HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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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

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No B49/2024

BETWEEN:

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

and

**COMMISSIONER OF STATE REVENUE**
Respondent

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No B50/2024

BETWEEN:

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

and

**COMMISSIONER OF STATE REVENUE**
Respondent

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## SUBMISSIONS OF THE APPELLANTS (the GG Entities[1])

[1] The appellant in proceeding B48/2024 is **GG120E**. In proceedings B49/2024 and B50/2024, the appellant is **GG180Q**.

## PART I: CERTIFICATION

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

## PART II: ISSUES

2 The Australia-Germany double-taxation agreement (the **German agreement**) is one of several bilateral agreements "concluded between Australia and other countries based upon the [OECD] Model Tax Convention on Income and on Capital".[2] Article 24 is a "non-discrimination" clause. It relevantly prohibits specified Australian enterprises (those the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of Germany) from being subjected to "taxation" that is "more burdensome" than the taxation imposed on similar Australian enterprises: Art 24(4). The GG Entities are Australian enterprises of the specified kind: **SCB 33 [41.2]-[41.3]**.

3 Article 24 applies to taxes of "every kind and description": Art 24(5); and therefore applies to State taxes. In Queensland, companies and trustees are subjected to land tax imposed at the "general rate": ***Land Tax Act*** *2010* (Qld), s 32(1)(b)(i). If a company or trustee is a "foreign company" or a "trustee of a foreign trust", it is also required to pay an additional amount imposed at the "surcharge rate" (the **Foreign Surcharge**): s 32(1)(b)(ii).

4 The Commissioner assessed the GG Entities as liable for the Foreign Surcharge. At that time, s 5(1) of the *International Tax Agreements Act 1953* (Cth) (the **ITA Act**) gave the "force of law" to Arts 24(4)-(5) of the German agreement.[3] The GG Entities objected to the Commissioner's assessments, on the ground that imposing the Foreign Surcharge on the GG Entities contravened Art 24(4) of the German agreement, and was therefore inconsistent with s 5(1) of the ITA Act and invalid under s 109 of the Constitution. The Commissioner now agrees with that proposition: see **Q1**. Earlier, however, the Commissioner disallowed the objections, saying that Art 24(4) was not "engaged".

5 The GG Entities appealed to the Supreme Court of Queensland under the *Taxation* ***Administration Act*** *2001* (Qld) on the same ground as the ground on which they had objected to the assessments: **SCB 185, 190, 195**. While the appeals were pending, the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (the **Amendment Act**) inserted s 5(3) in the ITA Act, to provide that the operation of s 5(1) is "subject to anything inconsistent" in a Commonwealth, State or Territory law that imposes a tax (other than

[2] [2016] ATS 23; see ***Addy*** *v Federal Commissioner of Taxation* (2021) 273 CLR 613 at [12] (the Court).

[3] The German agreement came into force on 7 December 2016, and reference to it was inserted into s 5(1) of the ITA Act by the *International Tax Agreements Amendment Act 2016* (Cth): **SCB 33 [38.2]**.

"Australian tax"[4]). Section 5(3) applies in relation to taxes payable on or after 1 January 2018: Amendment Act, Sch 1, cl 2. If valid, the Amendment Act removed the inconsistency underpinning the GG Entities' appeals.

6 The resolution of the single ground in each appeal[5] now depends on the following:

**Is s 5(3) of the ITA Act supported by the external affairs power? (Q2)**

No: s 5(3) is not capable of being considered as appropriate and adapted to the purpose of implementing any treaty provisions, including Art 24 of the German agreement.

**Is s 5(3) effective from 1 January 2018 to remove the inconsistency between s 32(1)(b)(ii) of the Land Tax Act and s 5(1) of the ITA Act (and any consequent invalidity)? (Q3)**

No: to give s 5(3) that retrospective effect would be contrary to *Metwally*.[6]

**Did s 5(3) effect an "acquisition of the property" of the GG Entities? (Q4)**

Yes: if s 5(3) retrospectively removed the inconsistency, the GG Entities were deprived of property (claims in restitution and their pending appeals) and the Commissioner acquired a corresponding financial benefit.

7 The outcome of the appeals is not affected by new s 104 of the Land Tax Act or new s 189 of the Administration Act (**Q4A**). The GG Entities anticipate that the Commissioner will contend otherwise on the basis that those new provisions "validate the retrospective operation and imposition" of the Foreign Surcharge.[7] The GG Entities will address that argument (once it is made) in reply, along with any consequential issue of validity (**Q4B**).

## PART III: SECTION 78B NOTICE

8 The GG Entities gave notice pursuant to s 78B of the *Judiciary Act 1903* (Cth): **SCB 19**. The GG Entities will give a further notice to address the argument at paragraph 54 below.

## PART IV: FACTS

9 During the 2020-21 and 2021-22 financial years, GG120E (as trustee for the GG120E Unit Trust) was the registered proprietor of the GG120E Land, and GG180Q (as trustee for the GG180Q Unit Trust) was the registered proprietor of the GG180Q Land: **SCB 26 [9], 27 [16]**. GG120E and GG180Q are companies incorporated in Australia: **SCB 25 [5], 26 [12]**.

4 Defined so as not to include land tax imposed by the Land Tax Act: ITA Act, s 3(1); paragraph 17 below.

5 Each of which was removed into this Court by order of Jagot J, 26 August 2024: **SCB 6, 9, 12**.

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

7 Revenue Legislation Amendment Bill 2024 (Qld), Explanatory Note for amendments moved during consideration in detail, p 3; Statement of Compatibility for those amendments, p 3.

The units in the Unit Trusts and the shares in the GG Entities are owned and controlled by a German corporation, DWS, through interposed entities: **SCB 25 [4], [7], 26 [14], 48, 65**.

10 Based on those facts, each of the GG120E Land and the GG180Q Land was "taxable land" within the Land Tax Act: ss 6, 9; GG120E and GG180Q were the respective "owners" of that land: s 10; and each of GG120E and GG180Q was a "foreign company" and "trustee of a foreign trust": ss 18B-18C: **SCB 25 [8], 26 [9]-[10], [15], 27 [16]-[17]**. On that basis, the Commissioner assessed the GG Entities as liable to pay land tax at the general rate, plus the Foreign Surcharge: **SCB 27-28 [20], [23], 29 [26], 30 [29]**.

## PART V: ARGUMENT

10 ### A QUESTION 1: Section 109

11 It is agreed that, before the commencement of the Amendment Act, s 32(1)(b)(ii) of the Land Tax Act was invalid in its application to the GG Entities by force of s 109 of the Constitution, by reason of inconsistency with s 5(1) of the ITA Act. It is therefore agreed that the Court should answer "yes" to Question 1: **SCB 34 [42.3]**. While "[q]uestions of the validity of a law cannot be decided by agreement of the parties" and the Court must "be satisfied that a law is invalid before answering in that way a question reserved for the opinion of the Full Court",[8] the Court can be so satisfied here: see **SCB 33-34 [41]-[42]**. In short, if s 32(1)(b)(ii) of the Land Tax Act required the GG Entities to pay the Foreign Surcharge, the GG Entities would be subject to taxation prohibited by Art 24(4) of the
20 German agreement, such that s 32(1)(b)(ii) would "alter, impair or detract" from s 5(1) of the ITA Act in its operation with Art 24(4) of the German agreement.[9]

### B QUESTION 2: External Affairs

12 The Commissioner and the Commonwealth have given notice that they will contend that s 5(3) of the ITA Act is supported by the "external affairs" power in s 51(xxix).[10] Accepting that contention depends on the proper characterisation of s 5(3). That task involves: (1) examining the legal and practical operation of the law; and (2) assessing whether there is a "sufficient connection" between that operation and external affairs.[11]

8 *Unions NSW v NSW* (2023) 277 CLR 627 at [33] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

9 *Work Health Authority v* ***Outback Ballooning*** (2019) 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [65], [70]-[72] (Gageler J), [105] (Edelman J). See also ***Momcilovic*** *v The Queen* (2011) 245 CLR 1 at [238]-[245], [258]-[261] (Gummow J).

10 That notice was given under orders made by Jagot J on 26 August 2024: **SCB 6, 9, 12**.

11 See ***Spence*** *v Queensland* (2019) 268 CLR 355 at [57] (Kiefel CJ, Bell, Gageler and Keane JJ).

13 Given the subject matter of the ITA Act, the GG Entities assume the argument will focus on the treaty implementation aspect of the "external affairs" power.[12] That aspect is wide. However, as Brennan J presciently observed in ***Gerhardy*** *v Brown*:[13]

> When the Commonwealth Parliament, in performance of an international treaty obligation, introduces the provisions of an international convention into Australian municipal law, it is beyond the limits of the power conferred by s 51(xxix) of the Constitution for the Commonwealth Parliament to enact a law that operates, or that permits a State law to operate, in a manner inconsistent to any substantial extent with the operation which international law intends the Convention provisions to have.

14 Section 5(3) of the ITA Act infringes that limitation. For that reason, among others, s 5(3) is not reasonably capable of being considered as appropriate and adapted to a treaty implementation purpose. It is not a law with respect to external affairs and, in so far as it operates by reference to a law of a State, it is invalid.[14]

### B.1 Characterisation Step 1: legal and practical operation of s 5(3) of the ITA Act

15 The legal and practical operation of s 5(3) is to be determined by reference to the "rights, duties, power and privileges" which the law "*changes*, regulates or abolishes".[15] Section 5(3) changed the previous operation of s 5(1). In those circumstances, the operation of s 5(3) "can be ascertained only by reference" to s 5(1), "the operation of which it is expressed to affect".[16] It is therefore necessary first to examine the operation of s 5(1) before its amendment by s 5(3), and then consider the position afterwards.

16 ***Pre-amendment*****:** Section 5(1) gave, to each specified "agreement", "the force of law according to its tenor".[17] By implementing agreements in that way, s 5(1) gave to each provision of each agreement the "same meaning" in domestic law as they have in international law.[18] That implementation was "subject to" anything contained in the ITA Act. That qualification ensured the effectiveness, for example, of other provisions in the Act directed to how particular agreements were to operate in specified circumstances.

[12] Any other aspect of s 51(xxix) raised in support of s 5(3) will be addressed in reply.

[13] (1985) 159 CLR 70 at 119 (emphasis added).

[14] In so far as it operates by reference to a law of the Commonwealth or a Territory, it may be supported by some other head of power, but it is unnecessary to decide that issue in light of the terms of Question 2.

[15] *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 (Kitto J) (emphasis added).

[16] ***Kartinyeri*** *v Commonwealth* (1998) 195 CLR 337 at [8], see also [10] (Brennan CJ and McHugh J), [69] (Gummow and Hayne JJ); *Acts Interpretation Act 1901* (Cth), s 11B(1).

[17] See also ITA Act, s 3AAA ("Definitions—current agreements").

[18] See *Addy* (2021) 273 CLR 613 at [6] (the Court).

17 Subject to such qualifications, ss 4 and 4AA of the ITA Act gave each provision of each "agreement" paramountcy over any Commonwealth Acts imposing or assessing "Australian tax" as defined in the ITA Act[19] — in general terms, Commonwealth income tax and Commonwealth fringe benefits tax.[20] In other words, if there was an inconsistency between a provision of an agreement and a provision of a Commonwealth Act imposing Australian tax, the provision of the agreement prevailed. The provisions of each agreement may have also prevailed over Commonwealth laws not specified in ss 4 and 4AA, including any Commonwealth law imposing tax other than Australian tax. That would have depended on the principle that statutes that share a field of operation should, as far as possible, be given a "harmonious" construction.[21] Further, as a result of being given the force of Commonwealth law by s 5(1), the provisions of each agreement necessarily prevailed over any inconsistent State or Territory law (under s 109 of the Constitution for State law, or by the same principles for Territory law[22]).

18 Consistent with that general description of s 5(1), the provision gave the "force of law" to every provision of the German agreement. The "Taxes Covered" by that agreement are specified in Art 2. They include "the income tax, the fringe benefits tax and resource rent taxes imposed under the federal law of Australia" that were existing at the time the agreement was signed: Art 2(3)(a). Such tax is defined in the agreement as "Australian tax" and generally aligns with the definition of "Australian tax" in the ITA Act.

19 Article 24 is headed "Non-discrimination". It contains provisions relating to the taxation of "Nationals" of a Contracting State: Art 24(1); "permanent establishments" that are "enterprises" of a Contracting State: Art 24(2); deductions in relation to certain payments: Art 24(4); and, as relevant to the GG Entities, "enterprises" of a Contracting State wholly or partly owned or controlled by a resident of the other Contracting State: Art 24(4). Article 24(5) provides: "The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind of every description".

[19] Other than Subdiv 195C of the *Income Tax Assessment Act 1997* (Cth), and the anti-avoidance provisions in Pt IVA of the *Income Tax Assessment Act 1936* (Cth) and s 67 of the *Fringe Benefits Tax Assessment Act 1986* (Cth): see ITA Act, s 3 (definition of "Australian tax").

[20] See *Addy* (2021) 273 CLR 613 at [4] (the Court).

[21] See *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [78] (Crennan, Kiefel and Bell JJ), [98]-[99] (Gageler J); *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at [23] (Kiefel CJ, Keane, Gordon and Steward JJ).

[22] See *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 28; *Outback Ballooning* (2019) 266 CLR 428 at [30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

20 Because those terms were to be given the same meaning in domestic law as under international law, they were to be interpreted in accordance with the principles in the Vienna Convention on the Law of Treaties.[23] Applying those principles, the ordinary meaning[24] of Art 24(5) is that Arts 24(1)-(4) apply to all taxes, whether imposed under Commonwealth, State or Territory law — as confirmed[25] by the OECD Commentary, which states that, by Art 24(5), Art 24 "applies to taxes of every kind and description levied by, or on behalf of, the State, its political subdivisions or local authorities".[26]

21 The practical effect of that understanding and operation of Art 24 is illustrated by the answer to Question 1. But it has broader significance. More generally, because of the way in which s 5(1) of the ITA Act gave effect to Art 24 of the German agreement, Art 24 overrode any inconsistent State and Territory law,[27] as well as any inconsistent Commonwealth law imposing Australian tax. Article 24 may also have overridden Commonwealth laws imposing tax other than Australian tax (and given the text of s 5(1) and Art 24(5), it would likely have done so absent express provision to the contrary).

22 ***Post-amendment*:** It is against that legal framework that the legal and practical operation of s 5(3) must be examined. In general terms, s 5(3) "permanently reduces the ambit" of s 5(1).[28] It does so by preventing s 5(1) from giving force to any part of an "agreement" that would be "inconsistent" with "anything" "contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax". That legal operation of s 5(3), combined with s 5(1), has the following practical effect:[29]

22.1 For State and Territory laws imposing taxes that are **not** Australian taxes, s 5(3) reverses the previous operation of s 5(1): for such laws, inconsistency will be avoided by s 5(3). In truth, this applies to any State and Territory law imposing any

[23] See *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519 at [69]-[72] (the Court); *Wells Fargo Trust Company, National Association v VB Leaseco Pty Ltd* (2022) 275 CLR 1 at [1] (the Court).

[24] Vienna Convention, Art 31(1). See *Addy* (2021) 273 CLR 613 at [23] (the Court).

[25] Vienna Convention, Art 32. See *Addy* (2021) 273 CLR 613 at [32], [35] (the Court).

[26] See Commentary (2014) at C(24)-26 [81]; (2017) at C(24)-26 [81]. Art 24(4)-(5) of the German agreement are based on Art 24(5)-(6) of the Model Convention. See also Reimer and Rust (eds), ***Klaus Vogel*** *on Double Taxation Conventions* (5th ed, 2022) at 1957 [121], [123]-[124]; Explanatory Memorandum, International Tax Agreement Amendment Bill 2016 (Cth) at [1.415].

[27] Cf Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (**Amendment Bill EM**) at [3.2], suggesting (incorrectly) that there was "some uncertainty" as to the relationship between Art 24 (and its equivalents) and "taxes that are not covered taxes under the treaty" (that is, taxes not within Art 2), such as "some state and territory property taxes"; see also [4.25].

[28] *Kartinyeri* (1998) 195 CLR 337 at [9] (Brennan CJ and McHugh J); see also [48] (Gaudron J).

[29] See also Amendment Bill EM at [3.7]-[3.8].

tax: under the ITA Act "Australian taxes" are, by definition, imposed by Commonwealth law.

22.2 For Commonwealth laws imposing taxes that are **not** Australian tax, the position is similar: previously any conflict would have been determined by application of the principle of harmonious construction; but now the other Commonwealth law will necessarily prevail over the terms of an agreement.

22.3 For Commonwealth laws imposing taxes that **are** Australian taxes, the position has not changed: ss 4 and 4AA continue to ensure that s 5(1) prevails over those laws.

23 The only qualification to that operation of s 5(3) is where the Commonwealth, State or Territory law "expressly" provides otherwise.

24 That general operation of s 5(3) significantly affects the way in which s 5(1) implements Art 24 of the German agreement (and all equivalent non-discrimination clauses). The combined effect of s 5(1) and (3) is that Art 24 applies to prohibit "discrimination" in Australian taxes (as defined in the ITA Act) **and**, at the same time, permit discrimination in any other kind of tax (whether imposed under Commonwealth, State or Territory law). And, because of the alignment between the "Australian taxes" (under the ITA Act) and "Australian taxes" (under Art 2 of the German agreement), ss 5(1) and (3) effectively confine the operation of Art 24 to those taxes identified in Art 2. By doing so, they give Art 24 an operation that:

24.1 contradicts the text of Art 24(5) ("notwithstanding the provisions of Article 2");

24.2 is inconsistent with the "international law concept of non-discrimination in the field of taxation": Art 24(5) ensures "that countries cannot circumvent their non-discrimination obligations by subjecting the taxpayer to taxes not covered by Article 2", which reflects the underlying notion that "[a]ll tax discrimination in whatever form impedes international trade";[30]

24.3 violates the "absolute character" of Art 24: under international law, any discrimination based on "the forbidden criteria is prohibited and automatically violates" the clause, and it is not permissible for contracting parties to seek to "justify" any such discrimination;[31] and

[30] *Klaus Vogel* (2022) at 1957-1958 [123].

[31] *Klaus Vogel* (2022) at 1907-1908 [4], see also at 1961 [132]-[133].

24.4 is not consistent with any reservation made by Australia to Art 24 of the OECD Model Convention.[32]

## B.2 Characterisation Step 2: no sufficient connection to external affairs

25 The external affairs power "extends to the enactment of laws implementing the provisions of treaties entered into by the Executive".[33] And, as a general proposition, each head of legislative power carries with it the power to amend existing laws "with respect to that subject matter".[34] Thus, in principle, the Parliament may modify the way in which it implements a treaty provision. However, a question "may arise whether the law, as it stands after its alteration, retains its character as a law with respect to a matter within Commonwealth legislative power".[35] That question arises here. In short, s 5(3) "so changed the character" of s 5(1) that s 5(3) deprived s 5(1) of its "constitutional support".[36]

26 ***Limits on the power*:** "Where a treaty relating to a domestic subject matter is relied on to enliven the legislative power conferred by s 51(xxix) the validity of the law depends on whether its purpose or object is to implement the treaty".[37] A law with that purpose will have a "sufficient connection" to the external affairs power. A law's purpose is what it "can be seen to be designed to achieve in fact".[38] It is to be "ascertained objectively from its whole text and context at a level of generality or specificity calibrated to the importance of the 'constitutional value ... at stake'".[39]

27 It is also necessary to ensure that, "in truth", the law does not pursue a constitutionally impermissible purpose[40] — namely, an attempt by the Parliament to undertake the general

[32] Australia had recorded a reservation to Art 24, but unlike some other countries, the reservation was not directed to the scope of Art 24(5): see Commentary (2014) at C(24)-27 [86]; (2017) at C(24)-27; see also *Addy* (2021) 273 CLR 613 at [35] (the Court).

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

[34] *Kartinyeri* (1998) 195 CLR 337 at [13] (Brennan CJ and McHugh J), [47] (Gaudron J), [57], [72] (Gummow and Hayne JJ).

[35] *Kartinyeri* (1998) 195 CLR 337 at [47] (Gaudron J).

[36] Cf *Kartinyeri* (1998) 195 CLR 337 at [15] (Brennan CJ and McHugh J); *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 75 (McHugh J).

[37] *IR Act Case* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[38] *Spence* (2019) 268 CLR 355 at [60] (Kiefel CJ, Bell, Gageler and Keane JJ). See also ***Richardson*** *v Forestry Commission* (1988) 164 CLR 261 at 311 (Deane J); ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336 at [101]-[102] (Gageler J).

[39] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ), quoting *Alexander* (2022) 276 CLR 336 at [104] (Gageler J).

[40] *Alexander* (2022) 276 CLR 336 at [117] (Gageler J). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 296-297 (Mason CJ), 321-322 (Brennan J).

regulation of the subject matter to which the treaty relates "under colour of carrying out" the treaty.[41] That is why, where the apparent purpose of a law is to implement a provision of a treaty, the law must be "reasonably capable of being considered appropriate and adapted" to that purpose.[42] If that "proportionality" condition is satisfied, that will confirm that the true purpose of the law is to implement the treaty provision. In other words, the law will reflect a "faithful pursuit" of that purpose.[43] That purpose will therefore "pervade and explain the operation of the law to an extent that warrants the overall characterization of the law as one with respect to external affairs".[44]

28 The "proportionality" condition requires "an assessment of both means and ends, and the relationship between the two".[45] One situation in which that condition will not be satisfied is where the implementing law contains a "deficiency which, when coupled with other provisions of the law" means the law is "substantially inconsistent" with the treaty provision it is purporting to implement.[46] The limitation identified by Brennan J in *Gerhardy*[47] can be understood as a specific manifestation of that general principle.

29 ***Substantial inconsistency*:** Before s 5(3) was inserted, the purpose of s 5(1) was (stated at a high level of generality) to implement, into domestic law, each provision of each identified agreement. At a more specific level, the purpose of s 5(1) of the ITA Act was to implement Art 24 of the German agreement. At both levels, the means adopted by s 5(1) were "reasonably capable of being considered appropriate and adapted" to the purpose: it directly transposed the text of each agreement into Australian law, subject only to limited modifications (none of which affected the implementation of Art 24 in a substantial way).

30 Following the commencement of s 5(3), the apparent purpose of s 5(1) has not changed at either level of analysis. But, examined at both levels, the means adopted give rise to substantial inconsistency with the provisions of the agreements that are to be implemented. That inconsistency arises in two distinct ways.

41 *R v* ***Burgess****; Ex parte Henry* (1936) 55 CLR 608 at 674-675 (Dixon J). See also *Richardson* (1988) 164 CLR 261 at 311-312 (Deane J).

42 See *IR Act Case* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

43 See *Burgess* (1936) 55 CLR 608 at 674 (Dixon J); *Richardson* (1988) 164 CLR 261 at 312 (Deane J).

44 *Richardson* (1988) 164 CLR 261 at 311, see also at 309-310 (Deane J).

45 See ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [44] (the Court).

46 See *IR Act Case* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

47 (1985) 159 CLR 70 at 119; see paragraph 13 above.

31 *First*, s 5(3) is only triggered when there is an inconsistency: the existence of an inconsistency between the terms of an agreement and a law is its criterion of operation. In practical terms, the only circumstances in which s 5(3) will operate is where the provision of an agreement manifests an intention to prevail over another law. Yet s 5(3) will operate to contradict that intended operation of the provision in the agreement.

32 *Secondly*, rather than carving out specific obligations (so that they are not implemented at all)[48] or crafting modifications to those obligations (to ensure any departure from the terms of an obligation is still reasonably capable of being seen as appropriate and adapted to the obligation),[49] s 5(3) takes the blunt approach of leaving the degree to which particular treaty provisions are implemented (if at all) to depend on the terms of other Commonwealth, State and Territory laws as enacted from time to time. In so far as it concerns State laws, that directly engages Brennan J's observations in *Gerhardy*.[50]

33 That second point coheres with the reasoning regarding various provisions in the regulations that were challenged in *Burgess*.[51] One provision gave to the Minister a "general dispensing power" to direct that an aircraft be registered, whether or not it was registrable in accordance with the relevant treaty provision. Another enabled the Minister to exempt any aircraft or person from all or any part of the regulations and, therefore, from all or any of the requirements of the treaty. There were also provisions directed to reserving the rights of a State government: one directed to the State as owner or user of aircraft, within the State, for State purposes; another directed to the "police powers of the State". Neither of those State-specific exemptions was authorised by any provision of the treaty. Latham CJ described each of those provisions as "inconsistent" with the treaty provisions that they were notionally implementing.[52]

34 At the more specific level of analysis, the problem is even more acute. The apparent purpose (implementing Art 24 of the German agreement) is defeated by the means adopted to achieve that purpose — implementing Art 24, subject to the qualification in s 5(3). As set out in paragraph 24 above, the combined effect of ss 5(1) and (3) is to give an operation

[48] See, for example, ITA Act, s 5(2), which disapplies Art 23 of the US Convention (a form of non-discrimination clause).

[49] See, for example, ITA Act, s 6B. See also *IR Act Case* (1996) 187 CLR 416 at 495-496 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[50] (1985) 159 CLR 70 at 119; see paragraph 13 above; see also *Viskauskas v Niland* (1983) 153 CLR 280 at 292 (the Court); *Metwally* (1984) 158 CLR 447 at 455 (Gibbs CJ).

[51] (1936) 55 CLR 608.

[52] See *Burgess* (1936) 55 CLR 608 at 647, 651-653, see also 674 (Dixon J), 694 (Evatt and McTiernan JJ).

to Art 24 that contradicts the express text of the Article, and undermines the operation it is intended to have under international law. Indeed, that was precisely what was contemplated when s 5(3) was enacted.[53]

35 In short, because of the operation of s 5(3), s 5(1) can no longer be seen as reasonably capable of being considered appropriate and adapted to implementing the provisions of the agreements specified in s 5(1), including Art 24 of the German agreement. In circumstances where the validity of s 5(1) in its pre-amendment form is not challenged, s 5(3) should be held invalid.[54]

## C QUESTION 3: The *Metwally* Principle

36 *Metwally* establishes the principle that "a law of the Commonwealth cannot retrospectively avoid the operation of s 109 of the Constitution on a State law that was inconsistent with a law of the Commonwealth".[55] Because of that principle, the Amendment Act is ineffective to avoid the invalidity that is identified in Question 1 above.[56] For the Commissioner to succeed on this issue, he must apply for *Metwally* to be re-opened and, if leave to re-open is granted, persuade the Court that it should be overruled.[57] Leave should not be granted. If leave is granted, the *Metwally* principle should be affirmed.

### C.1 Leave to re-open *Metwally* should be refused

37 Reopening an earlier decision of the Court is a course that "should not lightly be taken".[58] That position is underpinned by "a strongly conservative cautionary principle", which the Court has adopted "in the interests of continuity and consistency in the law".[59] Bearing that principle in mind, the considerations that inform whether a decision should be reopened are "incapable of exhaustive definition",[60] and the significance of particular factors will depend on all of the circumstances.[61] Even in constitutional cases, "it is

53 See Amendment Bill EM at [3.7].

54 See *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 267-268 (Dixon CJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

55 (1995) 183 CLR 373 at 454-455. See also *Spence* (2019) 268 CLR 355 at [34] (Kiefel CJ, Bell, Gageler and Keane JJ), [146] (Nettle J), [236] (Gordon J), [370] (Edelman J).

56 The Court may find it appropriate to consider the s 51(xxxi) question before the *Metwally* question: see Plaintiff's Submissions in *Stott v Commonwealth* (24 February 2025) at [25]-[26].

57 That would depart from Queensland's position in *Spence*: see (2019) 268 CLR 355 at 370 (Dunning QC).

58 ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 at [70] (French CJ).

59 *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ).

60 *NZYQ* (2023) 97 ALJR 1005 at [17] (the Court).

61 See *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 56 (Gibbs CJ).

obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason".[62] "Mere expedience" is certainly not enough.[63]

38 Here, the Court should give overriding weight to the fact that *Metwally* is a decision of long standing. Of course, that factor is not decisive, as some recent decisions illustrate.[64] But unlike those decisions, *Metwally* has not "come increasingly to appear as an outlier in the stream of authority".[65] There is no later authority that has "weakened" *Metwally*; nor has the Court's understanding of the Constitution evolved in a way that points in favour of re-opening.[66] And there are no external factors that make reconsideration timely.[67]

39 To the contrary, *Metwally* has not since been doubted in any decision of the Court, bears on Commonwealth-State relations, and has now been acted on by Australian polities for more than 40 years.[68] As to the last point, *Metwally* evidently informed the drafting and operation of important provisions of the *Native Title Act 1993* (Cth).[69] That is to say, there has been legislative reliance on the decision in a manner that militates against reopening. Further, one of the core propositions, on which *Metwally* is built, was well-established in the authorities by the time *Metwally* was decided.[70] It cannot be said that the principle was not worked out in a significant succession of cases.

40 Based on those factors, any application for reopening will be "rooted in barren ground".[71] One seed of hope, for those who argue for reopening, is that the reasoning of the majority judges in *Metwally* was not uniform. That consideration should be given little weight. Their Honours' reasoning did not diverge on critical points; nor did they reason inconsistently.[72] To the contrary, they adopted a common principle for common reasons.

62 *Hughes and Vale Pty Ltd v NSW* (1953) 87 CLR 49 at 102 (Kitto J), quoted in ***Lange*** *v ABC* (1997) 189 CLR 520 at 554 (the Court) and ***Vanderstock*** *v Victoria* (2023) 98 ALJR 208 at [426] (Gordon J).

63 *Vanderstock* (2023) 98 ALJR 208 at [893] (Jagot J).

64 See *Vanderstock* (2023) 98 ALJR 208; *NZYQ* (2023) 97 ALJR 1005.

65 *NZYQ* (2023) 97 ALJR 1005 at [35] (the Court).

66 *NZYQ* (2023) 97 ALJR 1005 at [35] (the Court). See also *Vanderstock* (2023) 98 ALJR 208 at [128] (Kiefel CJ, Gageler and Gleeson JJ), [934] (Jagot J).

67 See *North Australian Aboriginal Justice Agency v NT* (2015) 256 CLR 569 at [162] (Keane J); cf *Vanderstock* (2023) 98 ALJR 208 at [132] (Kiefel CJ, Gageler and Gleeson JJ), [887], [939] (Jagot J).

68 See *Vanderstock* (2023) 98 ALJR 208 at [8] (Kiefel CJ, Gageler and Gleeson JJ).

69 See *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362 at [143] (Mansfield J); Supplementary Explanatory Memorandum, Native Title Bill 1993 (Cth) at 12-13.

70 See paragraph 41.1 below.

71 *Vanderstock* (2023) 98 ALJR 208 at [893] (Jagot J).

72 Cf *Lange* (1997) 189 CLR 520 at 555 (the Court).

## C.2 If reopened, *Metwally* should be affirmed

41 The steps in the majority's reasoning in *Metwally* were essentially as follows:

41.1 *First,* the invalidity of a State law is brought about by the "direct", "automatic" and "self-executing" operation of s 109, not the operation of the Commonwealth law.[73]

41.2 *Secondly*, s 109 has a "temporal aspect".[74] That emerges from the text of s 109: "When a law of the State is inconsistent". That text directs attention to the period "while the Commonwealth law and the inconsistent State law are contemporaneously on the respective statute books".[75]

41.3 *Thirdly*, the existence of an inconsistency between laws, for the identified period of time, is an "objective fact"; it is "a matter of history, not of legislative intention".[76]

41.4 *Fourthly*, taking the above three propositions together, the Parliament cannot undo, "exclude" or "vary" the invalidating effect of s 109 on a State law "for the period in which the fact of that inconsistency existed".[77]

42 Those propositions should be affirmed: to conclude otherwise would "elevate" Commonwealth law above the Constitution[78] and give a "contradictory operation" to s 109.[79] That outcome does not depend on the adoption of a particular purpose of s 109. But it is reinforced by Gibbs CJ's observation that s 109 is "not only critical in adjusting the relations between the legislatures of the Commonwealth and the States, but of great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe".[80] That observation was endorsed by Gaudron, McHugh and Gummow JJ in *Croome v Tasmania*[81] and by seven judges in *Dickson v The Queen*.[82]

73 *Metwally* (1984) 158 CLR 447 at 455 (Gibbs CJ), 468 (Murphy J), 473 (Brennan J), 478 (Deane J).

74 *Metwally* (1984) 158 CLR 447 at 472-473 (Brennan J), 478 (Deane J); see also 457 (Gibbs CJ), 469 (Murphy J). See also *Momcilovic* (2011) 245 CLR 1 at [223] (Gummow J).

75 *Metwally* (1984) 158 CLR 447 at 473 (Brennan J).

76 *Metwally* (1984) 158 CLR 447 at 474 (Brennan J), 479 (Deane J); see also 457 (Gibbs CJ), 479 (Murphy J).

77 *Metwally* (1984) 158 CLR 447 at 479 (Deane J); see also 457 (Gibbs J), 469 (Murphy J), 474 (Brennan J).

78 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J)

79 *Metwally* (1984) 158 CLR 447 at 474 (Brennan J).

80 *Metwally* (1984) 158 CLR 447 at 458 (Gibbs CJ); see also 477 (Deane J).

81 (1997) 191 CLR 119 at 129-130. See also *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [69] (Gummow and Gaudron JJ).

82 (2010) 241 CLR 491 at [19]. See also *Momcilovic* (2011) 245 CLR 1 at [256] (Gummow J), [347] (Hayne J).

## D QUESTION 4: Section 51(xxxi)

43 The premise for Question 4 is that s 5(3) of the ITA Act, together with cl 2 of Sch 1 to the Amendment Act, removed the inconsistency that previously existed and did so from 1 January 2018. In that event, the question is whether s 5(3) effected an "acquisition" of the "property" of the GG Entities for the purposes of s 51(xxxi) of the Constitution. If so, the law will be invalid to that extent: no just terms were provided.

44 For a law to be characterised as a law with respect to an "acquisition of property" for the purposes of s 51(xxxi): there must be a deprivation of "**property**"; and the Commonwealth or another person must "**acquire**" a proprietary benefit.[83] Both requirements involve "[q]uestions of substance and of degree, rather than merely form".[84]

45 That requires both the legal and practical operation of the law to be examined.[85] Upon that examination, s 5(3) deprived the GG Entities of "property" in two ways: (1) by extinguishing accrued common law claims in restitution; and (2) by reducing to zero the economic value of the appeal proceedings. In both instances, the Commissioner "acquired' a proprietary benefit — namely, relief from the corresponding financial liability.

46 However, not every "acquisition of property" is an "acquisition of property for the purposes of s 51(xxxi)".[86] There remains an "ultimate question of characterisation".[87] There is no "set test or formula" for answering that question.[88] The authorities provide some guidance, but none assists the Commissioner or the Commonwealth in this case.

### D.1 Restitution claims

47 Any "chose in action" recognised at law or in equity is "property" for the purposes of s 51(xxxi).[89] It is sufficient to describe a "chose in action" as a "right enforceable by action",[90] and as extending to an "alleged chose of action" involving "genuine assertions

83 ***Mutual Pools*** *and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ).

84 *Smith v* ***ANL*** *Ltd* (2000) 204 CLR 493 at [22] (Gaudron and Gummow JJ), see also [7] (Gleeson CJ), [75] (Kirby J), [119] (Hayne J).

85 *Telstra v Commonwealth* (2008) 234 CLR 210 at [49] (the Court).

86 *Mutual Pools* (1994) 179 CLR 155 at 178 (Brennan J) (emphasis in original); see also 172 (Mason CJ).

87 *Cunningham* (2016) 259 CLR 536 at [60] (Gageler J).

88 See *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ).

89 *ANL* (2000) 204 CLR 493 at [20] (Gaudron and Gummow JJ), see also [3], [7] (Gleeson CJ), [80], [86] (Kirby J), [117] (Hayne J); ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 (Mason CJ, Deane and Gaudron JJ).

90 *Loxton v Moir* (1914) 18 CLR 360 at 379 (Rich J), quoted in *ANL* (2000) 204 CLR 493 at [21] (Gaudron and Gummow JJ).

of a right enforceable by an action".[91] Two things follow from that description. *First*, a person will have "property" if they have a claim to a right enforceable by action. *Secondly*, because all that is required is that the claim be enforceable, a person with such a claim will have "property" even if the person has not yet commenced a proceeding to enforce it.[92]

48 A claim in restitution is therefore "property" for the purposes of s 51(xxxi).[93] At least before the commencement of the Amendment Act, the GG Entities had such claims to recover the amounts of Foreign Surcharge they had paid: see **SCB 35-36 [47]**. The foundation of those claims was that s 109 of the Constitution rendered s 32(1)(b)(ii) of the Land Tax Act invalid, so that the Foreign Surcharge was unlawfully exacted. On that foundation, the amounts were recoverable because:[94] (1) the Foreign Surcharge was paid under duress;[95] or (2) there was an absence or failure of consideration.[96]

49 In its terms, the Amendment Act did not extinguish any chose in action. However, in its practical operation, it removed the legal foundation for each of the restitution claims. In the absence of that foundation, the GG Entities could no longer genuinely assert any right to recover money, enforceable in a court proceeding. That is, in substance, the Amendment Act extinguished the restitution claims and effected a deprivation of "property".

50 As a result of the Amendment Act having that effect, the Commissioner "acquired" a corresponding proprietary benefit in relation to each claim — namely, "relief from what otherwise would be the measure of liability" in respect of the claim.[97] Accordingly, on a prima facie basis, the Amendment Act has the character of a law with respect to

[91] See *Morgan v McMillan Investment Holdings Pty Ltd* (2024) 98 ALJR 1200 at [40] (the Court).

[92] See *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 354 at [47]-[48] (the Court). Similarly, a "matter" exists independently of a proceeding: see *Palmer v Ayres* (2017) 259 CLR 478 at [26]-[27] (Kiefel, Keane, Nettle and Gordon JJ).

[93] See *Mutual Pools* (1979) 179 CLR 155 at 176 (Brennan J).

[94] They may have also been recoverable under the *Woolwich* principle. On the assumption that either of the other bases is sufficient to resolve this proceeding, it is unnecessary to address that issue: see *Redland City Council v* ***Kozik*** (2024) 98 ALJR 544 at [78] (Gageler CJ and Jagot J), [188] (Gordon, Edelman and Steward JJ). All three bases are now being agitated in a representative proceeding filed in the Federal Court, in which the GG Entities meet the definition of "Group Member": see **SCB 37-38 [50]-[51]**.

[95] See *Kozik* (2024) 98 ALJR 544 at [76]-[77] (Gageler CJ and Jagot J), [179] (Gordon, Edelman and Steward JJ); *Mason v NSW* (1959) 102 CLR 108 at 125-129 (Kitto J); ***British American Tobacco*** *Ltd v Western Australia* (2003) 217 CLR 30 at [43] (McHugh, Gummow and Hayne JJ). Although the GG Entities objected to the validity of s 32(1)(b)(ii) of the Land Tax Act, they were required to pay the Foreign Surcharge before they could appeal, and were liable to pay interest for non-payment: Administration Act, ss 54, 69(1).

[96] See *Kozik* (2024) 98 ALJR 544 at [179], [183]-[187] (Gordon, Edelman and Steward JJ).

[97] *ANL* (2000) 204 CLR 493 at [20] (Gaudron and Gummow JJ).

"acquisition of property" for the purposes of s 51(xxxi). Nothing in the authorities suggests the law should not ultimately bear that character.[98]

51 The GG Entities anticipate that the Commissioner will resist that conclusion by reference to certain provisions of Queensland legislation: see **SCB 37 [49]**. To succeed, the Commissioner must establish that, before the Amendment Act commenced, at least one such provision extinguished the restitution claims (thereby depriving the GG Entities of their "property"), as opposed to giving rise to a defence that the Commissioner may have pleaded (which would not have deprived the GG Entities of any "property"[99]). As explained below, none of the identified provisions had that effect.

52 ***Section 36 of the Administration Act*:** Before 23 June 2023, s 36 of the Administration Act provided: "A person is not entitled to a refund of any amount paid, or purportedly paid, under a tax law other than under this division".[100] In *Glencore Coal Queensland Pty Ltd v Queensland*, the Supreme Court of Queensland held that s 36 did not extinguish common law causes of action for restitution to recover amounts paid or purportedly paid under a tax law.[101] The Supreme Court was correct to do so. Section 36 did not, in terms or by a "clear and unmistakeable implication", extinguish any underlying causes of action or affect any court's jurisdiction to determine any particular causes of action.[102]

53 ***Sections 36(2) and 188 of the Administration Act*:** Part 6 of the *Revenue Legislation Amendment Act 2023* (Qld) commenced on 23 June 2023[103] and inserted ss 36(2) and 188 in the Administration Act. Operating together, ss 36(2) and 188 of the Administration Act would have extinguished the GG Entities' restitution claims before the commencement of the Amendment Act.[104] But those provisions could not have validly applied to those claims because, if they had that operation, they would have been rendered invalid by s 109 of the

98 See, for example, *Haskins v Commonwealth* (2011) 244 CLR 22 at [41] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) and the cases there cited.

99 See *Georgiadis* (1994) 179 CLR 297 at 305 n 24 (Mason CJ, Deane and Gaudron JJ); *Commonwealth v Mewett* (1997) 191 CLR 471 at 508-509, 511-512 (Dawson J), 534-535 (Gummow and Kirby JJ); *ANL* (2000) 204 CLR 493 at [35] (Gaudron and Gummow JJ). See generally *Minister for Home Affairs v* ***DLZ18*** (2020) 270 CLR 372 at [4], [30]-[31] (the Court).

100 It remains in force, but since 23 June 2023 has been numbered "s 36(1)": see paragraph 53 below.

101 (2022) 12 QR 295 at [85]-[92], [98] (Bradley J).

102 See *DLZ18* (2020) 270 CLR 372 at [27]-[28], [31] (the Court).

103 Section 2; *Acts Interpretation Act 1954* (Qld), s 15A.

104 If, before 23 June 2023, a person could have started a proceeding involving a cause of action, right or remedy at common law for the refund or recovery of an amount paid or purportedly paid under a tax law, and the person had not started the proceeding as at 23 June 2023, s 36(2) extinguished the cause of action, right or remedy and the proceeding could not be started: s 188(1)-(2).

Constitution: they would have been inconsistent: (1) with s 5(1) of the ITA Act, applying Art 24(4) of the German agreement; and (2) otherwise, with s 64 of the Judiciary Act.

54 *Section 5(1) of the ITA Act:* If s 36(2) and s 188 of the Administration Act could validly apply to the restitution claims, the practical operation of those provisions would be precisely the same as s 32(1)(b)(ii) of the Land Tax Act. In substance, the provisions would have authorised the retention of the Foreign Surcharge, leaving the GG Entities "in the same position as if the exaction of the tax or charge had been lawful" in the first place.[105] At least in that operation, they were invalid under s 109 of the Constitution for the same reason identified in answer to Question 1.

10 55 *Section 64 of the Judiciary Act:* Because the foundation of the restitution claims depended on an inconsistency arising under s 109 of the Constitution, those claims involved a matter arising under the Constitution or involving its interpretation.[106] As a result, if the GG Entities had commenced a proceeding to vindicate those claims, the court would necessarily have been exercising federal jurisdiction. That would have engaged s 64 of the Judiciary Act,[107] which requires, in every suit to which the State is a party (or at least those in which it is a defendant[108]), "the rights of the parties must be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, statutory and otherwise", as would apply if the State "were a subject instead of being the Crown".[109]

56 Thus, if the GG Entities had commenced a proceeding, the rights of the Commissioner
20 would have been deemed to be, as nearly as possible, the same as if the Commissioner were a non-State party.[110] If a non-State party were the defendant in a restitution proceeding, that party would not have the benefit of ss 36(2) and 188 of the Administration Act. Therefore, s 64 of the Judiciary Act would require that the Commissioner not have the benefit of those provisions in any restitution proceeding brought by the GG Entities,[111] even if that would "prejudice the peculiar governmental interest in the protection of public revenue against reimbursement of moneys levied and collected without valid legislative

[105] See, by analogy, *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).

[106] See *British American Tobacco* (2003) 217 CLR 30 at [39]-[42] (McHugh, Gummow and Hayne JJ).

[107] See *British American Tobacco* (2003) 217 CLR 30 at [85] (McHugh, Gummow and Hayne JJ).

[108] See *British American Tobacco* (2003) 217 CLR 30 at [85]-[87] (McHugh, Gummow and Hayne JJ).

[109] *Commonwealth v* ***Evans Deakin*** *Industries Ltd* (1986) 161 CLR 254 at 262-263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). See also *Commr for Railways (Qld) v Peters* (1991) 24 NSWLR 407.

[110] See also *Kozik* (2024) 98 ALJR 544 at [75] (Gageler CJ and Jagot J).

[111] See *British American Tobacco* (2003) 217 CLR 30 at [69] (McHugh, Gummow and Hayne JJ).

mandate".[112] To the extent that ss 36(2) and 188 purported to operate otherwise, they were inconsistent with s 64 of the Judiciary Act and therefore invalid.[113]

57 ***Section 10A(3) of the* Limitation of Actions Act 1974 *(Qld)*:** Working together with s 10A(1),[114] s 10A(3) would have extinguished each of the restitution claims prior to the commencement of the Amendment Act[115] — but only if s 10A(3) could validly apply to those claims. For the reasons given at paragraphs 54 to 56 above, it could not validly apply.

**D.2 Right of appeal**

58 After being assessed for the Foreign Surcharge, the GG Entities followed the prescribed steps in the Administration Act to object to those assessments,[116] on the ground that the imposition of the Foreign Surcharge was inconsistent with the ITA Act and therefore invalid under s 109 of the Constitution: **SCB 28 [21], 29-30 [24], [27], 30-31 [30]**. After those objections were dismissed, and having paid the Foreign Surcharge,[117] the GG Entities had a right to appeal to the Supreme Court and have the Supreme Court determine their appeals on the basis of the ground raised in their notices of appeal,[118] being the same ground as their ground of objection to the assessments: see **SCB 32 [35]-[37]**.[119] If the appeals had been allowed before the commencement of the Amendment Act — as they necessarily would have, given the answer to Question 1 — the Commissioner would have been obliged to reassess the GG Entities' liabilities in order to give effect to the Court's decision.[120] Under those reassessments, the GG Entities would not have been liable to pay the Foreign Surcharge, and would therefore have been entitled to a refund of those amounts.[121]

[112] *British American Tobacco* (2003) 217 CLR 30 at [78], see also [79]-[84] (McHugh, Gummow and Hayne JJ).

[113] That is true even though the GG Entities had not commenced any restitution proceeding, because the rights and liabilities of the parties are fixed before any proceeding is commenced: see *Evans Deakin* (1986) 161 CLR 254 at 265-266 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

[114] Section 10A(1) fixed a 1-year period, following payment, for the commencement of an action to recover an amount paid as tax that was recoverable because of the invalidity of a provision of an Act; s 10A(3) provided that if an action were not brought within the period, "the right to recover the amount ends".

[115] By the time of commencement, it had been more than one year since each of the payments was made; the last payment was made on 30 March 2022: see **SCB 28 [22], 29 [25], 30 [28], 31 [31]**.

[116] See Administration Act, Div 1 of Pt 6.

[117] See Administration Act, s 69(2)(b).

[118] Administration Act, ss 69, 70, 70C.

[119] See Administration Act, s 70(5).

[120] Administration Act, s 19.

[121] Administration Act, s 37(2).

59 The concept of "property" extends to "every species of valuable right and interest".[122] It is to be construed "liberally".[123] Bearing that in mind, the statutory right of appeal, possessed by the GG Entities, is property. That conclusion is supported by two matters. *First*, through the operation of s 36(2), the Administration Act was intended to "substitute" the statutory appeal procedure for "antecedent proprietary rights recognized by the general law" (the restitution claims).[124] The right of appeal should therefore be treated as having equivalent characteristics for constitutional purposes.[125] *Secondly*, "property" extends to "money and the right to receive a payment of money".[126] Of course, the right of appeal possessed by the GG Entities did not entitle them to any immediate payment of money: any such right was contingent on the appeals being allowed, and further administrative steps being taken to implement the Court's decisions. Nonetheless, prior to the commencement of the Amendment Act, those events would necessarily have occurred because s 32(1)(b)(ii) was invalid in its application to the GG Entities. For that reason, the right of the GG Entities to have their statutory appeal determined, in accordance with the grounds advanced, was of substantial monetary value.

60 Before the Supreme Court could determine the appeals, the Amendment Act commenced. The Amendment Act did not formally extinguish the ability of the GG Entities to maintain their appeals: they remained, and continue to remain, "legally free" to have their appeals determined by the Supreme Court.[127] But that does not mean that the GG Entities were not deprived of "property". The question must always be approached as a matter of substance and by having regard to the practical effect of the Amendment Act. As noted at paragraph 58 above, before the commencement of the Amendment Act, the Supreme Court would have necessarily allowed the appeals on the basis that s 32(1)(b)(ii) of the Land Tax Act was invalid in its application to the GG Entities. The practical operation of the Amendment Act was to reverse that position. From that point onwards, the Supreme Court would have been obliged to disallow the appeals. In that way, once the Amendment

[122] ***Australian Tape Manufacturers*** *Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

[123] *Georgiadis* (1994) 179 CLR 297 at 303 (Mason CJ, Deane and Gaudron JJ).

[124] See *Health Insurance Commission v* ***Peverill*** (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [133] (McHugh J).

[125] Cf *A-G (NT) v Chaffey* (2007) 231 CLR 651 at [26]-[27] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

[126] *Australian Tape Manufacturers* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ); see also *Peverill* (1994) 179 CLR 226 at 235 (Mason CJ, Deane and Gaudron JJ).

[127] *ANL* (2000) 204 CLR 493 at [21] (Gaudron and Gummow JJ).

Act commenced, the "economic value"[128] of each appeal was reduced to zero. As a matter of substance, the GG Entities were left with an "empty shell".[129] That was a deprivation of "property".

61 As a result of that deprivation, the Commissioner "acquired" a corresponding financial benefit: the "quantum" of the Commissioner's financial exposure was also reduced to zero.[130] There being an "acquisition of property", the Amendment Act was prima facie a law with respect to an "acquisition of property" for the purposes of s 51(xxxi). Again, there is no reason why the law should not ultimately bear that character. Although some statutory rights might be "inherently susceptible" to modification by subsequent legislation (ordinarily of the same legislature), the right here was not of that kind.[131]

## E ORDERS SOUGHT

62 The questions in the Special Case should be answered: **(1)** Yes; **(2)** No; **(3)** No (if necessary); **(4)** Yes (if necessary); **(4A)** No; **(4B)** Yes (if necessary); **(5)(a)** declare that, prior to the commencement of the Amendment Act, s 32(1)(b)(ii) of the Land Tax Act was invalid in its application to the GG Entities, and that s 5(3) of the ITA Act is invalid in so far as it concerns State laws; **(b)** the appeals be allowed completely, with costs;[132] **(6)** the Commissioner.

## PART VI: ESTIMATE OF TIME

63 It is estimated that up to 3.5 hours will be required for the GG Entities' oral argument, including a reply.

**Dated:** 26 February 2025

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[128] See *ANL* (2000) 204 CLR 493 at [21] (Gaudron and Gummow JJ).

[129] See *ANL* (2000) 204 CLR 493 at [90] (Kirby J); *Dalziel* (1944) 68 CLR 261 at 286 (Rich J) ("empty husk").

[130] See *ANL* (2000) 204 CLR 493 at [21] Gaudron and Gummow JJ).

[131] Compare the examples given in *Wurridjal* (2009) 237 CLR 309 at [364] (Crennan J).

[132] See Administration Act, s 70C; Judiciary Act, s 40(3).

## ANNEXURE TO SUBMISSIONS OF GG ENTITIES

Pursuant to Practice Direction No 1 of 2024, the GG Entities set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions

| No. | Description | Version | Provisions | Reason for version | Applicable dates |
|---|---|---|---|---|---|
| 1. | *Constitution* | Current | s 51(xxix), (xxxi)<br><br>s 109 | In force at all relevant times. | The dates the Commissioner issued notices of assessment to the GG Entities: 19 February 2021, 3 November 2021 and 14 February 2022.<br><br>8 April 2024: the Amendment Act was passed. |
| 2. | *International Tax Agreements Act 1958* (Cth) | 1 October 2020 – 30 June 2021<br><br>Compilation No. 39 | ss 3, 3AAA, 4, 4AA, 5, 6B | In force when the disputed land tax was imposed. | 19 February 2021: when the Commissioner issued notices of assessment to the GG Entities for the 2020-21 financial year. |
| 3. | *International Tax Agreements Act 1958* (Cth) | 1 July 2021 – 30 June 2022<br><br>Compilation No. 40 | ss 3, 3AAA, 4, 4AA, 5, 6B | In force when the disputed land tax was imposed. | The dates the Commissioner issued notices of assessment to the GG Entities for the 2021-22 financial year, being 3 November 2021 and 14 February 2022. |
| 4. | *Judiciary Act 1903* (Cth) | Current<br><br>Compilation No. 51 | s 64 | In force at all relevant times. | Relevant to the ability of the GG Entities to pursue restitution claims for the disputed land tax, since the GG Entities paid the land tax as assessed. |
| 5. | *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) | No. 18, 2024 | ss 2, 3<br>Sch 1 | Impugned Amendment Act, as enacted. | 8 April 2024: amendment of the *International Tax Agreements Act 1958* (Cth). |

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| 6. | *International Tax Agreements Act 1958* (Cth) | Current (from 8 April 2024)<br><br>Compilation No. 44 | ss 3, 3AAA, 4, 4AA, 5, 6B | Principal Act, following amendment by the impugned Amendment Act. | |
| | | | ***State legislation*** | | |
| 7. | *Acts Interpretation Act 1954* (Qld) | Current | s 15A | In force at all relevant times. | 23 June 2023: when the *Revenue Legislation Amendment Act 2023* (Qld) commenced, amending the Administration Act. |
| 8. | *Land Tax Act 2010* (Qld) | 30 June 2019 – 30 June 2022 | ss 6, 7, 8, 9, 10, 18B, 18C, 18D, 18E, 18F, 32 Sch 2 | In force when the disputed land tax was imposed. | The dates the Commissioner issued notices of assessment to the GG Entities (see item 1 above) |
| 9. | *Limitation of Actions Act 1974* (Qld) | Current (from 20 September 2023) | s 10A | In force at all relevant times (without amendment). Purports to affect the ability of the GG Entities to pursue restitution claims for the disputed land tax. | Ongoing, since the GG Entities paid the disputed land tax: on 27 April 2021, 6 May 2021, 2 February 2022 and 30 March 2022. |
| 10. | *Revenue Legislation Amendment Bill 2024* (Qld) | As passed | Pt 2A, Pt 5 | Upon Royal Assent and commencement, will insert s 104 of the Land Tax Act and s 189 of the Amendment Act | From commencement, which will occur on Royal Assent to the Bill. |
| 11. | *Taxation Administration Act 2001* (Qld) | 1 October 2020 – 9 June 2022 | ss 11, 19, 30, 31, 36, 37, 54, Pt 6 Div 1 (ss 63, 64, 65, 66, 67, 68), 69, | In force when the disputed land tax was imposed and the GG Entities commenced the objections and | The dates the Commissioner issued notices of assessment (see item 1 above).<br><br>The period when the |

| No. | Description | Version | Provisions | Reason for version | Applicable dates |
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| | | | 70, 70A, 70C | appeals process. | GG Entities objected to the assessments, being 19 April 2021, 3 January 2022, 30 March 2022 and 14 April 2022.<br><br>The dates when the GG Entities paid the disputed land tax: 27 April 2021, 6 May 2021, 2 February 2022 and 30 March 2022.<br><br>11 March 2022: when the GG Entities brought appeals from the Commissioner's objection decisions dated 10 January 2022. |
| 12. | *Taxation Administration Act 2001* (Qld) | 1 March 2023 – 22 June 2023 | ss 19, 36, 37, Pt 6 Div 1, 69, 70, 70A, 70C | In force when the GG Entities commenced the appeals process. | 8 June 2023: when GG180Q brought an appeal regarding the Commissioner's objection decision dated 14 April 2023. |
| 13. | *Taxation Administration Act 2001* (Qld) | Current (from 23 June 2023) | ss 19, 36, 37, 69, 70, 70C, 188 | Currently in force. Purports to affect the ability of the GG Entities to pursue restitution claims for the disputed land tax. | Ongoing, since 23 June 2023, being the date of commencement of s 36(2) and 188. |
| ***International instruments*** | | | | | |
| 14. | Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to | Current<br><br>[2016] ATS 23 | Recitals Arts 2, 3, 24 | In force at all relevant times. | Ongoing, since the Commissioner issued notices of assessment to the GG Entities. |

| No. | Description | Version | Provisions | Reason for version | Applicable dates |
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| | Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance | | | | |
| 15. | Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income | Current<br><br>[1983] ATS 16 | Art 23 | For illustrative purposes. | |
| 16. | OECD, *Model Tax Convention on Income and on Capital (Full Version)* | 2014 | Art 24<br><br>Commentary to Art 24(5), (6). Reservations to Art 24. | As in force when the German agreement (see item 13 above) was made. | |
| 17. | Vienna Convention on the Law of Treaties (1969) | Current<br><br>[1974] ATS 2 | Art 31 | In force at all relevant times. | |