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
MELBOURNE REGISTRY

BETWEEN: **FRANCIS STOTT**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

STATE OF VICTORIA
Second Defendant

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

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

and

COMMISSIONER OF STATE REVENUE
Respondent

BETWEEN: **G GLOBAL 180Q PTY LTD ATF THE G GLOBAL 180Q AUT**
Appellant

and

COMMISSIONER OF STATE REVENUE
Respondent

BETWEEN: **G GLOBAL 180Q PTY LTD ATF THE G GLOBAL 180Q AUT**
Appellant

and

COMMISSIONER OF STATE REVENUE
Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING
OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline

2. The Attorney General for New South Wales (**NSW Attorney**) advances submissions in respect of Questions 2 and 4 in the Stott Special Case and Questions 3 and 4B in the G Global Special Case, to the extent it is necessary for the Court to answer each of them.

Questions 4 and 4B

3. Questions 4 and 4B in the Stott and G Global Special Cases should each be answered "no": see NSW Attorney submissions in the Stott proceedings (**NSS**) at [3](a) and NSW Attorney submissions in the G Global proceedings (**NGS**) at [4].

4. The University of Wollongong v Metwally (1984) 158 CLR 447 (**Metwally**) (**Stott JBA, Vol 14, Tab 94**) does not prevent the Commonwealth from *clearing the way* for a retrospective State law, which alters rights and liabilities by fixing on events which occurred in the past: Doyle v Queensland (2016) 249 FCR 519 (**Stott JBA, Vol 17, Tab 109**) at [48]. See **NSS [11]-[22]**; **NGS[4]**.

5. The fresh imposition of land tax by s 106A(2) of the Land Tax Act 2005 (Vic) and s 104(2) of the Land Tax Act 2010 (Qld) does not deem the purported land tax to be valid contrary to s 109 of the Constitution; they leave the purported land tax "so far as [its] inherent quality is concerned, as [it was] before the passing" of the State amendment acts: see, by analogy, The Queen v Humby; Ex parte Rooney (1973) 129 CLR 231 (**Stott JBA, Vol 12, Tab 84**) at 243 (Stephen J). **See NSS [21]**. As in that case, s 106A and s 104 "operate[] by attaching to them, as acts in the law, consequences which it declares them to have always had".

Questions 2 and 3

6. If Questions 2 and 3 in the Stott and G Global Special Cases are considered necessary to determine, they should each be answered "yes": **NSS [3](b); NGS [5]**.

7. On that assumption, Metwally should be: distinguished and confined as an authority to the precise question which it decided; or if it cannot be distinguished, reopened and overruled.

8. **Metwally is distinguishable**: The construction of the relevant laws is the "starting point" in all cases involving the application of s 109 of the Constitution: Momcilovic v The Queen (2011) 245 CLR 1 (**Momcilovic**) (**Stott JBA, Vol 9, Tab 75**) at [242] (Gummow J) and [323] (Hayne J); *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500 (**Stott JBA, Vol 4, Tab 40**) at [52]; Work Health Authority v Outback Ballooning Pty Ltd (2019) 266 CLR 428 (**Outback Ballooning**) (**Stott JBA, Vol 15, Tab 101**) at [34]. See **NSS [5]-[7], [25]-[33].**

9. In the case of an indirect inconsistency, as in Metwally, the primary focus is determining whether the Commonwealth law is intended to be exhaustive or exclusive with respect to an identified subject matter: Outback Ballooning at [34]. The use of the metaphor of intention must not mislead. As Hayne J observed in Momcilovic, at [327] the relevant intention is "the objective intention of the legislation as revealed by its proper construction"; "the task is one of construing the relevant Act, not some exercise in divining the intention (expressed or unexpressed) of those who propounded or drafted the Act". See, to similar effect, Momcilovic at [111] (French CJ), [146] and [261] (Gummow J), [474] (Heydon J) and [638] (Crennan and Kiefel JJ). See also the authorities collected at **NSS [32]**.

10. Metwally should be understood as a particular consequence of the objective nature of Parliament's intention in cases of indirect inconsistency and as authority for the proposition that the Commonwealth Parliament is unable to retroactively deem whether or not a law is, or is not, intended to cover the field contrary to the objective intention of the legislation. This reflects the context, argument and judgments in Metwally.

    a. Section 3 of the Racial Discrimination Amendment Act 1983 (Cth) (**Stott JBA, Vol 2, Tab 20**) was an attempt to reverse the conclusion in Viskauskas v Niland (1982) 153 CLR 280 (**Stott JBA, Vol 15, Tab 98**) at 291-292 that the Commonwealth Parliament had intended to cover the field.

    b. The argument was focussed on whether the Commonwealth's intention to cover the field was "susceptible of retrospective change": see Metwally at 449.

    c. The precise answer given by the majority in Metwally was, relevantly, that:

> 'The provisions of Pt II of the *Anti-Discrimination Act* 1977 (N.S.W.) were invalid prior to the enactment of the *Racial Discrimination*

Amendment Act 1983 (Cth) by virtue of their inconsistency with the *Racial Discrimination Act* 1975 (Cth) and the operation of s. 109 of the Constitution, and the enactment of the *Racial Discrimination Amendment Act* 1983 did not give those provisions a valid operation prior to the date of that enactment.'

See: Metwally at 459 (Gibbs CJ), 471 (Murphy J), 475 (Brennan J) and 481 (Deane J). See Metwally at 487.

d. The retroactive deeming of Parliament's intent was a principal concern of the majority: see 457 (Gibbs CJ), 467 (Murphy J), 474 (Brennan J), 478 (Deane J).

11. **If Metwally cannot be distinguished**: If Metwally cannot be distinguished, it should be re-opened and overruled in favour of the minority's approach for the reasons set out at [32]-[37] of the Commonwealth's submissions in the Stott proceedings.

12. The majority's conception of s 109 of the Constitution is also inconsistent with the centrality of construction to the operation of s 109 of the Constitution. Further, as Mason J observed in Metwally at 463, s 109 of the Constitution is not a "source of protection to the individual against the unfairness and injustice of a retrospective law": retrospective laws being constitutionally permissible. See **NSS [34]-[37].**

13. To the extent s 109 protects the individual so be it: but that is not its purpose.

Dated: 8 May 2025

James Renwick SC M O Pulsford