HIGH COURT OF AUSTRALIA

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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

APPELLANTS' REPLY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: REPLY

2 Since 2021, the GG Entities have maintained that they were not liable to pay the Foreign Surcharge because s 32(1)(b)(ii) of the Land Tax Act was invalid. The Commissioner now accepts that the GG Entities were right (at least until 8 April 2024) and, for that reason, that Q1 should be answered "yes". The essence of the Commissioner's case is that, because of the concerted efforts of two different legislatures, the answer to Q1 is now irrelevant to the rights of the GG Entities. The "threshold" question is whether s 5(3) is supported by the external affairs power (**Q2**): **C(GG) [4]**. If it is not, then s 5(3) will be invalid in all of its operations (in relation to State laws): see **Part A**. If it is, the next issue will be whether, in so far as s 5(3) purports to operate in relation to the period between 1 January 2018 and 8 April 2024, it authorises or effects an "acquisition of property" (**Q4**). If so, only s 51(xxxi) can support that operation of s 5(3), and because no "just terms" have been provided, that operation will be invalid:[1] see **Part B**.

3 If the retroactive operation of s 5(3) is invalid under either Q2 or Q4, then s 5(1) continues to give force to Art 24(4)-(5) of the German Agreement in relation to the period before 8 April 2024. In that event, it will be necessary to decide whether the **new Queensland provisions** — s 104 of the Land Tax Act and s 189 of the Administration Act — operate inconsistently with that continuing operation of s 5(1). Because the new Queensland provisions purport to impose tax upon the GG Entities in or for periods before 8 April 2024 (**Q4A**), to that extent, they are invalid under s 109 of the Constitution for the same reason that s 32(1)(b)(ii) of the Land Tax Act was invalid (**Q4B**). If the retroactive operation of s 5(3) is not invalid under either Q2 or Q4, the same result follows from *Metwally*.

A EXTERNAL AFFAIRS (QUESTION 2)

4 The government parties' primary response to Q2 is that s 5(3) of the ITA Act should be characterised as a "repeal" or a "roll-back" of s 5(1), and is for that reason alone necessarily supported by the external affairs power: **C(GG) [16]; Q [13]**. To describe s 5(3) as involving a "partial repeal" or "roll-back" of s 5(1) glosses over its true operation and scope: see **GG [22]-[24]**. More fundamentally, that approach would enable the Parliament, through the device of enactment and subsequent amendment, to produce an

[1] See *Yunupingu* [2025] HCA 6 at [17] (Gageler CJ, Gleeson, Jagot and Beech Jones JJ).

amended law that it would not otherwise have power to enact. The correct approach is to ask whether the law, as amended, "retains its character as a law with respect to a matter within Commonwealth legislative power".[2]

5 Thus, Q2 is to be resolved by asking: in reliance on the external affairs power, could the Parliament have enacted s 5(1), together with s 5(3), from the outset (see **C(GG) [20]**)? The answer to that question is "no". Operating together, they are not reasonably capable of being considered appropriate and adapted to the purpose of s 5(1), which may be described at different levels of generality: **GG [29]-[30], [35]**.

5.1 If the purpose is identified as the implementation of each obligation in each 10 "agreement", the law as amended is inconsistent with that purpose because it authorises State Parliaments to dictate whether (and the extent to which) Australia complies with those obligations. Each obligation of each treaty *is* implemented by s 5(1) — but s 5(3) means that that position may be overridden at any time by an enactment of a State Parliament: see **GG [31]-[33]**. As in *Burgess*, that outcome has "no foundation" in any of the agreements: see **C(GG) [23]**; **GG [33]**.

5.2 If the purpose is identified as the implementation of Art 24(4), the law as amended is inconsistent with that purpose because it authorises State Parliaments to dictate the extent to which that obligation is implemented. By force of s 5(1), Art 24(4) is implemented in relation to *all taxes*, as required by Art 24(5). But s 5(3) authorises 20 a State Parliament to enact a law with the practical effect that Art 24(4) continues to be implemented in relation to all taxes — *except* the particular discriminatory State tax: **GG [24], [34]**. That outcome is directly inconsistent with the text and purpose of Art 24(5).

6 Both arguments are supported by principle and authority, including Brennan J's observations in *Gerhardy*: **GG [13], [32]**. The government parties largely ignore Brennan J (sidelining him in a foonote: **C(GG) n 27**), as well as the gravamen of the first argument. Only the Commissioner makes a real attempt to engage with it, by identifying the purpose of s 5(1) as being "to implement the provisions of the identified agreements" but only in a "qualified way", relying on the fact that s 5(1) has always been expressed to

[2] See *Kartinyeri* (1998) 195 CLR 337 at [47] (Gaudron J), [173]-[175] (Kirby J); *Clyne* (1958) 100 CLR 246 at 267 (Dixon CJ); *McKellar* (1977) 139 CLR 527 at 550 (Gibbs J), 560 (Stephen J), 568 (Jacobs J), 572 (Mason J), 577 (Aickin J). The different result reached by the minority in *Pacific Coal* (2000) 203 CLR 346 followed from a narrower interpretation of the relevant head of power, not because of a doubt about the underlying principles: see at [52], [75]-[80] (Gaudron J), [165]-[170] (McHugh J), [288] (Kirby J).

be "[s]ubject" to the remainder of the Act: **Q [23]**. That response conflates the *means* of s 5(1) (reflected in its terms) with its *purpose* (what it is designed to achieve in fact),[3] and short-circuits[4] the "demanding" and "strict" analysis that is required: see **SA [5.1]. [6].**

7 As to the second argument, the core problem with the government parties' approach is that they, in effect, treat Art 24(5) as "peripheral" to Art 24(4): **Q [15]**, see also **C(GG) [22]**. The text and purpose of Art 24(5) establish the opposite: the two are inseverable. The text of Art 24(5) expressly displaces the limiting effect that Art 2 would have on the scope of taxes covered by Art 24(4): **GG [24.1]**. That is the whole point of Art 24(5) appearing in the agreement at all,[5] and reflects a deliberate choice to extend the obligation in Art 24(4) beyond those taxes identified in Art 2, so as to ensure that the operation of Art 24(4) in relation to Art 2 taxes could not be circumvented by imposing other discriminatory taxes: **GG [24.2]**; **Q [18]**. To give Art 24 a narrower operation than required by Art 24(5), as s 5(3) does, is to permit exactly that type of circumvention, contrary to the text and intended effect of Art 24(5).[6] Nothing in the cases about "partial implementation"[7] supports carving-up and rewriting terms of a treaty in that way.[8]

8 Finally, the Commonwealth relies on that aspect of the external affairs power that extends "to places, persons, matters or things physically external to Australia".[9] It does so on the basis that s 5(1), in its operation with Art 24(4), is a law concerning the "rights and duties of foreign nationals, residents, or enterprises": **C(GG) [24]**. That is wrong: Art 24(4) regulates identified "Enterprises of a Contracting State" from being subjected to tax by that *same* contracting State. Thus, the rights and duties affected by Art 24(4) are of *Australian* enterprises (including the GG Entities[10]), which are not external to Australia.

3 See *Unions NSW v NSW* (2019) 264 CLR 595 at [170]-[171] (Edelman J); *Alexander* (2022) 276 CLR 336 at [101] (Gageler J).

4 See *Brown v Tasmania* (2017) 261 CLR 328 at [322] (Gordon J).

5 But for its inclusion, the other provisions in Art 24 would apply only to Art 2 taxes: *Klaus Vogel* at 1959 [127].

6 Nothing can be made from the fact that Art 23 of the US Convention has not been implemented: cf **QS n 27**. It requires only that the parties "shall ensure" certain matters "*in enacting* tax measures". That is, it is directed to the legislative process. And they do *not* have "direct effect"; if infringed; the parties "shall only consult each other in an endeavour to resolve the matter": see *Klaus Vogel* at 1915 n 44.

7 See *Tasmanian Dams* (1983) 158 CLR 1 at 172 (Murphy J), 231-232 (Brennan J), 268 (Deane J); *IR Act Case* (1996) 187 CLR 416 at 488-489, 546 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

8 See, by analogy, limitations on redrafting statutes in other contexts: *YBFZ* (2024) 99 ALJR 1 at [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *A-G (Cth) v* ***Huynh*** (2023) 97 ALJR 298 at [65]-[66] (Kiefel CJ, Gageler and Gleeson JJ), [153]-[156] (Gordon and Steward JJ), [204] (Edelman J), [269]-[275] (Jagot J).

9 *XYZ* (2006) 227 CLR 532 at [10] (Gleeson CJ), [30] (Gummow, Hayne and Crennan JJ).

10 Being corporations who are registered in Australia. They also conduct business in Australia and are trustees of trusts governed by Australian domestic law: see **SCB 19 [9], [11], 20 [16], [18]**.

B ACQUISITION OF PROPERTY (QUESTION 4)

9 This reply responds to the most substantial of the plethora of arguments advanced by the government parties in response to the first aspect of Q4, concerning the extinguishment of the GG Entities' restitution claims.

10 *First*, s 5(3) is said not to "authorise or effect" an "acquisition", because it "does no more than remove an obstacle" to the imposition of Foreign Surcharge: **C(GG) [30]; V(S) [55]**. The question is one of characterisation, bearing in mind the status of s 51(xxxi) as a "constitutional guarantee".[11] That is a question of substance and practical operation (not simply of legal form): **GG [44]**. The "intended practical operation" of the law is therefore of central importance.[12] Here, it was intended that s 5(3), operating in respect of past taxes, would defeat any accrued claims for the period between 1 January 2018 and 8 April 2024.[13] If valid and effective, s 5(3) would have achieved that outcome: it would have removed an "essential element" of the restitution claims (namely, the unlawfulness of s 32(1)(b)(ii) of the Land Tax Act) and, therefore, in substance, extinguished the restitution claims: **GG [49]**; **S Reply [8]-[9], [12]-[13]**.

11 *Second*, as a matter of historical fact, before s 5(3) was enacted, the GG Entities had "property" in the form of restitution claims. The retroactive operation of s 5(3) did not (and could not) alter that historical fact: see **P(S) [25]-[26]**; cf **C(GG) [33]; W(S) [41]**.

12 *Third*, whether s 5(1) was "inherently defeasible" is the wrong question: see **S Reply [14]**; cf **C(GG) [30]; V(S) [56]**. The "property" said to be extinguished is a vested chose in action that "arises under the general law", as distinct from a "right which has no existence apart from statute".[14] Even if the concept of "inherent defeasibility" is capable of application in some limited contexts outside of statutory rights,[15] it has never been suggested to be relevant in the context of accrued choses in action.[16]

13 *Fourth*, it is said that the "assessments" created statutory debts, and accordingly "there can be no restitution": **C(GG) [32]**; **Q [46]**. That position is contrary to the conclusion in

11 *Yunupingu* [2025] HCA 6 at [15] (Gageler CJ, Gleeson, Jagot and Beech Jones JJ), [128] (Gordon J).

12 See *Outback Ballooning* (2019) 266 CLR 428 at [72] (Gageler J).

13 The reason why cl 2 of Sch 1 fixes on 1 January 2018 is because it "broadly aligns" with general limitation periods under State and Territory law: **S Reply [8]**. Thus, it was not necessary for s 5(3) to reach back further, because claims for earlier periods could be defeated by governments pleading a general limitation defence.

14 *Georgiadis* (1994) 179 CLR 297 at 305-306 (Mason CJ, Deane and Gaudron JJ).

15 *Yunupingu* [2025] HCA 6 at [162] (Gordon J), [308] (Edelman J).

16 In any event, the phrase "subject to this Act" is not sufficient to establish that any subsequent modification is not an "acquisition of property": see *Cunningham* (2016) 259 CLR 536 at [68]-[69] (Gageler J); cf **C(S) [41]**.

Glencore.[17] Moreover, the Queensland Parliament subsequently legislated on the basis that *Glencore* was correct: **C(GG) n 54**. In any event, the provisions of the Administration Act that are relied upon (ss 30(1)(e), 45 and 69(1)(b)) do not assist:

13.1 The "liability" of the GG Entities to pay the Foreign Surcharge was purportedly imposed by ss 6 to 8 of the Land Tax Act, at the rate specified in s 32(1)(b)(ii), which directs attention to "schedule 2, part 2" where the "Tax payable" is identified. It is those provisions that make a tax "payable under a tax law",[18] being the expression in ss 30(1)(e) and 45 of the Administration Act. And, because s 32(2)(b)(ii) was invalid, the Foreign Surcharge was not a tax "payable under a tax law". Section 69(1)(b) does not change that conclusion: it refers to tax "payable under the assessment", not tax "payable under a tax law".

13.2 To the extent any provisions of the Administration Act operate so that an "assessment" creates a debt for a tax liability that is imposed under an invalid law,[19] the term "assessment" in those provisions should not be construed as extending to an "assessment" of an invalid tax. If it were otherwise, they would be invalid for the same reason as the provisions purportedly imposing the tax liability.[20]

14 *Fifth*, s 132 of the Administration Act ("Evidentiary provisions for assessments") does not advance the argument: cf **Q [46], C(GG) [37], C(S) [43]**. Section 132(1) does no more than alter the rules of evidence,[21] which are only relevant once a proceeding has commenced; they are not capable of extinguishing choses in action. Section 132(2) does no more than make clear that non-compliance with the terms of a tax law does not render an "assessment" invalid.[22] That does not address the situation where the provision imposing the tax is constitutionally invalid. Nor did the decision in *Futuris*. In any event, the word "assessment" in s 132 should not be read as encompassing an assessment of an invalid tax: see **S Reply [19]**.

17 (2022) 12 QR 295 at [93]. It should not be readily assumed the Court in that case was not referred to certain provisions of the Administration Act (**C(GG) n 42**), in circumstances where the State was a party.

18 "Tax law" is defined to include a "revenue law", which includes the Land Tax Act: s 6(4).

19 Cf *ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509 at [87] (Bell and Gordon JJ).

20 In contrast, the term "assessment" as it appears in Pt 6 of the Administration Act is most naturally construed as a reference to an assessment in fact, irrespective of the validity of the assessment or the underlying tax: see, eg, *Minister v Moorcroft* (2021) 273 CLR 21; cf **C(GG) n 41**. Otherwise, the Pt 6 procedure could not be used to challenge an assessment issued where there was, for example, conscious maladministration.

21 See *Futuris* (2008) 237 CLR 146 at [65] (Gummow, Hayne, Heydon and Crennan JJ).

22 See *Futuris* (2008) 237 CLR 146 at [23]-[25] (Gummow, Hayne, Heydon and Crennan JJ).

15 *Sixth*, it is said that the restitution claims were "extinguished" by s 10A of the Limitation Act, or by ss 36(2) and 188(2) of the Administration Act: cf **GG [53]-[54]**. There is some divergence on this issue. The Commissioner says those laws are "directed to the manner of exercise of jurisdiction" and "the correct question" is whether they would be applied by s 79(1) of the Judiciary Act: **Q [41]**; **SA [20]-[21]**; **V(GG) [9]**. But, if ss 10A, 36 and 188 merely regulate the exercise of jurisdiction, they would not extinguish the underlying claims (as opposed to reducing their value).[23] In contrast, the Commonwealth starts from the position that the provisions operate of their own force, and then resist the proposition that those provisions are invalid because of s 109 of the Constitution: **C(GG) [36]**.

16 Regarding s 64 of the Judiciary Act, the Commonwealth raises three objections. The ***first*** objection is inconsistent with the temporal operation of s 64 explained in *Evans Deakin*:[24] cf **C(GG) [43]**. The ***second*** objection mischaracterises the claims: they are common law claims for restitution, on bases that are available between subject and subject (namely, duress and failure of consideration: **GG [48]**).[25] For that reason, there is no analogy with the *Mining Act Case* and the observations in *BAT*[26] are not distinguishable: cf **C(GG) [45]-[46]**. The ***third*** objection proceeds on the basis that, if s 64 of the Judiciary Act purported (with s 109 of the Constitution) to deny the State the benefit of the provisions that would be beyond Commonwealth legislative power: **C(GG) [48]**; **Q [44]**; **V(GG) [17]**. That is not so: where, as here, a matter is in federal jurisdiction because it arises under a law of the Commonwealth Parliament, s 64 of the Judiciary Act is supported by the same head of power that supported the law under which the matter arose (in addition to ss 51(xxxix) and 78 of the Constitution): cf **SA [25]**.[27] Section 64 "can, and if need be should, be read as applying to all such rights as lie within the reach of legislative power".[28]

17 As for s 5(1) of the ITA Act, the extinguishing of restitution claims impaired or detracted from the immunity conferred by Art 24(4), because it removed a mechanism to enforce that immunity and thereby reduced its efficacy: cf **C(GG) [37]-[38]**; **Q [45]**.

23 See *ANL* (2000) 204 CLR 493 at [194], [198] (Callinan J); *Mewett* (1997) 191 CLR 471 at 509 (Dawson J).

24 (1986) 161 CLR 254 at 266 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); **GG [56] n 113**.

25 See also *Kozik* (2024) 98 ALJR 544 at [78] (Gageler CJ and Jagot J), contemplating that s 64 might prevent adoption of the *Woolwich* principle. That implicitly recognises that a restitution claim to recover an unlawful tax, on other grounds, is comparable to any other restitution claim between subject and subject.

26 (2003) 217 CLR 30 at [78]-[84] (McHugh, Gummow and Hayne JJ); **GG [56]**.

27 See *Huynh* (2023) 97 ALJR 298 at [43], [47] (Kiefel CJ, Gageler and Gleeson JJ). See also *R v Hughes* (2000) 202 CLR 535 at [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Williams v Commonwealth* (2014) 252 CLR 416 at [35]-[36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

28 *Maguire* (1977) 139 CLR 362 at 401-402 (Mason J).

18 To the extent that any of the provisions purport to deny the Federal Court of jurisdiction (cf **C(S) [45]**), they would be invalid under s 109 of the Constitution because of s 39(1A)(b)-(c) of the Judiciary Act. To the extent they purport to deny the Federal Court the power to grant a remedy (**SA [21]**), they would be inconsistent with those provisions of the Federal Court Act that confer powers on that Court and therefore could not be applied by s 79(1) of the Judiciary Act: see **S Reply [7]**.[29]

C QUESTIONS 4A AND 4B: THE NEW QUEENSLAND PROVISIONS

19 The new Queensland provisions arise for consideration in two scenarios. If either Q2 or Q4 is answered in favour of the GG Entities, then s 5(3) of the ITA Act did not modify the
10 operation of s 5(1) before 8 April 2024 (**Q4**) or at all (**Q2**). The GG Entities contend that the new Queensland provisions are inconsistent with the subsisting operation of s 5(1) and are rendered inoperative by s 109 (**Q4A, 4B**). No issue arises about *Metwally* (**Q3**): see **S Reply [21]; Q [27]; C(GG) [25]**. If Q2 and Q4 are resolved adversely to the GG Entities, analysis shifts to *Metwally* (**Q3**). The result is the same (**Q4A, 4B**).

C.1 Inconsistency where "retroactive" operation of s 5(3) is not within legislative power

20 The new Queensland provisions purport to impose tax upon the GG Entities with precisely the same legal and practical consequences as the Foreign Surcharge purportedly imposed upon the GG Entities under s 32(1)(b)(ii) of the Land Tax Act — namely, a discriminatory tax, within the meaning of Art 24(4), in or for specified tax periods in the past.

20 20.1 Section 104(2) of the Land Tax operates to impose a tax by reference to a defined, past period: where tax has purportedly been imposed between 30 June 2019 and 8 April 2024: s 104(1).

20.2 As a result of the fictions created by s 104(3) and (7), that tax was imposed on the GG Entities by s 104(2) on 30 June 2020 and 30 June 2021;[30] and the GG Entities paid that tax in 2021 and 2022.[31] The provisions do not affect tax liability for any future period.

20.3 The "backwards" operation of s 104 is underscored by the payment provisions. Rights and liabilities relating to Foreign Surcharge are replicated: s 104(6); s 189(2),

[29] Section 79(2)-(4) have no relevance where the inconsistency is with another Act, not the Judiciary Act.

[30] Under s 104(3), the s 104(2) liability is 'taken to have arisen' on the date that liability for the purported Foreign Surcharge 'would have arisen. Liability for land tax 'arises' at midnight on 30 June immediately preceding the financial year: s 7.

[31] More precisely: GG120E paid Foreign Surcharge on 6 May 2021 and 2 February 2022; GG180Q paid on 27 April 2021 and 30 March 2022: **SCB 28 [22], 29 [25], 30 [28], 31 [31]**. Therefore, the GG Entities are to be taken to have paid the s 104(2) tax on those dates.

(3). That includes the due date for payment. Accordingly, where a taxpayer has already paid the Foreign Surcharge (as the GG Entities have), no future action is required.[32] But if a taxpayer had not paid the Foreign Surcharge, interest would accrue in respect of the s 104(2) tax from the date (in the past) that the Foreign Surcharge was due.[33] The provisions do not impose a requirement to pay an amount in future based on something that has happened in the past. In substance, they require the taxes to have been paid in the past.[34]

20.4 Further, in order to reach the conclusion that the GG Entities' appeals must be disallowed (see **Q [50]; C(GG) [12]**), s 189(4) must deem that: the GG Entities objected to fictional s 104(2) assessments; the GG Entities lodged appeals from the disallowance of those objections; and the single ground in each of those fictional appeals disputed the imposition of taxation under s 104 (not under s 32(1)(b)(ii)).

21 There is no basis to distinguish that legal and practical operation of the new Queensland provisions from the legal and practical (invalid) operation of s 32(1)(b)(ii) of the Land Tax Act. Thus, the new Queensland provisions are rendered inoperative by s 109 of the Constitution for precisely the same reason that everyone agrees that s 32(1)(b)(ii) of the Land Tax is invalid under Q1: see also **S Reply [23]-[29]**.

22 If necessary to apply a label, the new Queensland provisions are properly classified as "retroactive" because they operate backwards in the way described above.[35] The use of the formulation "taken to be, and always to have been" does not tend against that conclusion. In the cases cited by the government parties, it was not necessary to distinguish between a "retroactive" or a "retrospective" law because that distinction had no bearing on the constitutional analysis, which concerned whether the impugned "validating" provisions contravened Ch III: cf **C(S) n 53; Q n 38; V(S) [42]**. Moreover, observations in the authorities positively support the proposition that deeming language of the kind used in the new Queensland provisions signals a "retroactive" effect. For example, in *Metwally,* where the statute provided that it should be "deemed never to have been intended to exclude or limit the operation of a law of a State", Dawson J described that provision as

[32] **C(S) [17]**; GG120E paid Foreign Surcharge on 6 May 2021 and 2 February 2022; GG180Q paid on 27 April 2021 and 30 March 2022: **SCB 28 [22], 29 [25], 30 [28], 31 [31]**.

[33] Administration Act, s 189(2), (3); Land Tax Act, s 54.

[34] Fuller, *The Morality of Law* (rev ed, 1969) at 59-60.

[35] *Stephens* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman and Gleeson JJ). See also *R v Kidman* (1915) 20 CLR 425 at 443 (Isaacs J); *Duncan v ICAC* (2015) 256 CLR 83 at [46] (Nettle and Gordon JJ).

"retroactive" because it provided that "at a past date the law shall be taken to have been that which it was not".[36] The law in *AEU v FWA*, which stated that the purported registration of an organisation "is taken, for all purposes, to be valid and to have always been valid", was described by French CJ, Crennan and Kiefel JJ as "mak[ing] a change in the law with deemed operation from a date prior to the date of its enactment".[37] To the same effect, Gummow, Hayne and Bell JJ accepted that "because s 26A altered the law as it did, the [organisation] has now and since the time at which it was purportedly registered … had the status of a registered organisation":[38] cf **Q [29]**.

23 In the end, however, the distinction between "retroactive" and "retrospective" laws, so heavily relied upon by the government parties — see **C(GG) [25]; Q [28]; V(GG) [5]; N(GG) [4]; SA[16]; W(GG) [5]** — distracts from the relevant inquiry.[39] Section 109 requires analysis of the legal and practical operation of each law on rights, duties and liabilities.[40] That is an inquiry of substance, not form.

C.2 *Metwally* leads to the same conclusion

24 In *Metwally*, at the time of the contraventions of the New South Wales Discrimination Act alleged by Mr Metwally, the NSW provisions were sterilised. "During that period, an act, matter or thing to which the State law would have applied is barren of the legal effect that the State law would otherwise have attributed to it".[41] Because that consequence flowed from s 109, the Commonwealth Parliament could not later deem the act, matter or thing to have the legal effect that the State law would otherwise have attributed to it.[42] That is precisely what the new Queensland provisions are seeking to do. The *Metwally* principle is not so fragile as to permit Queensland's legislative fictions to undermine the "great importance" of s 109 for the "ordinary citizen":[43] **GG [42]**; **SA [13]**.

25 The *Native Title Act Case* and *Doyle* do not assist the government parties: **C(S) [25]-[26]; Q [28]-[29]; V(S) [36]-[37]; N(S) [14]-[17]**. In the *Native Title Act Case*, the Court affirmed that "[i]f native title was protected [in the past] by the *Racial Discrimination Act*, only a law of the Commonwealth could be effective to modify the operation of the *Racial*

36 *Metwally* (1984) 158 CLR 447 at 484 (Dawson J).
37 *AEU v FWA* (2012) 246 CLR 117 at [2], [50] (French CJ, Crennan and Kiefel JJ) (emphasis added).
38 *AEU v FWA* (2012) 246 CLR 117 at [97], see also at [90] (Gummow, Hayne and Bell JJ) (emphasis added).
39 See *Stephens* (2022) 273 CLR 635 at [29], [32]-[33] (Keane, Gordon, Edelman and Gleeson JJ).
40 *Jemena* (2011) 244 CLR 508 at [41]-[44] (the Court).
41 *Metwally* (1984) 158 CLR 447 at 473 (Brennan J).
42 See *Metwally* (1984) 158 CLR 447 at 457-458 (Gibbs CJ), 469 (Murphy J), 473 (Brennan J), 478 (Deane J).
43 *Metwally* (1984) 158 CLR 447 at 458 (Gibbs CJ).

Discrimination Act and then only for the future", because "the effect of s 109 cannot be retrospectively undone".[44] *Doyle* concerned a State law in the terms anticipated in the *Native Title Act Case*. The Full Federal Court accepted that such a law "attach[ed] a new legal significance to past acts", "together with an accompanying statement" that the acts are to be "taken" always to have had that significance.[45] The State law considered in *Doyle* operated "for the purposes of determining … whether native title exists" — in future.[46] By contrast, the new Queensland provisions altered the law which determined the tax imposed and payable — in the past.

D COSTS

26 The GG Entities seek the following costs orders, given the agreed answer to Q1 and otherwise irrespective of the ultimate outcome of the appeals. *First*, the Commissioner pay costs on an indemnity basis, until 8 April 2024. The Commissioner now concedes that the imposition of the Foreign Surcharge upon the GG Entities was invalid until that date. *Second*, the Commissioner pay costs, on the standard basis, between 8 April 2024 and 28 February 2025. The premise for removal of these appeals into this Court was that, for the Commissioner to succeed (given the concession above), it was necessary for *Metwally* to be overruled. The Commissioner now says that it is unnecessary to overrule *Metwally*, because of the new Queensland provisions. The case now advanced by the Commissioner only arose upon commencement of those new provisions on 28 February 2025.[47] Otherwise, the usual costs position should apply in both the special case and the appeals.

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[44] (1995) 183 CLR 373 at 451 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See, further, 454-456, as to the effect of a State law validating past acts, the force of which was recognised only "from and by reason of the enactment" of the State law.

[45] *Doyle* (2016) 249 FCR 519 at [57] (the Court).

[46] *Doyle* (2016) 249 FCR 519 at [58] (the Court).

[47] See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [188] (Gageler J).