HIGH COURT OF AUSTRALIA

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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

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

PART I: CERTIFICATION

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

PART II: INTERVENTION

2. The Attorney General for **Western Australia** intervenes pursuant to s 78A of the ***Judiciary Act*** *1903* (Cth) in support of the defendants.

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: ARGUMENT

Introduction

4. Consistent with the precept followed by the Court for more than a century, if it is unnecessary to decide a constitutional question it is necessary not to decide it. As Hayne, Kiefel and Bell JJ further observed in *ICM Agriculture v Commonwealth*, "constitutional questions should not be decided unless it is necessary 'to do justice in the given case and to determine the rights of the parties'".[1]

5. In the absence of any application to re-open *University of Wollongong v* ***Metwally***,[2] it is only necessary for the Court to consider whether:

   (a) ***Metwally*** should be re-opened and overruled; and

   (b) section 5(3) of the *International Tax Agreements Act 1953* (Cth) (**ITA Act**) is a law with respect to the acquisition of property from a person otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution,

   if the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Commonwealth Amendment Act**) did not clear the way for the *State Taxation Further Amendment Act 2024* (Vic) (**Victorian Amendment Act**) to impose land tax retrospectively[3] on absentee owners, in the same amount and circumstances in which they were purportedly imposed by ss 7, 8, 35, 104B and cl 4.1 to 4.5 of Sch 1 to the ***Land Tax Act*** *2005* (Vic).[4]

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1 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 [141] (footnotes omitted).
2 *University of Wollongong v Metwally* (1984) 158 CLR 447.
3 That is, for the future only, the Victorian Amendment Act changed the law from what it otherwise would have been with respect to a prior event: ***Stephens*** *v The Queen* (2022) 273 CLR 635 [29] (Keane, Gordon, Edelman and Gleeson JJ).
4 Collectively, the ***Land Tax Act*** **provisions**.

6. For the reasons submitted by the Commonwealth [5] and Victoria, [6] if the Commonwealth Amendment Act cleared the way for the Victorian Amendment Act to have this retrospective effect, it did so consistent with *Metwally* and no occasion for considering the correctness of that decision arises. If the occasion for reconsideration does not arise, *Metwally* should not be reconsidered.

7. Further, and for the reasons submitted by the Commonwealth [7] and Victoria [8] whether there has been an acquisition of property from a person otherwise than on just terms only falls for consideration if the Commonwealth Amendment Act purports to retroactively[9] remove an inconsistency under s 109 of the Constitution. *Metwally* stands in the way of the Commonwealth Parliament enacting such a law. However, *Metwally* does not stand in the way of the Commonwealth Parliament enacting retrospective or prospective legislation to clear the way for a State Parliament to enact retrospective or prospective legislation.

8. If the Court considers it necessary or otherwise appropriate [10] to consider the questions identified above at [5(a) and (b)], which engage Questions 2 and 3 respectively of the Special Case (**SCB 55-56**), for the reasons below:

   (a) the Court should consider whether to re-open and overrule *Metwally* before considering whether the Commonwealth Amendment Act is a law with respect to the acquisition of property: if *Metwally* stands, **no** head of Commonwealth legislative power can support retroactive removal of the inconsistency which engaged s 109, such that the *Land Tax Act* provisions were inoperative;

   (b) *Metwally* should be re-opened and overruled;

   (c) the Commonwealth Amendment Act was effective on its own, and with retroactive effect from 1 January 2018, to remove the inconsistency which had engaged s 109 such that the *Land Tax Act* provisions were inoperative; and

   (d) the Commonwealth Amendment Act is not a law with respect to the acquisition of property from a person otherwise than on just terms.

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5 First Defendant's (Commonwealth's) Submissions (**CS**) [22]-[26].
6 Second Defendant's (Victoria's) Submissions (**VS**) [21]-[28].
7 CS [30].
8 VS [46]-[47].
9 That is, the law operates backwards and changes the law from what it was: *Stephens* [29] (Keane, Gordon, Edelman and Gleeson JJ).
10 Western Australia accepts that the Court may prefer to take the approach identified in CS [7].

9. In light of the above and for the reasons below, Western Australia submits:

   (a) Question 1 should be answered "yes";

   (b) Question 2 is unnecessary to answer or, if *Metwally* is re-opened and overruled, should be answered "yes";

   (c) Question 3 is unnecessary to answer or, if *Metwally* is re-opened and overruled, should be answered "no"; and

   (d) Question 4 should be answered "no" or, if Question 2 is answered "yes" and Question 3 is answered "no", is unnecessary to answer.

10. In the balance of these submissions and consistent with the above, the questions stated are addressed in the following order: Questions 1, 4, 2 and 3.

The legislative scheme

11. Western Australia adopts the Commonwealth's[11] and Victoria's[12] explanation of the statutory scheme, including that the Commonwealth Amendment Act is capable of being construed as having not only prospective operation, but also either retrospective or retroactive operation in relation to events before 8 April 2024.

Question 1: there was inconsistency before 8 April 2024

12. It is common ground that before the Commonwealth Amendment Act came into operation on 8 April 2024, the *Land Tax Act* provisions were inconsistent with Art 24 of the New Zealand Convention,[13] given effect as Commonwealth law by s 5(1) of the ITA Act, and thereby inoperative pursuant to s 109 of the Constitution.

Question 4: section 106A of the *Land Tax Act* and related provisions are valid

13. Western Australia adopts the submissions of the Commonwealth[14] and Victoria[15] and makes the following submissions.

14. Section 106A of the *Land Tax Act* and s 135A of the ***Taxation Administration Act*** *1997* (Vic) commenced on 4 December 2024.

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11 CS [13]-[17].
12 VS [10]-[20].
13 That is, the Convention between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion (done at Paris on 26 June 2009) [2010] ATS 10.
14 CS [18]-[30].
15 VS [21]-[45].

15. At that time, there was no inconsistency between s 106A of the *Land Tax Act* and s 135A of the *Taxation Administration Act* on the one hand and s 5 of the ITA Act on the other. This was so even if s 5(3) of the ITA Act validly has only prospective operation.

16. Section 106A(1) of the *Land Tax Act* provides that the section applies if the purported imposition of land tax surcharge (**LTS**) was invalid because the provisions imposing the tax were to any extent invalid or inoperative under s 109 of the Constitution due to an inconsistency with an agreement given the force of law by s 5(1) of the ITA Act.

17. In those circumstances, s106A(2) imposes LTS afresh. Section 135A of the *Taxation Administration Act* provides in the same circumstances that an assessment made in respect of a purported liability has, and is taken to have had, the same effect as if LTS had been imposed under s 106A(2) of the Land Tax Act.

18. In *Metwally*, none of the Justices held that the Commonwealth Act was invalid. The majority instead concluded that the Act could not retroactively remove the inconsistency that existed where the Commonwealth and State laws were on the statute books at the same time.[16]

19. As two members of the majority, Murphy and Deane JJ, expressly recognised in separate judgments, the Commonwealth Parliament can legislate to clear the way for a State Parliament to make a fresh State Act to apply a law that was invalid due to s 109 inconsistency retrospectively in the same terms.[17] When the fresh State Act is made, there is no s 109 inconsistency between the Commonwealth law and the fresh State Act.

20. In this case, if *Metwally* is not re-opened and overruled:

    (a) section 5(3) of the ITA Act cleared the way for a fresh State Act to apply retrospectively, irrespective of whether s 5(3) had retrospective, retroactive or only prospective operation; and

    (b) section 106A of the *Land Tax Act* and s 135A of the *Taxation Administration Act* validly imposed LTS afresh.

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16 See, for example, *Metwally* 475 (Brennan J).
17 *Metwally* 469 (Murphy J), 480 (Deane J).

Question 2: if necessary, *Metwally* should be re-opened and overruled

21. Western Australia adopts the submissions of the Commonwealth[18] and makes the following submissions.

22. If it becomes necessary or is otherwise appropriate to re-consider *Metwally*, Western Australia submits that *Metwally* should be re-opened and overruled.

23. In *Metwally*, the Court considered an amendment to the ***Racial Discrimination Act 1975*** (Cth), relevantly to the effect that the *Racial Discrimination Act* was not intended, and should be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory.[19] The amendment had been made shortly after the Court's unanimous judgment in ***Viskauskas*** *v Niland*[20] that the *Racial Discrimination Act* covered the field, such that s 109 of the Constitution rendered New South Wales legislation on which Mr Metwally sought to rely inoperative.

24. In *Metwally* the majority (Gibbs CJ, Murphy, Brennan and Deane JJ in separate judgments) concluded that Commonwealth amending legislation could not give the State law valid operation at a time when s 109 of the Constitution had rendered it invalid.[21]

25. The minority, Mason and Dawson JJ (in separate judgments, with both of whom Wilson J agreed)[22] held that the Commonwealth amending legislation had removed the inconsistency upon which s 109 operated with retroactive effect.[23]

26. As Edelman J observed in ***Spence*** *v Queensland*,[24] the essential difference between the majority and the minority in *Metwally* is whether a "law of the Commonwealth" in s 109 of the Constitution means:

    (a) only the content of that law at the time of the alleged inconsistency; or

    (b) includes content arising from subsequent, retroactive Commonwealth laws.

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18 CS [31]-[37].
19 *Metwally* 453 (Gibbs CJ).
20 *Viskauskas v Niland* (1983) 153 CLR 280.
21 *Metwally* 457 (Gibbs CJ), 469 (Murphy J), 475 (Brennan J), 477-478 (Deane J).
22 *Metwally* 471 (Wilson J).
23 *Metwally* 461-462 (Mason J), 485 (Dawson J).
24 *Spence v Queensland* (2019) 268 CLR 355 [371].

27. In light of the fact that the Commonwealth Parliament has the power to make retroactive laws,[25] Western Australia submits that a "law of the Commonwealth" in s 109 includes content arising from subsequent, retroactive Commonwealth laws.

28. The term "law of the Commonwealth" is used in various places in the Constitution, including in ss 61, 80, 109 and 120. In order to ensure a coherent approach, the term can have no different meaning in s 109 from the meaning it has elsewhere.[26]

29. An interpretation of the term "law of the Commonwealth" which includes content arising from retroactive laws can be consistently applied to each use of that term in the Constitution. For example, the executive power of the Commonwealth in s 61 necessarily applies to the laws of the Commonwealth, including content arising from retroactive laws.

30. Contrary to the concern about "Orwellian notions of doublethink" expressed by Deane J in *Metwally*,[27] it cannot be that the effect of s 109 is to constrain the Commonwealth Parliament from legislating retroactively not only to remove an inconsistency between a law of the Commonwealth and of a State, *but to create one*. If that is the view which his Honour held, which with respect is unclear, then accepting that view would require an acceptance that:

    (a) s 109 of the Constitution is always engaged, such that if there is no inconsistency between a law of the Commonwealth and of a State at a given time, s 109 operates to prevent the Commonwealth from retroactively creating one – notwithstanding that on its terms the text of s 109 is concerned only with circumstances where an inconsistency exists; and

    (b) the limits on the retroactive exercise of Commonwealth legislative power are broader than has previously been recognised[28] and, by operation of s 109, extend to preventing the Commonwealth from retroactively legislating to create an inconsistency with a law of the State which did not exist before.

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25 *Mabo v Queensland* (1988) 166 CLR 186, 211-212 (Brennan, Toohey and Gaudron JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

26 See in this context *Vunilagi v The Queen* (2023) 97 ALJR 627 [51]-[52] (Kiefel CJ, Gleeson and Jagot JJ), [64]-[65] (Gageler J), [207] (Edelman J).

27 *Metwally* 476.

28 VS [21] footnote 5.

31. It is respectfully submitted that this further illustrates the difficulty in squaring *Metwally* with the Commonwealth's power to legislate retroactively with respect to any head of Commonwealth legislative power and with s 109 of the *Constitution* having a workable operation.

32. For two members of the majority in *Metwally*, Gibbs CJ and Deane J, an important aspect of their Honour's reasoning was the proposition that the purpose of s 109 extends to informing the ordinary citizen which of two inconsistent laws they are required to observe.[29] As Edelman J observed in *Spence* [372], whether that is a purpose of s 109 remains unsettled.

33. Section 109 of the Constitution may have the *consequence* that a citizen is aware of the law they are required to observe. However, it does not follow that this is the *purpose* of s 109. The purpose of s 109 is to secure paramountcy of Commonwealth laws over inconsistent State laws for the reasons given by Mason J.[30]

34. *Metwally* also illustrates that s 109 may **not** have the consequence that a citizen (or indeed the Commonwealth or a State or Territory) is aware of the law that they are required to observe. It is apparent from how quickly the Commonwealth sought to amend the *Racial Discrimination Act* after *Viskauskas* that it had not appreciated the effect of its own law was to render part of a State law seeking to address the evil of racial discrimination inoperative pursuant to s 109 of the Constitution.

35. It is clear from the terms of s 109 of the Constitution that where there is an inconsistency between a law of the Commonwealth and a law of the State, the law of the Commonwealth will prevail and the State law will be invalid (that is, inoperative) to the extent of the inconsistency. As the many decisions of the Court considering s 109's interaction with Commonwealth and State laws illustrate, including *Viskauskas*, *Metwally* and this case, s 109 will not of itself make it clear to the Commonwealth, the States and Territories, and others subject to their laws, whether there is such an inconsistency and, if so, the extent of that inconsistency.

36. The Constitution expressly and impliedly imposes constraints on the exercise of Commonwealth legislative power, whether retroactively, retrospectively or prospectively. Those constraints include, so far as the States are concerned, the

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29 *Metwally* 458 (Gibbs CJ), 477 (Deane J).
30 *Metwally* 461-463.

intergovernmental immunities recognised in *Melbourne Corporation v Commonwealth*[31] and considered in subsequent cases.

37. Section 109 imposes no constraint on Commonwealth legislative power, but instead is concerned with resolving conflict between inconsistent laws of the Commonwealth and of a State. *Metwally* stands for the contrary proposition and, if necessary or otherwise appropriate to do so, it should be re-opened and overruled.

38. If *Metwally* is re-opened and overruled, then the direct effect of the Commonwealth Amendment Act was to revive the operation of the *Land Tax Act* provisions from 1 January 2018. The State Amendment Act does not operate and does not need to operate for the *Land Tax Act* provisions to have validly imposed the LTS on the plaintiff from 1 January 2018.

Question 3: the Commonwealth Amendment Act is not a s 51(xxxi) law

39. The plaintiff's contention that s 5(3) of the ITA Act effected an acquisition other than on just terms, contrary to s 51(xxxi) of the Constitution, is premised on the Commonwealth Amendment Act having retroactive effect, so that s 5(3) retroactively removed the inconsistency between the *Land Tax Act* provisions and s 5(1) of the ITA Act.[32]

40. If s 5(3) of the ITA Act did not have that retroactive effect and merely cleared the way for a fresh State Act to re-impose LTS, no question of an acquisition other than on just terms arises.

41. If *Metwally* is overruled and s 5(3) of the ITA Act did have that retroactive effect, s 51(xxxi) of the Constitution is still not engaged. The plaintiff had no "property" to acquire and s 5(3) is not a law with respect to the acquisition of property.

42. The plaintiff contends that the "property" acquired constituted a claim in restitution.[33] It is necessary to consider whether the plaintiff has such an action. If it does not, there is no property that can be said to have been acquired.[34]

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31 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
32 Plaintiff's Submissions (**PS**) [12].
33 PS [13], read with PS [8].
34 *Haskins v Commonwealth* (2011) 244 CLR 22, [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

43. The Plaintiff does not have a claim in restitution because s 96(2) of the *Taxation Administration Act* relevantly provides that no court has jurisdiction or power to consider any question concerning an assessment except as provided by the statutory objection process in that Part of the *Taxation Administration Act*.

44. Section 96(2) applies in federal jurisdiction by reason of s 79(1) of the *Judiciary Act*. The balance of s 79 confirms that the *Judiciary Act* (including s 64) does not otherwise provide.

45. Western Australia adopts the Commonwealth's submission[35] that the plaintiff would not have a claim in restitution in any event because the payments were made in discharge of a debt.

46. Even if, contrary to the above, the Plaintiff held property, s 5(3) of the ITA Act is not a law with respect to the acquisition of that property.

47. Western Australia adopts the Commonwealth's and Victoria's submissions that:

    (a) in clearing the way for State laws to operate, s 5(3) of the ITA Act does not authorise or effect an acquisition of property.[36] The position may well have been different if the Commonwealth had legislated to enter the field and the Commonwealth Amendment Act had of its own force effected an acquisition, but they did not;

    (b) the concern of the Commonwealth Amendment Act with taxation presupposes the absence of the *quid pro quo* involved in the "just terms" prescribed by s 51(xxxi) of the Constitution;[37] and

    (c) 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.[38]

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35 CS [43].
36 CS [39]-[40], VS [55].
37 VS [54].
38 CS [41]; VS [56].

48. 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 Sch 1 to the Commonwealth Amendment Act can be read down (to have only retrospective and/or prospective effect) or severed.[39]

49. Section 5(3) of the ITA Act, whether operating retrospectively and prospectively or operating only prospectively, is still effective:

    (a) to clear the way for the State Amendment Act to operate; and

    (b) for s 106A of the *Land Tax Act* and s 135A of the *Taxation Administration Act* to impose LTS afresh on the plaintiff for the relevant period before 8 April 2024.

PART V: LENGTH OF ORAL ARGUMENT

50. It is estimated that the oral argument for Western Australia will take no more than 15 minutes (jointly in this matter and in G Global 120E T2 Pty Ltd as trustee for the G Global 120E AUT v Commissioner of State Revenue (B48/2024).

Dated: 2 April 2025

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[39] See for example CS [46] and VS [32], [35] and [38].

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

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA (INTERVENING)

Pursuant to Practice Direction No 1 of 2024, the Attorney General for the State of Western Australia sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in the submissions.

No.	Description	Version	Provisions	Reason for version	Applicable dates
Constitutional provisions					
1.	*Commonwealth Constitution*	Current	ss 51(xxxi), 61, 80, 109, 120	In force at all relevant times.	All relevant times.
Statutory provisions					
Commonwealth legislation					
2.	*International Tax Agreements Act 1953* (Cth)	Version 43 (29 June 2023 to 7 April 2024)	s 5	Version prior to insertion of s 5(3).	Prior to 8 April 2024.
3.	*International Tax Agreements Act 1953* (Cth)	Version 45 (11 December 2024 – current)	ss 5, 5(1), 5(3)	Currently in force, includes amendment inserting s 5(3).	From 8 April 2024.

4.	*Judiciary Act 1903* (Cth)	Version 51 (11 December 2024 to current)	ss 64, 78A, 79	No material difference.	All relevant times.
5.	*Racial Discrimination Act 1975* (Cth)	Version in force between 19 June 1983 and 9 December 1986	s 6A	For illustrative purposes only.	As in force in *Metwally*.
6.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	As made (8 April 2024 – current)	Sch 1, cll 1, 2	Inserted s 5(3) into the *International Tax Agreements Act 1953* (Cth).	From 8 April 2024.
State legislation					
7.	*Land Tax Act 2005* (Vic)	Version 81 (1 January 2025 to current)	ss 7, 8, 35, 104B, 106A and cll 4.1 to 4.5 of Sch 1	No material difference, save insertion of s 106A.	All relevant times.
8.	*State Taxation Further Amendment Act 2024* (Vic)	As made (3 December 2024 to current)	ss 42, 54	Inserted s 106A into the Land Tax Act and s 135A into the Taxation Administration Act.	All relevant times.
9.	*Taxation Administration Act 1997* (Vic)	Version 88 (1 January 2025 to current)	ss 96(2), 135A	No material difference, save insertion of s 135A.	All relevant times.