmanian Dam case)* (1983) 158 CLR 1, 172 (Murphy J), 233-234 (Brennan J), 268 (Deane J).

¹² *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

¹³ *Burgess* (1936) 55 CLR 608, 646-654 (Latham CJ); 674-675 (Dixon J); 695 (Evatt and McTiernan JJ).

23. In contrast, the provisions of the ITA Act are concerned with giving force to international tax agreements. That the ITA Act does not give force to an international tax agreement in every respect does not deprive the ITA Act of its character as a law with respect to external affairs.
24. To the extent that any of the judgments in *Burgess* suggest that legislation implementing a treaty must comply with all obligations under the treaty in order to enliven the external affairs power, the *Tasmanian Dam* case and later authorities confirm that this is not an essential requirement of validity.¹⁴
25. Having regard to the terms of the ITA Act as a whole, as it stands as amended by the Commonwealth Amendment Act, Western Australia submits that the ITA Act remains supported by the external affairs power.

Question 3: if it is necessary, *Metwally* should be re-opened and overruled

26. For the reasons submitted by Western Australia in *Stott*, it is unnecessary to answer this question.
27. If the Commonwealth Amendment Act cleared the way for the Queensland Amendment Act to impose the foreign surcharge on land tax retrospectively as described above [5], it did so consistent with *Metwally* and no occasion for considering the correctness of that decision arises. If the occasion for reconsideration does not arise, *Metwally* should not be reconsidered.
28. However, if the Court considers it necessary or otherwise appropriate to consider whether *Metwally* should be re-opened, for the reasons submitted by Western Australia in *Stott* [21]-[38]:
 - (a) *Metwally* should be re-opened and overruled; and
 - (b) the Commonwealth Amendment Act was effective on its own, and with retroactive effect from 1 January 2018, to remove the inconsistency which had engaged s 109 such that s 32(1)(b)(ii) of the Queensland *Land Tax Act* was inoperative.

¹⁴ *IR Act Case 488* (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

Question 4: the Commonwealth Amendment Act is not a s 51(xxxi) law

29. For the reasons submitted by Western Australia in *Stott*, it is also unnecessary to answer this question.
30. However, if it is necessary or otherwise appropriate to consider whether the Commonwealth Amendment Act effected an acquisition other than on just terms, contrary to s 51(xxxi) of the Constitution, for the reasons submitted by Western Australia in *Stott* [39]-[49], s 51(xxxi) is not engaged by the Commonwealth Amendment Act.

Questions 4A and 4B

31. Western Australia adopts Queensland's submissions on Questions 4A and 4B.¹⁵

PART V: LENGTH OF ORAL ARGUMENT

32. It is estimated that the oral argument for Western Australia will take no more than 15 minutes (jointly in this matter and in *Stott*).

Dated: 2 April 2025



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¹⁵ QS [50] and [51].

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**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE
 STATE OF WESTERN AUSTRALIA (INTERVENING)**

Pursuant to Practice Direction No 1 of 2024, the Attorney General for the State of Western Australia sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in the submissions.

No.	Description	Version	Provisions	Reason for version	Applicable dates
Constitutional provisions					
1.	<i>Commonwealth Constitution</i>	Current	ss 51(xxxi), 51(xxix), 109	In force at all relevant times.	All relevant times.

Statutory provisions					
<i>Commonwealth legislation</i>					
2.	<i>International Tax Agreements Act 1953</i> (Cth)	Version 43 (29 June 2023 to 7 April 2024)	s 5	Version prior to the insertion of s 5(3).	Prior to 8 April 2024.
3.	<i>International Tax Agreements Act 1953</i> (Cth)	Version 45 (11 December 2024 – current)	ss 3(1), 5(1), 5(2), 5(3), 5A, 6A, 7, 10A, 11, 11C-11F, 11G, 11H, 11K-11N, 11R, 16, 17A	Currently in force, includes amendment inserting s 5(3).	From 8 April 2024.
4.	<i>Judiciary Act 1903</i> (Cth)	Version 51 (11 December 2024 to current)	s 78A	No material difference.	All relevant times.
5.	<i>Treasury Laws Amendment (Foreign Investment) Act 2024</i> (Cth)	As made (8 April 2024 – current)	Sch 1, cll 1, 2	Inserted s 5(3) into the <i>International Tax Agreements Act 1953</i> (Cth).	From 8 April 2024.
<i>State legislation</i>					
6.	<i>Land Tax Act 2010</i> (Qld)	30 June 2019 – 30 June 2022	s 32(1)(b)(ii)	Version in force when the land tax was imposed on the Appellants.	The assessment notices were issued on 19 February 2011, 3 November 2021 and 14 February 2022.
7.	<i>Land Tax Act 2010</i> (Qld)	Current (28 February 2025 – current)	ss 32(1)(b)(ii), 104	Currently in force, includes amendment inserting s 104.	From 28 February 2025: date of commencement of s 104.
8.	<i>Land Tax Act 2005</i> (Vic)	Version 81 (1 January 2025 to current)	s 106A	No material difference, save insertion of s 106A.	All relevant times.

9.	<i>Revenue Legislation Amendment Act 2025 (Qld)</i>	As made (28 February – current)	ss 26B, 32	Inserted s 104 into the Land Tax Act (Qld) and s 189 into the Taxation Administration Act (Qld).	From 28 February 2025.
10.	<i>State Taxation Further Amendment Act 2024 (Vic)</i>	As made (3 December 2024 to current)	ss 42, 54	Inserted s 106A into the Land Tax Act (Vic) and s 135A into the Taxation Administration Act (Vic).	All relevant times.
11.	<i>Taxation Administration Act 2001 (Qld)</i>	Current (28 February 2025 – current)	s 189	Currently in force, includes amendment inserting s 189.	From 28 February 2025: date of commencement of s 189.
12.	<i>Taxation Administration Act 1997 (Vic)</i>	Version 88 (1 January 2025 to current)	s 135A	No material difference, save insertion of s 135A.	All relevant times.