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 as trustee for THE G GLOBAL 120E AUT**
Appellant
and
COMMISSIONER OF STATE REVENUE
Respondent

No. B49/2024

BETWEEN: **G GLOBAL 180Q PTY LTD as trustee for THE G GLOBAL 180Q AUT**
Appellant
and
COMMISSIONER OF STATE REVENUE
Respondent

No. B50/2024

BETWEEN: **G GLOBAL 180Q PTY LTD as trustee for THE G GLOBAL 180Q AUT**
Appellant
and
COMMISSIONER OF STATE REVENUE
Respondent

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M60/2024

BETWEEN: **FRANCIS STOTT**
Plaintiff
and
THE COMMONWEALTH OF AUSTRALIA
First Defendant
and
THE STATE OF VICTORIA
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in proceedings numbered B48/2024, B49/2024 and B50/2024 (**the G Global proceedings**) and the proceeding numbered M60/2024 (**the Stott proceeding**) pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**the *Judiciary Act***) to advance submissions that are generally in support of the Respondent and the Defendants respectively.[1]

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. South Australia makes submissions concerning the following issues arising from the proceedings:[2]

   4.1. Whether s 5(3) of the *International Tax Agreements Act 1953* (Cth) (**the ITAA**), in so far as it operates by reference to a provision contained in a law of a state, is supported by a head of power?[3]

   4.2. Whether s 5(3) of the ITAA is effective to remove the inconsistency between the state tax laws and s 5(1)?[4]

   4.3. Whether s 10A(3) of the *Limitation of Actions Act 1974* (Qld) (**the LAA (Qld)**) and ss 36(2) and 188 of the *Taxation Administration Act 2001* (Qld) (**the TAA (Qld)**) are picked up by s 79, or inconsistent with s 64, of the *Judiciary Act*?[5]

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1 For the purposes of these submissions, South Australia employs the collective terms **appellants** and **respondents**, except where referring to the particular Appellants and Respondents in the G Global proceedings, or the Plaintiff and Defendants in the Stott proceeding.

2 The parties agree that s 32(1)(b)(ii) of the *Land Tax Act 2010* (Qld) (**LT Act (Qld)**) and ss 7, 8, 35, 104B and cll 4.1-4.5 of Sch 1 to the *Land Tax Act 2005* (Vic) (**LT Act (Vic)**) (collectively, **the state tax laws**) were, prior to the commencement of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), inconsistent with s 5(1) of the ITAA for the purposes of s 109 of the *Constitution*. Sections 72 and 102AB of the *Stamp Duties Act 1923* (SA) also impose foreign ownership surcharges.

3 This question only arises in the G Global proceedings: *Amended Special Case (G Global)*, [54(2)].

4 This question arises in both sets of proceedings: *Amended Special Case (G Global)*, [54(3)]; *Agreed Special Case (Stott)*, [56(2)].

5 These questions only arise in the G Global proceedings: *Appellants' Notice of a Constitutional Matter*, 15 January 2025, [5]; *Respondent's Notice of a Constitutional Matter*, 27 March 2025, [5]. They arise in the course of determining the broader question identified in the Amended Special Case (G Global, [54(4)],

5. For the reasons advanced below, South Australia submits that:

5.1. Despite the strict approach that this Court has taken to partial treaty implementation pursuant to s 51(xxix) of the *Constitution*, s 5(3) is supported by that power. However, if s 5(3) is not supported by the external affairs power, then the Appellants' submission that s 5(3) may simply be severed should not be accepted.[6]

5.2. Consistently with this Court's decision in *Metwally*,[7] s 5(3) of the ITAA is effective to remove the inconsistency between the state tax laws and s 5(1), in conjunction with s 188 of the TAA (Qld) and s 106A of the LT Act (Vic).[8] Accordingly, no occasion to reconsider *Metwally* arises. However, in the event that the application to reopen *Metwally* is entertained, leave should be refused. If leave is granted, *Metwally* should be affirmed.[9]

5.3. Section 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the TAA (Qld) are picked up in federal jurisdiction by s 79 of the *Judiciary Act*. If s 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the TAA (Qld) are not picked up by s 79, then they are not inconsistent with s 64 of the *Judiciary Act*, and apply as laws governing the rights of parties of their own force because s 64 is invalid in so far as it purports to regulate the substantive rights of the states to be determined in federal jurisdiction.[10]

Section 5(3) is supported by the external affairs power[11]

6. The Appellants in the G Global proceedings are correct to observe that the principles that govern the reliance on the external affairs power to support partial treaty implementation are demanding,[12] necessitating a "faithful pursuit of the purpose [of] carrying out of the

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concerning whether s 5(3) effected an acquisition of property within the meaning of s 51(xxxi) of the *Constitution*, otherwise than on just terms.

6 Paragraphs [6]-[9] below; *Submissions of the Appellants (the GG Entities)* (**AS**), [35].

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

8 Collectively, **the retrospective state laws**.

9 Paragraphs [10]-[15] below.

10 Paragraphs [16]-[29] below.

11 The Commonwealth does not seek to rely on the power conferred by s 51(ii) of the *Constitution* to support s 5(3) in so far as it applies to State taxes: letter from Australian Government Solicitor to Crown Law Queensland dated 9 October 2024 sent in accordance with the order made by Justice Jagot in the G Global proceedings on 26 August 2024. That is consistent with the inherent limitation, long recognised by this Court, that the power conferred by s 51(ii) is a power to makes laws with respect to 'Commonwealth taxation': *Victoria v Commonwealth* (1957) 99 CLR 575, 614 (Dixon CJ); *Vanderstock v Victoria* (2023) 98 ALJR 208, 232 [69] (Kiefel CJ, Gageler and Gleeson JJ), 308 [397] (Gordon J, in dissent); L Zines and J Stellios, *The High Court and the Constitution* (2022, 7th ed), 558-560.

12 AS, [13], [25]-[28], citing, amongst other authorities: *Victoria v Commonwealth* (1996) 187 CLR 416 and *Gerhardy v Brown* (1985) 159 CLR 70.

external obligation".[13] Nonetheless, for the reasons advanced by the Respondent,[14] s 5(3) may correctly be characterised as a partial implementation of the German Agreement.[15]

7. Although not strictly raised by the terms of the second question identified in the Special Case,[16] the Appellants submit that the consequence of s 5(3) not being supported by the external affairs power is that s 5(1) would continue to operate in its pre-amended form.[17] However, if contrary to the submission advanced above, s 5(3) is not supported by the external affairs power, then severance in the terms contemplated by the Appellants does not appear to be open. To simply sever s 5(3) would fail to take account of the continued operation that s 5(3) would enjoy with respect to Commonwealth and Territory taxes, supported respectively by ss 51(ii) and 122 of the *Constitution*.[18]

8. Further, to sever s 5(3), and restore s 5(1) to its pre-amendment operation, would fly in the face of the intended operation of ss 5(1) and (3) apparent from the Explanatory Memorandum: "the Government's policy position that Australian Commonwealth, state and territory taxes, other than income taxes and fringe benefit taxes, prevail in the case of any inconsistency with the Agreements Act."[19] In light of that unambiguous purpose, the Commonwealth Parliament cannot be assumed to have intended that s 5(1) should revert to its pre-amendment operation, in circumstances where s 5(3) was not available to afford the relief to the State and Territory revenue which it was plainly intended to.[20] The severance proposed by the Appellants should not be accepted. Alternative approaches are open.

9. As Queensland submits, the German Agreement given force by s 5(1) may instead be severed in so far as it purports to implement Art 24.[21] A further alternative may be that both subss 5(1) and (3) are partially disapplied so as to operate only with respect to

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

14 *Respondent's Submissions* (**RS**), [12]-[24].

15 The Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance made at Paris in June 2009 (**the German Agreement**).

16 *Amended Special Case (G Global)*, [54(2)].

17 AS, [35].

18 This potential operation is acknowledged by the Appellants: AS, fn 14.

19 *Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth)* (**EM**), 34-35 [3.7]. See also, 33 [3.2], 35 [3.8] and [3.11], 36 [3.14] and 41 [4.25].

20 *Spence v Queensland* (2019) 268 CLR 355, 414-415 [87] (Kiefel CJ, Bell, Gageler and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 221 [148] (Gageler J), 321 [431]-[432] (Edelman J); *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ).

21 RS, [26].

Australian taxes (or, perhaps, Commonwealth and Territory taxes). It may be noted that disapplication in this manner would not create any incongruity with the apparent legislative purpose identified in the Explanatory Memorandum. The existence of alternatives, of course, speaks against the availability of such techniques.[22]

Section 5(3) of the ITAA is effective to remove the inconsistency with s 5(1) in conjunction with the retrospective state laws

10. For the reasons advanced by the respondents in both sets of proceedings, s 5(3) of the ITAA is effective, together with the state retrospective laws, to remove the inconsistency between the state tax laws and s 5(1) of the ITAA.[23] This approach is consistent with the observations of Justices Murphy and Deane in *Metwally*[24] as applied by six members of this Court in the *Native Title Act Case*.[25] Accordingly, no occasion arises for the Court to consider the correctness of *Metwally*.

11. However, in the event that the Court entertains the alternative pathway identified by the Commonwealth[26] (despite the fact that it would arrive at the same result), then the application to reopen *Metwally* should be refused. *Metwally* has stood as authority of this Court for over 40 years. In that time, it has been repeatedly affirmed.[27] The reasoning of the Court has grounded intra-governmental arrangements of national significance.[28] The Commonwealth submits that "the consequences of departing from it are not significant"[29] and that it "does not achieve a useful result".[30] With respect, those submissions fail to grapple with the observation of Chief Justice Gibbs in *Metwally*:[31]

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22 *Spence v Queensland* (2019) 268 CLR 355, 414-415 [87] (Kiefel CJ, Bell, Gageler and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 221 [148] (Gageler J), 321 [431]-[432] (Edelman J); *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Pidoto v Victoria* (1943) 68 CLR 87, 111 (Latham CJ).

23 RS, [27]-[30]; DS, [21]-[47]; *Written Submissions of the Commonwealth* filed in the Stott proceedings (**CS**), [18]-[30].

24 *Metwally*, 469 (Murphy J), 479-480 (Deane J).

25 *Western Australia v The Commonwealth* (1995) 183 CLR 373 (***Native Title Act Case***).

26 CS, [31]-[37].

27 *Native Title Act Case*, 454-455 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Croome v Tasmania* (1997) 191 CLR 119, 129-130 (Gaudron, McHugh and Gummow JJ); *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372, 407 [69] (Gaudron and Gummow JJ); *Dickson v The Queen* (2010) 241 CLR 491, 503 [19] (the Court); *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***), 105 [223] (Gummow J).

28 *Native Title Bill 1993, Explanatory Memorandum*, p 12-13; *Native Title Act Case*, 454-455 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Griffith v Northern Territory (No 3)* (2016) 337 ALR 362, [143] (Mansfield J); *Doyle v Queensland* (2016) 249 FCR 519, 525-532 [27]-[60] (North, Barker and White JJ).

29 CS, [32].

30 CS, [36].

31 *Metwally*, 457 (emphasis added); see, to the same effect, 476 (Deane J).

> If the respondents' argument were correct, the Commonwealth Parliament could retrospectively reveal that the Commonwealth law had an intention, which it lacked at the earlier time, either to cover, or not to cover, the whole field, with the result that the State law would be retrospectively invalidated or validated.

12. If the application to reopen *Metwally* is granted, it should be affirmed. The decision in *Metwally* is consistent with the long recognized temporal operation of s 109 of the *Constitution*.[32] Whilst the primary purpose of s 109 may accurately be understood to be "to secure the paramountcy of Commonwealth laws over conflicting State laws",[33] that purpose must be understood contextually. Section 109 appears in Chapter V of the *Constitution*, concerning "The States". It follows immediately s 108, which has the effect of saving State laws. Accordingly, whilst s 109 may do "no more and no less" than establish Commonwealth legislative supremacy,[34] the purpose of s 109 should be understood as promoting the legal certainty required in a federation that provides for the concurrent exercise of state and Commonwealth legislative power over, to a very substantial extent, the same subject matter.

13. The importance of legal certainty was a matter that featured in the majority judgments in *Metwally*. Some emphasis, in this regard, was placed on the need for citizens to know which law must be observed.[35] Yet, it was also acknowledged that s 109 is "critical in adjusting the relation between the legislature of the Commonwealth and the States."[36] It is not necessary to promote the notion that s 109 is "a source of individual rights",[37] to appreciate that s 109 promotes a higher order principle of legal certainty which has beneficial consequences for both citizens and polities alike within the federation. As Justice Gummow observed in *Momcilovic*:[38]

> [T]hese outcomes … [have] obvious significance for the citizen and for the place of s 109 in adjusting the relationship between the citizen on the one hand and the exercise of concurrent powers of federal and State legislatures on the other. However, this state of affairs is to be accepted as a product of the accommodations required by the federal system.

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32 *Butler*, 283 (Taylor J); *Metwally*, 473 (Brennan J), 478 (Deane J); *Momcilovic*, 105 [223] (Gummow J).
33 *Metwally*, 461 (Mason J, in dissent).
34 *Metwally*, 463 (Mason J, in dissent).
35 *Metwally*, 458 (Gibbs CJ);477 (Deane J).
36 *Metwally*, 458 (Gibbs CJ).
37 *Metwally*, 486 (Dawson J, in dissent). With respect, South Australia agrees with Justice Dawson's observations, in dissent, in this regard. They are consistent with the frequently repeated observation that the unexpressed assumption of the framers of the *Constitution* was that rights protection was a matter within the purview of responsible government rather than incorporation by way of a Bill of Rights: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ); *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 9 [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
38 *Momcilovic*, 256 [115] (Gummow J).

14. In its most simple terms, *Metwally* resolves an ambiguity about how questions of federal legislative inconsistency are to be resolved. The alternatives are "satisfaction of the condition from time to time"[39] or "[w]hen it is sought to apply s 109".[40] The adoption of the former "self-executing"[41] approach by the majority in *Metwally*,[42] promotes legal certainty for citizens and the States. Of course, as noted above, the opposite conclusion would subject the States to the prospect of unilateral retroactive Commonwealth legislation prevailing over state legislation. That conclusion would not only allow for legal confusion, but would also sit in tension with principles of federal comity.

15. Finally, even if the minority reasoning in *Metwally* was to find favour with a majority of the Court as presently constituted, that would not provide an adequate reason to overrule the decision.[43] Whilst there can be no "very definite rule",[44] consistent with the "strongly conservative cautionary principle" recently and unanimously reaffirmed in *NZYQ*,[45] the Court should decline to depart from its earlier decisions unless satisfied that they are "plainly wrong".[46]

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39 *Metwally*, 474 (Brennan J).

40 *Metwally*, 485 (Dawson J, in dissent). These alternatives are explained in *Spence v Queensland* (2019) 268 CLR 355, 519 [371] (Edelman J).

41 *Metwally*, 475 (Brennan J), 478 (Deane J).

42 *Metwally*, 458 (Gibbs CJ), 469 (Murphy J), 475 (Brennan J), 478 (Deane J).

43 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte The Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54 (***The Tramways Case (No 1)***, 58 (Griffith CJ), 69 (Barton J); *Cain v Malone* (1942) 66 CLR 10 (***Cain***), 15 (Latham CJ), 17 (McTiernan J, agreeing); *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 (***Perpetual Trustee***), 244, 253 (Dixon J); *Hughes and Vale Pty Ltd v New South Wales [No 1]* (1953) 87 CLR 49, 70 (Dixon CJ); *Victoria*, 615 (Dixon CJ), 658 (Kitto J, agreeing); *Queensland v The Commonwealth* (1977) 139 CLR 585 (***Queensland***), 599, 600, 603-604 (Gibbs J); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 39-40 (McHugh J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 365-366 [125] (Hayne J).

44 *Perpetual Trustee*, 243-244 (Dixon J).

45 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1011 [17]-[18] and 1015 [35] (the Court).

46 A "plainly wrong", "clearly wrong", "manifestly wrong" or "fundamental error" test has been applied on many occasions: *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278-279 (Isaacs J, 'clearly wrong' or 'manifestly wrong'), 288 (Higgins J, agreeing), 292 (Powers J, 'clearly wrong'); *The Tramways Case No 1*, 58 (Griffith CJ, 'manifestly wrong'), 69 (Barton J, 'manifestly wrong' or 'clearly wrong'), 86-87 (Powers J, 'clearly wrong'); *Cain*, 15 (Latham CJ, 'manifestly wrong'), 15-16 (Rich J, 'clearly wrong'), 17 (McTiernan J, agreeing with Latham CJ); *Perpetual Executors and Trustees Association of Australia Ltd v Commissioner of Taxation (Cth)* (1949) 77 CLR 493, 496 (Latham CJ for the Court, 'manifestly wrong'); *Perpetual Trustee*, 261 (McTiernan J, 'manifestly wrong'), 266 (Williams J, 'manifestly wrong'); *Victoria v Commonwealth* (1957) 99 CLR 575 (***Victoria***), 626 (McTiernan J, 'manifestly wrong'), 629 (Williams J, 'manifestly wrong'); *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372, 377 (Dixon CJ, 'fundamental error'), 381 (Kitto J agreeing), 390 (Windeyer J agreeing); *Parker v The Queen* (1963) 111 CLR 610, 632-633 (Dixon CJ, 'misconceived and wrong', 'fundamental' propositions, with agreement of Taylor, Menzies, Windeyer and Owen JJ); *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13-14 (Mason J, 'plainly erroneous', 'manifestly incorrect', 'manifestly erroneous'); *Stevens v Head* (1993) 176 CLR 433, 464 (Gaudron J, 'wrong and fundamentally so'); *McGinty v Western Australia* (1996) 186 CLR

Section 5(3) does not acquire property of other than on just terms contrary to s 51(xxxi)

16. For the reasons advanced by the respondents in both sets of proceedings (on either pathway identified by the Commonwealth in the Stott proceedings), s 5(3) of the ITAA does not effect an acquisition of property.[47] On the first approach (consistent with *Metwally*), s 5(3) merely removed a prospective inconsistency which permitted the enactment of the state retrospective laws which (subject to further arguments advanced by the respondents) acquired the appellants' claims. On the alternative pathway (inconsistent with *Metwally*), s 5(3) removed the earlier inconsistency with the state tax laws which (again, subject to further arguments advanced by the respondents) acquired the appellants' claims. Therefore, either the state retrospective laws or the state tax laws acquired the appellants' property, rather than s 5(3) of the ITAA.

17. If, contrary to the above submission, s 5(3) of the ITAA is understood to have been capable of acquiring the appellants' property, then in the G Global proceedings the Respondent contends that s 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the TAA (Qld) had the effect of extinguishing the Appellants' rights prior to s 5(3) giving effect to any acquisition. In response to this submission, the Appellants submit that s 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the TAA (Qld) are inconsistent with s 64 of the *Judiciary Act*.

Section 79 of the *Judiciary Act*[48]

18. Prior to addressing the Appellants' submissions concerning s 64, there is an important anterior question about whether s 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the

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140, 235 (McHugh J, 'fundamentally wrong'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (the Court, 'manifestly wrong'); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 552 (Dawson J, 'plainly wrong'), 576 (McHugh J, 'plainly wrong'); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 421 [90] (McHugh J, 'clearly wrong'), 518 [376] (Callinan J agreeing); *Barns v Barns* (2003) 214 CLR 169, 205 [104] (Gummow and Hayne JJ, 'wrong in a significant respect'); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 61 [120] (Gummow J, 'erred in a significant respect'); *Vunilagi v The Queen* (2023) 97 ALJR 627, 655 [132], 661 [163]-[164], 665 [178], 673 [221] (Edelman J, 'manifestly wrong', 'clearly wrong', 'fundamentally contrary to basic principle', 'significant and manifest error or injustice'); *Vanderstock v Victoria* (2023) 98 ALJR 208, 356 [608]-[609] (Edelman J, 'fundamentally contrary to basic principle', 'significant or manifest error or injustice', 'manifestly wrong'). See, also, J Edelman, "Overturning Al-Kateb v Godwin: Unanswered Questions about the Rules of Precedent" (Sir Harry Gibbs Memorial Oration, unpublished paper, Gold Coast, 25 May 2024).

47 RS, [31]-[49]; DS, [52]-[63]; CS, [38]-[45].

48 The Plaintiff in the Stott proceeding, on the agreed basis that s 20A of the *Limitation of Actions Act 1958* (Vic) bars the remedy but does not extinguish underlying rights, has not made submissions that it would not be picked up by s 79 of the *Judiciary Act*: *Submissions of the Plaintiff*, [17] fn 62.

TAA (Qld) are picked up by s 79 of the *Judiciary Act*.[49] Accordingly, attention must first be given to the operation of s 79.

19. In *British American Tobacco Australia Ltd v Western Australia* (***BAT***),[50] the Court considered that a notice requirement under Western Australian law before commencing proceedings against the State was not picked up in federal jurisdiction by s 79 of the *Judiciary Act*. The plurality characterised the notice requirement as being in the nature of a condition on a grant by State law of new rights or remedies against the State, rather than a separate and independent bar on a cause of action.[51] Section 79 does not pick up State laws where, among other things, another law of the Commonwealth has "otherwise provided". As there was an existing right in that matter to proceed against Western Australia in federal jurisdiction,[52] the Commonwealth Parliament had so provided for the purposes of s 79 and the State provisions were not picked up.[53] Further, the plurality accepted that, if it were possible to treat the notice requirement as an independent and general limitation on a right to proceed against the State, it would not be picked up on the basis that s 64 of the *Judiciary Act* had otherwise provided. That was so, in the opinion of the plurality, because it would place the State in a special position above that of litigants against the State, and thereby deny the requirement of s 64 that the rights of the parties "be as nearly as possible the same as those in a suit between subject and subject".[54] It was unnecessary in *BAT* for the Court to decide whether further State legislation prescribing a one-year limitation period for claims for recovery of invalid tax would be picked up by s 79, as the claim had been brought within that time and that question was not before the Court.[55]

20. Following the decision in *BAT*, s 79 was amended to expressly provide that a provision of the *Judiciary Act* would not prevent courts exercising federal jurisdiction from being bound by certain State or Territory laws relating to the recovery of amounts paid under

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49 RS, [41]; *Rizeq v Western Australia* (2017) 262 CLR 1, 24-26 [58]-[61] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Masson v Parsons* (2019) 266 CLR 554, 579-580 [42]-[43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

50 (2003) 217 CLR 30.

51 *BAT*, 56-57 [55]-[56], 60 [67], 64 [77] (McHugh, Gummow and Hayne JJ).

52 Arising by implication from the conferral on the Supreme Court of jurisdiction in a matter arising under the *Constitution* under s 39(2) of the *Judiciary Act*, supported by ss 76(i) and 78 of the *Constitution*: *BAT*, 55 [50], 58-59 [60]-[63], 60 [67] (McHugh, Gummow and Hayne JJ), 90 [171]-[172] (Callinan J).

53 *BAT*, 60 [67] (McHugh, Gummow and Hayne JJ), 90 [171]-[172] (Callinan J).

54 *BAT*, 61 [69] (McHugh, Gummow and Hayne JJ), 89 [167], 90 [171]-[172] (Callinan J).

55 *BAT*, 45 [14] (Gleeson CJ), 55 [48], 56-57 [54]-[55] (McHugh, Gummow and Hayne JJ).

purportedly invalid taxes.[56] Sections 79(2)-(4) include (by way of example rather than exclusively) State laws "limiting the period for bringing the suit to recover the amount" (s 79(3)(a)) and requiring prior notice to be given (s 79(3)(b)), the precise issue considered in *BAT*. Importantly, it must be noted that s 79(2) expressly prevails over other provisions of the *Judiciary Act*, such that if a provision falls within s 79(2)-(4), no further question about inconsistency with s 64 arises.[57] Plainly, s 10A of the LAA (Qld) is encompassed by the expanded operation of s 79.[58] That is a complete answer to the Appellants' claim in the G Global proceedings.[59]

21. Even if s 10A was not picked up, it is arguable that ss 36(2) and 188 of the TAA (Qld) are. Sections 36(1) and (2) remove the power to award remedies outside those provided for under the statutory process under the TAA, and s 188(2) precludes starting new proceedings at common law. As Queensland submits,[60] such laws are "directed to the manner of exercise of jurisdiction".[61] That jurisdiction is exercised in accordance with the statutory process under the TAA, which prescribes "some other remedy by which [the taxpayer] may regain the money or obtain reparation".[62]

22. As Queensland further submits,[63] if s 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the TAA (Qld) do not fall within s 79, then they apply of their own force in federal jurisdiction, unless they are inconsistent with Commonwealth law or the *Constitution*.[64] The Appellants assert an inconsistency with s 64.

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56 The *Explanatory Memorandum, Judiciary Amendment Bill 2008* (Cth) makes clear that this was an express response to the decision in *BAT*.

57 As pointed out in *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55, 64 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ), s 64 "is neither a constitutional provision nor an entrenched law", and its application or operation will be excluded to the extent it is inconsistent with subsequently enacted Commonwealth statutory provisions.

58 *Rizeq v Western Australia* (2017) 262 CLR 1, 15 [22] (Kiefel CJ), 35-36 [89] (Bell, Gageler, Keane, Nettle and Gordon JJ) (citing *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308; *Bate v International Computers (Aust) Pty Ltd* (1984) 2 FCR 526).

59 In the Stott proceeding, it is asserted that some claims are not out of time, and that there would be power to extend time in any event. South Australia makes no submissions on these points.

60 Queensland Submissions, para [41] fn 52.

61 *Masson v Parsons* (2019) 266 CLR 554, 578 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

62 *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).

63 RS, [42].

64 *Masson v Parsons* (2019) 266 CLR 554, 575 [30] and [31], 576-577 [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

Section 64 of the *Judiciary Act*

23. The Appellants' submission that s 10A(3) of the LAA (Qld) and ss 36(2) and 188 of the TAA (Qld) are inconsistent with s 64 of the *Judiciary Act* should be rejected. Section 64 does not regulate the substantive rights and liabilities of State parties.[65]

24. It has long been doubted that s 64 operates to alter the substantive rights of the states in federal jurisdiction.[66] It was unnecessary for the Court to resolve this question in *BAT*.[67] South Australia submits that, in the event that it is necessary for the Court to determine that issue in the present proceedings, the Court should confirm that s 64 has no such operation.

25. The Commonwealth does not possess general legislative authority to alter the substantive rights of the states, including those rights to be determined in the exercise of federal jurisdiction.[68] The only potential sources of such power could be ss 75 and 76 (combined with s 51(xxxix) or s 77) or s 78.

26. Sections 75 and 76 set out the matters constituting federal jurisdiction that may be conferred on federal and State courts by laws made under s 77. However, it is uncontroversial that the source of authority to adjudicate a matter is to be distinguished from the law that is being enforced or applied in the adjudication. Put another way, the bare conferral of federal jurisdiction does not, of itself, change the law that is to be enforced.[69] Rather, it authorises courts to hear and determine disputes in the exercise of federal jurisdiction, "in accordance with the independently existing substantive law".[70] Neither the conferral of federal jurisdiction, nor the power in s 51(xxxix) to legislate in respect of "matters incidental to the execution of any power vested by this Constitution

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65 These issues do not appear to arise squarely, if at all, in the Stott proceeding: see *Submissions of the Plaintiff*, [17]; CS, [45]; DS, [60]-[63].

66 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *Maguire v Simpson* (1977) 139 CLR 362, 401 (Mason J).

67 *BAT*, 66 [85]-[87] (McHugh, Gummow and Hayne JJ).

68 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

69 *Rizeq v Western Australia* (2017) 262 CLR 1, 12-13 [9] (Kiefel CJ), 23 [53] (Bell, Gageler, Keane, Nettle and Gordon JJ), 71 [196] (Edelman J). Sections 75 and 76 are not the source of the substantive law determining rights and liabilities: see e.g. *Werrin v Commonwealth* (1938) 59 CLR 150, 167-168 (Dixon J); *Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 178-179 (Mason CJ), 204-207 (Deane and Gaudron JJ), 232 (Toohey J).

70 *Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 205 (Deane and Gaudron JJ), quoted in *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 586 [55] (Gleeson CJ, Gaudron and Gummow JJ); *Rizeq v Western Australia* (2017) 262 CLR 1, 16 [25] (Kiefel CJ).

… in the Federal Judicature", authorise a change in the law to be applied when exercising federal jurisdiction:[71]

> The Parliament has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III.

27. The terms of s 78 of the *Constitution* only authorise the making of "laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of federal judicial power". The purpose of s 78 is identified in the Convention Debates. The framers, aware of immunities enjoyed by the Crown at common law,[72] were doubtful that provision for the High Court's jurisdiction, under what became ss 75 and 76, was sufficient to ensure persons could be conferred with rights to proceed against the Crown.[73] They considered it necessary to confer the Commonwealth Parliament with clear power to legislate in order to allow persons to be able to bring such proceedings to enforce rights, while also permitting the Commonwealth Parliament to legislate to control or regulate those rights.[74] The purpose of s 78 *was not* to authorise the alteration of the substantive rights or liabilities of a State (or, indeed, the Commonwealth).

28. It is clear that s 78 authorises the enactment of laws that remove any immunity from suit or similar obstacles to the initiation of an action *against* the Commonwealth or a State in respect of matters within federal jurisdiction. However, the mere conferral of a right to *proceed* could not alter the law to be applied as to *the existence* of substantive rights and liabilities.[75] Notwithstanding, s 64 of the *Judiciary Act* has been held to have the effect of imposing substantive rights and liabilities upon the Commonwealth[76] which, in that

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71 *Rizeq v Western Australia* (2017) 262 CLR 1, 21 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).

72 Principally, the immunity of the Crown from being impleaded in its own courts (see e.g. *R v Dalgety & Co Ltd* (1944) 69 CLR 18; *Commonwealth v Mewett* (1997) 191 CLR 471, 497 (Dawson J), 545 (Gummow and Kirby JJ)) and immunity in tort and for the torts of its servants (see e.g. *Feather v The Queen* (1865) 6 B & S 257; 122 ER 1191).

73 However, in *BAT* the plurality held that such rights were implicit in the conferral of federal jurisdiction, including in relation to jurisdiction conferred under s 76(i), resulting in overlap with s 78 of the *Constitution*: see fn 52.

74 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 215-216 (McHugh J); *Commonwealth v Mewett* (1997) 191 CLR 471, 496-497 (Dawson J); *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 1 March 1898, 320, 1653-1679; J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 804-806; J Quick and L Groom, *The Judicial Power of the Commonwealth: With the Practice and Procedure of the High Court* (1904), 190-193.

75 See e.g. *Commonwealth v Mewett* (1997) 191 CLR 471, 492 (Brennan CJ).

76 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

respect, can only derive from a source other than s 78.[77] In *BAT*, South Australia submitted that the consequence of s 64 extending to the States in matters beyond rights to proceed where a State was a defendant was that s 64 was invalid. That submission was rejected.[78] South Australia now submits that s 64 may be disapplied in so far as it purports to alter the substantive rights of the states.[79]

29. Applying the above principles, s 64 cannot give rise to inconsistency in relation to s 10A of the LAA (Qld) or ss 36(2) and 188 of the TAA (Qld). In so far as those provisions regulate the manner of the exercise of jurisdiction, they are picked up by s 79 of the *Judiciary Act* for the reasons above. In so far as they are determinative of the existence of rights and liabilities, and therefore applying of their own force subject to any inconsistent Commonwealth law within the meaning of s 109 of the *Constitution*, s 64 is not capable of giving rise to an inconsistency.

Part V: TIME ESTIMATE

30. It is estimated that up to 15 minutes will be required for the presentation of South Australia's oral argument.

Dated: 2 April 2025

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[77] The power under s 51(xxxix) to make laws incidental to the executive power has generally been identified. See also *Maguire v Simpson* (1977) 139 CLR 362, 388 (Gibbs J) as to the breadth of the Commonwealth's power to govern its liability.

[78] *BAT*, 66 [86]-[87] (McHugh, Gummow and Hayne JJ), on the basis that s 64 would be able to be read down to operate differentially between the Commonwealth and the States.

[79] Although the approach in *BAT* was described as a reading down, adopting the nomenclature of Justice Edelman this would more precisely be described as involving partial disapplication: see the authorities cited in fn 22.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
No. B48/2024
BETWEEN: **G GLOBAL 120E T2 PTY LTD as trustee for THE G GLOBAL 120E AUT**

Appellant
and
COMMISSIONER OF STATE REVENUE
Respondent

No. B49/2024
BETWEEN: **G GLOBAL 180Q PTY LTD as trustee for THE G GLOBAL 180Q AUT**

Appellant
and
COMMISSIONER OF STATE REVENUE
Respondent

No. B50/2024
BETWEEN: **G GLOBAL 180Q PTY LTD as trustee for THE G GLOBAL 180Q AUT**

Appellant
and
COMMISSIONER OF STATE REVENUE
Respondent

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
No. M60/2024
BETWEEN: **FRANCIS STOTT**

Plaintiff
and
THE COMMONWEALTH OF AUSTRALIA
First Defendant
and
THE STATE OF VICTORIA
Second Defendant

ANNEXURE
PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
Constitutional provisions					
1.	*Constitution*	Current	ss 51(ii), 51(xxix), 109	In force at all relevant time	All relevant times
Commonwealth statutory provisions					
1.	*Acts Interpretation Act 1901*	Current	s 15a	No material difference	All relevant times
2.	*International Tax Agreements Act 1953 (Cth)*	Current	s 5	Includes amendment inserting s 5(3)	All relevant times
3.	*Judiciary Act 1903 (Cth)*	Current	ss 39B, 64, 78, 79, 80	No material difference	All relevant times
4.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	As made (8 April 2024 to current)	Sch 1 Cl 2	Inserted s 5(3) into Agreements Act	All relevant times
State statutory provisions					
1.	*Land Tax Act 2005 (Vic)*	Current	ss 3, 7, 8, 35, 104B, 106A, Sch 1 Pt 1, Sch 1 Pt 4	No material difference, except s 106A inserted	All relevant times
2.	*Limitations of Actions Act 1958 (Vic)*	Current	s 20A	No material difference	All relevant times
3.	*Land Tax Act 2010 (Qld)*	Current	ss 32(1)(b)(ii), 104	Includes amendment by the *Revenue Legislation Amendment Act 2025* (Qld)	28 February 2025
4.	*Limitations of Action Act 1974*	Current	s 10A	No material difference	As at 8 April 2024, when s 5(3) of the ITA enacted
5.	*Tax Administration Act 2001 (Qld)*	Current	ss 36-39, 69, 70C, 132, 188	As at 8 April 2024, when s 5(3) of the ITA enacted	As at 8 April 2024, when s 5(3) of the ITA enacted
6.	*Stamp Duties Act 1923 (SA)*	Current	ss 72 and 102AB	No material difference	All relevant times