HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No B48/2024

G GLOBAL 120E T2 PTY LTD AS TRUSTEE FOR THE G GLOBAL 120E AUT — APPELLANT

AND

COMMISSIONER OF STATE REVENUE — RESPONDENT

Matter No B49/2024

G GLOBAL 180Q PTY LTD AS TRUSTEE FOR THE G GLOBAL 180Q AUT — APPELLANT

AND

COMMISSIONER OF STATE REVENUE — RESPONDENT

Matter No B50/2024

G GLOBAL 180Q PTY LTD AS TRUSTEE FOR THE G GLOBAL 180Q AUT — APPELLANT

AND

COMMISSIONER OF STATE REVENUE — RESPONDENT

Matter No M60/2024

FRANCIS STOTT — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR — DEFENDANTS

G Global 120E T2 Pty Ltd v Commissioner of State Revenue
G Global 180Q Pty Ltd v Commissioner of State Revenue
G Global 180Q Pty Ltd v Commissioner of State Revenue
Stott v The Commonwealth of Australia
[2025] HCA 39
Date of Hearing: 7 & 8 May 2025
Date of Judgment: 15 October 2025
B48/2024, B49/2024, B50/2024 & M60/2024

ORDER

In each of Matter Nos B48/2024, B49/2024 and B50/2024:

The questions stated for the opinion of the Full Court in the amended special case filed on 25 February 2025 be answered as follows:

Question 1: *Prior to the commencement of the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth), was s 32(1)(b)(ii) of the* Land Tax Act 2010 *(Qld) invalid in its application to the Appellants, by force of s 109 of the* Constitution, *by reason of its inconsistency with s 5(1) of the* International Tax Agreements Act 1953 *(Cth)?*

Answer: *Yes.*

Question 2: *If the answer to Question 1 is "yes", is s 5(3) of the* International Tax Agreements Act 1953 *(Cth) (alternatively, cl 1 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth)), insofar as it operates by reference to a provision contained in a law of a State, supported by any head of Commonwealth legislative power?*

Answer: *Yes, it is supported by s 51(xxix) of the* Constitution.

Question 3: *If the answer to Question 2 is "yes", is s 5(3) of the* International Tax Agreements Act 1953 *(Cth) (alternatively, cl 1 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth)), when read with cl 2 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth), effective from 1 January 2018 to remove the inconsistency between s 32(1)(b)(ii) of the* Land Tax Act 2010 *(Qld) and s 5(1) of the* International Tax Agreements Act 1953 *(Cth) and any consequent invalidity?*

Answer: *Yes.*

Question 4: *If the answer to Question 2 is "yes", is s 5(3) of the* International Tax Agreements Act 1953 *(Cth) (alternatively, cl 1 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth)), when read with cl 2 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth), invalid (in whole or in part) because it effected an acquisition of the property of the Appellants, within the meaning of s 51(xxxi) of the* Constitution*, otherwise than on just terms?*

Answer: *No.*

Question 4A: *On their proper construction, do s 104 of the* Land Tax Act 2010 *(Qld) and/or s 189 of the* Taxation Administration Act 2001 *(Qld) have the effect of requiring the Appellants' appeals to be disallowed?*

Answer: *Unnecessary to answer.*

Question 4B: *If the answer to Question 4A is "yes", are s 104 of the* Land Tax Act 2010 *(Qld) and/or s 189 of the* Taxation Administration Act 2001 *(Qld) inconsistent with s 5(1) of the* International Tax Agreements Act 1953 *(Cth) and therefore invalid to that extent by force of s 109 of the* Constitution*?*

Answer: *Unnecessary to answer.*

Question 5: *What, if any, relief should be granted to the Appellants?*

Answer: *None.*

Question 6: *Who should pay the costs of the Special Case?*

Answer: *The Appellants.*

In Matter No M60/2024:

The questions stated for the opinion of the Full Court in the special case filed on 12 December 2024 be answered as follows:

Question 1: *Prior to the commencement of the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth) on 8 April 2024, were the following provisions invalid or inoperative in their application to the Plaintiff, by force of s 109 of the* Constitution*, by reason of their inconsistency with Article 24(1) of the New Zealand Convention (to the extent that Article 24(1) is given legislative force by s 5(1) of the* International Tax Agreements Act 1953 *(Cth)):*

(a) *ss 7, 8, 35 and cll 4.1 through 4.5 of Sch 1 to the* Land Tax Act 2005 *(Vic), to the extent that they imposed a legal liability or obligation on the Plaintiff to make the LTS Payments; or*

(b) *s 104B, to the extent that it required the Plaintiff to lodge the notice and documents referred to therein?*

Answer 1(a): *Yes.*

Answer 1(b): *Yes.*

Question 2: *If the answer to Question 1 is "yes", is s 5(3) of the* International Tax Agreements Act 1953 *(Cth) (in its operation with cl 2 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth)) valid or effective to remove that inconsistency and any consequent invalidity in relation to LTS Payments payable on or after 1 January 2018, having regard to* University of Wollongong v Metwally *(1984) 158 CLR 447?*

Answer: *Yes.*

Question 3: *Is s 5(3) of the* International Tax Agreements Act 1953 *(Cth) (in its operation with cl 2 of Sch 1 to the* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth)) invalid in its application to the Plaintiff with respect to the 2018 to 2024 land tax years, on the ground that it is a law with respect to the acquisition of the property from a person otherwise than on just terms within the meaning of s 51(xxxi) of the* Constitution*?*

Answer: *No.*

Question 4: *If the answer to Question 3 is "yes" or if Question 3 is unnecessary to answer, is s 106A of the* Land Tax Act 2005 *(Vic) invalid or inoperative in its application to the Plaintiff with respect to the 2018 to 2024 land tax years, by force of s 109 of the* Constitution, *by reason of its inconsistency with Article 24(1) of the New Zealand Convention (to the extent that Article 24(1) is given legislative force by s 5(1) of the* International Tax Agreements Act 1953 *(Cth))?*

Answer: *Unnecessary to answer.*

Question 5: *What relief, if any, should be granted to the Plaintiff?*

Answer: *None.*

Question 6: *Who should pay the costs of the special case?*

Answer: *The Plaintiff.*

Representation

F I Gordon KC with T M Wood and A I Wharldall for the appellants in B48/2024, B49/2024 and B50/2024 (instructed by PricewaterhouseCoopers)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka, M J Hafeez-Baig and K J E Blore for the respondent in B48/2024, B49/2024 and B50/2024 (instructed by Crown Law (Qld))

J T Gleeson SC with S H Hartford Davis, S J Hoare and H A X Rogers for the plaintiff in M60/2024 (instructed by Johnson Winter Slattery)

S P Donaghue KC, Solicitor-General of the Commonwealth, with A Lord and G B Ayres for the first defendant in M60/2024, and for the Attorney-General of the Commonwealth, intervening in B48/2024, B49/2024 and B50/2024 (instructed by Australian Government Solicitor)

A D Pound SC, Solicitor-General for the State of Victoria, with C P Young KC, A C Roe and L L Chircop for the second defendant in M60/2024, and for the Attorney-General for the State of Victoria, intervening in B48/2024, B49/2024 and B50/2024 (instructed by Victorian Government Solicitor's Office)

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzer for the Attorney-General for the State of South Australia, intervening in all four matters (instructed by Crown Solicitor's Office (SA))

C S Bydder SC, Solicitor-General for the State of Western Australia, with S J Cobbett for the Attorney-General for the State of Western Australia, intervening in all four matters (instructed by State Solicitor's Office (WA))

J G Renwick SC with M O Pulsford for the Attorney-General for the State of New South Wales, intervening in all four matters (instructed by Crown Solicitor (NSW))

CATCHWORDS

G Global 120E T2 Pty Ltd v Commissioner of State Revenue
G Global 180Q Pty Ltd v Commissioner of State Revenue
G Global 180Q Pty Ltd v Commissioner of State Revenue
Stott v The Commonwealth of Australia

Constitutional law (Cth) – Legislative power – Inconsistency between Commonwealth and State laws – External affairs – Acquisition of property on just terms – Where rate of land tax imposed by State law on non-residents and foreign-owned or controlled entities higher than rate of land tax imposed on other residents and entities – Where Commonwealth law gave force of law to international agreements prohibiting discriminatory land tax on non-residents and foreign-owned or controlled entities – Where Commonwealth Parliament subsequently passed law excluding State taxes from scope of prohibition in Commonwealth law on imposition of discriminatory land tax on non-residents and foreign-owned or controlled entities – Whether State law inconsistent with Commonwealth law for purposes of s 109 of *Constitution* – Whether subsequent Commonwealth law supported by external affairs power – Whether subsequent Commonwealth law had retroactive or retrospective effect – Whether subsequent Commonwealth law effective in removing retroactively inconsistency between Commonwealth law and State law –Whether *University of Wollongong v Metwally* (1984) 158 CLR 447 should be reopened and overruled – Whether Commonwealth law reviving operation of State law imposing "genuine taxation" characterised as a law with respect to acquisition of property.

Words and phrases – "acquisition of property", "agreement between Australia and Germany", "agreement between Australia and New Zealand", "alter, impair or detract", "assessments of land tax", "bilateral agreements and treaties between Australia and other countries concerning taxation", "character of a law", "choses in action", "Commonwealth law", "Commonwealth Parliament", "declaratory relief", "differences in the reasoning of the members of this Court", "direct collision between an obligation imposed by a Commonwealth law and an obligation imposed by a State law", "direct inconsistency", "discriminatory land taxes", "external affairs power", "factors identified in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417", "force of law", "foreign company", "genuine taxation", "indirect inconsistency", "inoperative", "just terms", "leave to reopen", "legislative power", "manifestly wrong", "obligation to pay additional land tax", "paramountcy of Commonwealth laws over State laws", "partial implementation", "principles carefully worked out in a succession of cases", "property", "purported land tax", "reopened and overruled", "representative proceedings", "restitution", "retroactive operation", "retrospective operation", "revival of inoperative taxes", "rights of recovery", "special case", "State law", "statements of legislative intention", "surcharge rate", "taxes imposed by State legislation", "temporal application", "validity of a law cannot be decided by agreement of the parties".

Constitution, ss 51(ii), 51(xxix), 51(xxxi), 109.
High Court Rules 2004 (Cth), r 27.08.1.
International Tax Agreements Act 1953 (Cth), ss 3(1), 3AAA, 5(1), 5(3), 6B.
Judiciary Act 1903 (Cth), s 40(1).
Land Tax Act 2005 (Vic), ss 3(1), 7, 8, 10, 35, 36, 104B, 106A, Sch 1, cll 4.1-4.5.
Land Tax Act 2010 (Qld), ss 7, 8, 18B, 18C, 18D, 32, 104, 105, Sch 2, Pts 1, 2.
State Taxation Further Amendment Act 2024 (Vic), ss 42, 54.
Taxation Administration Act 1997 (Vic), ss 8, 135A.
Taxation Administration Act 2001 (Qld), ss 63, 69, 70, 189.
Treasury Laws Amendment (Foreign Investment) Act 2024 (Cth), Sch 1, cll 1, 2.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. These proceedings concern whether a Commonwealth law is effective in removing retroactively an inconsistency between a Commonwealth law and a State law so as to render the past exaction of a State land tax valid. If effective, there is a further question of whether such a Commonwealth law effects an acquisition of property within the meaning of s 51(xxxi) of the *Constitution* because it extinguishes the right of a taxpayer to recover payment of the otherwise invalid State land tax.

2 Removed into this Court are appeals to the Supreme Court of Queensland by two companies that own land in Queensland ("the Global Proceedings"), G Global 120E T2 Pty Ltd and G Global 180Q Pty Ltd ("the GG Entities"). The GG Entities are owned and controlled by a company incorporated in Germany. They appeal against assessments of land tax made under the *Land Tax Act 2010* (Qld) ("the QLTA") for the 2020-2021 and 2021-2022 financial years. Additionally, in proceedings commenced in the original jurisdiction of this Court ("the Stott Proceedings"), the plaintiff, Francis Stott, a citizen of New Zealand, seeks various forms of relief relating to assessments of land tax under the *Land Tax Act 2005* (Vic) ("the VLTA") for the 2016 to 2024 tax years.

3 The assessments each included additional amounts of land tax that either the GG Entities had to pay because a foreign entity held a controlling interest in them or Mr Stott had to pay because he was not an Australian citizen or resident and present in Australia at the relevant times. The imposition of the additional land tax on the GG Entities was contrary to the provisions of an agreement between Australia and Germany ("the German Agreement").[1] The imposition of the additional land tax on Mr Stott was contrary to the provisions of an agreement between Australia and New Zealand ("the New Zealand Convention").[2]

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1 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.

2 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.

4 Prior to 8 April 2024, the German Agreement and the New Zealand Convention were given force of law in full[3] in Australia by s 5(1) of the *International Tax Agreements Act 1953* (Cth) ("the ITAA"). As a consequence, prior to 8 April 2024, the provisions of the QLTA and the VLTA imposing the additional land tax were inoperative in their application to the GG Entities and Mr Stott by reason of their inconsistency with s 5(1) of the ITAA and the operation of s 109 of the *Constitution*.

5 On 8 April 2024, the ITAA was amended by the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) ("the Amending Act") relevantly to exclude State taxes, including land taxes, that were payable from 1 January 2018 from the scope of s 5(1) of the ITAA. Thereafter, each of the QLTA and the VLTA was amended to include provisions the broad effect of which is that, if the provisions that imposed the obligation to pay additional land tax remained inoperative by reason of s 109 of the *Constitution*, then new additional land tax was imposed in the same amounts and on the same terms as had been purported to be imposed before the amendments.[4]

6 The other parties to and the interveners in the Global Proceedings and the Stott Proceedings contended that the amendment to s 5(1) of the ITAA, either in its own right or when taken with those amendments to the QLTA and the VLTA, removed the GG Entities' and Mr Stott's rights to recover so much of the additional land tax that was payable (and paid) after 1 January 2018 or created an offset that rendered those rights valueless.

7 Pursuant to leave granted by Jagot J, the parties agreed to state questions of law in each proceeding in the form of a special case for the opinion of the Full Court.[5] Three principal issues emerged, the resolution of which is determinative of the questions raised by the special cases.

8 The first issue, which only arises in the Global Proceedings, is whether the Amending Act is supported by s 51(xxix) of the *Constitution* (ie, the external

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3 There was an immaterial qualification in relation to the New Zealand Convention: ITAA, s 6B.

4 QLTA, s 104; VLTA, s 106A.

5 *High Court Rules 2004* (Cth), r 27.08.1.

affairs power). The answer is that the Amending Act and s 5(1) of the ITAA as amended by the Amending Act are both supported by s 51(xxix).

9 The second issue is whether, having regard to the decision of this Court in *University of Wollongong v Metwally*,[6] the amendments made to the ITAA by the Amending Act have retroactive effect to remove the inconsistency that existed prior to 8 April 2024 between s 5(1) of the ITAA and the provisions of the QLTA and VLTA that imposed the obligation on the GG Entities and Mr Stott to pay additional land tax on or after 1 January 2018. For the reasons that follow, *Metwally* should be reopened and overruled and the Amending Act had that retroactive effect.

10 The third issue is whether, having regard to the effect of the amendments made by the Amending Act on the GG Entities' and Mr Stott's rights to recover the additional land tax that was payable and paid on or after 1 January 2018, the Amending Act is a law with respect to the acquisition of property within the meaning of s 51(xxxi) of the *Constitution* and therefore invalid as just terms were not provided for the acquisition. For the reasons that follow, it was not a law with respect to the acquisition of property.

11 The balance of the judgment is structured as follows:

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6 (1984) 158 CLR 447.

International Tax Agreements Act 1953 **(Cth)**

12 At all relevant times, s 5(1) of the ITAA provided:

> "Subject to this Act, on and after the date of entry into force of a provision of an agreement mentioned below, the provision has the force of law according to its tenor.
>
> Note 1: The table also lists some provisions of this Act that relate to the agreement.
>
> Note 2: Some current agreements are given the force of law by other provisions of this Act."

13 As suggested by Note 1, the provision included a table listing various bilateral agreements and treaties between Australia and other countries concerning

taxation, which are given the force of law. The table also listed particular provisions of the Act relating to each specific agreement to which s 5(1) is subject.[7]

14 The German Agreement and the New Zealand Convention (together, "the Agreements") are two of the agreements given the force of law by s 5(1).[8] The Agreements are almost identical. Article 1(1) of the Agreements provided that they apply to persons who are residents of one or both of the Contracting States. Article 2 of the Agreements described the taxes covered by them which, in the case of Australia, corresponds with the definition of "Australian tax" in s 3(1) of the ITAA, which relevantly included income tax and fringe benefits tax.

15 Article 24 of the German Agreement relevantly provided:

"Non-discrimination

1 Nationals of a Contracting State shall not be subjected in the other Contracting State to *any taxation or any requirement connected therewith, which is other or more burdensome* than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

...

4 Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to *any taxation or any requirement connected therewith which is other or more burdensome* than the taxation and connected requirements to which other similar enterprises of the

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7 See, eg, ITAA, ss 6-11ZI.

8 ITAA, ss 3AAA, 5(1). Although, as noted, there is an immaterial qualification in relation to New Zealand: ITAA, s 6B.

first-mentioned State in similar circumstances are or may be subjected.

5 The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of *every kind and description*." (emphasis added)

16 There are immaterial differences between this Article and Art 24 of the New Zealand Convention.[9] Like this Article, Art 24 of the New Zealand Convention extended its protection to requirements "connected" with taxation and "taxes of every kind and description",[10] including taxes imposed by State legislation.

The Amending Act

17 On 8 April 2024, s 5 of the ITAA was amended by the Amending Act, which, by cl 1[11] of Sch 1, inserted s 5(3) as follows:

> "The operation of a provision of an agreement provided for by subsection (1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax, unless expressly provided otherwise in that law."

18 Insofar as s 5(1) gave force of law to Art 24 of the Agreements, the effect of s 5(3) is to confine that Article's operation to Australian tax as defined in s 3(1) of the ITAA and to exclude the operation of those agreements upon other taxes imposed by the Commonwealth as well State and Territory taxes (unless the relevant law otherwise provides).

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9 The New Zealand Convention refers to taxation and connected requirements that are "more burdensome" rather than taxation and connected requirements which are "other or more burdensome" as referred to in the German Agreement.

10 New Zealand Convention, Art 24(7).

11 The special cases referred to the provisions in Sch 1 to the Amending Act as "clauses", when they are in fact "items". For consistency with the framing of the special cases, we will refer to "clauses".

19 The only other substantive provision of the Amending Act was cl 2 of Sch 1, which addressed the temporal application of the amendment to s 5 of the ITAA by the inclusion of s 5(3). Clause 2 of Sch 1 provided as follows:

> "The amendment made by this Schedule applies in relation to:
>
> (a) taxes (other than Australian tax) payable on or after 1 January 2018; and
>
> (b) taxes (other than Australian tax) payable in relation to tax periods (however described) that end on or after 1 January 2018."

The Global Proceedings

20 At relevant times, s 7 of the QLTA imposed on the "owner" of "taxable land" a liability for land tax "at midnight on 30 June immediately preceding the financial year".[12] For a company or trustee that owns taxable land, land tax is imposed at the "general rate".[13] "[I]f the company or trustee is a foreign company or a trustee of a foreign trust", additional land tax is imposed at a "surcharge rate" ("the Foreign Surcharge Rate").[14]

21 DWS Grundbesitz GmbH ("DWS") is a company incorporated in Germany and a resident of that country for the purposes of German income tax law. As such, DWS was a "foreign person" and a "foreign company" within the meaning of the QLTA.[15] Each of the GG Entities was incorporated in Australia, was the trustee of a unit trust and at the relevant times was, in its respective capacity as trustee, an "owner" of property in Queensland within the meaning of the QLTA. The shares in the GG Entities and the units in those trusts were ultimately owned or controlled

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12 QLTA, ss 7, 8.

13 QLTA, s 32(1)(b)(i), Sch 2, Pt 1.

14 QLTA, s 32(1)(b)(ii), Sch 2, Pt 2.

15 QLTA, ss 18B(1)(a), 18D(b).

by DWS. As a consequence, both of the GG Entities were "foreign companies" within the meaning of the QLTA[16] and the trustees of a "foreign trust".[17]

22 In February 2021, the GG Entities were issued with land tax assessments made under the *Taxation Administration Act 2001* (Qld) ("the TAA (Qld)") for the 2020-2021 financial year that comprised land tax levied at the general rate and additional land tax levied at the Foreign Surcharge Rate. Assessments for land tax were levied and issued on the same basis for the 2021-2022 financial year. The GG Entities paid those assessments, which included additional land tax levied at the Foreign Surcharge Rate ("the Global additional land tax").

23 Pursuant to s 63 of the TAA (Qld), the GG Entities objected to the assessments on the basis that in their application to the GG Entities the provisions of the Queensland laws pursuant to which they were made were inconsistent with the ITAA. The respondent to the Global Proceedings, the Commissioner for State Revenue of Queensland ("the Qld Commissioner"), disallowed the objections. Pursuant to ss 69(2) and 70 of the TAA (Qld), the GG Entities appealed to the Supreme Court of Queensland against the Qld Commissioner's decisions.

24 As noted, on 8 April 2024 the Amending Act came into force. On 20 November 2024, representative proceedings were commenced in the Federal Court of Australia seeking restitution from the State of Queensland of land tax paid at the Foreign Surcharge Rate and interest. The "group members"[18] included the GG Entities.

Further imposition of land tax

25 On 28 February 2025, the QLTA was amended by the inclusion of s 104, which relevantly provided:

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16 QLTA, s 18B(1)(b).

17 QLTA, s 18C(1).

18 *Federal Court of Australia Act 1976* (Cth), s 33A.

"**Imposition of land tax payable 30 June 2019 to 8 April 2024 – foreign company or trustee of foreign trust**

(1) This section applies if –

(a) land tax was purportedly imposed for a financial year on taxable land at the rate (the ***surcharge rate***) mentioned in section 32(1)(b)(ii) as in force when the liability for the land tax arose; and

(b) the land tax was purportedly payable on or after 30 June 2019 and before 8 April 2024; and

(c) the purported imposition of land tax on the taxable land at the surcharge rate was invalid only because the provisions of this Act that purportedly imposed the land tax were to any extent invalid or inoperative under the Commonwealth Constitution, section 109 because of an inconsistency with a provision of an agreement given the force of law by the *International Tax Agreements Act 1953* (Cwlth), section 5(1).

(2) Land tax at the surcharge rate is imposed on the taxable land.

...

(8) In this section –

purported land tax, in relation to taxable land, means land tax referred to in subsection (1) that was purportedly imposed on the taxable land."

26 This provision is only engaged if land tax was (purportedly) imposed at the Foreign Surcharge Rate and was (purportedly) payable in the period referred to in s 104(1)(b), but that imposition was invalid only because of the reason specified in s 104(1)(c) ("the purported land tax"). In that event, land tax at the Foreign Surcharge Rate was (again) imposed.[19] That land tax is taken to have arisen and to

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19 QLTA, s 104(2).

have always arisen at the same time as the purported land tax,[20] is payable and is taken to have always been payable by the person who would have been liable if the purported land tax had been validly imposed,[21] and is and is taken to have always been the same amount as the purported land tax.[22] Further, anything done or omitted to be done by a person in relation to the purported land tax has and is taken to have always had the same force and effect as if it were done or omitted to be done in relation to the land tax imposed by s 104(2).[23] For example, a payment made in relation to the purported land tax is taken to be a payment in relation to the land tax imposed by s 104(2).

27 Also on 28 February 2025 the TAA (Qld) was amended by the inclusion of s 189, which was applicable if s 104 applied and an assessment of a taxpayer's liability was made or purportedly made in relation to the purported land tax under the QLTA.[24] If s 189 applied, an assessment of the purported land tax is and is taken to have always been an assessment of the land tax imposed under s 104(2) of the QLTA.[25] The rights and liabilities of any person in relation to an assessment of the purported land tax and anything done or omitted to be done or amounts paid in relation to those assessments were addressed in a similar way to s 104.

Proceedings in this Court

28 On the application of the Attorney-General for the State of Queensland, on 26 August 2024 the appeals to the Supreme Court of Queensland against the Qld Commissioner's disallowance of the objections to the original assessments of

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20 QLTA, s 104(3).

21 QLTA, s 104(4).

22 QLTA, s 104(5).

23 QLTA, s 104(7).

24 TAA (Qld), s 189(1).

25 TAA (Qld), s 189(2).

land tax imposed under s 7 of the QLTA were removed into this Court[26] (ie, the Global Proceedings).

The Stott Proceedings

29 At midnight on 31 December in the year preceding each of the 2016 to 2024 tax years, Mr Stott was an "absentee person" within the meaning of s 3(1) of the VLTA because he was not an Australian citizen or resident, did not ordinarily reside in Australia and was absent from Australia on 31 December in the years between 2015 and 2023, inclusive. As Mr Stott was also an "owner" of land, he was at the relevant times an "absentee owner" of land for the purposes of the VLTA.[27] Section 104B of the VLTA obliged a person who was an absentee owner on 31 December of each preceding year to lodge a written notice and associated documents with the Commissioner for State Revenue ("the Victorian Commissioner") before 15 January of the following year.

30 Pursuant to the *Taxation Administration Act 1997* (Vic) ("the TAA (Vic)"), the Victorian Commissioner assessed an owner's liability for land tax based on the total taxable value of all taxable land of which they were the owner at midnight on 31 December immediately preceding that tax year[28] and by applying the applicable rate of land tax specified in Schedule 1 to the VLTA.[29] With effect for the tax year beginning 1 January 2016 and thereafter, the applicable rate of land tax imposed on an absentee owner[30] had been higher than the general rates applied to other owners of land[31] and the surcharge rates applied to land held by owners subject to a trust.[32]

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26 *Judiciary Act 1903* (Cth), s 40(1).

27 VLTA, ss 3(1), 10(1)(a).

28 TAA (Vic), s 8; VLTA, s 36(1).

29 VLTA, ss 35(1), 36(3).

30 VLTA, Sch 1, Pt 4.

31 VLTA, Sch 1, Pt 1.

32 VLTA, Sch 1, Pt 3.

31 On 24 October 2016, Mr Stott notified the Victorian Commissioner of his status as an absentee owner. In February 2017, the Victorian Commissioner reassessed Mr Stott's liability to pay land tax for the 2016 and 2017 tax years by applying the applicable rate for an absentee owner. Thereafter, the Victorian Commissioner made assessments for each subsequent tax year up to and including the 2024 tax year. Mr Stott paid the assessments for the 2016 and 2017 tax years prior to 1 January 2018 and the remainder thereafter ("the LTS Payments").

32 In February 2024, Mr Stott and another person commenced representative proceedings in the Federal Court seeking, in the case of Mr Stott, restitution of the LTS Payments.

33 On 4 December 2024, after the Amending Act came into force, the amendments that added s 106A to the VLTA, which is not relevantly different to s 104 (and s 105) of the QLTA, commenced.[33] Similar to those provisions of the QLTA, s 106A of the VLTA was only engaged if land tax was (purportedly) imposed by reference to the absentee owner surcharge rate or the surcharge rate for absentee trusts, that (additional) land tax was purportedly payable on or after 1 January 2018 and before 8 April 2024 and the purported imposition of that (additional) land tax was invalid only because the provisions of the VLTA were to any extent invalid or inoperative under s 109 of the *Constitution* by reason of inconsistency with a provision of a tax agreement given force of law by s 5(1) of the ITAA. The remaining provisions of s 106A were functionally identical to s 104(2)-(8) of the QLTA. The TAA (Vic) was also amended to include a provision[34] that was not relevantly different to s 189 of the TAA (Qld).[35]

Proceedings in this Court

34 In July 2024, Mr Stott commenced proceedings in the original jurisdiction of this Court against the Commonwealth of Australia and the State of Victoria (ie, the Stott Proceedings). By an amended statement of claim filed on 3 December 2024 he sought declaratory relief to the effect that the provisions of the VLTA that imposed the obligation to make the LTS Payments and lodge a notice of his status

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33 *State Taxation Further Amendment Act 2024* (Vic), s 42.

34 TAA (Vic), s 135A.

35 *State Taxation Further Amendment Act*, s 54.

as an absentee owner were invalid by force of s 109 of the *Constitution*. He also sought a declaration to the effect that the amendments to the VLTA including s 106A are invalid by force of s 109 of the *Constitution* to the extent that they purported to impose (or revive) a legal liability on Mr Stott for the LTS Payments paid and payable after 1 January 2018 ("the post-2018 LTS Payments") or the requirement to lodge a notice of his status as an absentee owner.

Prior inconsistency (Question 1 in the Global Proceedings and the Stott Proceedings)

35 Question 1 in the Global Proceedings is whether, prior to the commencement of the Amending Act, the provision of the QLTA imposing land tax at the Foreign Surcharge Rate[36] was invalid, in the sense of being inoperative, in its application to the GG Entities by force of s 109 of the *Constitution* because of its inconsistency with s 5(1) of the ITAA (insofar as it gives effect to Art 24 of the German Agreement).

36 Question 1 in the Stott Proceedings similarly asks whether, prior to the commencement of the Amending Act, those provisions of the VLTA that imposed a liability on Mr Stott to make the LTS Payments[37] and required that he lodge a notice and accompanying documents as an "absentee owner"[38] were invalid or inoperative in their application to him by force of s 109 of the *Constitution*, by reason of their being inconsistent with Art 24(1) of the New Zealand Convention as given legislative force by s 5(1) of the ITAA.

37 The parties agreed that Question 1 in their respective special cases should be answered "yes". However, as "[q]uestions of the validity of a law cannot be decided by agreement of the parties",[39] it is necessary to explain briefly why that answer is correct.

38 Section 109 of the *Constitution* provides that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the

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36 QLTA, s 32(1)(b)(ii).

37 VLTA, ss 7, 8, 35, Sch 1, cll 4.1-4.5.

38 VLTA, s 104B.

39 *Unions NSW v New South Wales* (2023) 277 CLR 627 at 645 [33].

former shall, to the extent of the inconsistency, be invalid". The provision is only engaged by a law within Commonwealth legislative power and an otherwise valid law of the State.[40] Where there is an inconsistency, the provision resolves the inconsistency by affording paramountcy to the Commonwealth law and rendering the State law "invalid" to the extent of the inconsistency.[41] The type of invalidity effected by s 109 does not render the State law void or beyond State legislative power but instead renders the State law "inoperative". On and from the Commonwealth law ceasing to have effect, the State law resumes its full force and effect.[42]

39 The authorities in this Court describe two approaches that might be taken to determining whether an inconsistency within the meaning of s 109 has arisen,[43] although they should be seen as different aspects of the single concept of inconsistency.[44]

40 The first approach is often referred to as "direct inconsistency" and involves considering whether a State law would alter, impair or detract from the operation of the Commonwealth law.[45] The second approach is usually referred to as

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40 *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 573; *Gerhardy v Brown* (1985) 159 CLR 70 at 81.

41 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 446 [29].

42 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 286, cited in *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 464-465.

43 *Outback Ballooning* (2019) 266 CLR 428 at 446 [31], referring to *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630, *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28], *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14], *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [39]; cf *Outback Ballooning* (2019) 266 CLR 428 at 456-460 [65]-[73], 472-473 [105].

44 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260, 280.

45 *Outback Ballooning* (2019) 266 CLR 428 at 447 [32].

"indirect inconsistency" and involves considering "whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'".[46] A law of that kind is often described as "'cover[ing] the field'" which it occupies or "'cover[ing] the subject matter'"[47] with which it deals such that there is no scope for the operation of a State law dealing with the same subject matter.[48]

41 Whichever of those approaches might be considered to provide the better explanation, an inconsistency has never been doubted to exist between a Commonwealth law which operates expressly to exclude the operation of a specified category of State law and a State law within the category specified.[49] Thus, there was clearly an inconsistency between Art 24 of the Agreements as given the force of law by s 5(1) of the ITAA and the higher rates imposed by the two land tax regimes on enterprises owned or controlled by residents of Germany and on nationals of New Zealand. As noted, by reason of their ownership and control by DWS, the GG Entities are "[e]nterprises of a Contracting State" that are wholly owned and controlled by a resident of Germany for the purposes of Art 24(4) of the German Agreement. The QLTA subjected those enterprises to taxation that was more burdensome than the taxation to which the QLTA subjected similar Australian enterprises, being those that were not "a foreign company or a trustee of a foreign trust" under the QLTA, in similar circumstances. The effect of the VLTA was that, as a national of New Zealand, Mr Stott was subject to taxation more burdensome than the taxation to which Australian nationals were subject in otherwise the same circumstances. Further, in being obliged to lodge a notice and associated documents concerning his status as an absentee owner, Mr Stott was

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46 *Outback Ballooning* (2019) 266 CLR 428 at 447 [33], quoting *Ex parte McLean* (1930) 43 CLR 472 at 483.

47 *Outback Ballooning* (2019) 266 CLR 428 at 447 [33], quoting *McLean* (1930) 43 CLR 472 at 483.

48 *Outback Ballooning* (2019) 266 CLR 428 at 447 [33].

49 *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 56; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 465; *Native Title Act Case* (1995) 183 CLR 373 at 467-468; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 644 [91].

subjected by the VLTA to a more burdensome requirement connected to taxation than those requirements connected to taxation of Australian nationals in otherwise the same circumstances.

42 Thus, Question 1 in both special cases concerns a circumstance that is an exemplar of the application of s 109, namely a Commonwealth law conferring an immunity and State laws infringing it.[50] However the inconsistency is characterised, the relevant State laws impaired or detracted from the operation of the Commonwealth law.

43 Question 1 in both cases should be answered "yes".

External affairs power (Question 2 in the Global Proceedings)

44 Question 2 in the Global Proceedings is whether "s 5(3) of the [ITAA] (alternatively, cl 1 of Sch 1 to the [Amending Act]), insofar as it operates by reference to a provision contained in a law of a State, [is] supported by any head of Commonwealth legislative power".

45 Many of the provisions of the international agreements given the force of law by s 5(1) of the ITAA concern taxes and associated obligations imposed by laws of the Commonwealth. To that extent, s 5(1) is a law with respect of taxation within the meaning of s 51(ii) of the *Constitution*. However, to the extent that s 5(1) of the ITAA gives the force of law to a provision of an international tax agreement that operates upon taxes imposed by a law of a State, it is not supported by s 51(ii) of the *Constitution*, it being accepted that the subject matter of s 51(ii) does not include State taxation.[51] Article 24 of the German Agreement in its application to taxes imposed by the QLTA is such a provision.

46 Nevertheless, in giving effect to obligations imposed by agreements or treaties between the Executive and foreign countries, including Art 24 of the German Agreement, s 5(1) of the ITAA is also a law with respect to external affairs within the meaning of s 51(xxix) of the *Constitution*. The external affairs power empowers the Commonwealth Parliament to enact laws that are reasonably

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50 *Botany Municipal Council* (1992) 175 CLR 453 at 464.

51 *Victoria v The Commonwealth* (1957) 99 CLR 575 at 614; *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 221.

capable of being considered appropriate and adapted to implementing a treaty prescribing a regime affecting a domestic subject matter such as taxation.[52]

47 The GG Entities contend that, by limiting the operation of s 5(1) in implementing agreements such as the German Agreement, s 5(3) of the ITAA is not reasonably capable of being considered as appropriate and adapted to the implementation of such agreements, and thus is not a law with respect to external affairs and is invalid insofar as it operates by reference to a law of a State. They contend that s 5(3) contradicts the intended operation of the German Agreement and impermissibly leaves the degree of implementation of its provisions to depend on the terms of other Commonwealth, State or Territory laws as enacted from time to time.

48 The GG Entities seek to draw support for these contentions from the following observations of Brennan J in *Gerhardy v Brown*:[53]

> "When the Commonwealth Parliament, in performance of an international treaty obligation, introduces the provisions of an international convention into Australian municipal law, it is beyond the limits of the power conferred by s 51(xxix) of the Constitution for the Commonwealth Parliament to enact a law that operates, or that permits a State law to operate, in a manner inconsistent to any substantial extent with the operation which international law intends the Convention provisions to have."

49 This passage from *Gerhardy* should be considered against the explanation of the principle it describes provided by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v Commonwealth (Industrial Relations Act Case)*.[54] Their Honours approved a statement by Deane J in *The Commonwealth v Tasmania (The Tasmanian Dam Case)*[55] to the effect that, while a law under s 51(xxix) may partly carry a treaty into effect and leave it to the States or

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52 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 486-487.

53 (1985) 159 CLR 70 at 119.

54 (1996) 187 CLR 416.

55 (1983) 158 CLR 1.

executive action to implement the remainder of its terms or leave them unperformed,[56] a law that contains "significant provisions which are inconsistent with" the terms of the treaty is "extremely unlikely" to be characterised as a law with respect to external affairs.[57] Their Honours articulated the relevant principle as follows:[58]

> "Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention."

50 The application of this principle does not involve a simple comparison of particular provisions of the impugned Commonwealth law against a particular provision of a treaty and the invalidation of so much of the former that does not fully implement the latter. Instead, it involves determining whether, overall, the Commonwealth law's implementation of the treaty was so deficient as to preclude the law being characterised as a measure implementing the relevant treaty and thus a law with respect to external affairs.

51 An example of the application of this principle is *R v Burgess; Ex parte Henry*,[59] where the "basal principle" of air navigation regulations was held to contain "so important a departure from the requirements" of an international convention for the regulation of aerial navigation as to be incapable of being supported by an empowering provision which relied on the external affairs power.[60] By contrast, in *The Tasmanian Dam Case*, the *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) only implemented Australia's protection obligations under the relevant treaty in respect of a portion of the land which was the subject of protection and conservation obligations under the

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56 *Industrial Relations Act Case* (1996) 187 CLR 416 at 488.

57 *Industrial Relations Act Case* (1996) 187 CLR 416 at 488.

58 *Industrial Relations Act Case* (1996) 187 CLR 416 at 489.

59 (1936) 55 CLR 608.

60 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 674; see also at 645-655, 696.

relevant treaty.[61] Those regulations were nevertheless found to be supported by the external affairs power.[62]

52 One difficulty with the GG Entities' attempt to apply the above principle from the *Industrial Relations Act Case* to the present case is that they only seek to invalidate s 5(3) while preserving s 5(1) in its unamended form. However, the principle from the *Industrial Relations Act Case* is not to be applied to s 5(3) in isolation but instead to s 5(1) as amended by or operating with s 5(3). This is so because, as a general proposition, the power to make laws includes the power to unmake or repeal them,[63] such that a law that repeals (or limits the operation of) a valid law is usually supported by the head of power that supported the law so repealed (or limited) unless there is some constitutional limitation on the power to effect the repeal (or limitation).[64] In its unamended form, s 5(1) is supported by s 51(xxix) and no relevant constitutional limitation is said to be engaged by its repeal or limitation in scope, save for s 51(xxxi), which is addressed below. It follows that the Commonwealth Parliament has the authority to pass a law repealing or limiting s 5(1). Where the latter course is taken, the provision as amended must then be examined to determine if it is (still) supported by s 51(xxix). If it is not then, subject to discerning any intention to preserve its unamended operation if its amended form is found to be invalid, the whole provision must be struck down.

53 The effect of s 5(3) of the ITAA is to limit the scope of s 5(1) in its implementation of the various international agreements, including the German Agreement, to Australian tax and, relevantly, to exclude State taxes from the application of those agreements. This does not amount to a relevant form of "inconsistency" between s 5(1) and (3), on the one hand, and the German Agreement, on the other, of the kind contemplated by the *Industrial Relations Act*

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61 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 233-234, 265-266.

62 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 138-139, 178-179, 233-234, 267-268.

63 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355 [13], 368-369 [47], 372 [57], 376 [72].

64 *Kartinyeri* (1998) 195 CLR 337 at 356-357 [15], 368-369 [47]; *Shergold v Tanner* (2002) 209 CLR 126 at 135 [26]. See [94] below.

Case. The substantive provisions of that agreement, including Art 24, can be applied even if their scope is limited to Australian tax. Section 5(1) continues to incorporate into domestic law the core operation of the specified agreements, including the German Agreement, with respect to Australian tax. In that respect there is a partial implementation of the German Agreement. Section 5(3) simply reduces the ambit of the implementation of Art 24 of the German Agreement as a matter of domestic law. Despite that reduced ambit, s 5 of the ITAA remains reasonably capable of being considered appropriate and adapted to implementing the German Agreement. Put another way, there is no deficiency in the implementation of the German Agreement that is so substantial as to deny s 5(1) the character of a measure implementing that agreement.

54 Contrary to the GG Entities' submissions, no analogy may be drawn to the facts of *Burgess*, where the relevant regulations were made "upon the wrong assumption that the Commonwealth Parliament has full power to legislate with respect to air navigation" and made provision with respect to matters that had no foundation in the treaty.[65]

55 As amended, s 5 of the ITAA is a law with respect to external affairs. Question 2 in the Global Proceedings should be answered "yes".

Revival of inoperative taxes and *Metwally* (Question 3 in the Global Proceedings and Question 2 in the Stott Proceedings)

56 These questions reduce to whether s 5(3) of the ITAA and cl 1 of Sch 1 (when read with cl 2 of Sch 1) to the Amending Act are effective to revive the operation of those provisions of the QLTA that purportedly imposed the Global additional land tax on the GG Entities (without regard to s 104 of the QLTA) and those provisions of the VLTA that purportedly imposed the obligation to pay the post-2018 LTS Payments on Mr Stott (without regard to s 106A of the VLTA). To answer these questions, it is necessary: first, to construe the relevant provisions to determine whether they have that operation; if so, to identify whether that operation is precluded by this Court's decision in *Metwally*; and if so, to consider whether *Metwally* should be reopened and overruled.

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65 *Burgess* (1936) 55 CLR 608 at 646-647, 670; see also at 647-654, 673-675.

The parties' submissions

57 Mr Stott contended that Question 2 in the Stott Proceedings should not be addressed before Question 3 in those proceedings, which asks whether s 5(3) is invalid in its application to him in relation to the post-2018 LTS Payments on the basis that it is a law with respect to the acquisition of property within the meaning of s 51(xxxi) of the *Constitution* and just terms were not provided for the acquisition. He contended that Question 2 is addressed to the operation of s 109 of the *Constitution* and the validity of s 5(3) should be addressed first as s 109 is only engaged by a valid Commonwealth law.[66] Thus Mr Stott submitted that Question 2 does not arise but, if it is reached, the effect of *Metwally* is that s 5(3) and cl 2 of Sch 1 could not undo the inconsistency that previously existed, and *Metwally* should not be reopened or overruled. The GG Entities' submissions in the Global Proceedings were not relevantly different.

58 Victoria submitted that the effect of *Metwally* is that s 5(3) cannot operate to revive taxes imposed by laws passed prior to 8 April 2024[67] but can operate on laws enacted after 8 April 2024 that impose taxes referred to in cl 2 of Sch 1. Victoria contended that, in that respect, s 5(3) simply "clear[s] the way" by prospectively removing the inconsistency that previously arose so as to allow State laws to be enacted free from any inconsistency with Commonwealth law.[68] Victoria submitted that s 106A of the VLTA is such a provision and the questions in the special case should be answered by reference to the operation and effect of that provision. The Qld Commissioner made the same submission by reference to the operation and effect of s 104 of the QLTA (and s 189 of the TAA (Qld)). The Attorney-General for South Australia, intervening, supported those submissions but also submitted that, if the application to reopen *Metwally* were reached, leave to reopen should be refused.

59 The Commonwealth submitted that s 5(3) and cl 2 of Sch 1 had both a retroactive and retrospective operation. The Commonwealth submitted that the

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66 See [38] above.

67 The date the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) commenced.

68 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 469; *Native Title Act Case* (1995) 183 CLR 373 at 455.

Court need only address the retrospective operation of these provisions and answer the questions concerning s 104 of the QLTA and s 106A of the VLTA. Otherwise, the Commonwealth submitted that the retroactive effect of s 5(3) and cl 2 of Sch 1 is such that they operate to remove the inconsistency that previously existed to render inoperative the provisions that imposed on the GG Entities the obligation to pay the Global additional land tax and on Mr Stott the obligation to make the post-2018 LTS Payments. The Commonwealth submitted that, to the extent that *Metwally* precludes s 5(3) and cl 2 of Sch 1 from having that effect, it was wrongly decided and should be overruled, a position supported by the Attorney-General for Western Australia, intervening. The Attorney-General for New South Wales, intervening, submitted that *Metwally* could be distinguished but, if it could not be, it should be reopened and overruled.

60 It is not necessary to resolve the dispute about whether Question 2 or Question 3 in the Stott Proceedings should be addressed first. The analysis below of whether s 5(3) of the ITAA in its retroactive effect is a law with respect to the acquisition of property addresses all of the permutations by which that issue may arise.

Construction of s 5(3)

61 The parties' submissions raised an issue of construction concerning the temporal operation of s 5(1) as amended by s 5(3). In particular, does cl 2 of Sch 1 give s 5(3) a "retroactive" operation in respect of the taxes referred to in cl 2 of Sch 1; ie, does it "operate[] backwards" to "change[] the law from what it was" by reviving the provisions that imposed an obligation on the GG Entities to pay the Global additional land tax and on Mr Stott to make the post-2018 LTS Payments from the time at which they were purportedly imposed?[69] An alternative construction is that cl 2 of Sch 1 only gives s 5(3) a "retrospective" effect[70] in the sense that it authorises a law enacted after 8 April 2024 to impose new taxes (other than Australian tax), payable on or after 1 January 2018 or applying to tax periods ending on or after 1 January 2018, free of s 5(1) and the agreements to which it gives effect.

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69 *Stephens v The Queen* (2022) 273 CLR 635 at 651 [29], quoting *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 at 381 [39].

70 *Stephens* (2022) 273 CLR 635 at 651 [29].

62 This distinction between retroactive and retrospective laws was described in *Stephens v The Queen* with the caveat that it should not distract "from the underlying principle ... concerning how to interpret the temporal operation of legislation",[71] specifically the presumption against interpreting legislation in a manner that "would conflict with recognized principles that [the Commonwealth] Parliament would be prima facie expected to respect".[72] The force of that presumption is greater the more fundamental the rights and the greater the extent to which they would be infringed by a retrospective or retroactive law.[73] Moreover, there are degrees of retroactivity.[74] While the terminology "retroactive" and "retrospective" will be adopted, the ultimate question is not whether a statute is to be labelled "retroactive" or "retrospective", but what is the statute's temporal operation in a particular context?

63 The retroactive construction is more consonant with the text of s 5(3) and cl 2 of Sch 1, construed in context and in light of its purpose. As already noted, s 5(3) operates to limit the scope of s 5(1) so that it does not apply to anything inconsistent with "a law" of the Commonwealth, State or Territory "that imposes a tax" (other than Australian tax). Clause 2 of Sch 1 provides for s 5(3) to apply to various "taxes payable". As s 5(3) only operates on a law imposing a tax, it follows that cl 2 of Sch 1 makes s 5(3) applicable to *laws* imposing taxes "payable on or after 1 January 2018" or "payable in relation to tax periods (however described) that end on or after 1 January 2018". While such laws could be confined to laws that are only enacted after 8 April 2024, it is difficult to envisage why they would have been intended to be so limited given that s 5(3) also expressly applies to laws of the Commonwealth that impose taxes other than Australian tax. It is inherently unlikely that the Commonwealth Parliament only intended to make those taxes payable if it later enacted a further law reimposing a tax that it already imposed.

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71 *Stephens* (2022) 273 CLR 635 at 651 [29].

72 *Stephens* (2022) 273 CLR 635 at 653 [33], quoting *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

73 *Stephens* (2022) 273 CLR 635 at 653-654 [34].

74 *Stephens* (2022) 273 CLR 635 at 653-654 [34], 654 [37].

Analysed in this way, the text of s 5(3) and cl 2 of Sch 1 displaces the presumption against the form of retroactive operation of this statute described above.[75]

64 The intended retroactive application of s 5(3) in the circumstances specified in cl 2 of Sch 1 is confirmed by resort to the Explanatory Memorandum to the Amending Act.[76] The Explanatory Memorandum referred to the "retrospective nature of [s 5(3)] provid[ing] certainty for affected taxpayers by preserving the status quo that [the] taxes [referred to in cl 2] *have been validly imposed and collected*".[77] The Explanatory Memorandum added that the selection of the starting period in cl 2 of Sch 1 "broadly aligns with the six-year statute of limitation periods generally provided under state and territory legislation".[78]

65 Although the Explanatory Memorandum describes s 5(3) as having a "retrospective" operation, it describes the provision operating retroactively in the sense that has been explained above. If the provision only purported to partially disapply s 5(1) so as to authorise the imposition of taxes described in cl 2 of Sch 1 by a further law enacted on or after 8 April 2024, s 5(3) would not of itself operate to preserve the valid operation of laws pursuant to which taxes had already been imposed and collected before 8 April 2024.

The effect of Metwally *on s 5(3)*

66 It follows that s 5(3) purports to restrict retroactively the scope of s 5(1) in its application to laws imposing taxes (other than Australian tax) as described in cl 2 of Sch 1, including laws enacted prior to 8 April 2024. Does that provision revive so much of the QLTA that imposed on the GG Entities the obligation to pay the Global additional land tax and so much of the VLTA that imposed the obligation on Mr Stott to make the post-2018 LTS Payments?

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75 *Stephens* (2022) 273 CLR 635 at 653-654 [34]-[36].

76 *Acts Interpretation Act 1901* (Cth), s 15AB(1).

77 Australia, House of Representatives, *Treasury Laws Amendment (Foreign Investment) Bill 2024*, Explanatory Memorandum ("Explanatory Memorandum to the Amending Act") at 35 [3.9] (emphasis added).

78 Explanatory Memorandum to the Amending Act at 35 [3.9].

67 Since at least *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* ("the *Credit Tribunal Case*")[79] it has been accepted that a Commonwealth law cannot of its own force deny operational validity to a State law. However, a Commonwealth law can demonstrate an intention to make exclusive provision on a subject matter, thereby engaging s 109, or disclaim such an intention and thereby allow State laws not directly inconsistent with Commonwealth law to operate.[80] It has also been accepted that a provision in a Commonwealth statute evincing an intention not to make exclusive provision on a particular subject matter "cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed".[81] It follows that, if a legislative intention not to make exclusive provision on a particular subject matter were expressed to operate retroactively, the provisions that bring that intention into effect would also not engage s 109 so as retroactively to avoid such a direct inconsistency. None of these principles was in dispute in the Global Proceedings or the Stott Proceedings, although it will be necessary to return to the significance of express statements of legislative intention in the context of s 109.

68 The issues raised by the retroactive operation of s 5(3) on the QLTA and the VLTA are whether a Commonwealth law can retroactively avoid an indirect inconsistency and, so far as a direct inconsistency in the form of a direct collision between a Commonwealth law and a law of the State is concerned, what would ensue if, instead of merely expressing a retroactive legislative intention, the Commonwealth retroactively repealed or amended the Commonwealth law that was said to give rise to the inconsistency?

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79 (1977) 137 CLR 545 at 563.

80 *Credit Tribunal Case* (1977) 137 CLR 545 at 563. See also *Native Title Act Case* (1995) 183 CLR 373 at 466; *Gould v Brown* (1998) 193 CLR 346 at 382-383 [21]-[22]; *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at 527-528 [21]; *Dickson* (2010) 241 CLR 491 at 507 [33].

81 *Credit Tribunal Case* (1977) 137 CLR 545 at 563, citing *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 346-347.

69 In *Viskauskas v Niland*[82] this Court found that Pt II of the *Anti-Discrimination Act 1977* (NSW) ("the ADA") was inconsistent with the *Racial Discrimination Act 1975* (Cth) ("the RDA") because the RDA was intended to be a complete statement of the law relating to racial discrimination.[83] Following *Viskauskas*, the Commonwealth Parliament amended the RDA by inserting a provision which stated that the RDA was not intended "and shall be deemed never to have been intended" to exclude or limit the operation of a particular State's laws, including the ADA.[84]

70 In *Metwally*, a majority of this Court (Gibbs CJ, Murphy, Brennan and Deane JJ) held that this amendment to the RDA did not result in Pt II of the ADA having a valid operation during any period prior to the amendment coming into force. Each of Murphy, Brennan and Deane JJ held that the Commonwealth Parliament could not retroactively undo or alter the invalidating effect that s 109 previously had upon a State law.[85] The reasoning of Gibbs CJ was arguably narrower in that his Honour held that the Commonwealth could not retroactively undo or alter the invalidating effect that s 109 previously had upon a State law by "declaring"[86] or "asserti[ng]" that the relevant Commonwealth law was never intended to exclude the operation of that State law.[87]

71 In dissent, Mason J, with whom Wilson and Dawson JJ relevantly agreed,[88] accepted that, consistent with the *Credit Tribunal Case*, the Commonwealth Parliament could not legislate prospectively or retroactively to provide that a State law which was inconsistent with a Commonwealth law should have, and should

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82 (1983) 153 CLR 280.

83 *Viskauskas v Niland* (1983) 153 CLR 280 at 292.

84 See *Metwally* (1984) 158 CLR 447 at 453.

85 *Metwally* (1984) 158 CLR 447 at 469, 474, 479.

86 *Metwally* (1984) 158 CLR 447 at 455.

87 *Metwally* (1984) 158 CLR 447 at 456.

88 *Metwally* (1984) 158 CLR 447 at 471, 485, 487.

always have had, its full force and effect notwithstanding the inconsistency.[89] However, their Honours held that there is no impediment to the Commonwealth Parliament enacting laws that prospectively or retrospectively (including retroactively) remove the inconsistency upon which s 109 operates,[90] including by evincing a retroactive legislative intention that the enactment was not intended to cover the field or relevant subject matter.[91]

72 Unlike the circumstances of *Metwally*, here the inconsistency that existed prior to the coming into effect of the Amending Act can be characterised as a direct inconsistency, and the Amending Act did not introduce into the ITAA any express statement as to the intended operation of the ITAA upon the QLTA or VLTA (or other legislation) with retroactive effect. Instead, the Amending Act purported to amend the substantive operation of s 5(1) of the ITAA with retroactive effect. This potential basis for distinguishing *Metwally* was raised by the Attorney-General for New South Wales, intervening in both proceedings, and arguably finds support in the judgment of Gibbs CJ. *Metwally* should not be distinguished on that basis.

73 In *Western Australia v The Commonwealth (Native Title Act Case)*[92] and *Spence v Queensland*[93] the principle which *Metwally* is taken as establishing was expressed in terms that clearly reflect the judgments of Murphy, Brennan and Deane JJ,[94] namely that "a law of the Commonwealth cannot retrospectively [or retroactively] avoid the operation of s 109 of the Constitution on a State law that was inconsistent with a law of the Commonwealth".[95] That formulation of the principle also reflects the rationale for s 109 articulated by Gibbs CJ in *Metwally*;

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89 *Metwally* (1984) 158 CLR 447 at 460.

90 *Metwally* (1984) 158 CLR 447 at 460-461.

91 *Metwally* (1984) 158 CLR 447 at 461.

92 (1995) 183 CLR 373 at 454-455.

93 (2019) 268 CLR 355 at 396-397 [34].

94 See *Native Title Act Case* (1995) 183 CLR 373 at 451, 455; *Momcilovic v The Queen* (2011) 245 CLR 1 at 105 [223]; *Spence v Queensland* (2019) 268 CLR 355 at 518-519 [370].

95 *Native Title Act Case* (1995) 183 CLR 373 at 454-455.

namely that s 109 not only adjusts relations between the legislatures of the Commonwealth and the States but enables a citizen to know which of two inconsistent laws he or she is required to observe,[96] a rationale that has since been accepted[97] and which is further addressed below. To distinguish *Metwally* on the basis that it concerned indirect inconsistency whereas the inconsistency that arose here might be considered to be direct inconsistency would risk elevating the distinction between those concepts above its utility as a means of addressing the same constitutional concept of "inconsistency" in s 109 of the *Constitution*.

74 It follows that application of the *Metwally* principle would preclude s 5(3) and cl 2 of Sch 1 from reviving so much of the QLTA that imposed an obligation to pay the Global additional land tax on the GG Entities and so much of the VLTA that imposed the obligation to make the post-2018 LTS Payments on Mr Stott.

The application to reopen and overrule Metwally

75 As noted, many of the submissions contended that it was not necessary for this Court to address the correctness of *Metwally*, instead contending that the questions in the special cases should be answered only by reference to s 104 of the QLTA and s 106A of the VLTA. However, those provisions are only engaged if the provisions of the QLTA purporting to impose the Global additional land tax on the GG Entities and the provisions of the VLTA purporting to impose the obligation to make the post-2018 LTS Payments on Mr Stott remain inoperative by force of s 109 of the *Constitution* after s 5(3) of the ITAA and cl 2 of Sch 1 to the Amending Act came into force on 8 April 2024.[98] As explained above, that premise is based upon the correctness of *Metwally* and thus it follows that the Commonwealth's contention that *Metwally* should be reopened and overruled should be addressed.

76 The Commonwealth's submission that *Metwally* should be reopened and overruled was framed by reference to each of the four factors identified in *John v*

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96 *Metwally* (1984) 158 CLR 447 at 458.

97 *Croome v Tasmania* (1997) 191 CLR 119 at 129-130; *Dickson* (2010) 241 CLR 491 at 503-504 [19]; *Momcilovic* (2011) 245 CLR 1 at 143 [347].

98 QLTA, s 104(1)(c); VLTA, s 106A(1)(c).

Federal Commissioner of Taxation[99] as considerations relevant to an assessment of whether this Court should reopen or depart from its earlier decisions; namely whether: (1) the earlier decision did not rest upon a principle carefully worked out in a succession of cases; (2) there was a difference in the reasoning between the reasons of the justices comprising the majority; (3) the decision had achieved no useful result; and (4) the decision had not been independently acted upon in a manner that militates against its reconsideration. The submission recognised that those factors are not necessarily exhaustive or apposite to every application made to this Court for it to revisit one of its earlier decisions. Implicit in the first two factors is also the force of the reasoning that supports the principle upon which the decision rests.

77 So far as the first two factors are concerned, in *Metwally* Gibbs CJ, Brennan and Deane JJ conceived of s 109 having what the Commonwealth described in its submissions as a "temporally linear" application so that once it is engaged by two contemporaneous laws the result of its application is fixed and immutable from that point onwards[100] or "sterilize[d]"[101] and any attempt to retroactively change the Commonwealth law (or its effect) upon which s 109 operated is ineffective. Their Honours characterised any attempt by the Commonwealth to do so as involving a "fiction" that would deny the "truth"[102] or the "objective fact" of the contemporaneous inconsistency.[103]

78 Mr Stott supported this approach by arguing that *Metwally* is an instance of the application of the principle derived from the *Australian Communist Party v The Commonwealth* in that the existence of inconsistent laws is an objective "constitutional fact" which the Court must determine and which forms the basis upon which s 109 operates.[104] However, the present issue concerns the extent of

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99 (1989) 166 CLR 417 at 438-439.

100 *Metwally* (1984) 158 CLR 447 at 457 per Gibbs CJ, 478 per Deane J.

101 *Metwally* (1984) 158 CLR 447 at 473 per Brennan J.

102 *Metwally* (1984) 158 CLR 447 at 457 per Gibbs CJ, 474 per Brennan J, 478-479 per Deane J.

103 *Metwally* (1984) 158 CLR 447 at 479 per Deane J.

104 (1951) 83 CLR 1 at 205-206, 221, 258, 265.

the Commonwealth Parliament's capacity to retroactively change the content of its own laws and the operation of s 109 on those laws as altered. The Commonwealth Parliament has not purported to "make a conclusive determination on an issue, factual or legal, on which constitutionality depend[s]"[105] or otherwise to direct how s 109 operates.

79 Even though each of Gibbs CJ, Brennan and Deane JJ referred to the capacity of the Commonwealth Parliament to pass retrospective (including retroactive) laws,[106] their Honours' approach of fixing upon only the contemporaneous application of Commonwealth and State law at a particular time so as to "sterilize[]" the outcome of that application as an "objective fact" significantly undermines the Commonwealth Parliament's capacity to enact effective retroactive laws.[107] Thus, Deane J referred to the Commonwealth Parliament passing retroactive laws but only doing so "for itself".[108]

80 Taken to its logical conclusion, their Honours' approach would not only preclude the Commonwealth Parliament passing a law with retroactive effect that removed a past inconsistency between a Commonwealth law and a State law; it would also preclude the Commonwealth Parliament passing a retroactive law that gives rise to a past inconsistency with a State law where no such inconsistency existed previously. If a citizen's entitlement to know which of two laws to observe is violated by a law that purports retroactively to remove an inconsistency, then it is also violated by a law that purports retroactively to create an inconsistency. This approach would restrict the Commonwealth Parliament's capacity to pass effective retroactive laws to such laws concerning those subject areas upon which the States have not yet legislated to inconsistent effect.

81 The other member of the majority, Murphy J, only referred to the rationale of s 109 as a means of resolving a conflict between Commonwealth and State

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105 *Thomas v Mowbray* (2007) 233 CLR 307 at 386 [226], quoting Kenny, "Constitutional Fact Ascertainment" (1990) 1(2) *Public Law Review* 134 at 155.

106 *Metwally* (1984) 158 CLR 447 at 454, 456, 475, 479.

107 See Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 704-706.

108 *Metwally* (1984) 158 CLR 447 at 479.

laws[109] and did not adopt the strictly linear temporal approach to s 109 of Gibbs CJ, Brennan and Deane JJ. His Honour accepted that "[s] 109 does not apply only to laws which are on the statute book at the same time" but also applies to an inconsistency between a State law and a retroactive Commonwealth law because "[o]therwise Parliament's power to legislate retrospectively would be ineffective" if Commonwealth laws did not prevail over otherwise inconsistent State laws.[110] Thus, while his Honour accepted that the Commonwealth Parliament could enact retroactive laws upon which s 109 would operate to invalidate State laws as in force prior to the Commonwealth enactment, his Honour did not accept that retroactive laws passed by the Commonwealth Parliament could engage s 109 to remove a past inconsistency.[111] Why the Commonwealth Parliament could do one and not the other is not clear.

82 Mason, Wilson and Dawson JJ did not refer to any purpose of s 109 beyond ensuring the paramountcy of Commonwealth laws over State laws.[112] Their temporal approach to s 109 was to apply its terms at the time the inquiry is being made about its application. Thus, Dawson J observed:[113]

> "When it is sought to apply s 109, then *at that time the question must be asked whether there is any inconsistency* between the relevant State law and the relevant Commonwealth law. If there is, then under s 109 the State law is inoperative to the extent of the inconsistency. If there is not, then s 109 has no operation and it matters not in my view how the absence of an inconsistency comes about – whether it be because the Commonwealth has passed no law on the relevant subject, or because the Commonwealth has repealed any law which it had on that subject, or because the Commonwealth law has ceased to be in force because of the disappearance of the power (eg, the defence power) to support it. And if the Commonwealth can remove an inconsistency by repealing the law there is

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109 *Metwally* (1984) 158 CLR 447 at 467-468.

110 *Metwally* (1984) 158 CLR 447 at 468.

111 *Metwally* (1984) 158 CLR 447 at 469.

112 *Metwally* (1984) 158 CLR 447 at 460-463, 471, 485.

113 *Metwally* (1984) 158 CLR 447 at 485.

> no reason, in my view, why it cannot do so retrospectively." (emphasis added)

83 Gibbs CJ's rationale for s 109, as giving effect to the citizen's entitlement to know which of two inconsistent laws he or she is required to observe, has been taken up in subsequent cases but not in the context of considering retroactive laws.[114] Whether or not that is truly a rationale for s 109 or merely a consequence or effect of the usual application of s 109 in a context that does not involve retroactive laws,[115] Dawson J's explanation of the temporal operation of s 109 is also consistent with that rationale if it is to be understood as only referring to a citizen making an inquiry about what law was operative at a particular point in time. If the rationale is not to be so understood then, contrary to the statements of the majority in *Metwally*, s 109 would represent a significant limitation on the Commonwealth Parliament's capacity to enact effective retroactive laws.

84 As to the last of the factors identified in *John*, it is significant that no case in this Court since *Metwally* has applied the principle for which it stands, although the principle has been referred to in obiter dicta.[116]

85 In the *Native Title Act Case*,[117] Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ observed:[118]

> "Section 5(1) [of the *Land (Titles and Traditional Usage) Act 1993* (WA) ("the WA Act")] is concerned to confirm the validity of grants of title made after the [RDA] came into operation where those grants purported to extinguish or impair native title. If native title was protected then by the

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114 *Croome* (1997) 191 CLR 119 at 129-130; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 407 [69]; *Dickson* (2010) 241 CLR 491 at 503-504 [19].

115 *Spence* (2019) 268 CLR 355 at 519 [372].

116 *Native Title Act Case* (1995) 183 CLR 373 at 451, 455; *Momcilovic* (2011) 245 CLR 1 at 105 [223]; *Spence* (2019) 268 CLR 355 at 396-397 [34].

117 (1995) 183 CLR 373.

118 *Native Title Act Case* (1995) 183 CLR 373 at 451, citing *Metwally* (1984) 158 CLR 447. See also *Native Title Act Case* (1995) 183 CLR 373 at 455.

> [RDA], only a law of the Commonwealth could be effective to modify the operation of the [RDA] and then only for the future: the effect of s 109 of the Constitution cannot be retrospectively undone".

86 The *Native Title Act Case* addressed the validity and operation of the *Native Title Act 1993* (Cth) ("the NTA"). Section 5(1) of the WA Act purported to confirm the retrospective extinguishment of native title to land the subject of Crown grants in Western Australia and provide certain statutory rights in place of native title.[119] The NTA was assented to after the WA Act. The NTA recognised and protected native title, confirmed the validity of (certain) "past acts", which might otherwise not have been effective to extinguish or impair native title, and gave full force and effect to certain "future acts" which might not otherwise have been effective to extinguish native title.[120] The context for the above passage is that Western Australia contended that, notwithstanding the RDA, the WA Act validly extinguished native title prior to the NTA coming into force so that there was nothing for the NTA to recognise and protect.[121]

87 The above quote from the *Native Title Act Case* was obiter dicta in that the NTA did not purport retroactively to undo the effect of the RDA on inconsistent provisions of State legislation that extinguished or impaired native title. Instead, the NTA prospectively removed any invalidating inconsistency between a State law that might be enacted after the passage of the NTA and purported to validate certain past acts, on the one hand, and the RDA or any other law of the Commonwealth, on the other.[122] Thus it was a particular example of the circumstance contemplated by Murphy J (and Deane J) in *Metwally* of a Commonwealth law "clear[ing]" the way "for the State Parliament to make a fresh State Act to apply retrospectively" that the approach of the minority in *Metwally* would also uphold in the same terms.[123]

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119 *Native Title Act Case* (1995) 183 CLR 373 at 418, 420.

120 *Native Title Act Case* (1995) 183 CLR 373 at 453.

121 *Native Title Act Case* (1995) 183 CLR 373 at 419.

122 *Native Title Act Case* (1995) 183 CLR 373 at 455.

123 *Metwally* (1984) 158 CLR 447 at 469; see also at 479 per Deane J.

88 In any event, if *Metwally* is to be overruled, as it should be, it would not necessarily follow that, if the RDA had been repealed with retroactive effect, that would have resulted in State laws such as the WA Act (or the legislation addressed in *Mabo v Queensland*[124]) that purported to extinguish or affect native title after the RDA came into force in 1975 becoming effective. At the time of the *Native Title Act Case* it had not yet been conclusively established, as it is now, that native title is "property" for the purposes of s 51(xxxi) of the *Constitution*.[125] As noted, s 109 only operates on otherwise valid Commonwealth (and State) laws. If the purported effect of a retroactive repeal or amendment of a Commonwealth law were to result in the revival of a State law that purported to extinguish and thereby acquire existing rights to property, then a real question would arise as to whether the law effecting that repeal or amendment is a law with respect to the acquisition of property within the meaning of s 51(xxxi) in respect of which just terms must be provided.[126] In light of the manner in which Question 4 in the Global Proceedings and Question 3 in the Stott Proceedings are resolved it is unnecessary to consider that issue further.

Metwally *should be reopened and overruled*

89 There were differences in the reasoning of the members of this Court that comprised the majority in *Metwally*. Not only does the principle for which *Metwally* stands not rest upon principles carefully worked out in a succession of cases before or after it was decided, the reasoning is contrary to authorities which have consistently confirmed the capacity of the Commonwealth Parliament to enact (effective) retroactive laws.[127] Further, *Metwally* achieves no useful result in that the means of retroactively avoiding an inconsistency between a Commonwealth law and a State law suggested by the majority is to have the Commonwealth Parliament amend its laws to enable the State Parliament to enact retrospective legislation to the same effect as legislation that it has already enacted. Thus, even assuming that it is a purpose of s 109 to ensure that the citizen may

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124 (1988) 166 CLR 186.

125 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519; 421 ALR 604.

126 See [57] above.

127 *R v Kidman* (1915) 20 CLR 425; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501.

know which of two inconsistent laws they are required to observe, the *Metwally* principle does not advance that purpose. There are no countervailing considerations. *Metwally* concerns a question of "constitutional importance". It is "manifestly wrong".[128] It should be reopened and overruled.

Limits on Commonwealth legislative power to enact retroactive legislation

90 The approach of the minority in *Metwally* to the temporal application of s 109 of the *Constitution* to Commonwealth laws with retroactive or retrospective effect as explained in the passage from the judgment of Dawson J set out above should be accepted. Two particular aspects of that approach should be noted.

91 First, as noted, it was accepted in the *Credit Tribunal Case* and by the minority in *Metwally* that an expressed legislative intention that a Commonwealth law is not intended to make exclusive provision on a particular subject matter is not effective to avoid a direct inconsistency between the Commonwealth law and a State law in the form of a direct collision between laws making it impossible to obey the commands of both.[129] The same would apply to such a legislative intention expressed to operate retroactively. These propositions do not, however, reflect any limitation on Commonwealth legislative power arising from s 109 but instead illustrate the force of the statement in *Work Health Authority v Outback Ballooning Pty Ltd* that the "question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction".[130]

92 Were there to be such a direct collision between an obligation imposed by a Commonwealth law and an obligation imposed by a State law, then an express statement of intention in the Commonwealth law that it was not intended to make exclusive provision on a particular subject matter, or that it was not intended to affect the operation of the relevant provision of the State law, without more, would be ineffective to remove that inconsistency unless that statement, as a matter of construction, qualifies the substantive operation of the Commonwealth law imposing the obligation. The references to Parliamentary "intention" in this context

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128 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

129 (1977) 137 CLR 545.

130 (2019) 266 CLR 428 at 447 [34].

are to be understood as an aspect of the process of statutory construction of the provisions of the relevant legislation as a whole; express legislative statements of the intention of a statutory provision are an important factor in that process but they are not necessarily determinative.[131]

93 As explained, here there was what could be characterised as a direct inconsistency between the Commonwealth law, namely s 5(1) of the ITAA insofar as it gave force of law to Art 24 of the German Agreement and of the New Zealand Convention, and State laws, namely the relevant provisions of the QLTA and the VLTA. The Amending Act did not merely purport to state with retroactive effect that there was no inconsistency. Instead, it removed with retroactive effect the basis for s 109 of the *Constitution* to operate by restricting the scope of s 5(1) of the ITAA.

94 Second, as suggested by the above discussion of the *Native Title Act Case*, the Commonwealth does not have unlimited authority to enact laws that engage s 109, nor unlimited authority to enact retroactive laws. A Commonwealth law, including, and perhaps especially, a law that has retroactive effect to create an inconsistency with a State law, might be beyond Commonwealth legislative power because it infringes an express or implied constitutional prohibition such as would be engaged were the law to significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions, or the actual exercise of those constitutional powers and functions,[132] or to impermissibly interfere with the exercise of judicial power in relation to proceedings that have already proceeded to conviction or judgment,[133] or perhaps are pending.[134]

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131 *Momcilovic* (2011) 245 CLR 1 at 133-134 [315]-[316], 136-137 [327]-[328].

132 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 75; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 232-233.

133 See *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 106, quoted in *New South Wales v Kable* (2013) 252 CLR 118 at 139 [53].

134 See, eg, *Liyanage v The Queen* [1967] 1 AC 259. See also *War Crimes Act Case* (1991) 172 CLR 501 at 533-534, referring to *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88.

However, such potential limits on the Commonwealth's power to legislate retroactively arise from provisions of the *Constitution* other than s 109. While s 109 provides part of the context for ascertaining the purported effect of a Commonwealth law if it is valid,[135] construing a Commonwealth law to ascertain its meaning and effect and then determining whether the operation of that law transgresses constitutional limits are steps that arise at an anterior stage to the application of s 109.

Conclusion on Metwally *and the Amending Act*

95 *Metwally* having been reopened and overruled, it follows that s 5(3) of the ITAA, when read with cl 2 of Sch 1 to the Amending Act, was effective to remove the inconsistency that previously existed between the provision of the QLTA that imposed land tax at the Foreign Surcharge Rate and s 5(1) of the ITAA in respect of the taxes referred to in cl 2 of Sch 1. Question 3 in the Global Proceedings should be answered "yes".

96 Similarly, s 5(3) and cl 2 of Sch 1 are also valid and effective to remove the equivalent inconsistency identified in Question 1 in relation to the provisions that imposed an obligation on Mr Stott to make the post-2018 LTS Payments. Question 2 in the Stott Proceedings should also be answered "yes".

Acquisition of property (Question 4 in the Global Proceedings and Question 3 in the Stott Proceedings)

97 In essence, Question 4 in the Global Proceedings asks whether s 5(3) of the ITAA, when read with cl 2 of Sch 1 to the Amending Act, is invalid in whole or in part because, in its application to the GG Entities' rights of recovery of the Global additional land tax, it is a law with respect to an acquisition of property within the meaning of s 51(xxxi) without the provision of just terms. Question 3 in the Stott Proceedings is to the same effect save that it concerns the plaintiff's rights of recovery of the post-2018 LTS Payments.

98 It follows from the answer to Question 3 in the Global Proceedings, and Question 2 in the Stott Proceedings, that these questions are to be addressed on the basis of the retroactive effect of s 5(3) and cl 2 of Sch 1; ie, that those provisions operate to revive the provisions of the QLTA and the VLTA that imposed the

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135 See *Native Title Act Case* (1995) 183 CLR 373 at 466-468.

obligation on the GG Entities to pay the Global additional land tax and the obligation on Mr Stott to make the post-2018 LTS Payments respectively.

99 Mr Stott submitted that, as choses of action are a form of "property",[136] his restitutionary claim to recover the post-2018 LTS Payments is property for the purposes of s 51(xxxi). He contended that the retroactive operation of s 5(3) either extinguishes, sufficiently impairs, or "leach[es] the economic value of"[137] his restitutionary claims and results in a direct benefit or gain to the State of Victoria so as to give s 5(3) in its retroactive operation a prima facie acquisitive character. Based on the extrinsic materials referable to the passage of the Amending Act,[138] he contended that the purpose of s 5(3) having retroactive effect was to effect an extinguishment of any claim to a refund. He further submitted that, unlike a tax imposed by a law supported by s 51(ii) of the *Constitution*, s 5(3) is supported by s 51(xxix) and s 51(xxxi) abstracts the power to pass laws with respect to the acquisition of property from that head of power.[139]

100 The GG Entities' submissions were to the same effect, save that they also contended that their rights of appeal to the Supreme Court of Queensland against the disallowance of their objections constituted "property" for the purposes of s 51(xxxi).

101 The respondent in each of the Global Proceedings and each defendant in the Stott Proceedings, as well as some of the interveners, disputed the characterisation of s 5(3) as a law with respect to the acquisition of property principally on the basis that it only removes an obstacle to a State law validly imposing taxation. They contended that, while s 5(3) may have removed an element of the restitutionary

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136 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 196 [131].

137 *Smith v ANL Ltd* (2000) 204 CLR 493 at 504 [21].

138 See Explanatory Memorandum to the Amending Act; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 2024 at 685, 778-779, 784; Australia, Senate, *Parliamentary Debates* (Hansard), 26 February 2024 at 414; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 2024 at 4159, 4162.

139 See, eg, *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 15 [12], 31 [61]-[62], 47 [125], 100-101 [256]-[257].

actions that contended that the Global additional land tax and Mr Stott's obligation to make the post-2018 LTS Payments were unlawfully imposed, s 5(3) did not directly extinguish those causes of action. Amongst other matters, it was also contended that the effect of various provisions of the VLTA, the QLTA and the *Limitation of Actions Act 1974* (Qld) (in the Global Proceedings) were such that the GG Entities and Mr Stott did not have any cause of action that could constitute property.

102 The GG Entities responded by submitting that their rights of recovery were protected by s 64 of the *Judiciary Act 1903* (Cth). Mr Stott submitted that the provisions on which Victoria in the Stott Proceedings relied to say that Mr Stott's restitution claims were not "property" in the requisite sense were not picked up and applied by s 79 of the *Judiciary Act* in the representative proceedings commenced in the Federal Court.

103 It is not necessary to address all these points. Instead, Question 4 in the Global Proceedings and Question 3 in the Stott Proceedings can be addressed on the assumption that, absent the retroactive operation of s 5(3), the GG Entities have sufficiently viable choses in action for restitution of the Global additional land tax and Mr Stott has the same in relation to the post-2018 LTS Payments to constitute "property" for the purposes of s 51(xxxi), and that those choses in action will in effect be extinguished if the retroactive operation of s 5(3) is upheld. Nevertheless, as submitted by both Victoria and the Qld Commissioner, in merely reviving State laws imposing discriminatory land taxes, s 5(3) is not a law with respect to the acquisition of property because State laws imposing taxation do not effect an acquisition of property.

Genuine taxation is not acquisition

104 When read with the opening words of s 51 of the *Constitution*, s 51(xxxi) provides that the Commonwealth Parliament shall, subject to the *Constitution*, have power to make laws for the peace, order and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Commonwealth Parliament has power to make laws. This provision has two relevant effects: one being to confer a legislative power to make particular laws with respect to the acquisition of property conditional on the provision of just terms; and the other being to abstract the power to support a law for the acquisition of property at least from the

other legislative powers in s 51.[140] The effect of that abstraction is that s 51(xxxi) is the sole source of power to make any law which has the character of a law with respect to an acquisition of property for any purpose in respect of which the Commonwealth Parliament has power to make any law.[141]

105 In *Mutual Pools & Staff Pty Ltd v The Commonwealth*, Mason CJ nominated, as examples of laws that are not laws with respect to acquisitions of property, laws supported by s 51(xxxiii) which confers legislative power with respect to the acquisition of State railways "on terms arranged between the Commonwealth and the State", laws authorising the exercise of powers with respect to bankruptcy and insolvency by the sequestration of the property of a bankrupt and its vesting in the Official Receiver, laws authorising the forfeiture of prohibited imports or the forfeiture of property as a consequence of a conviction for a criminal offence or breach of a statutory provision and laws relating to the imposition of taxation.[142]

106 In one part of his Honour's judgment in *Mutual Pools*, Mason CJ described these as instances of the *Constitution* manifesting a contrary intention to the abstracting effect of s 51(xxxi).[143] However, given that s 51(xxxi) abstracts at least from the other legislative powers in s 51,[144] these instances are best understood as examples of laws vesting powers the exercise of which does not involve an acquisition of property within the meaning of s 51(xxxi). Thus, s 51(xxxiii) only confers legislative power for the acquisition of railways from a State, "with the

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140 *Yunupingu* (2025) 99 ALJR 519 at 530-531 [15], 531 [17], 566 [186], 568 [197], 586 [268]; 421 ALR 604 at 610-611, 655, 657-658, 679.

141 *Yunupingu* (2025) 99 ALJR 519 at 530-531 [15], 531 [17], 566 [186], 568 [197], 586 [268]; 421 ALR 604 at 610-611, 655, 657-658, 679.

142 (1994) 179 CLR 155 at 170-171.

143 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169.

144 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403, 407; *Yunupingu* (2025) 99 ALJR 519 at 531 [17], 566 [186], 568 [197], 586 [268]; 421 ALR 604 at 610-611, 655, 657-658, 679.

consent of [the relevant] State". A law giving effect to such an acquisition would not be a law with respect to the (compulsory)[145] acquisition of property.

107 Of present relevance is Mason CJ's observation in *Mutual Pools* about laws relating to the imposition of taxation, namely that:[146]

> "because the purpose served by an exercise of the taxation power conferred by s 51(ii) is compulsorily to acquire money for public purposes, a law that relates to the imposition of taxation *will rarely, if ever*, amount at the same time to a law with respect to the acquisition of property within the meaning of s 51(xxxi). Of its nature 'taxation' presupposes the absence of the kind of quid pro quo involved in the "just terms" prescribed by s 51(xxxi)." (emphasis added)

108 This mutual exclusivity between the imposition of taxation and the acquisition of property was accepted by the other members of the Court in *Mutual Pools*[147] and is well established.[148]

109 The possible exception in respect of a law that relates to the imposition of taxation adverted to by Mason CJ in the above passage from *Mutual Pools* arises from the following passage in *Australian Tape Manufacturers Association Ltd v The Commonwealth*:[149]

> "If ... a law did no more than provide that a particular named person was under an obligation to pay to the Commonwealth an amount of money equal to the total value of all his or her property, the law would effect an acquisition of property for the purposes of s 51(xxxi), notwithstanding the

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145 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270-271.

146 *Mutual Pools* (1994) 179 CLR 155 at 170-171 (footnotes omitted).

147 (1994) 179 CLR 155 at 178, 187-188, 197-198.

148 See *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263, 268, 270, 272; *Tooth & Co Ltd* (1979) 142 CLR 397 at 408, 426, 453-454; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60]; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97 at 104 [15].

149 (1993) 176 CLR 480 at 509-510; *Mutual Pools* (1994) 179 CLR 155 at 171, fn 44.

> fact that it imposed merely an obligation to pay money and did not directly expropriate specific notes or coins. In that regard, the comment of a majority of the Court in *MacCormick v Federal Commissioner of Taxation* that a tax is 'no more than the imposition of a pecuniary liability'[150] must be understood in context and does not constitute authority for a general proposition that the imposition of an obligation to pay money can never constitute an 'acquisition of property' for the purposes of s 51(xxxi). Section 51(xxxi)'s guarantee of just terms is not to be avoided by 'a circuitous device to acquire indirectly the substance of a proprietary interest'[151]. In a case where an obligation to make a payment is imposed as *genuine taxation* ... it is unlikely that there will be any question of an 'acquisition of property' within s 51(xxxi) of the Constitution[152]. On the other hand, the mere fact that what is imposed is an obligation to make a payment or to hand over property will not suffice to avoid s 51(xxxi)'s guarantee of 'just terms' if the direct expropriation of the money or other property itself would have been within the terms of the sub-section. Were it otherwise, the guarantee of the section would be reduced to a hollow facade." (emphasis added)

110 The phrase "genuine taxation" in this passage is to be understood in the context of the clarification in *Australian Tape Manufacturers* that the reference in *MacCormick* to a tax being "no more than the imposition of a pecuniary liability"[153] is not to be taken as suggesting that a law that merely imposes a pecuniary liability on a person or class of persons necessarily falls outside s 51(xxxi). *MacCormick* (and other cases) identified the additional features of such a pecuniary liability that make it "answer the usual description of a tax",[154] namely: it is a compulsory exaction for government or public purposes, enforceable by law;[155] it does not

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150 (1984) 158 CLR 622 at 638.

151 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349.

152 See, generally, *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373.

153 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638.

154 *MacCormick* (1984) 158 CLR 622 at 639.

155 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276; *MacCormick* (1984) 158 CLR 622 at 639.

constitute an exaction for services rendered or a penalty;[156] and it is not "arbitrary"[157] (or "incontestable"[158]) in that it is a liability imposed by reference to ascertainable criteria with a sufficiently general application and cannot be imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation.[159]

111 It is not necessary to decide whether all of these features of the "usual description of a tax" are necessary elements of a "genuine tax" that cannot constitute an acquisition of property for the purposes of s 51(xxxi).[160] It suffices to observe that those provisions of the QLTA which imposed the additional land tax on the GG Entities and those provisions of the VLTA which imposed the additional land tax on Mr Stott, all of which were revived by the retroactive operation of s 5(3), satisfy all of these criteria. On any view, those provisions of the QLTA and the VLTA imposed a "genuine tax". They did not effect any direct expropriation of money or other property.

112 If a Commonwealth law imposing "genuine taxation" is not properly characterised as a law with respect to the acquisition of property, it must follow that a Commonwealth law that revives the operation of a State law imposing genuine taxation is not properly characterised as a law with respect to the acquisition of property. This is so even if the Commonwealth law that revives the operation of a State law imposing genuine taxation is supported by a head of power other than s 51(ii) of the *Constitution* and even if the Commonwealth law can also be characterised as a law extinguishing choses in action for the recovery of payments of taxes levied pursuant to State laws that were previously rendered inoperative by s 109 of the *Constitution*.

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156 *MacCormick* (1984) 158 CLR 622 at 639; *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 566-572.

157 *MacCormick* (1984) 158 CLR 622 at 639.

158 *Mutual Pools* (1994) 179 CLR 155 at 198.

159 *MacCormick* (1984) 158 CLR 622 at 639; *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684.

160 See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

113 It follows that, in its retroactive operation upon the GG Entities' rights of recovery of the Global additional land tax and their appeals to the Supreme Court of Queensland, and Mr Stott's rights of recovery of the post-2018 LTS Payments, s 5(3) is not a law with respect to the acquisition of property. The same result would also follow had it been necessary to address the suggested retrospective operation of s 5(3).

114 Both Question 4 in the Global Proceedings and Question 3 in the Stott Proceedings should be answered "no".

Remaining questions

115 Question 4A in the Global Proceedings concerns the effect of s 104 of the QLTA and s 189 of the TAA (Qld) on the appeals to the Supreme Court of Queensland and Question 4B addresses the validity of those provisions if they do require those appeals to be disallowed. Similarly, Question 4 in the Stott Proceedings concerns the validity and operation of s 106A of the VLTA. As those provisions are not engaged, it follows that these questions do not arise.

116 The GG Entities seek special costs orders against the Qld Commissioner. First, they seek orders for indemnity costs up to 8 April 2024 because the Qld Commissioner conceded that the Global additional land tax was invalidly imposed until that date. Second, they seek an order that the Qld Commissioner pay their costs for the period from 8 April 2024 to 28 February 2025, the latter being the date that s 104 of the QLTA and s 189 of the TAA (Qld) commenced. The GG Entities contend that, to succeed, the Qld Commissioner had to argue successfully that *Metwally* should be overturned but instead after 28 February 2025 the Qld Commissioner relied on s 104 of the QLTA and s 189 of the TAA (Qld). That basis for a special costs order is not made out because *Metwally* has been overturned and ss 104 and 189 are not engaged. Otherwise, it was not demonstrated that any particular costs were thrown away by the supposedly belated nature of the concession concerning the inconsistency that existed prior to 8 April 2024.

117 The GG Entities and Mr Stott should pay the costs of the special cases on the usual basis.

Relief: the Global Proceedings

118 The questions referred in the special case in the Global Proceedings should be answered as follows:

Question 1

Prior to the commencement of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), was s 32(1)(b)(ii) of the *Land Tax Act 2010* (Qld) invalid in its application to the Appellants, by force of s 109 of the *Constitution*, by reason of its inconsistency with s 5(1) of the *International Tax Agreements Act 1953* (Cth)?

Answer

Yes.

Question 2

If the answer to Question 1 is "yes", is s 5(3) of the *International Tax Agreements Act 1953* (Cth) (alternatively, cl 1 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)), insofar as it operates by reference to a provision contained in a law of a State, supported by any head of Commonwealth legislative power?

Answer

Yes, it is supported by s 51(xxix) of the *Constitution*.

Question 3

If the answer to Question 2 is "yes", is s 5(3) of the *International Tax Agreements Act 1953* (Cth) (alternatively, cl 1 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)), when read with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), effective from 1 January 2018 to remove the inconsistency between s 32(1)(b)(ii) of the *Land Tax Act 2010* (Qld) and s 5(1) of the *International Tax Agreements Act 1953* (Cth) and any consequent invalidity?

Answer

Yes.

Question 4

If the answer to Question 2 is "yes", is s 5(3) of the *International Tax Agreements Act 1953* (Cth) (alternatively, cl 1 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)), when read with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), invalid (in whole or in part) because it effected an acquisition of the property of the Appellants, within the meaning of s 51(xxxi) of the *Constitution*, otherwise than on just terms?

Answer

No.

Question 4A

On their proper construction, do s 104 of the *Land Tax Act 2010* (Qld) and/or s 189 of the *Taxation Administration Act 2001* (Qld) have the effect of requiring the Appellants' appeals to be disallowed?

Answer

Unnecessary to answer.

Question 4B

If the answer to Question 4A is "yes", are s 104 of the *Land Tax Act 2010* (Qld) and/or s 189 of the *Taxation Administration Act 2001* (Qld) inconsistent with s 5(1) of the *International Tax Agreements Act 1953* (Cth) and therefore invalid to that extent by force of s 109 of the *Constitution*?

Answer

Unnecessary to answer.

Question 5

What, if any, relief should be granted to the Appellants?

Answer

None.

Question 6

Who should pay the costs of the Special Case?

Answer

The Appellants.

Relief: the Stott Proceedings

119 The questions referred in the special case in the Stott Proceedings should be answered as follows:

Question 1

Prior to the commencement of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) on 8 April 2024, were the following provisions invalid or inoperative in their application to the Plaintiff, by force of s 109 of the *Constitution*, by reason of their inconsistency with Article 24(1) of the New Zealand Convention (to the extent that Article 24(1) is given legislative force by s 5(1) of the *International Tax Agreements Act 1953* (Cth)):

a. ss 7, 8, 35 and cll 4.1 through 4.5 of Sch 1 to the *Land Tax Act 2005* (Vic), to the extent that they imposed a legal liability or obligation on the Plaintiff to make the LTS Payments; or

b. s 104B, to the extent that it required the Plaintiff to lodge the notice and documents referred to therein?

Answer

a. Yes.

b. Yes.

Question 2

If the answer to Question 1 is "yes", is s 5(3) of the *International Tax Agreements Act 1953* (Cth) (in its operation with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)) valid or effective to remove that inconsistency and any consequent invalidity in relation to LTS Payments payable on or after 1 January 2018, having regard to *University of Wollongong v Metwally* (1984) 158 CLR 447?

Answer

Yes.

Question 3

Is s 5(3) of the *International Tax Agreements Act 1953* (Cth) (in its operation with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)) invalid in its application to the Plaintiff with respect to the 2018 to 2024 land tax years, on the ground that it is a law with respect to the acquisition of the property from a person otherwise than on just terms within the meaning of s 51(xxxi) of the *Constitution*?

Answer

No.

Question 4

If the answer to Question 3 is "yes" or if Question 3 is unnecessary to answer, is s 106A of the *Land Tax Act 2005* (Vic) invalid or inoperative in its application to the Plaintiff with respect to the 2018 to 2024 land tax years, by force of s 109 of the *Constitution*, by reason of its inconsistency with Article 24(1) of the New Zealand Convention (to the extent that Article 24(1) is given legislative force by s 5(1) of the *International Tax Agreements Act 1953* (Cth))?

Answer

Unnecessary to answer.

Question 5

What relief, if any, should be granted to the Plaintiff?

Answer

None.

Question 6

Who should pay the costs of the special case?

Answer

The Plaintiff.