HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 08 May 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M60/2024
File Title:	Stott v. The Commonwealth of Australia & Anor
Registry:	Melbourne
Document filed:	Form 27F - AG-Cth Outline of oral argument
Filing party:	Defendants
Date filed:	08 May 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

No. M60/2024

BETWEEN: **FRANCIS STOTT**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

STATE OF VICTORIA
Second Defendant

AND

IN THE HIGH COURT OF AUSTRALIA

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

COMBINED OUTLINE OF ORAL SUBMISSIONS OF THE COMMONWEALTH IN M60/2024 AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING) IN B48/2024, B49/2024 AND B50/2024

PART I INTERNET PUBLICATION

1 This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Sections 5(1) and 5(3) are laws with respect to external affairs (CS (GG) [13]-[24])

2 The external affairs power supports ss 5(1) and 5(3) of the *International Tax Agreements Act 1953* (Cth) (**Agreements Act**) (**S Vol 1, Tab 4 | GG Vol 1, Tab 5**). Section 5(3) partially repeals, or rolls back, s 5(1) in relation to one obligation in a small number of the treaties that s 5(1) incorporates into domestic law. The "power which validly supports a law supports the law which amends or repeals it": *Shergold v Tanner* (2002) 209 CLR 126 at [26] (**GG Vol 11, Tab 76**); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [11], [13], [17] (**GG Vol 8, Tab 61**).

3 Parliament could have enacted ss 5(1) and 5(3) in reliance upon s 51(xxix). The combined effect of those provisions is fully to implement 51 of the treaties listed in s 5(1), and to implement all but one aspect of one obligation in the other eight treaties. With respect to those eight treaties, to the extent that they impose non-discrimination obligations in relation to State taxes, s 5(3) leaves it to State Parliaments to decide the extent to which those obligations will be given effect in domestic law. The purpose of s 5 is plainly to give effect to Australia's international obligations under the listed treaties. To the extent that those obligations are not fully implemented in domestic law, that does not deny the character of ss 5(1) and (3) as laws with respect to s 51(xxix): *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 172, 233-234, 268 (**GG Vol 6, Tab 47**); *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 488-489 (**GG Vol 13, Tab 84**); *R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 626, 647, 652 (**GG Vol 10, Tab 71**).

***Metwally* should be re-opened and overruled (CS (S) [19]-[26] | CS (GG) [27])**

4 Section 5(3) of the Agreements Act retroactively repealed s 5(1) to the extent that it implemented the non-discrimination provisions in the eight treaties that contain such provisions with respect to State taxes. The State foreign surcharges thereby regained the operative effect of which they had been deprived by s 109 of the Constitution. *University of Wollongong v* ***Metwally*** (1984) 158 CLR 447 (**S Vol 14, Tab 94 | GG Vol 12, Tab 82**), which holds that a retroactive Commonwealth law cannot have that effect, should be re-opened and overruled. The minority reasoning at 460-461 and 463 (Mason J) and 485-486

(Dawson J) should be preferred.

5 The majority reasoning is inconsistent with four uncontroversial propositions: (1) the Parliament may make retroactive laws; (2) the Parliament by express language can decide a Commonwealth law's relationship with a State law (such as by expressing an intention not to cover the field); (3) the operation of s 109 depends on the content of Commonwealth and State laws; and (4) when it operates, s 109 renders State laws inoperative but not void. Those four propositions require the conclusion that the Commonwealth may retroactively change the content of the law so as to remove the occasion for s 109 to operate. Doing so involves changing the content of the law as a legal reality, not creating a legal fiction. It is no different to an ordinary retroactive law, which is not constitutionally prohibited.

The Amending Act does not acquire property (CS (S) [34]–[45] | CS (GG) [29]–[49])

6 Section 5(3) is not properly characterised as a law with respect to the acquisition of property on either of the grounds alleged.

7 As to the primary s 51(xxxi) argument advanced by the moving parties, s 5(3) is incapable retrospectively of removing the inconsistency that they contend is an essential element of their alleged chose in action, thereby acquiring their property, unless *Metwally* is overruled: cf **Stott Reply [8], [12], [13]**. That is why Question 2 must be decided before Question 3.

8 If *Metwally* is overruled, with the result that s 5(3) is effective partially to repeal s 5(1) such that the original State land tax provisions revive, s 5(3) is not a law with respect to the acquisition of property because Commonwealth law does not take its character from what is or has been done by a State legislature in the independent exercise of legislative power: *Spence v Queensland* (2019) 268 CLR 355 (**S Vol 14, Tab 91 | GG Vol 12, Tab 78)** at [309]; *Fortescue v Commonwealth* (2013) 250 CLR 548 at [117]-[121]; *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 (**S Vol 8, Tab 65**) at [36], [46]; *Spencer v Commonwealth* (2018) 262 FCR 344 at [171]-[172], [210].

9 In the alternative, the moving parties contend that — even if the partial repeal of s 5(1) does no more than make room for future State legislation that may acquire property — it is a law with respect to the acquisition of property because their alleged choses in action have lost their "immunity" from possible future State legislative action that may diminish their value. That submission mistakenly treats limitations on power as proprietary rights. Further, to the extent that it depends on the "immunity" said to arise from Commonwealth law having particular content, that immunity is inherently susceptible to variation.

10 In determining whether an alleged chose in action is property, the question is not whether the claim would survive a strike-out application: *Haskins v Commonwealth* (2011) 244 CLR 22 (**Stott Vol 7, Tab 63 | GG Vol 8, Tab 59**) at [41]-[42], [61], [64], [68].

11 No cause of action in restitution arose from the payment of foreign surcharge, because those payments were made in discharge of a legally enforceable obligation to pay. The assessments of land tax were not invalid because the amounts in them were (in part) assessed by reference to provisions that were inoperative in their application to the moving parties: *Federal Commissioner of Taxation v Futuris* (2008) 237 CLR 146 (**S Vol 7, Tab 59 | GG Vol 8, Tab 56**) at [24]-[25]; *Chhua v Federal Commission of Taxation* (2018) 262
10 FCR 228 (**S Vol 17, Tab 105**) at [14]; *Commissioner of State Revenue (Vic) v ACN 005 057 349* (2017) 261 CLR 509 at [87] (**S Vol 5, Tab 48 | GG Vol 5, Tab 42**).

12 Unless it is necessary to do so, the Court should not decide the issues raised in relation to s 64 of the *Judiciary Act 1903* (Cth) (**S Vol 1, Tab 6 | GG Vol 3, Tab 12**).

Date: 8 May 2025

Stephen Donaghue **Anna Lord** **Glyn Ayres**