HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B48/2024

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

and

COMMISSIONER OF STATE REVENUE
Respondent

No. B49/2024

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

and

COMMISSIONER OF STATE REVENUE
Respondent

No. B50/2024

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

and

COMMISSIONER OF STATE REVENUE
Respondent

RESPONDENT'S SUBMISSIONS

Filed on behalf of the respondent 26 March 2025

PART I: CERTIFICATION

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

PART II: ISSUES

2. **Question 1** asks whether, before the insertion of s 5(3) into the *International Tax Agreements Act 1953* (Cth) ('**ITA Act**') by the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) ('**Commonwealth Amendment Act**'), s 32(1)(b)(ii) of the *Land Tax Act 2010* (Qld) ('**Land Tax Act**') was inconsistent with s 5(1) of the ITA Act in its application to the Appellants, and therefore invalid to the extent of the inconsistency by force of s 109 of the Constitution. The parties are agreed that it was.

3. **Question 2** asks whether s 5(3) of the ITA Act is supported by a head of Commonwealth legislative power. The answer is 'yes'. Section 5(3) is a law that reverses—in small part—the implementation of a treaty. Such a law is supported by the external affairs power.

4. **Question 3** asks whether s 5(3) of the ITA Act was effective from 1 January 2018 to remove the inconsistency and invalidity identified in Question 1. It is unnecessary to answer the question or consider the correctness of *Metwally*. In February 2025, the *Revenue Legislation Amendment Act 2025* (Qld) ('**Queensland Amendment Act**') inserted provisions into the Land Tax Act and the *Taxation Administration Act 2001* (Qld) ('**Taxation Administration Act**') that validate the tax purportedly imposed by s 32(1)(b)(ii) of the Land Tax Act. Those provisions are not inconsistent with s 5 of the ITA Act and require the appeals to be disallowed (see Question 4A below).

5. **Question 4** asks whether s 5(3) of the ITA Act is 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. The answer is 'no'. Any acquisition of property was effected by the State laws introduced by the Queensland Amendment Act, after s 5(3) of the ITA Act had cleared the way for their enactment. In any event: (i) when a State law imposes or validates a tax, there is no acquisition of property, much less is there an acquisition of property when a Commonwealth law merely allows for the *possibility* of such a State law; (ii) any common law restitutionary

claims had already been extinguished by provisions of the *Limitation of Actions Act 1974* (Qld) ('**Limitation Act**') and Taxation Administration Act; and (iii) the right to appeal to the Supreme Court of Queensland under the Taxation Administration Act was always inherently susceptible to alteration by later legislative action.

6. **Question 4A** asks whether the provisions enacted by the Queensland Amendment Act have the effect of requiring the Appellants' appeals to be disallowed. The answer is 'yes'. The provisions validate the tax purportedly imposed by s 32(1)(b)(ii) of the Land Tax Act and require the appeals to be disallowed.

7. **Question 4B** asks if the provisions enacted by the Queensland Amendment Act are inconsistent with s 5(1) of the ITA Act and therefore invalid to that extent by force of s 109 of the Constitution. The answer is 'no'. Their operation is permitted by s 5(3) of the ITA Act which, for the reasons given above, is a valid law.

8. **Alternative submission**: If *Metwally* is re-opened and overturned, and s 5(3) of the ITA Act operates unilaterally to remove the inconsistency identified in Question 1, the answer to Question 4 is still 'no'. On that hypothesis, the Appellants' restitutionary claims were still extinguished by a State law (s 32(1)(b)(ii) of the Land Tax Act), and there was no acquisition for the reasons given in answer to Question 4.

PART III: SECTION 78B NOTICE

9. The Appellants have given two notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) ('**Judiciary Act**'). The Commissioner will give further notice.

PART IV: FACTS

10. The facts articulated by the Appellants at AS [9]–[10] are not disputed.

PART V: ARGUMENT

QUESTION 1: Section 109

11. The Commissioner accepts that, before the insertion of s 5(3) of the ITA Act in 2024, s 32(1)(b)(ii) of the Land Tax Act was inconsistent with s 5(1) of the ITA Act in its application to the Appellants, and therefore invalid to the extent of the inconsistency by force of s 109. Accordingly, it is agreed that Question 1 should be answered 'yes'.

QUESTION 2: External Affairs

12. A law that implements a treaty is a law with respect to external affairs within s 51(xxix) of the Constitution.[1] A law will implement a treaty if it is 'reasonably capable of being considered appropriate and adapted to implementing the treaty'—that is, reasonably capable of being considered proportionate to implementing the treaty.[2]

13. The power to make a law includes the power to unmake it.[3] Accordingly, a law that reverses the implementation of a treaty—in whole or in part—is just as much a law with respect to external affairs as the law that implemented the treaty. That may be subject to qualification where an amendment leaves a law standing that no longer retains its character as a law with respect to external affairs.[4] That might arise where the resulting law is so substantially deficient in its implementation of the treaty that it can no longer be said to be implementing the treaty.[5] In assessing whether a deficiency rises to that level, it must be borne in mind that the Commonwealth Parliament has considerable latitude in deciding how it will implement treaty obligations, if it decides to implement them at all.[6] The Commonwealth Parliament is not restricted to implementing a treaty in full.[7] One legitimate reason why the Commonwealth Parliament may choose not to implement a treaty in full is to avoid overriding a State law.[8]

14. In this case, there is no dispute that s 5(1) of the ITA Act is a law with respect to external affairs (AS [29]). By giving the force of law to the double taxation agreement with Germany and similar agreements with various other countries, s 5(1) implements those treaties and is therefore a law with respect to external affairs.[9]

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1 *Commonwealth v Tasmania* (1983) 158 CLR 1, 127 (Mason J), 170–1 (Murphy J), 218–9 (Brennan J), 258 (Deane J) ('*Tasmanian Dam Case*').

2 *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

3 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 355–7 [13]–[15] (Brennan CJ and McHugh J), 368–9 [47] (Gaudron J), 372 [57] (Gummow and Hayne JJ). See also *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

4 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 369 [47] (Gaudron J).

5 *Victoria v Commonwealth* (1996) 187 CLR 416, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

6 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634, 648 (Starke J); *Industrial Relations Act Case* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

7 *Tasmanian Dam Case* (1983) 158 CLR 1, 172 (Murphy J), 233–4 (Brennan J), 268 (Deane J); *Industrial Relations Act Case* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

8 James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 475.

9 More particularly, the ITA Act is an Act to 'give the force of Law' to certain treaties relating to 'Taxes on

15. Section 5(3) of the ITA Act narrows the scope of that implementation and is therefore also a law with respect to external affairs.[10] The narrowing of the implementation of the German agreement does not result in a law that no longer furthers the object of implementing the German agreement, let alone the object of implementing all the double taxation agreements. Section 5(3) merely addresses an unintended consequence of a peripheral aspect of a small number of the treaties implemented by s 5(1). That can be seen from the relevant extrinsic materials[11] and by comparing the operation of s 5(1) before and after the introduction of s 5(3).

16. Section 5(1) gives each provision of the 59 double taxation agreements 'the force of law according to its tenor', subject to the ITA Act. Those agreements are mostly modelled on the OECD Model Tax Convention on Income and on Capital. They are concerned with avoiding double taxation, but not *all* double taxation. The agreements are carefully drafted to avoid double taxation only with respect to *federal* taxes in Australia, particularly income tax.[12] 'These tax treaties, as noted in their title, are generally made "*for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion*" or similar'.[13] Indeed, income tax has been the focus of these treaties since Australia started entering into double taxation treaties in the 1940s.[14]

17. As an illustration of these points, the German agreement covers, in the case of Australia, 'the income tax, the fringe benefits tax and resource rent taxes imposed under the *federal* law of Australia'.[15] By contrast, the German taxes captured by the agreement are wider: they extend to taxes on capital and taxes imposed by German States or Länder.[16]

Income and Fringe Benefits': see the long title to the ITA Act. The reference to 'Fringe Benefits' in the long title was inserted in 1995: *Income Tax (International Agreements) Amendment Act 1995* (Cth) s 3, sch, item 1. The 1995 amendments also changed the short title of the Act; prior to that it was the *Income Tax (International Agreements) Act 1953*.

10 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 355–7 [13]–[15] (Brennan CJ and McHugh J), 368–9 [47] (Gaudron J), 372 [57] (Gummow and Hayne JJ). See also *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418, 434 (Kitto J).

11 Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) 35 [3.11]. See also 35 [3.7]–[3.8].

12 See generally art 2 of each of the treaties listed in s 3AAA of the ITA Act (apart from the amending protocols and the *Multilateral Convention* [2019] ATS 1), but see art 1 of the *Canadian protocol (No. 1)* [2002] ATS 26, *Singaporean agreement* [1969] ATS 14 (amended by [1990] ATS 3), *South African protocol (No. 2)* [2008] ATS 18, as well as in each of the *Airline Profits Agreements* with China [1986] ATS 31, Greece [1981] ATS 10 and Italy [1976] ATS 7.

13 Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) 33 [3.2].

14 See *Income Tax (International Agreements) Act 1953* (Cth) ss 5, 6, sch 1 (art 1(a)), sch 2 (art 1(a)) (as enacted).

15 [2016] ATS 23, art 2(3)(a) (emphasis added).

16 [2016] ATS 23, art 2(1), (3)(b).

18. A small number of the agreements implemented by s 5(1) of the ITA Act (8 of the 59 agreements) also include a non-discrimination clause that applies not only to the taxes the subject of the agreement but also to 'taxes of every kind and description'.[17] The German agreement contains such a clause in art 24. The reason these non-discrimination clauses apply to a broader range of taxes is to ensure that the contracting states do not circumvent their non-discrimination obligations through taxes that are not otherwise covered by the agreement.[18] Article 24 addresses a discrete topic (discrimination) compared to the remainder of the treaty (double taxation), and its wider ambit serves to reinforce that fact.

19. The domestic implementation of the non-discrimination clause in the German agreement (and the 7 other agreements that contain non-discrimination clauses in that form) has had unintended consequences. It does not appear to have been contemplated that these non-discrimination clauses would disturb existing Commonwealth and State taxes apart from income tax and fringe benefits tax. For example, when the ITA Act was amended in 2016 to include the German agreement, the Explanatory Memorandum envisaged that taxes in Australia would still be able to treat German nationals and businesses differently 'where legitimate and objective justifications exist[ed]'.[19] But the non-discrimination clause prohibits this.[20]

20. Once it became apparent that the non-discrimination clauses operated in an unforeseen way, the Commonwealth Parliament amended s 5 in 2024 to make clear that the implementation of the double taxation agreements was not intended to 'undermine other Australian taxation regimes'.[21] Following the amendment, s 5(3) provides that the implementation of a provision of a double taxation agreement is subject to anything inconsistent in a Commonwealth, State or Territory law imposing a tax 'other than

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17 Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) 33–4 [3.2]–[3.3]. Australia has entered into double taxation agreements containing a non-discrimination clause with 12 countries: *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613, 626 [13] fn 34 (the Court). But only 8 of those agreements contain a non-discrimination clause extending beyond the taxes covered in art 2. In the case of the agreements with Chile, Israel, Turkey and the United Kingdom, the non-discrimination clause is confined to the taxes in art 2 (as well as GST in Chile's case): [2013] ATS 7, art 24(7); [2019] ATS 20, art 24(6); [2013] ATS 19, art 24(8); [2003] ATS 22, art 25(7).

18 Alexander Rust, 'Non-discrimination' in Ekkehart Reimer and Alexander Rust (eds), *Klaus Vogel on Double Taxation Conventions* (Wolters Kluwer, 5th ed, 2022) 1957–8 [123].

19 Explanatory Memorandum, International Tax Agreements Amendment Bill 2016 (Cth) 211 [2.25].

20 Alexander Rust, 'Non-discrimination' in Ekkehart Reimer and Alexander Rust (eds), *Klaus Vogel on Double Taxation Conventions* (Wolters Kluwer, 5th ed, 2022) 1907–8 [3]–[4].

21 Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) 35 [3.11]. See also 35 [3.7]–[3.8].

Australian tax'. 'Australian tax' is defined in s 3 as income tax and fringe benefits tax, which is also the primary subject of the double taxation agreements implemented by s 5(1).[22] By preserving the position with respect to 'Australian tax', s 5(3) leaves intact the implementation of the vast bulk of the German agreement as well as the vast bulk of all other double taxation agreements implemented by s 5(1).

21. Against that background, the insertion of s 5(3) cannot be seen as resulting in a law that no longer furthers the object of implementing the German agreement, or all the double taxation agreements. Section 5 still implements those agreements—it is 'reasonably capable of being considered appropriate and adapted to implementing the [treaties]'.[23] Section 5 does not lose that character merely because it no longer implements a small part of some of those treaties, including a small part of the German agreement.

22. Even at a more specific level of analysis, s 5 still implements art 24 of the German agreement (cf AS [29]). Preventing discrimination against German entities in relation to income tax and fringe benefits tax still implements art 24, even if Parliament could have chosen to prevent discrimination in relation to other taxes also.[24] Section 5 still goes some way towards realising or advancing that objective, rather than reversing or undermining it. That is, the failure to prevent discrimination in relation to other taxes does not make s 5's implementation of art 24 with respect to income tax and fringe benefits tax 'substantially inconsistent' with art 24 of the German agreement.[25]

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22 Some agreements also extend to other federal taxes. For example, the German agreement also captures 'resource rent taxes'. Currently, the only resource rent taxes are imposed by the *Petroleum Resource Rent Tax (Imposition—General) Act 2012* (Cth); *Petroleum Resource Rent Tax (Imposition—Customs) Act 2012* (Cth); *Petroleum Resource Rent Tax (Imposition—Excise) Act 2012* (Cth).

23 *Industrial Relations Act Case* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

24 There are many examples of Commonwealth laws that advance the objective of a treaty by only giving partial effect to a treaty obligation or obligations. For example, s 4 of the *Human Rights (Sexual Conduct) Act 1994* (Cth)—which prevents a very specific form of arbitrary interference with privacy—is a law that implements art 17 of the *International Covenant on Civil and Political Rights*, even if the Parliament could have chosen to prevent other arbitrary interferences with privacy but did not do so: see *Croome v Tasmania* (1997) 191 CLR 119, 124, 129. Likewise, the regulations that prevented the construction of a dam helped to implement Australia's obligations under arts 4 and 5 of the *Convention for the Protection of the World Cultural and Natural Heritage*, even if those regulations did not exhaust Australia's international obligations with respect to that specific site, let alone other sites: *Tasmanian Dam Case* (1983) 158 CLR 1, 172 (Murphy J), 233–4 (Brennan J), 268 (Deane J).

In a different context, a law that addresses corruption risks arising from property developers is still a law that helps to address corruption and undue influence, even if Parliament could have also chosen to address corruption risks presented by others: *McCloy v New South Wales* (2015) 257 CLR 178, 209–10 [54]–[56], 212 [64] (French CJ, Kiefel, Bell and Keane JJ), 251 [197] (Gageler J).

25 *Industrial Relations Act Case* (1996) 187 CLR 416, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Gerhardy v Brown* (1985) 159 CLR 70, 119 (Brennan J) ('inconsistent to any

23. The Appellants seek to avoid that result by reframing s 5's purpose as the *unqualified* implementation of art 24 of the German agreement (AS [29]). Any *qualified* implementation of art 24, they suggest, would necessarily defeat that purpose of implementing art 24 in full (AS [34]). But that is not, and never has been, the purpose of s 5. The purpose of s 5(1) cannot be understood in isolation from s 5(3), which reduces its ambit.[26] Moreover, even before the introduction of s 5(3), s 5(1) was expressed to be '[s]ubject to this Act'.[27] Accordingly, the purpose of s 5 is to implement the provisions of the identified agreements, but not in an unqualified way.

24. For these reasons, s 5(3) of the ITA Act is supported by the external affairs power insofar as it operates by reference to a State law.[28]

25. In any event, if the Appellants' submissions about s 51(xxix) and s 5(3) of the ITA were accepted, it would not follow that s 5 would revert to its pre-amendment form.[29] There is no analogy with cases in which an amendment is wholly invalid for transgressing a constitutional limitation, such that the statute as it stood pre-amendment remains in force.[30] Section 5(3) cannot be wholly beyond power (as the Appellants appear to acknowledge[31]) given that its operation with respect to Commonwealth taxation and Territory taxation can be supported by other heads of power (s 51(ii) and s 122 respectively). That being so, the basis on which the Appellants maintain that s 5(1) should continue to operate as if s 5(3) had never been enacted is obscure.

26. The difficulty for the Appellants is even more acute if they can establish only that the effect of s 5(3) is that s 5(1) is no longer proportionate to the purpose of implementing

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substantial extent').

26 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 354 [10] (Brennan CJ and McHugh J).

27 See, eg, s 5(2) which provides that s 5(1) does not apply to 'Article 23 of the United States Convention'. The Appellants appear to accept that such a modification would have been acceptable (AS [32]) even though it would present the same issues they identify in relation to s 5(3): s 5(2) 'contradicts the express text of the Article, and undermines the operation it is intended to have under international law': AS [34]. Moreover, the Appellants appear to accept that s 5(2) would be an exercise of the external affairs power even though it results in a complete failure to implement the non-discrimination clause in the US agreement, whereas they contend that s 5(3) would not be supported by the head of power even though it at least implements the non-discrimination provisions to income tax and fringe benefits tax.

28 Insofar as it operates by reference to a Commonwealth law that imposes a tax, s 5(3) of the ITA Act is also supported by s 51(ii) of the Constitution: see James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 460. Likewise, insofar as it operates by reference to a Territory law imposing a tax, s 5(3) is also supported by s 122 of the Constitution.

29 Contrast AS [35].

30 Compare AS [35] fn 54. See *Commissioner of Taxation v Clyne* (1958) 100 CLR 246, 267–8 (Dixon CJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 40 [86] (Gummow and Bell JJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 202–3 [97] (Gummow, Kirby and Crennan JJ).

31 See AS [14] fn 14.

art 24 of the German agreement. In that event, the result is not that s 5(3) is invalid, it is that s 5(1) no longer implements art 24.[32] The Appellants simply overlook this.

QUESTION 3: The *Metwally* principle

27. Question 3 asks whether s 5(3) of the ITA Act (alternatively, the relevant provisions of the Commonwealth Amendment Act) was effective from 1 January 2018 to remove the inconsistency and invalidity identified in Question 1. The Appellants submit that, for the Commissioner to succeed on this issue, he must apply for *University of Wollongong v Metwally*[33] to be reopened and persuade the Court that it should be overruled (AS [36]). That is not correct. On 28 February 2025, the Queensland Amendment Act inserted s 104 into the Land Tax Act and s 189 into the Taxation Administration Act.[34] Those provisions make it unnecessary for the Court to consider the correctness of *Metwally* and, accordingly, it should not do so.[35]

28. *Metwally* stands for the proposition that if s 109 has rendered a State law inoperative at a particular point in time, no later Commonwealth law can alter how s 109 operated on that State law at that time.[36] *Metwally* 'says nothing', however, about the ability of either the Commonwealth or the State Parliaments to 'enact a law attaching new legal significance to events in the past which were invalid or ineffective at that time'.[37] That is all that s 104 of the Land Tax Act and s 189 of the Taxation Administration Act do:

    (a) Section 104 of the Land Tax Act applies if a land tax surcharge payable between 30 June 2019 and 8 April 2024 was rendered inoperative by s 109 of the Constitution ('purported surcharge') (s 104(1)). The parties agree in the proposed answer to Question 1 that that was the case; *Metwally*—the correctness of which the Commissioner does not challenge—tells us that s 32(1)(b)(ii) of the Land Tax

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32 At least to the extent its implementation relies solely on s 51(xxix). See s 15A of the *Acts Interpretation Act 1901* (Cth); *Clubb v Edwards* (2019) 267 CLR 171, 219 [141] (Gageler J), 320[429]–[430] (Edelman J); *Pidoto v Victoria* (1943) 68 CLR 87, 110-1 (Latham CJ); *Industrial Relations Act Case* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

33 (1984) 158 CLR 447.

34 SCB 38 [53]. Paragraph [53.1] of the Amended Special Case mistakenly states that these provisions were inserted by the '*Revenue Legislation Amendment Act 2024* (Qld)', which should be a reference to the '*Revenue Legislation Amendment Act 2025* (Qld)'.

35 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ).

36 *University of Wollongong v Metwally* (1984) 158 CLR 447, 456–7 (Gibbs CJ), 469 (Murphy J), 473–5 (Brennan J).

37 *Doyle v Queensland* (2016) 249 FCR 519, 521 [5]. See also 530–1 [50]–[52], 532 [57] (the Court), applying the comments of Murphy J at 469 and Deane J at 480 in *University of Wollongong v Metwally* (1984) 158 CLR 447. See also *Western Australia v Commonwealth* (1995) 183 CLR 373, 454–5 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*').

Act remained inoperative in that time period even after the commencement of the Commonwealth Amendment Act. In those circumstances, s 104(2) operates to impose a new tax at the surcharge rate ('new surcharge'). The new surcharge is taken to have arisen in the same way as the purported surcharge, and to be payable by the same person in the same amount as the purported surcharge (ss 104(3)–(5)). Section 104(6) provides that the rights and liabilities of a person in relation to the new surcharge are taken to be, and to have always been, the same as if the purported surcharge had been validly imposed. Anything done or omitted in relation to the purported surcharge is taken to have the same force and effect as if it were done in relation to the new surcharge (s 104(7)).

(b) Under s 189 of the Taxation Administration Act, an assessment in relation to a purported surcharge is taken to have, and always to have had, the same force and effect as if it were made in relation to the new surcharge (s 189(2)(b)). The rights and liabilities in relation to the assessment are taken to be, and to have always been, the same as if the assessment were made in relation to the new surcharge (s 189(3)(b)). Amounts paid in relation to an assessment are taken to be, and always to have been, paid in relation to the new surcharge (s 189(5)(b)).

29. By employing the oft-used phrase 'taken to be, and always to have been', ss 104 and 189 attach new legal consequences to past events that previously did not attract those consequences.[38] The sections do not 'purport to declare what the law *was*' before the enactment of the Commonwealth Amendment Act.[39]

30. The only question, then, is whether ss 104 and 189 are inconsistent with s 5(1). Because s 5(3) of the ITA Act is valid, the implementation of the German agreement under s 5(1) of the ITA Act is 'subject to anything inconsistent … contained in a law of … a State … that imposes a tax other than Australian tax'. Clause 2 of Schedule 1 of the Commonwealth Amendment Act means that s 5(3) applies where a State law imposes a tax which is payable in relation to tax periods that end on or after 1 January 2018.

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38 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, 98 [25] (French CJ, Kiefel, Bell and Keane JJ); *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, 137 [36], 143 [53] (French CJ, Crennan and Kiefel JJ), 156 [96] (Gummow, Hayne and Bell JJ); *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 243 (Stephen J), 248–9 (Mason J); *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495, 579 (Dixon J); *Doyle v Queensland* (2016) 249 FCR 519, 530–1 [50]–[52] (the Court).

39 *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, 156 [96] (Gummow, Hayne and Bell JJ) (emphasis in original).

Section 104 of the Land Tax Act and s 189 of the Taxation Administration Act are laws of that kind. They are therefore not inconsistent with s 5(1)[40] and are valid and operative. For the reasons explained in answer to Question 4A, they require the Appellants' appeals to be disallowed.

QUESTION 4: Acquisition of property

31. The premise of the Appellants' submission on s 51(xxxi) is that—contrary to *Metwally*—s 5(3) (together with cl 2 of sch 1 of the Commonwealth Amendment Act) 'removed the inconsistency that previously existed and did so from 1 January 2018'. In that event, it is said, s 5(3) effected an 'acquisition' for the purposes of s 51(xxxi), because it extinguished accrued common law claims in restitution and reduced the economic value of the appeal proceedings to nothing (AS [43], [45]).

32. However, neither party now seeks to re-open *Metwally* and have it overruled. As outlined above, it was s 104 of the Land Tax Act and s 189 of the Taxation Administration Act that effected the validation of the purported surcharges.[41] The enactment of those provisions reflects an assumption—consistent with *Metwally*—that s 5(3) did no more than clear the way for States to enact new laws to validate the invalid taxes.[42] Accordingly, any acquisition of property was effected by State laws, to which neither s 51(xxxi) nor any like restriction applies.[43] The 'premise' for the Appellants' s 51(xxxi) argument does not arise. That is sufficient to dispose of it.

33. The Appellants might submit that s 5(3) of the ITA Act nonetheless falls foul of s 51(xxxi) because it allows for the *possibility* that States may take steps to acquire property other than on just terms. But any such submission would be untenable. To be characterised as a law with respect to the acquisition of property other than on just terms, a Commonwealth law first 'must authorise or effect an acquisition of property';

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40 The same result would follow if, as a result of the insertion of s 5(3), s 5(1) was no longer supported by the external affairs power in relation to art 24: see [26] above. No inconsistency would arise.

41 *Native Title Act Case* (1995) 183 CLR 373, 454–5 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

42 The same assumption appears to have underpinned the Commonwealth Amendment Act. See Package of correspondence relating to Senate Scrutiny of Bills Committee, Scrutiny Digest 5 of 2024 (27 March 2024), 52 (letter from Dr Chalmers MP to Committee dated 26 March 2024) (pointing out that 'How the operation of a state tax law to certain persons is ultimately impacted by the *Treasury Laws Amendment (Foreign Investment) Bill 2024* will be a matter for each of the state governments and Parliaments').

43 *Pye v Renshaw* (1951) 84 CLR 58, 78–9 (the Court); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10 [12]–[14] (Gaudron, McHugh, Gummow and Hayne JJ), 426 [59] (Kirby J).

in other words, the Commonwealth law 'must provide for the taking of property from a person and for the conferral of a corresponding interest in property on the Commonwealth or on another person'.[44] Merely leaving space for State laws to operate—which is all that s 5(3) does—is not enough.[45]

34. Perhaps more fundamentally, s 51(xxxi) is not concerned with federal taxes, let alone State taxes. The Commonwealth Parliament is not subject to s 51(xxxi) when it imposes a tax.[46] The reason is that the imposition of a tax is 'inconsistent or incongruous' with the notion of any requirement to pay just terms compensation.[47] '[O]f its nature, "taxation" presupposes the absence of the kind of direct quid pro quo involved in the "just terms" prescribed by s 51(xxxi)'.[48]

35. Likewise, the Commonwealth Parliament may retrospectively validate a tax.[49] Validating a tax may involve an acquisition of property in the sense that it results in the absence of any right not to pay the tax or to seek restitution of any tax that has been paid. But any acquisition of property without just terms is 'a "necessary or characteristic feature" of the means which the law selects to achieve an objective which is within power'.[50] Insofar as s 5(3) operates to revive Commonwealth taxes, it is a law with respect to taxation under s 51(ii) of the Constitution and therefore does not provide for an 'acquisition' of property for the purposes of s 51(xxxi).

36. By parity of reasoning, when a State imposes a tax or validates a tax, there is no

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44 *Cunningham v Commonwealth* (2016) 259 CLR 536, 560 [58] (Gageler J).

45 By contrast, a Commonwealth law may fall foul of s 51(xxxi) if it gives effect to an intergovernmental agreement providing for a State to acquire property on unjust terms: *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 402–3 (Latham CJ), 420–5 (Williams J, Rich J agreeing), 430–1 (Webb J). But no such arrangement, let alone agreement, exists in this case.

46 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246, 263 (Dixon CJ); *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483, 494–5 (Barwick CJ, Mason and Jacobs JJ); *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 638–9 (Gibbs CJ, Wilson, Deane and Dawson JJ); *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480, 508–9 (Mason CJ, Brennan, Deane and Gaudron JJ); *Commonwealth v Yunupingu* [2025] HCA 6, [189] (Gordon J).

47 *Theophanous v Commonwealth* (2006) 225 CLR 101, 124–6 [56]–[60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 436 [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

48 *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

49 *Werrin v Commonwealth* (1938) 59 CLR 150, 161 (Rich J), 163 (Starke J), 165 (Dixon J); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 167–8 (Mason CJ), 209, 217–8 (McHugh J); *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation* (2017) 251 FCR 40, 82 [141] (Pagone J, Allsop CJ and Perram J agreeing).

50 *Commonwealth v Yunupingu* [2025] HCA 6, [189] (Gordon J), quoting *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 179, 180–1 (Brennan J).

'acquisition' of property that would attract the requirement of just terms within the meaning of s 51(xxxi) (even if States were subject to s 51(xxxi), which they are not). A Commonwealth law that merely allows for the possibility that a State might impose or validate a tax is even further removed from any characterisation as a law with respect to the 'acquisition' of property. Indeed, it would be a curious inversion of constitutional design if s 51(xxxi) prevented the Commonwealth from 'clearing the way' for a State law to validate State taxation, even though s 51(xxxi) would not impede the validation of Commonwealth taxation.

37. That, again, is sufficient to dispose of the Appellants' argument that s 5(3) of the ITA Act infringes s 51(xxxi) of the Constitution. But there are further reasons still why there was no 'acquisition of property' within the meaning of that section.

38. The Appellants' submission that s 5(3) extinguished accrued common law claims in restitution fails at the outset because by the time s 5(3) was enacted any such claims had already been extinguished:

(a) Sections 10A(1) and (3) of the Limitation Act provide that an action 'to recover an amount paid as tax that is recoverable because of the invalidity of … a provision of an Act' must be started within one year of the payment (s 10A(1)), and that if that is not done, 'the right to recover the amount ends' (s 10A(3)). The last of the Appellants' payments was made in March 2022 and the Appellants took no action within a year (AS [57] fn 115).

(b) If s 10A had not already extinguished any right to recover the amounts paid by the Appellants, ss 36(2) and 188(2) of the Taxation Administration Act would have applied. Those provisions, which were inserted from 23 June 2023, provide that '[n]o cause of action, right or remedy is available at common law for the refund or recovery of any amount paid or purportedly paid under a tax law' (s 36(2)) and '[s]ection 36(2) extinguishes the cause of action, right or remedy and the proceeding may not be started' (s 188(2)).[51]

39. The Appellants accept that these provisions would have extinguished their claims, subject to two points (AS [53], [54]). But neither point withstands scrutiny.

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[51] Section 36(1) provides that '[a] person is not entitled to a refund of any amount paid, or purportedly paid, under a tax law other than under this division'. That provision appeared in the Taxation Administration Act before ss 36(2) and 188 were inserted.

40. First, the Appellants say that the provisions set out above would have been rendered invalid by s 109 of the Constitution because they would have been inconsistent with s 64 of the Judiciary Act (AS [53], [55]–[57]). There are multiple answers to this.

41. The Appellants' submissions assume that the provisions would have applied of their own force, so that the question is whether there would have been an inconsistency with s 64 of the Judiciary Act that enlivened s 109 of the Constitution. But the provisions, as State laws regulating the exercise of jurisdiction,[52] cannot apply directly to the exercise of federal jurisdiction.[53] The correct question is therefore whether they would have been 'picked up' by s 79 of the Judiciary Act, or whether s 64 of that Act is a Commonwealth law that 'otherwise provide[s]'. But whether s 64 otherwise provides is irrelevant, because ss 79(2) and (3) expressly provide that the Judiciary Act 'does not prevent' a 'law of a State … that would be applicable to the suit if it did not involve federal jurisdiction' from 'binding a court under [s 79] in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State … invalidly purported to impose'.[54] The provisions would therefore have been 'picked up' by s 79, and would have extinguished any restitutionary claims the Appellants had.

42. Alternatively, if the provisions set out in [38] above do not regulate the exercise of jurisdiction, then they necessarily apply of their own force in federal jurisdiction, 'independently of anything done by a court'.[55] In that event, the question would be: did those provisions fail to extinguish the Appellants' claims because *if* the Appellants had commenced restitutionary proceedings in federal jurisdiction, s 64 would have operated inconsistently with those provisions? The answer to that question is 'no'.

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52 Sections 10A(1) and (3) of the Limitation Act 'bar the court absolutely or conditionally by reason of effluxion of time from entertaining a claim': *Rizeq v Western Australia* (2017) 262 CLR 1, 36 [89] (Bell, Gageler, Keane, Nettle and Gordon JJ) (and see also at 15 [22] (Kiefel CJ)). Sections 36(1) and (2) of the Taxation Administration Act remove the court's power to award a remedy and s 188(2) provides that the proceeding 'may not be started'. Each of these provisions, 'although determinative of rights and obligations, are directed to the manner of exercise of jurisdiction': *Masson v Parsons* (2019) 266 CLR 554, 578 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). Accordingly, they are picked up by s 79(1) of the Judiciary Act: see *Rizeq v Western Australia* (2017) 262 CLR 1, 33–4 [83], 39–40 [100]. Any doubt that s 79 is intended to pick up such laws is dispelled by ss 79(2) to (4): see footnote 54 below.

53 *Rizeq v Western Australia* (2017) 262 CLR 1, 24–6 [58]–[61]; *Masson v Parsons* (2019) 266 CLR 554, 574–5 [30].

54 Sections 79(2), (3), and (4) were clearly intended to apply to laws such as s 10A and ss 36 and 188. In particular, s 10A falls squarely within the terms of s 79(3)(a). Sections 79(2), (3) and (4) were introduced to overcome the result of this Court's decision in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30: see Explanatory Memorandum, Judiciary Amendment Bill 2008 (Cth).

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

43. Following *Rizeq*, it must be accepted that s 64—however it operates in relation to the Commonwealth—does not alter the law that defines a State's rights and liabilities merely because a proceeding is commenced (or *might* be commenced[56]) in federal jurisdiction.[57] A different operation would exceed Commonwealth legislative power. *Rizeq* established that State laws that define rights and liabilities (and do not also regulate the exercise of jurisdiction[58]) form part of the 'single composite body of federal and non-federal law' applicable to cases in both State and federal jurisdiction 'because they are laws'.[59] Such laws are not 'picked up and applied' by s 79 of the Judiciary Act. Indeed, they could not be. That is because:[60]

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

44. It is true that s 78 of the Constitution—which empowers the Commonwealth Parliament to 'make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power'—was not considered in *Rizeq*. But s 78 requires no qualification to the statement in *Rizeq*. The conferral of 'rights to proceed' overcomes the Crown's immunity from suit,[61] but it does not *create* the substantive law that governs the State's liability. That law exists independently.[62] A Commonwealth law made under s 78 can therefore have no interaction with a State law which applies 'independently of anything done by a court' to govern a State's

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56 Cf AS [56] fn 113.

57 *Rizeq* also discarded the distinction between 'procedural' and 'substantive' laws when applying s 79 of the Judiciary Act: 15 [19] (Kiefel CJ), 33 [83] (Bell, Gageler, Keane, Nettle and Gordon JJ), 46 [122] (Edelman J). It should likewise be discarded in relation to s 64.

58 *Rizeq v Western Australia* (2017) 262 CLR 1, 33–4 [83] (Bell, Gageler, Keane, Nettle and Gordon JJ).

59 *Rizeq v Western Australia* (2017) 262 CLR 1, 24 [56] (Bell, Gageler, Keane, Nettle and Gordon JJ).

60 *Rizeq v Western Australia* (2017) 262 CLR 1, 21 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also 68–9 [189], [199] (Edelman J).

61 Sections 5 and 6 of the *Crown Suits Act 1947* (WA), considered in *British American Tobacco Ltd v Western Australia* (2003) 217 CLR 30, conditionally removed the State's immunity from suit: see 55–6 [52]–[53]. Those sections were therefore capable of being rendered inoperative by a Commonwealth law made under s 78 (ie, s 64). *British American Tobacco* also shows that the conferral of federal jurisdiction under s 39 of the Judiciary Act may itself be inconsistent with the maintenance of a State's immunity from suit: 58–9 [60]–[63] (McHugh, Gummow and Hayne JJ). That tends to suggest that State laws conferring immunity from suit are laws regulating the exercise of jurisdiction, within the post-*Rizeq* understanding of the scope of s 79.

62 See *Werrin v Commonwealth* (1938) 59 CLR 150, 167–8 (Dixon J); *Commonwealth v Mewett* (1997) 191 CLR 471, 491 (Brennan CJ), 545, 549–51 (Gummow and Kirby JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 312 (Brennan J); *British American Tobacco Ltd v Western Australia* (2003) 217 CLR 30, 45 [14], 46 [18] (Gleeson CJ), 56 [55], 58–9 [59] (McHugh, Gummow and Hayne JJ).

substantive liability[63]—for example, by extinguishing a cause of action.[64] Section 64 in its application to the States must be construed accordingly.

45. Second, the Appellants say that the provisions of the Limitation Act and (in the alternative) the Taxation Administration Act would have been rendered invalid by s 109 of the Constitution because they would have been inconsistent with s 5(1) of the ITA Act, applying art 24(4) of the German agreement (AS [53]–[54], [57]). As a preliminary point, the question is not whether there is an inconsistency for the purposes of s 109, but whether s 5(1) of the ITA Act is a Commonwealth law that 'otherwise provide[s]' within the meaning of s 79 of the Judiciary Act.[65] But more importantly, the Appellants' submission is not correct. The provisions do not have 'precisely the same [operation] as s 32(1)(b)(ii) of the Land Tax Act', nor do they 'in substance … authorise[] the retention of the Foreign Surcharge' (AS [54]). Section 10A of the Limitation Act imposes a time bar, and ss 36 and 188 of the Taxation Administration Act have the effect that any refund must be sought under Part 4, Division 2 of that Act. None of the provisions are inconsistent with s 5(1) of the ITA Act:[66]

(a) Section 5(1), applying art 24(4) of the German agreement, only requires that enterprises whose capital is controlled by German residents 'shall not be subjected … 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 Australia in similar circumstances are subject (emphasis added). Section 10A of the Limitation Act and ss 36 and 188 of the Taxation

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63 Neither *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 nor *Maguire v Simpson* (1977) 139 CLR 362 hold otherwise. As explained in *Evans Deakin*, the understanding of s 64 adopted in that case was reached without considering either the full scope of s 78 or how s 64 might validly apply in relation to the States: (1986) 161 CLR 254, 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). See also *Maguire* (1977) 139 CLR 362, 396 (Stephen J), 401 (Mason J), 388 (Gibbs J); *Commonwealth v Mewett* (1997) 191 CLR 471, 492 (Brennan CJ).

Rizeq does not lead to the invalidity of s 64. As observed in *British American Tobacco* (2003) 217 CLR 30, 66 [87] it is possible for s 64 to be 'read down to operate differentially between the Commonwealth and the States' (albeit the reading down necessary in light of *Rizeq* differs from that contemplated in *British American Tobacco*).

64 If a law which extinguishes a cause of action might circumvent a constitutional prohibition, it may be inconsistent with that constitutional prohibition, as in *Antill Ranger and Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83. But that problem does not arise in this case: see [45](b) below.

65 See [41] above. The test for whether a Commonwealth law 'otherwise provides' is, however, the same as for s 109 inconsistency: *Masson v Parsons* (2019) 266 CLR 554, 579–80 [43].

66 As it is a question of inconsistency, it is important also to construe s 5(1): *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428, 447 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The Appellants overlook this step.

Administration Act do not subject anyone to taxation. To the extent they might be said to impose 'requirements connected' with taxation, the requirements they impose are not 'more burdensome' in their application to German-controlled enterprises than other enterprises—they apply to all taxpayers in the same way.

(b) In any event, the Appellants' suggested analogy with *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport*[67] is inapposite: s 5(1) is not a constitutional guarantee.[68] And even if the analogy were apposite, the joint judgment in *Antill Ranger* specifically distinguished (i) a statute which gives the payer 'some other remedy by which he may regain the money or obtain reparation' (such as the Taxation Administration Act provisions here) and (ii) a statute that 'imposes a limitation of time' (such as the Limitation Act provisions here).[69]

46. Even if ss 10A(1) and (3) of the Limitation Act and ss 36(2) and 188(2) of the Taxation Administration Act would not have extinguished any common law claims in restitution the Appellants had, that does not mean they had claims that could be 'acquired' within the meaning of s 51(xxxi). Section 132 of the Taxation Administration Act is a 'conclusive evidence' and 'validity of assessment' provision of the type considered by this Court in *Futuris*.[70] The provision would be 'picked up' by ss 79(1), (2) and (3) of the Judiciary Act (see [41] above). Its effect is that, in any common law restitutionary claim, the court would be required to conclude that the tax was payable.[71] The money paid being due under statute, there could be no restitutionary claim to recover it.[72]

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67 (1955) 93 CLR 83.

68 See *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 100 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).

69 *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 99. As to s 10A of the Limitation Act in particular, see *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633, 659–60 (Fullagar J, Taylor J agreeing) and Fullagar J's earlier comments in *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 103. See also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 54 [45] fn 96 (McHugh, Gummow and Hayne JJ).

70 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

71 See, eg, *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 166–7 [64]–[67] (Gummow, Hayne, Heydon and Crennan JJ); *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473, 491–3 [41]–[45] (Gummow ACJ, Heydon, Crennan and Kiefel JJ).

72 See, eg, *Commissioner of State Revenue v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, 538 [87] (Bell and Gordon JJ); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 392 (Brennan J); *DD Growth Premium 2X Fund (In liq) v RMF Market Neutral Strategies (Master) Ltd* [2018] Bus LR 1595, 1612 [62] (Lord Sumption and Lord Briggs JJSC). Even if any claims were in principle available, they would be time-barred. Section 10A(1) of the Limitation Act (which can be severed from s 10A(3) if necessary) would be 'picked up' by ss 79(1), (2) and (3)(a) of the Judiciary Act and would bar any claims. They would therefore be doomed to fail and worthless and outside the scope of s 51(xxxi). *Commonwealth v Mewett* (1997) 191 CLR 471 is distinguishable because the limitation period

47. The Appellants also submit that s 5(3) of the ITA Act 'reduc[ed] to zero the economic value of the appeal proceedings' (AS [45]). It is necessary to focus on the right in question, which is the right of appeal to the Supreme Court provided by s 69 of the Taxation Administration Act (the exercise of which might ultimately lead to a refund under s 37). Because that is a right that '[has] no existence apart from statute and whose continued existence depends upon statute',[73] 'further analysis is imperative',[74] particularly of the legislation creating the right and the nature of the right.[75] Such analysis reveals that 'susceptibility … to alteration … by subsequent … legislative action' is 'a characteristic of the right [in s 69] … inherent at the time of its creation'.[76]

48. An appeal under s 69 of the Taxation Administration Act is 'a rehearing … conducted by the Supreme Court in its original jurisdiction, on the materials that were before the Commissioner, subject to the power of the Court to admit new evidence under s 70B(1)'.[77] The Supreme Court 'exercises its original jurisdiction to make such judgment as it considers ought to have been given, *on the facts and the law, at the time of the hearing of the appeal*'; '[t]he appeal is in that sense a hearing de novo'.[78] Where, as here, the appeal is 'from a decision involving the application of the law to objective conclusions of fact, which are not dependent upon the Commissioner's state of satisfaction, it is open for the Court to give such judgment on the appeal as it considers ought to have been given, on *the law and facts as they are at the time of the hearing of the appeal*'; there is no requirement to show 'legal, factual or discretionary error'.[79]

49. The requirement to apply changes in the law[80] since the Commissioner's decision—to

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here could not be extended or postponed. Even if s 10A(1) is subject to the postponement provision in s 38, that provision has no application here. In particular, s 38(1)(c) cannot apply because the Appellants were not mistaken: in each case they paid the tax after objecting to the assessment. They have not suggested that they would be entitled to restitution on the ground of mistake: AS [48]; SCB 35–6 [47].

73 *Cunningham v Commonwealth* (2016) 259 CLR 536, 555–6 [43] (French CJ, Kiefel and Bell JJ).

74 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 664 [23] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Cunningham v Commonwealth* (2016) 259 CLR 536, 556 [43] (French CJ, Kiefel and Bell JJ), 584 [154] (Keane J).

75 *Cunningham v Commonwealth* (2016) 259 CLR 536, 556 [44] (French CJ, Kiefel and Bell JJ), 563 [66] (Gageler J); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 361–2 [93] (French CJ), 440 [364] (Crennan J).

76 *Commonwealth v Yunupingu* [2025] HCA 6, [55] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Cunningham v Commonwealth* (2016) 259 CLR 536, 563 [66] (Gageler J).

77 *Wakefield v Commissioner of State Revenue* [2019] 3 Qd R 414, 425 [30] (Bowskill J).

78 *Wakefield v Commissioner of State Revenue* [2019] 3 Qd R 414, 425 [32] (emphasis added).

79 *Wakefield v Commissioner of State Revenue* [2019] 3 Qd R 414, 425–6 [34] (emphasis added).

80 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 107–8 (Dixon J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 556 [31] (Gageler J).

'obey'[81] the law at the time of the appeal—demonstrates that the right of appeal under s 69 (or its economic value) is of its nature susceptible to change. The right does not carry with it any entitlement to have the law as at the date of the Commissioner's decision (or at any other time) applied;[82] nor does it carry with it any entitlement to have that law remain unchanged.[83] The 'continued and fixed content [of the right] depend[s] upon the will from time to time of the legislature'.[84] There is no acquisition of property within the meaning of s 51(xxxi) involved in modifying a right that has no basis in the general law and which, of its nature, is susceptible to that course.[85] That is the case here. The modification of the right under s 69 (or the reduction of its economic value) is therefore not an 'acquisition' within the meaning of s 51(xxxi).

QUESTION 4A: Effect of Land Tax Act, s 104 and Taxation Administration Act, s 189

50. The appeals removed into this Court were appeals under s 69 of the Taxation Administration Act pending in the Supreme Court of Queensland.[86] Each of those appeals was from a decision of the Commissioner to disallow objections to the assessment of land tax surcharge in a land tax assessment notice.[87] As noted in [48] above, an appeal under s 69 is by way of rehearing, and the law at the time of the hearing of the appeal must be applied. In the present case, that extends to s 104 of the Land Tax Act and s 189 of the Taxation Administration Act, which commenced on 28 February 2025 (after the appeals were instituted). The operation of those provisions is described above at [28] to [29]. They remove the basis for the Appellants' objections and require their appeals to be disallowed.[88]

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81 *United States v Schooner Peggy*, 5 US 103, 110 (1801) (Marshall CJ), quoted in *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, 151 [80] (Gummow, Hayne and Bell JJ).

82 See, eg, *Minogue v Victoria* (2018) 264 CLR 252, 264 [19] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

83 'No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit': *New York Central RR Co v White*, 234 US 188, 198 (1917), quoted in *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 261 (McHugh J). See also *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 52–3 [136]–[138] (McHugh J).

84 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 664 [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309, 383 [172] (Gummow and Hayne JJ); *Cunningham v Commonwealth* (2016) 259 CLR 536, 556 [44] (French CJ, Kiefel and Bell JJ).

85 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 361–2 [92]–[93] (French CJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 16 [15] (Brennan CJ), 35–6 [78] (Gaudron J), 54 [140] (McHugh J); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305–6 (Mason CJ, Deane and Gaudron JJ).

86 SCB 5–13.

87 SCB 185–199.

88 Under s 70C of the Taxation Administration Act.

QUESTION 4B: Validity of Land Tax Act, s 104 and Taxation Administration Act, s 189

51. As s 5(3) of the ITA Act is valid, the implementation of the German agreement under s 5(1) of the ITA Act is 'subject to anything inconsistent … contained in a law of … a State'—such as s 104 of the Land Tax Act and s 189 of the Taxation Administration Act—'that imposes a tax other than Australian tax'. As those State provisions are not inconsistent with s 5 of the ITA Act, they are valid and operative.

ORDERS SOUGHT

52. The questions in the Special Case should be answered: **(1)** Yes; **(2)** Yes; **(3)** Unnecessary to answer; **(4)** No; **(4A)** Yes; **(4B)** No; **(5)** None; **(6)** The Appellants.

ALTERNATIVE SUBMISSION

53. The following alternative submission is made if, contrary to the above, a successful application is made to reopen and overrule *Metwally* with the result that, from the commencement of the Commonwealth Amendment Act, s 109 ceased to render s 32(1)(b)(ii) of the Land Tax Act inoperative with effect from 1 January 2018.

54. That result would not affect the characterisation of s 5(3) as a law with respect to external affairs. Nor would it make s 5(3) a law with respect to acquisition of property on other than just terms. Removing the pressure of the Commonwealth Act would simply allow s 32(1)(b)(ii) of the Land Tax Act to spring back to life, 'like Jack-in-the-box'.[89] It is s 32 of the Land Tax Act that would impose the tax and it is therefore that provision that would remove any still-subsisting right to recover the tax paid. Even if that operation of the State law could somehow be sheeted home to s 5(3) of the ITA Act, at most that would mean that s 5(3) is a law that facilitates the imposition of State taxation. While it would not be a law with respect to federal taxation under s 51(ii), it would still be a law with respect to an exaction that is 'inconsistent or incongruous' with just terms compensation.[90] The categories of 'incongruous' exactions are not confined to laws supported by particular heads of power such as s 51(ii).[91]

55. If s 32(1)(b)(ii) of the Land Tax Act were to revive, s 104 of that Act would not have

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89 *R v Licensing Court (Brisbane); Ex parte Daniell* (1920) 28 CLR 23, 33 (Higgins J).

90 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 436 [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

91 For example, a law providing for the forfeiture of enemy property would be a law supported by the aliens power in s 51(xix) and would not be subject to s 51(xxxi): *Commonwealth v Yunupingu* [2025] HCA 6, [189] (Gordon J).

any operation. Under s 104(1), that provision only applies if the land tax surcharge was rendered inoperative by s 109 of the Constitution, but if s 5(3) of the ITA Act unilaterally and retroactively removed the inconsistency on 8 April 2024 when it commenced, there was no inconsistency on which s 104 of the Land Tax Act could operate when it commenced on 28 February 2025.[92] If s 104 is not engaged then neither is s 189 of the Taxation Administration Act (s 189(1) provides that that section only applies if, relevantly, s 104 of the Land Tax Act applies).

56. Accordingly, if *Metwally* is reopened and overruled, the questions in the Special Case should be answered: **(1)** Yes; **(2)** Yes; **(3)** Yes; **(4)** No; **(4A)** No; **(4B)** Unnecessary to answer; **(5)** None; **(6)** The Appellants.

PART VI: TIME ESTIMATE

57. It is estimated that the Commissioner will require up to 1 hour 40 minutes for oral argument.

Dated 26 March 2025.

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[92] Reading s 104(2) as imposing a duplication of the tax in s 32(1)(b)(ii) would be an absurd result that the legislature is distinctly unlikely to have intended and should therefore be avoided: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, 500 [3], 514–5 [41]–[42] (Kiefel CJ, Nettle and Gordon JJ).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B48/2024

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

and

COMMISSIONER OF STATE REVENUE
Respondent

No. B49/2024

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

and

COMMISSIONER OF STATE REVENUE
Respondent

No. B50/2024

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

and

COMMISSIONER OF STATE REVENUE
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2024, the Commissioner of State Revenue sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions**.**

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
Constitutional provisions					
1.	*Constitution*	Current	ss 51(ii), 51(xxix), 51(xxxi),	In force at all relevant times	All relevant times

			78, 71-80 (Ch III), 109, 122		
Statutory provisions					
Commonwealth legislation					
2.	*Acts Interpretation Act 1901* (Cth)	Version 38 (11 December 2024 to current)	s 15A	No material difference between versions	All relevant times
3.	*Human Rights (Sexual Conduct) Act 1994* (Cth)	As made (19 December 1994 – 4 August 2009)	s 4	For illustrative purposes only	Version in force in *Croome v Tasmania* (1997) 191 CLR 119
4.	*Income Tax (International Agreements) Act 1953* (Cth)	As made (11 December 1953 – 20 May 1958)	ss 5, 6, sch 1 (art 1(a)), sch 2 (art 1(a))	Illustrates focus of double taxation treaties on income tax as at time of enactment	11 December 1953 – 20 May 1958
5.	*Income Tax (International Agreements) Act 1953* (Cth)	Version in force from 24 December 1993 – 28 March 1995		Version in force before amendment by the *Income Tax (International Agreements) Amendment Act 1995* (Cth)	24 December 1993 – 28 March 1995
6.	*Income Tax (International Agreements) Amendment Act 1995* (Cth)	As made (29 March 1995 – 13 November 1995)	s 3, Sch, item 1	Inserted the reference to 'Fringe Benefits' in the long title of the ITA Act and changed the short title of the ITA Act	From 29 March 1995
7.	*International Tax Agreements Act 1953* (Cth)	Version 39 (1 October 2020 – 30 June 2021)	ss 3AAA, 5	Version in force when the land tax was imposed	19 February 2021: the Commissioner issued the First GG120E Assessment and the First GG180Q Assessment for the 2020-21 financial year
8.	*International*	Version 40	ss 3AAA, 5	Version in force	3 November

	Tax Agreements Act 1953 (Cth)	(1 July 2021 – 30 June 2022)		when the land tax was imposed	2021: The Commissioner issued the Second GG120E Assessment for the 2021-22 financial year 14 February 2022: The Commissioner issued the Second GG180Q Assessment for the 2021-22 financial year
9.	*International Tax Agreements Act 1953* (Cth)	Version 45 (11 December 2024 – current)	ss 3AAA, 5	Version includes amendment inserting s 5(3)	Current version in force which includes amendments to s 5 in force from 8 April 2024
10.	*Judiciary Act 1903* (Cth)	Version 51 (11 December 2024 – current)	ss 39, 64, 78B, 79	No material difference between versions	All relevant times
11.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	As made (8 April 2024 – current)	Sch 1, cll 1, 2	Inserted subsection 5(3) into the *International Tax Agreements Act 1953* (Cth)	From 8 April 2024
12.	*Petroleum Resource Rent Tax (Imposition—Customs) Act 2012* (Cth)	As made (29 March 2012 – current)		For illustrative purposes only	All relevant times
13.	*Petroleum Resource Rent Tax (Imposition—Excise) Act 2012* (Cth)	As made (29 March 2012 – current)		For illustrative purposes only	All relevant times
14.	*Petroleum Resource Rent Tax*	As made (29 March 2012 – current)		For illustrative purposes only	All relevant times

	(Imposition—General) Act 2012 (Cth)				
State legislation					
15.	*Crown Suits Act 1947* (WA)	Reprint dated 14 April 1971	ss 5, 6	For illustrative purposes only	Version in force in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30
16.	*Land Tax Act 2010* (Qld)	30 June 2019 – 29 June 2022	s 32(1)(b)(ii)	Version in force when the land tax was imposed on the Appellants	The Commissioner issued the relevant assessment notices on 19 February 2021, 3 November 2021 and 14 February 2022
17.	*Land Tax Act 2010* (Qld)	Current (28 February 2025 – current)	ss 32(1)(b)(ii), 104	Version as amended by the *Revenue Legislation Amendment Act 2025* (Qld)	28 February 2025: date of commencement of s 104 of the *Land Tax Act 2010* (Qld)
18.	*Limitation of Actions Act 1974* (Qld)	Current (20 September 2023 – current)	s 10A	No material difference between versions	As at 8 April 2024 when s 5(3) of the ITA Act was enacted
19.	*Revenue Legislation Amendment Act 2025* (Qld)	As made (28 February 2025 – current)		Inserted s 104 into the *Land Tax Act 2010* (Qld) and s 189 into the *Taxation Administration Act 2001* (Qld)	28 February 2025: Act received Royal Assent
20.	*Taxation Administration Act 2001* (Qld)	23 June 2023 – 27 February 2025	ss 36–39, 69, 70C, 132, 188	Version in force as at 8 April 2024 when s 5(3) of the ITA Act commenced .	8 April 2024: Date of commencement of s 5(3) of the ITA Act
21.	*Taxation*	Current (28	ss 36–39,	Currently in	28 February

	Administration Act 2001 (Qld)	February 2025 – current)	69, 70C, 132, 188, 189	force, includes amendments made by the *Revenue Legislation Amendment Act 2025* (Qld)	2025: Date of commencement of s 189