



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

M60 of 2024

BETWEEN:

FRANCIS STOTT

Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

First Defendant

THE STATE OF VICTORIA

Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE
STATE OF WESTERN AUSTRALIA (INTERVENING)**

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Commonwealth Amendment Act cleared the way for the Victorian Amendment Act

2. Before the *Treasury Laws Amendment (Foreign Investment) Act 2024* (**Amendment Act**), ss 7, 8, 35, 104B and cl 4.1 to 4.5 of Sch 1 to the *Land Tax Act* 2005 (Vic) were inconsistent with the Australia-Germany double-taxation agreement given effect by s 5(1) of the *International Tax Agreements Act 1953* (Cth) (**ITA Act**).
3. On the authority of *University of Wollongong v Metwally* (1984) 158 CLR 447 (**JBA Vol 14 Tab 94**), s 5(3) of the ITA Act cannot operate to retroactively remove that inconsistency.
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4. The particular concern of the majority in *Metwally* was that the removal of a past inconsistency would elevate legislation above the Constitution and alter the facts of history: *Metwally* 457-458 (Gibbs CJ), 469 (Murphy J), 474-475 (Brennan J), 478-479 (Deane J) (**JBA Vol 14 Tab 94, 5396-5397, 5408, 5413-5414, 5417-5418**).
5. However, as two members of the majority expressly recognised, and consistently with the focus of the majority's concern, the Commonwealth Parliament can legislate to clear the way for a State Parliament to make a fresh State Act to apply retrospectively to the same effect: *Metwally* 469 (Murphy J), 479, 480 (Deane J)
20 (**JBA Vol 14 Tab 94, 5408, 5418-5419**).
6. The Commonwealth and State legislation in this case is consistent with *Metwally*. Section 5(3) of the ITA Act cleared the way for s 106A of the *Land Tax Act* and s 135A of the *Taxation Administration Act 1997* (Vic) to impose the land tax surcharge afresh.

If necessary, *Metwally* should be re-opened and overruled

7. If the Court considers it necessary or otherwise appropriate to consider Question 2 of the Special Case, *Metwally* should be re-opened and overruled.
8. As Edelman J observed in *Spence v Queensland* (2019) 268 CLR 355 [371] (**JBA Vol 14 Tab 91, 5311**), the majority in *Metwally* adopted a restrictive interpretation
30 of the term "law of the Commonwealth" in s 109 of the Constitution which excludes

content arising from subsequent, retroactive Commonwealth laws. With respect, the majority's approach is difficult to reconcile with:

- (a) the ability of the Commonwealth to make retroactive laws: *Mabo v Queensland* (1988) 166 CLR 186, 211-212 (Brennan, Toohey and Gaudron JJ) (**JBA Vol 8 Tab 70, 3249-3250**); and
- (b) the requirement for "law of the Commonwealth" to have a consistent meaning throughout the Constitution in order to ensure coherence: *Vunilagi v The Queen* (2023) 97 ALJR 627 [207] (Edelman J) (**JBA Vol 18 Tab 117, 6883**).

9. Two members of the majority in *Metwally*, Gibbs CJ and Deane J, considered that the purpose of s 109 extends to informing the ordinary citizen which of two inconsistent laws they are required to observe: *Metwally* 458 (Gibbs CJ), 477 (Deane J) (**JBA Vol 14 Tab 94, 5397, 5416**).
10. *If* the purpose of s 109 so extends, that might support a narrower interpretation of the term "law of the Commonwealth": *Spence* [371] (Edelman J) (**JBA Vol 14 Tab 91, 5311**). However, while that may be an *effect* of s 109, it is not the *purpose* of s 109.
11. Its *purpose* is to secure the paramountcy of Commonwealth laws over inconsistent State laws: *Metwally* 461-463 (Mason J) (**JBA Vol 14 Tab 94, 5400-5402**).
12. If *Metwally* is re-opened and overruled, the effect of the Amendment Act was to revive the operation of the *Land Tax Act* provisions from 1 January 2018, meaning Question 2 would be answered 'yes'.

Commonwealth Amendment Act is not a s 51(xxxi) law

13. It is necessary to consider the practical operation and precise legal effect of s 5(3) of the ITA Act in order to determine whether it is a law with respect to the acquisition of property: *Smith v ANL Ltd* (2000) 204 CLR 493 [119] (Hayne J) (**JBA Vol 13 Tab 89, 5041**).
14. If the Amendment Act did not retroactively remove the inconsistency that previously existed, no question of an acquisition other than on just terms arises. The Amendment Act did not modify a cause of action, as occurred in *ANL*. In the present case, the fact that the Amendment Act allowed for a mere possibility that future legislation by a separate polity may affect the cause of action does not result in the Commonwealth law authorising or effecting an acquisition.

15. If *Metwally* is overruled and s 5(3) did retroactively remove the inconsistency, s 51(xxxi) of the Constitution is still not engaged.
16. The plaintiff has no action in restitution and accordingly no 'property' that can be said to have been acquired: *Haskins v Commonwealth* (2011) 244 CLR 22 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (**JBA Vol 7 Tab 63, 2810**). That is so because:
- (a) section 96(2) of the *Taxation Administration Act 1997* (Vic), which applies in federal jurisdiction by reason of s 79(1) of the *Judiciary Act 1903* (Cth), relevantly provides that no court has jurisdiction or power to consider any question concerning an assessment except as provided by the statutory objection process; and
- (b) the payments made by the plaintiff were made in discharge of a debt and so there can be no claim in restitution: *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, [87] (Bell and Gordon JJ) (**JBA Vol 5 Tab 48, 1878**).
17. In addition, any rights of the plaintiff arising from the agreements given force by s 5(1) of the ITA Act were inherently susceptible of variation and such a variation does not constitute an acquisition of property: *Health Insurance Commission v Peverill* (1984) 179 CLR 226, 237 (Mason CJ, Deane and Gaudron JJ) (**JBA Vol 7 Tab 64, 2846**).

If necessary, s 5(3) of the ITA Act can be read down or severed

18. Even if s 5(3) is invalid in its retroactive or retrospective operation (whether in light of *Metwally* or the operation of s 51(xxxi) of the Constitution), cl 2 of Schedule 1 to the Amendment Act can be read down (to have only retrospective and/or prospective effect) or severed.
19. In those circumstances, s 5(3) remains effective to clear the way for s 106A of the Land Tax Act and s 135A of the Taxation Administration Act to impose the land tax surcharge afresh for the relevant period prior to 8 April 2024.

Dated: 8 May 2025


Craig Bydder SC

Stuart Cobbett