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25 October 2021

Mr Nicholas Dowie and Ms Natasha McNamara
Tax Treaties Branch
Corporate and International Tax Division
Treasury

by email: RGCITDTaxTreatiesBranch@treasury.gov.au

Dear Mr Dowie and Ms McNamara,

RE: EXPANSION OF AUSTRALIA'S TAX TREATY NETWORK

I thank Treasury for its invitation to make submissions in respect of the public consultation announced on 16 September 2021, being "*Expanding Australia's Tax Treaty Network*" (the "**Consultation**"). The Consultation followed the Treasurer's own media release dated 15 September 2021 in which he announced that the Government's plan is to:

> …… allow Australia to enter into 10 new and updated tax treaties by 2023, building on our existing network of 45 bilateral tax treaties……
>
> …… ensure Australia's tax treaty network will cover 80 per cent of foreign investment in Australia and about $6.3 trillion of Australia's two-way trade and investment……
>
> Negotiations with India, Luxembourg and Iceland are occurring this year as part of the first phase of the program. Negotiations with Greece, Portugal and Slovenia are scheduled to occur next year as part of the second phase……

Professional credentials

I am a barrister authorised to practise in the Supreme Court of New South Wales, the Federal Court of Australia and the High Court of Australia. I am a member of Ground Floor Wentworth Chambers, a leading Sydney chambers with a revenue law specialism.

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Prior to joining the Bar, I was employed for 20 years by various financial institutions in Australia, the United Kingdom and Europe on tax related matters. At the Bar I specialise in providing advice on Australian taxation law and the resolution of controversies. Much of my advisory work arises in the fields of international taxation, taxation of trust estates and the taxation of capital gains. My end-clients include private taxpayers as well as government parties such as the Commonwealth of Australia, the Commissioner of Taxation and the Chief Commissioner of State Revenue (NSW). I am one of the co-authors of the *Australian CGT Handbook* published annually by Thomson Reuters.[1] I have written or co-authored numerous papers on Australian tax related matters.

Basis of submissions

The Commonwealth is devoting substantial human and financial resources as part of the double tax agreement ("**DTA**") expansion programme. There is a direct cost to the revenue that comes with the implementation of each end every new DTA because the power of the Commonwealth to impose taxation becomes restricted. Consequently, it must be the expectation of government that the elimination of double taxation will create revenue-enhancing opportunities for Australian resident taxpayers, a portion of which will be returned to the community by way of increased Australian income taxation collected by the Commonwealth.

My submissions eschew consideration of issues which are specific to the jurisdiction of any particular proposed treaty partner. Treasury has numerous industry correspondents who will identify such issues for you.

I make three submissions, the first two of which consider matters which I regard as foundational to the implementation of DTAs in an Australian tax setting.

The first of these seeks to address a normative question, the answer to which may influence the negotiation of a DTA by the Commonwealth. It is likely that my first submission will be regarded as uncontroversial by Treasury because I understand it is your existing (albeit unstated) practice to adhere to same.

The second of my submissions will be disputed by Treasury because it is contrary to your existing general practice. My anticipation is that Treasury's existing practice has been imposed upon you by other departments within the Commonwealth[2] rather than being a matter of genuine concern to Treasury itself.

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1 https://store.tax.thomsonreuters.com.au/en/store/book/australian-cgt-handbook-2021-22/p/42942735

2 The Attorney-General's Department.

The third of my submissions identifies problems with *International Tax Agreements Act (No 1) 2006* sch 1 that purports to enact into Australian law provisions that facilitate OECD Model[3] art 27 (dealing with mutual assistance in collection of tax debts).

Submissions

I: Guarantee of non-retrospectivity

I submit to Treasury that you should confirm to the public that the negotiation by the Commonwealth of any new or revised DTA will proceed on the basis that:

(a) the terms of a DTA will not enter into force so as to affect adversely the rights of any Australian resident person as a taxpayer or impose liabilities thereon with respect to any tax period that has concluded *prior* to the entry into force of the DTA; and

(b) the terms of any Australian legislation that implements a DTA into Australian law will not operate so as to affect adversely the rights of any Australian resident person as a taxpayer or impose liabilities thereon with respect to any tax period that has concluded *prior* to the announcement date of the legislation.

Appendix I discusses the basis for this first submission. I observe that very little retrospectivity has arisen from the implementation of Australia's existing DTAs and that the Commonwealth has performed an admirable role in ensuring this outcome.

II: Constitutional authorisation

I submit to Treasury that the explanatory memorandum that accompanies each bill which implements a DTA into Australian law should contain a brief section which confirms the head or heads of power within s 51 of the *Constitution* that supports Parliament's authority to enact into law each article of the DTA.

Appendix II discusses the basis for this second submission. I do not suggest that the Parliament lacks the requisite power. Rather there seem to be numerous heads of power available and it is of benefit to the broader community to understand the reasoning of the executive branch when preparing extrinsic material (such as an explanatory memoranda) for the legislative branch, the task of whom it becomes to decide whether to enact the law.

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[3] Model Tax Convention on Income and Capital (2003, 2005, 2008, 2010, 2014, 2017).

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III: Review of foreign tax collection rules

I submit to Treasury that government review *Taxation Administration Act 1953* sch 1 div 263 (the "**Foreign Tax Collection Rules**") which purports to give effect to those articles in 7 of Australia's DTAs (ratified since 2005) that are modelled on art 27 ("Assistance in the Collection of Taxes") of the OECD Model. This review should address the following two questions:

(a) whether the enactment of the Foreign Tax Collection Rules by *International Tax Agreements Amendment Act (No. 1) 2006* sch 1 fails as a valid exercise of the Parliament's legislative power for the reason that it was required to observe the "just terms" restriction imposed by s 51(xxxix) of the *Constitution* but did not do so; and

(b) should the enactment of the Foreign Tax Collection Rules otherwise be within power of the Parliament, whether those rules are defective for want of a mechanism that engages with the exclusions provided for in paragraph 8 of each DTA that includes an article modelled on art 27 of the OECD Model.

Appendix III discusses the basis for this third submission. Should the first of its two questions be answered in the affirmative, it would seem to me that the Commonwealth would need to know this outcome *prior* to negotiating with a treaty partner a new DTA that might include an article providing for mutual assistance in the collection of taxes.

Yours sincerely

Tim Russell

APPENDIX I
GUARANTEE OF NON-RETROSPECTIVITY

Australian domestic law

Common law view

At common law it is presumed that a statute will not have retrospective operation unless there are clear words to the contrary.[4] In *Maxwell v Murphy* Dixon CJ said:[5]

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

In *Fisher v Hebburn Ltd*, Fullagar J said:[6]

> There can be no doubt that the general rule is that an amending enactment — or, for that matter, any enactment — is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement.

In *Australian Education Union v General Manager of Fair Work Australia*, French CJ, Crennan and Kiefel JJ said:[7]

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.

Commonwealth legislative powers

I acknowledge that under domestic Australian law there is nothing that prevents the Parliament from enacting a law with retrospective effect. Frequently, this is the case with taxation laws and there appears to be community acceptance that a taxation law may commence from the date of its announcement by the executive branch of government rather than the date of its enactment by the Parliament.

There are competing definitions of "retrospectivity" and its companion term "retroactivity" as well as the extent to which those terms cover the same territory.

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[4] Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, 2014, LexisNexis) at [10.1].

[5] *Maxwell v Murphy* [1957] HCA 7, (1957) 96 CLR 261 per Dixon CJ at 267.

[6] *Fisher v Hebburn Ltd* [1960] HCA 80, (1960) 105 CLR 188 per Fullagar J at 194.

[7] *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19, (2012) 246 CLR 117 per French CJ, Crennan and Kiefel JJ at [30]

For purposes of this submission, I adopt a very narrow definition of a "**retrospective tax law**" as being:

> a law or treaty obligation which alters the incidence of or liability to tax of a person subject to Australian taxation in respect of a tax period that has concluded *prior* to:
>
> (i) in the case of a law, the date of the announcement of that law; or
> (ii) in the case of a DTA, the entry into force of that DTA

I observe that despite my definition the Parliament never has been prevented from enacting retrospective tax laws; indeed it has done so on many occasions although in the last 20 years those have diminished in frequency. In 2012, *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012 (Cth)* made changes to the *Income Tax Assessment Act 1997* (Cth) ("**ITAA97**") with retrospective operation to tax periods commencing 1 July 2004.[8] In *Chevron Australia Holdings Pty Ltd v FCT*[9] the Federal Court of Australia affirmed the ability of the Parliament to enact such retrospective tax laws. The decision was upheld on appeal by the Full Court of the Federal Court.[10]

With the foregoing acknowledged, there remains the normative question as to whether retrospectivity in taxation law (or any law) is desirable. Business taxpayers need certainty when planning their activities and risking their capital, particularly offshore; they need to be confident that the parliamentary draftsperson[11] will write clear legislation with *prospective* effect upon which they can rely.

Justification for retrospectivity

There exists a range of circumstances in which the legislature may be justified in the enactment of a retrospective taxation law. The circumstances include those where a retrospective law:

- counters unforeseen tax avoidance behaviour arising from artificial or contrived schemes that threaten government revenue significantly;
- reinstates a previous understanding of the law that existed prior to a judicial decision to the contrary; or

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8 The changes to the transfer pricing laws had been announced slightly earlier by Media release No 145, Bill Shorten MP, "Robust Transfer Pricing Rules for Multinationals" (1 November 2011).

9 *Chevron Australia Holdings Pty Ltd v FCT* [2015] FCA 1992, (2015) 102 ATR 13 at [553].

10 *Chevron Australia Holdings Pty Ltd v FCT* [2017] FCAFC 62, (2017) 251 FCR 40.

11 The Office of Parliamentary Counsel.

- addresses further consequences of such a judicial decision that were not covered by it or which validate earlier executive decisions that have been rendered invalid by that decision.

Implementation of treaties

Any DTA that the Commonwealth negotiates and ratifies with a treaty partner does not become enforceable under Australian law unless and until the Parliament passes an enactment to that effect – see for example *International Tax Agreements Amendment Act 2016* which implemented the 2015 DTA concluded with Germany. The effect of any implementing legislation is to incorporate a DTA into the provisions of the *International Tax Agreements Act 1953* ("**ITAA53**") by force of s 5.

Generally, it is the terms of the DTA itself (rather than an implementing statute) that set forth the time at which its provisions will enter into force – see for example the *Australia Germany DTA*[12] art 32.[13] Consequently, it would seem to me unlikely that any issue of retrospectivity should arise directly from the provisions of the implementing legislation. Rather, to the extent that retrospectivity might arise, it would do so from terms which had been negotiated into the DTA itself by the Commonwealth. Were this to be the case then the effect of the implementing legislation will be to transpose such retrospectivity into Australian law.

Due process protections

I discuss the issue of retrospective DTA terms in subsequent paragraphs of this submission. It is sufficient at this point to observe that that the due processes of the Commonwealth are alert to the issue of retrospectivity and provide safe-guards. These are that:

(1) the Department of Prime Minister & Cabinet:

  (a) requires that all provisions with retrospective effect that adversely affect rights or impose liabilities be justified in submissions to Cabinet;[14]

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[12] "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", Berlin, (12 November 2015).

[13] Article 32 of the *Australia-Germany DTA* reflects an analogous position provided for by the OECD Model Tax Convention, art 31.

[14] *Legislation Handbook*, Department of the Prime Minister and Cabinet, February 2017 at [3.7(l)], [3.19]; see also [7.29(c)-(d)].

(b) stipulates that such provisions are to be included only in exceptional circumstances and on explicit policy authority;[15] and

(c) requires that an explanation and a justification for any such provisions be given to the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee;[16]

(2) the Senate Standing Committee for the Scrutiny of Bills regards retrospective legislation potentially as offending the first of its five review principles;[17] therefore the committee requires disclosure as to whether any persons are likely to be detrimentally affected by the retrospective commencement or application of the legislation and, if so, to what extent their interests are likely to be affected; and

(3) the Senate requires compliance with order No 45 (in relation to parliamentary privilege) where there is a retrospective bill announced by press release such that the bill must be enacted within six months of the announcement date.

Content of double tax agreements

Unlike domestic law, it is relatively rare that an international treaty imposes obligations on signatories that have retrospective application.[18] Indeed art 28 of the *Vienna Convention*[19] to which Australia became a party in 1974 raises a rebuttable presumption that a treaty will not bind a party in relation to acts or facts which took place before its entry into force. A DTA is a treaty which is covered by the *Vienna Convention*.

Existing retrospectivity

Australia's DTAs are modelled on successive versions of the OECD Model Convention (the "**OECD Model**").[20] There is nothing in the OECD Model or its commentaries that precludes provisions of a DTA taking retrospective effect. Likewise, there is nothing in the OECD Model that encourages retrospectivity.

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15 *Legislation Handbook*, Department of the Prime Minister and Cabinet, February 2017 at [5.19].

16 *Legislation Handbook*, Department of the Prime Minister and Cabinet, February 2017 at [5.20]

17 Senate Standing Committee for the Scrutiny of Bills, "Principle (i): Undue trespass on personal rights and liberties". The Standing Committee states: "A basic value of the rule of law is that, in general, laws should only operate prospectively, not retrospectively. Retrospective commencement or application, when too widely used or insufficiently justified, can work to diminish respect for the rule of law and its underlying values."

18 See for example the discussion in Rosenne S, "The temporal application of the Vienna Convention on the Law of Treaties", (1970) 4 *Cornell International Law Journal* 1.

19 "Vienna Convention on the Law of Treaties", (1969).

20 Model Tax Convention on Income and Capital (various dates).

In the course of negotiating its existing suite of 45 bilateral DTAs and 1 multilateral instrument, the Commonwealth has conducted itself in an exemplary manner and has ensured that retrospectivity has not become a feature of Australia's treaty landscape. In the course of researching this submission, I have identified only a handful of instances of potential retrospectivity in our existing DTAs. Upon evaluation, I consider all of these to be trivial or falling outside the concern of my submission.[21] They are as follows:

(1) Article 35(4) of the Multilateral Instrument[22] (the **"MLI"**) adopts partial retrospectivity with respect to changes to art 16 (mutual agreement procedure). This has been transposed into Australia's synthesized MLI texts with France, Japan, Malta, New Zealand, Poland, Singapore, Slovakia and the United Kingdom.

Comment: Because the retrospective language of art 35(4) operates by way of an exclusion to a modification, its practical retrospectivity is trivial or non-existent.

(2) Article II(2) of the second protocol to the Belgium DTA[23] provides that the exchange of information powers conferred by art 26 "shall have effect with respect to criminal tax matters from the date of entry into force of the Protocol, without regard to the taxable period to which the matter relates." Consequently, where there is a criminal tax matter that arises, both Australia and Belgium are authorised to request information in respect of events prior to the commencement of the protocol.

Comment: Whilst the retrospective effect here is non-trivial, I regard it as falling outside my submission – the wording of the guarantee that I recommend disregards this type of retrospectivity because it does not affect the rights of a person as a taxpayer or impose liabilities. In general, I regard all exchange of information provisions as falling outside my submission. There is sufficient protection afforded to taxpayers by the time period limitations in the rules for amending assessments.[24]

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[21] Or otherwise irrelevant.

[22] "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (2016).

[23] "Second Protocol Amending the Agreement Between Australia and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed At Canberra on 13 October 1977 as amended by the Protocol signed at Canberra on 20 March 1984", Paris, (24 June 2009).

[24] *Income Tax Assessment Act 1936* ("**ITAA36**") s 170.

(3) Clause 10 of the exchange of notes that accompanies the United Kingdom DTA[25] stipulates in relation to each of art 26 (mutual agreement procedure) and art 27 (exchange of information) that those articles "shall have effect from the date of entry into force of the [DTA], without regard to the date of the relevant transactions or the taxable or chargeable period to which the matter relates".

Comment: I repeat and extend my preceding comment. I regard the procedural effect of both mutual agreement provisions and exchange of information provisions as falling outside the scope of retrospectivity with which this submission is concerned.

Finally, it appears to me to be significant that Australia has ratified and adopted the terms of the MLI on a non-retrospective basis. The provisions of the MLI have been drafted by OECD member countries in an effort to counter egregious schemes that relied upon deficiencies in the terms of DTAs and the OECD Model to foster tax avoidance on a widespread basis. The recognition by the OECD that embedding retrospectivity in a treaty instrument is an unsuitable method by which to combat tax avoidance is telling. This position is commendable. Australia's domestic rules are well equipped to counter tax avoidance without the need of treaty intervention.[26]

Retrospectivity and impending DTA negotiations

Based on the foregoing, it might be believed that there is little which should trouble Treasury regarding retrospectivity given the absence of it from existing DTAs and the various protections afforded by parliamentary due process. However, I caution that there is an emerging practice in some jurisdictions which is fostering treaty retrospectivity.

Typically this retrospectivity relates to the entry into force of optional art 27 of the OECD Model (assistance in the collection of taxes). To date, I note that Australia has included provisions modelled on art 27 in just a handful of its DTAs.[27] Further, Australia has enacted *Taxation Administration Act 1953* (**"TAA53"**) sch 1 div 263 (the **"Foreign Tax Collection Rules"**) to give domestic effect to its obligations under that article.

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[25] "Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains", Canberra (21 August 2003).

[26] *International Tax Agreements Act 1953* s 4(2) gives primacy to Australia's anti-avoidance rules ahead of the provisions in DTAs in any event.

[27] Refer to the DTAs (or protocols thereto) with Finland in 2006 (art 26), France in 2006 (art 26), Germany in 2016 (art 27), India in 2011 (art 26A), New Zealand in 2005 and then again in 2009 (art 27), Norway in 2006 (art 27) and South Africa in 2008 (art 25A).

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The United Kingdom (the **"UK"**) appears to be at the forefront of the push in favour of treaty retrospectivity.[28] For example, in its DTA with Iceland,[29] sub-s (2) of art 27 (entry into force) applies a special rule in respect of each of art 23 (mutual agreement procedure), art 24 (exchange of information) and art 25 (assistance in the collection of taxes). This causes those articles to "have effect from the date of entry into force of [the DTA], without regard to the taxable period to which the matter relates". Similar provisions appear in many recent UK DTAs that include a collection of taxes article,[30] although by no means is this uniform.[31]

The effect of the modification is that once the DTA enters into force, the UK and its treaty partner can (i) mutually agree matters in relation to taxes, (ii) exchange information that has a bearing on taxes and (iii) collect taxes owed to the other party *in relation to taxable periods ending prior to the DTA entering into force*, despite the underlying taxes otherwise being excluded from coverage of the DTA.

For the reasons given above, where the mutual agreement procedure or the exchange of information obligation is involved, I do not regard such retrospectivity as problematic – this is because those provisions do not, to my mind, affect adversely the rights of taxpayers or impose liabilities upon them.

However, in respect of the collection of taxes article, my view is that this will create a major problem for the Commonwealth because it would become compelled on behalf of a foreign government to impose substantive liabilities on resident taxpayers in respect of taxable periods that ended prior to the entry into force of the relevant DTA. It seems unwarranted and egregious that this provision could be availed of in circumstances where the underlying tax itself falls outside the provisions of the DTA (for the reason that such tax relates to a

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[28] I observe that the United Kingdom is not amongst the 6 names confirmed by Treasury thus far with whom Australia proposes to enter into new treaty negotiations. Australia's existing DTA with the United Kingdom was concluded in 2003 and has been updated by the MLI with effect from 1 January 2019.

[29] "Convention Between the Government of The United Kingdom of Great Britain and Northern Ireland and Iceland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains" (17 December 2013).

[30] The following recent treaties/protocols entered into by the United Kingdom *include* the retrospective entry into force provision regarding collection of taxes: Algeria (2015), Bulgaria (2015), Canada (2014) (retrospectivity limited to 5 years), Columbia (2016), Cyprus (2018), Gibraltar (2019), Guernsey (2018), Iceland (2013), India (2013), Isle of Man (2018), Japan (2013), Jersey (2018), Kosovo (2015), Lesotho (2016), Mexico (2011) (imprecise wording), New Zealand (2007) (imprecise wording), Senegal (2015), South Africa (2010) (imprecise wording) and Uzbekistan (2018).

[31] The following recent UK treaties/protocols *omit* the retrospective entry into force provision regarding collection of taxes even though an equivalent to OECD Model art 27 is present: Austria (2018), Faroes Islands (2007), Germany (2010), Liechtenstein (2012), Netherlands (2008), Norway (2013), Oman (2011) and Zambia (2014).

taxable period not covered by the DTA). Such arbitrary conduct engages none of the accepted justifications for retrospectivity listed on page 6 above.

By way of contrast, my reading of the prospective manner in which the similar provision in art 27 of Australia's recent DTA with Germany[32] operates is as follows:

- Australia is obliged to assist Germany to collect "revenue claims" of the sort identified by the provision (art 27) and vice versa;

- a "revenue claim" is defined by reference to "taxes of every kind and description imposed on behalf of" Australia, Germany and their subdivisions (art 27(2)) but is not limited by the definition of taxes covered in art 2 (art 27(3));

- the collection obligation imposed by art 27 enters into force in accordance with art 32(2) which sets out detailed timing rules for various types of taxes including other taxes – these are triggered by reference to events occurring, "years of income" or "periods of time" beginning on or after various dates *following* the entry into force of the overall DTA itself; and

- in the case of Australia, the Foreign Tax Collection Rules have been in force at a domestic level since 2006 to facilitate the collection of foreign tax for treaty partners.

These DTA provisions, to my mind, seem to provide sufficient protection against retrospectivity. Should there be any doubt, I observe that art 32(3) of the German DTA provides additional protection by stipulating that Australia's former DTA with Germany (signed in 1972) "shall continue to have effect for taxable years and periods which expired before the time at which the provisions of this Agreement shall be effective". I observe that the former DTA with Germany did not allow for the collection of taxes.

Submission

I submit to Treasury that it consider the wording of a "guarantee" against retrospectivity, being that the negotiation by the Commonwealth of any new or revised DTA will proceed on the basis that:

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[32] "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", Berlin, (12 November 2015).

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(a) the terms of a DTA will not enter into force so as to affect adversely the rights of any Australian resident person as a taxpayer or impose liabilities thereon with respect to any tax period that has concluded prior to the entry into force of the DTA; and

(b) the terms of any Australian legislation that implements a DTA into Australian law will not operate so as to affect adversely the rights of any Australian resident person as a taxpayer or impose liabilities thereon with respect to any tax period that has concluded prior to the announcement date of the legislation.

I recommend that in the negotiation of any future DTAs with treaty partners, this guarantee be regarded as a "line in the sand" over which the Commonwealth will not cross.

APPENDIX II
CONSTITUTIONAL AUTHORSATION

Content of explanatory memoranda

Whenever Treasury presents draft legislation for consideration by the Parliament, your current practise is to prepare a detailed explanatory memorandum (an **"EM"**) to accompany the draft bill. These EMs contain considerable analytical detail for the legislature but also is released publicly. An EM is of benefit to the broader Australian community in explaining what the executive branch believes a proposed law is purposed to achieve as well as how the drafting of the proposed law facilitates that achievement. (This community includes revenue law barristers who must then advise private and government on the new law!)

By way of example, I refer to the EM (the **"German DTA EM"**) that accompanies the *International Tax Agreements Amendment Bill 2016* (the **"Bill"**) that was introduced to give effect to the Commonwealth's ratification of the DTA with Germany in 2015 (the **"German DTA"**).[33] This is an excellent document of some 213 pages that explains comprehensively what is intended by the enactment of the German DTA. Treasury provides a detailed explication of its view as to how the new DTA rules will apply. Without having researched the point, my instincts tell me that there will be few jurisdictions in the world that devote the same level of analysis, resources and disclosure when enacting a DTA into domestic law. This is commendable. Highly.

Perplexingly, there is no discussion within the German DTA EM (or EMs in general) as to the authorisation of the bill in terms of the enumerated legislative powers conferred upon the Parliament by s 51 of the *Constitution*. A summary of the basis for such an authorisation would provide confirmation to the community that this matter had been researched, analysed, debated and addressed. My belief is that any disclosure by Treasury of the bases of constitutional authorisation for a bill will be:

(a) uncontroversial;
(b) not likely to be the cause of any political dispute;
(c) not capable of enlivening privacy concerns; and
(d) not, as to the generality of information disclosed, subject to any claims of legal privilege (other than those which might seek to inhibit transparency for an unstated purpose).

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[33] 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", Berlin, (12 November 2015).

In terms of Australia's DTA with Germany, it would seem to me that enactment of the implementing Bill is capable of authorisation by the following placita of the *Constitution*:

(1) as an exercise of the external affairs power under **s 51(xxix)** – for the reason that their provisions give effect to international obligations of the Commonwealth;

(2) as an exercise of the express grant of taxation power under **s 51(ii)** – in respect only of those articles of the DTA that modify the incidence of and liability to Australian tax of persons subject to Australian law;[34]

(3) as an exercise of the **implied incidental power** that is embedded within **s 51(ii)**[35] – at least in respect of those procedural articles that do not modify the incidence of and liability to Australian tax but, under accepted constitutional principles, nevertheless can be regarded as falling within such power; or

(4) by way of fallback, as an exercise of the **express incidental power** under **s 51(xxxix)** – once again, just in respect of those procedural articles referred to above and in accordance with accepted constitutional principles.

My expectation is that *all* of the articles of the German DTA are authorised in at least one way by s 51 of the *Constitution* (and all by s 51(xxix)). However, each specific article (or sub-article) may not be authorised in exactly the *same* way in respect of the s 51 alternatives. It would seem to me that any deviations in the bases of authorisation are worthy of:

(i) bringing to the attention of members of the legislature who must vote to enact any proposed law; and

(ii) disclosure to the broader community.

Within the German DTA EM, chapter 2 considers the DTA's compatibility with the *Human Rights (Parliamentary Scrutiny) Act 2011*. Treasury provides much helpful explanation therein. If compliance with human rights principles when enacting a bill has been deemed worthy of elevation to the attention of the

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[34] In keeping with the objective of DTAs, I observe that such alteration will, generally, effect a reduction in the liability to Australian tax to which a person subject to Australian law is subject.

[35] *Grannall v Marrickville Margarine Pty Ltd* [1955] HCA 6, (1955) 93 CLR 55 per Dixon CJ at 77; *GG Crespin & Son v Colac Co-operative Farmers Ltd* [1916] HCA 13, (1916) 21 CLR 205 per Griffith CJ at 212, per Barton J at 214.

Parliament (the legislation demanding of which is itself a mere act of that Parliament) then it seems incongruous to my mind that the constitutional authorisation for same (compliance with which is *not* at the discretion of Parliament) is ignored.

Submission

I submit to Treasury that the explanatory memorandum that accompanies each bill implementing a DTA into Australian law should contain a brief section which confirms the head(s) of power within s 51 of the *Constitution* that supports Parliament's authority to enact into law each article of the DTA.

APPENDIX III
REVIEW OF FOREIGN TAX COLLECTION RULES

Structure of treaty provisions

The 2003 iteration of the OECD Model was the first to include an article providing for the mutual assistance in the collection of taxes (art 27). A footnote to the title of art 27 which accompanied its 2003 inclusion and which remains in the most recent 2017 iteration of the OECD Model warns (emphasis added):

> In some countries, ***national law***, policy or administrative considerations ***may not allow or justify the type of assistance envisaged under this Article*** or may require that this type of assistance be restricted, e.g. to countries that have similar tax systems or tax administrations or as to the taxes covered. For that reason, ***the Article should only be included*** in the Convention ***where each State concludes*** that, based on the factors described in paragraph 1 of the Commentary on the Article, ***they can agree to provide assistance*** in the collection of taxes levied by the other State.

As observed in Appendix I, Australia has included an article that provides for mutual assistance in the collection of taxes in just 7 of its existing network of 45 bilateral DTAs.[36] Each of these has been modelled on art 27 of the OECD Model. The most recent DTA to include such a provision was the German DTA ratified in 2015.

Since 2011, Australia also has been a signatory to the 2010 protocol that amended the multilateral "Convention on Mutual Administrative Assistance in Tax Matters" (the "**MAA Convention**") arts 11-16 of which cover broadly the same subject matter as art 27 of the OECD Model. Although the MAA entered into force with respect to Australia on 1 December 2012, unlike the 7 bilateral DTAs, it never has been the subject of an act of the Parliament that gives it the force of Australian law. Additionally, its status as a *multilateral* treaty appears to render inapplicable the statutory scheme provided for by the Foreign Tax Collection Rules.[37] Therefore I discuss the MAA Convention no further.

The structure of each of the mutual assistance in tax collection articles which appear in 7 of Australia's DTAs generally is as follows:

- an obligation is imposed on each of the two treaty states to assist the other in the collection of revenue claims (para 1);
- such assistance is not confined by either the coverage provisions of art 1 (persons) or art 2 (taxes) (para 1);

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[36] Refer to the DTAs (or protocols thereto) with Finland in 2006 (art 26), France in 2006 (art 26), Germany in 2016 (art 27), India in 2011 (art 26A), New Zealand in 2005 and then again in 2009 (art 27), Norway in 2006 (art 27) and South Africa in 2008 (art 25A).

[37] Refer TAA53 sch 1 s 163-10 and the definition of "foreign revenue claim" which is defined by reference to an agreement which is bilateral in character. Given that the Parliament is yet to enact the MAA Convention into Australian law, it is understandable that this definition has not been widened.

- the term "revenue claim" is defined broadly and includes primary tax, interest, administrative penalties, collection costs and conservancy costs (para 2);
- a mechanism is provided for one state to present a revenue claim to another state, which then is to be collected by the second state as if it were one of its own revenue claims (para 3);
- likewise, a mechanism is provided for a second state to take conservancy measures at the request of a first state (para 4);
- there are rules for dealing with the priority to be accorded a revenue claim (para 5);
- the courts and tribunals of the state collecting the revenue claim are precluded from considering the existence, validity or amount of the revenue claim that is being prosecuted by the foreign state (para 6);
- there are rules dealing with the cessation of valid revenue claims (para 7); and
- there is a list of five exclusions which release a second state from the collection obligation otherwise owed to the first state (para 8).

The relevant provision I wish to draw to the attention of Treasury is paragraph 6. The full text of that provision, as it appears in the German DTA, is as follows:

> Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

I discuss this in later sections of this Appendix.

Structure of the Foreign Tax Collection Rules

The position at common law is that the courts of a sovereign state, such as Australia, will not entertain a suit by a foreign state to recover tax owed to it.[38] This position is reinforced by statute.[39]

In 2006, *International Tax Agreements Act (No 1) 2006* sch 1 inserted the Foreign Tax Collections Rules into TAA53 sch 1 as new division 263. The rules have been amended in minor ways only since that time. Implementation of the rules coincided with Parliament legislating to give effect to the first DTA that Australia had negotiated which included an assistance in collection of taxes article.[40]

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[38] *Government of India v Taylor* [1955] AC 491, see in particular the judgment of Viscount Simonds at 503.

[39] *Foreign Judgments Act 1991*, refer to the s 3 definition of "enforceable money judgment" which excludes amounts payable in respect of taxes (other than in respect of New Zealand tax or Papua New Guinea income tax).

[40] Refer *International Tax Agreements Act (No 1) 2006* sch 3 which implemented the protocol signed on 15 November 2005 in respect of the former DTA with New Zealand "Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income" (19 March 1995).

The Foreign Tax Collection Rules apply to a "foreign revenue claim" as defined in s 263-10 and which meets the conditions imposed by s 263-15. In particular, s 263-15 requires that each foreign revenue claim made by the competent authority of a foreign state, inter alia, be:

- consistent with the relevant DTA (para (b));
- made in the approved form (para (c)); and
- accompanied by a declaration of the competent authority of the foreign government that the claim fulfils the requirements of the DTA (para (e)).

Where the Commissioner is satisfied that a foreign revenue claim has been made properly under s 263-15 he is obliged by s 263-25 to register the claim on a "foreign revenue claims register" (s 263-20). Once this has been done, the operative provisions of the Foreign Tax Collection Rules take effect, being that:

(a) the amount owed by the "debtor" (ie. taxpayer) in respect of the foreign revenue claim becomes a pecuniary liability owed to the Commonwealth (s 263-30(1));
(b) the amount so owed becomes due and payable 30 days after particulars of the foreign revenue claim are given to the debtor (s 263-30(2)); and
(c) liability to general interest charge accrues from the time when the amount is payable (s 263-30(3)).

Because s 263-30(1) deems the amount of the claim to be a pecuniary liability owed to the Commonwealth, the machinery of TAA53 sch 1 pt 4-15 then takes effect as follows:

(d) the amount of the foreign revenue claim constitutes a "tax-related liability" (s 250-10(2) item 137);
(e) the amount of the tax-related liability becomes payable to the Commissioner on behalf of the Commonwealth (s 255-5(1));
(f) the Commissioner may sue in his official name to recover the amount;
(g) the presentation of a certificate by the Commissioner stating that a foreign revenue claim exists in respect of the debtor becomes prima facie evidence of its existence in any proceeding brought to recover that amount (s 255-45(1), (3));
(h) the debtor is precluded in those proceedings from seeking to defer the collection of tax on the basis that it is challenging the validity of the debt (TAA53 ss 14ZZM, 14ZZR); and
(i) the full range of the Commissioner's statutory powers to recover the amount due become enlivened (see for example TAA53 sch 1 div 260; TAA53 pt IVA; *Federal Court Rules 2011* div 7.4 etc).

Section 263-35 provides rules for amending the foreign revenue claims register. Section 263-40 requires the Commissioner to pay all or part of any amounts recovered from a debtor to the competent authority of the foreign government.

Importantly, I note the following three features of the Foreign Tax Collection Rules:

(1) the rules assume the correctness of the foreign revenue claim under foreign law (s 263-15);

(2) the rules prohibit any inquiry into or challenge of the correctness of the foreign revenue claim under Australian law – this being consistent with one of the purposes underlying the DTA article, and paragraph 6 thereof in particular – such that the foreign revenue claim becomes binding automatically on Australian courts in any recovery proceeding (refer (d)-(i) on page 19 above); and

(3) the rules lack a mechanism to provide the Commissioner (in the circumstance where Australia is collecting the tax of a foreign government) with information to determine the applicability of certain of the exclusions from the collection obligation provided for by paragraph 8 of the DTA article.

I address each of these in the two sub-headings (a) and (b) that follow.

(a) Constitutional considerations

I approach the discussion of constitutional issues conscious of the admonition of former High Court Justice Kirby that:[41]

> …. curious things sometimes happen when constitutional doctrine is applied to new facts…

In order to be within power of the Parliament under the *Constitution*, a law passed by it must be authorised by a provision of the *Constitution* and not infringe any of the handful of prohibitions contained within the *Constitution*. The large majority of legislative powers are located within s 51 and its numerous placita. Section 51 authorises the Parliament, subject to the *Constitution*, to make laws with respect to a list of subject matters. Most, but not all of the items on the list are activities which inherently are non-purposive powers but a small number of the items are purposive powers.[42]

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[41] *Commonwealth v WMC Resources Ltd* [1998] HCA 8, (1998) 194 CLR 1 per Kirby J at [211].

[42] Refer to the discussion in *Cunliffe v Commonwealth* [1994] HCA 44, (1994) 182 CLR 272 per Mason CJ at 296, Brennan J at 321-323; Dawson J at 354-356. See also Dixon R, “Overriding Guarantee of Just Terms

There are several powers located within s 51 which appear capable of authorising the Parliament to enact the provisions of *International Tax Agreements Act (No 1) 2006* sch 1, that is, the Foreign Tax Collection Rules. Additionally, there is one constitutional prohibition which those provisions either must not attract or must not infringe. I will deal with these matters below by posing and then responding to the following questions:

Q1: Are the Foreign Tax Collection Rules authorised by the external affairs power of s 51(xxix) of the *Constitution*?

Q2: Regardless of the answer to Q1, are the Foreign Tax Collection Rules authorised by the express grant of taxation power conferred by s 51(ii) (that is, disregarding any incidental power to s 51(ii))?

Q3: Regardless of the answer to Q1 and Q2, are the Foreign Tax Collection Rules authorised by the s 51(ii) taxation power because of the implied incidental power attached to that power or the express incidental power located in s 51(xxxix)?

Q4: Based on the answers to Q1, Q2 and Q3, is:

- **(a)** the operation of the prohibition in s 51(xxxi) attracted because property has been acquired by the Commonwealth from any state or person; and
- **(b)** if so, has that prohibition been infringed by the Foreign Tax Collection Rules because the acquisition was not on "just terms"?

Q1: The external affairs power

It would seem to me that the Foreign Tax Collection Rules clearly are authorised by the external affairs power. The Commonwealth has entered into an international treaty with a foreign government, one of the terms of which obliges mutual assistance in the collection of taxes.

The DTA article obliges the foreign government to ensure that when the competent authority of Australia (ie. the Commissioner) makes a request of it to collect Australian taxes owed by persons who have assets within the foreign jurisdiction, that it endeavours to collect the amount of those taxes and to pay them over to Australia. How the foreign government does so, is a matter for it – whether it achieves this by legislative or executive action is of no concern to

or Supplementary Source of Power? Rethinking s 51(xxxi) of the Constitution", (2005) 27 *Sydney Law Review* 639; Kirk J, "Constitutional Guarantees, Characterisation and Proportionality", (1997) 21 *Melbourne University Law Review* 1 at 21-24.

Australia. Other than to make the request for collection, there is no action for Australia to take in respect of its counterpart's obligation under the DTA.

The quid pro quo, of course, is that Australia is obliged to stand ready to receive requests for assistance by the foreign government with respect to foreign tax, then to collect same under Australian law and to remit any amounts collected to the foreign government. In order to achieve this, Australia has taken legislative action whereby the Parliament enacted the Foreign Tax Collection Rules in 2006. This legislative action represented partial fulfilment of Australia's international obligation. Whether or not a law which deprives persons of Australian assets in order to be transferred to foreign persons is authorised by any other provision of the *Constitution*, it has been uncontroversial since the 1980s that the giving effect by the Parliament to an international obligation of Australia will represent a valid exercise of the external affairs power.[43]

Q2: The taxation power – the express grant

I apprehend that the enactment of the Foreign Tax Collection Rules cannot be regarded as a valid exercise of the Parliament's power to make laws with respect to taxation within s 51(ii) (disregarding, for the time being, the extension of the express grant of power to embrace incidental matters).

The Foreign Tax Collection Rules do not impose or relate to "taxation" in the sense that that subject matter has been recognised by the High Court's reading of the *Constitution*. This is for several reasons:

(a) "taxation" has been interpreted by the High Court to mean taxes levied by the Commonwealth and not other jurisdictions;[44] and

(b) the drafting of the Foreign Tax Collection Rules enacts the deliberate effect of paragraph 6 of the DTA article which is to exclude the correctness of the underlying impost sought to be collected from challenge before an Australian court, thereby rendering it "incontestable" and beyond the taxation power.[45]

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43 See the line of cases that include *Koowarta v Bjelke-Petersen* [1982] HCA 27, (1982) 153 CLR 168, *Commonwealth v Tasmania* [1983] HCA 21, (1983) 158 CLR 1 and *Richardson v Forestry Commission* [1988] HCA 10, (1988) 164 CLR 261.

44 *Municipal Council of Sydney v Commonwealth* [1904] HCA 50, (1904) 1 CLR 208 per Griffith CJ at 232; *Victoria v Commonwealth* [1957] HCA 54, (1957) 99 CLR 575 per Dixon CJ at 614.

45 *MacCormick v FCT* [1984] HCA 20, (1984) 158 CLR 622 per Gibbs CJ, Wilson, Deane, Dawson JJ at 639-641; Brennan J at 658.

It is the second of these two reasons which is critical. In *MacCormick v FCT*[46] the High Court considered whether a tax imposed by the Commonwealth to recover tax avoided by promoters and participants in "bottom of the harbour" company asset stripping schemes was a valid exercise of the taxation power within s 51(ii) of the *Constitution*. It ruled that the exaction was authorised by s 51(ii), inter alia, for the reason that a review and appeal mechanism existed by which the putative taxpayer could challenge in the courts the criteria by reference to which liability to pay the tax had been imposed. However, the court ruled further that a conclusive evidence provision which purported to preclude the taxpayer from disputing that one of the conditions triggering liability had been satisfied was invalid, albeit severable from the law under consideration.[47]

The circumstances of the Foreign Tax Collection Rules are different to those of the regime considered in *MacCormick's* case. The person from whom the foreign revenue claim is sought to be collected under s 263-30 is denied the opportunity of disputing before an Australian court that a key element of the impost has been satisfied, that is that there is an amount due and owing to a foreign government in accordance with foreign law. TAA53 sch 1 s 255-45 then treats the correctness of that element as being proved conclusively against the taxpayer whenever an evidentiary certificate is tendered in recovery proceedings. To that extent, the impost is incontestable. Therefore it cannot represent a law with respect to taxation within the meaning of s 51(ii) (disregarding its incidental power).

Q3: The taxation power – the incidental powers

It has long been held by the High Court that the incidental power implied by or attached to the express grant of power in s 51(ii) authorises the collection and recovery of taxes.[48] Additionally, s 51(xxxix) provides an express grant of power to the Parliament to pass laws in respect of matters which are incidental to the execution of any power vested by the *Constitution* in the Parliament and other organs of government. Although there may be differences in the scope of the implied and express incidental powers, I make no further distinction between them.

It is apposite to consider whether the Foreign Tax Collection Rules are properly to be viewed as a law authorised by the *Constitution* for the reason that it is within the incidental power. This would be because the law relates to the collection and recovery of other taxes which themselves are constitutional, such as those assessed by ITAA36 and ITAA97 and imposed by *Income Tax Rates Act 1986*

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46 *MacCormick v FCT* [1984] HCA 20, (1984) 158 CLR 622.

47 *MacCormick v FCT* [1984] HCA 20, (1984) 158 CLR 622 per Gibbs CJ, Wilson, Deane, Dawson JJ at 643.

48 *GG Crespin & Son v Colac Co-operative Farmers' Ltd* [1916] HCA 13, (1916) 21 CLR 205 per Griffith CJ at 212, Barton J at 214, Isaacs J at 218, Higgins J at 223; *Moore v Commonwealth* [1951] HCA 10, (1951) 82 CLR 547 per Latham CJ at 564, Dixon J at 568, 569, McTiernan J at 573, Fullagar J at 578, Kitto J at 586.

(hereafter, a "**Constitutional Tax**"). In this context, a foreign government has agreed to collect Constitutional Taxes from persons beyond the reach (ie. enforcement powers) of Australia but within the reach of that government – the quid pro quo being that Australia agrees to collect unrelated foreign taxes from persons within the reach of Australia but beyond the reach of the foreign government.

This is a difficult question. Once again, I apprehend that the Foreign Tax Collection Rules are not authorised by the *Constitution* under the incidental powers in respect of taxation.

In a leading text on constitutional law, the learned author states that whether a law can be described as "incidental" to a subject matter, is akin to asking if:[49]

> the provision deals with a matter that "directly affects" the subject or is "conducive" to it or whether it is "an appropriate means" or "reasonably necessary" to the effectuation of a purpose within the power

Other authors have described the task as one that involves an assessment of the *proportionality* between the ends sought by a law and the means sought to achieve it.[50]

In *Nationwide News v Wills*[51] Mason CJ said:

> ….. even if the purpose of a law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, ie, unless it is capable of being considered to be reasonably proportionate to the pursuit of that end. Secondly, in determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object…..

In *Cunliffe v Commonwealth*[52] Dawson J observed that:

> ….disproportion…. may indicate that the means adopted are not the means of achieving an end within power but are in truth the means of achieving some end which lies outside power….

The question received extensive consideration by the High Court in *Leask v Commonwealth*,[53] which in doing so delivered seven separate judgments

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[49] Stellios J, *Zines's The High Court and the Constitution* (6th ed, 2015, Federation Press) at p 48.

[50] Kirk J, "Constitutional Guarantees, Characterisation and Proportionality", (1997) 21 *Melbourne University Law Review* 1 at 21 et seq; Joseph S and Castan M, *Federal Constitutional Law*, 4th ed, 2014, Thomson Reuters at [2.45]; see also Stellios J, *Zines's The High Court and the Constitution*, 6th ed, 2015, Federation Press at pp 56-60.

[51] *Nationwide News Pty Ltd v Wills* [1992] HCA 46, (1992) 177 CLR 1 per Mason CJ at 30-31.

[52] *Cunliffe v Commonwealth* [1994] HCA 44, (1994) 182 CLR 272 per Dawson J.

[53] *Leask v Commonwealth*[1996] HCA 29, (1996) 187 CLR 579.

expounding a range of views on the scope and relevance of proportionality. A majority rejected the applicability of the proportionality test to the identification of incidental powers attaching to non-purposive heads of power.[54] The taxation power is regarded as a non-purposive power.

In the context of the Foreign Tax Collection Rules, the answer as to whether those rules are authorised by the incidental power of s 51(ii) is not clear. However, it would seem to me that the facts under consideration are novel and extreme; those facts cannot be assimilated to the facts of other cases in which the collection and recovery of tax has fallen within the incidental taxation power. This is for the reason that in all other cases in which authorisation under the *Constitution* has been in issue, the underlying tax in respect of which a law relating to collection or recovery was enacted, was *itself* a tax authorised by the express grant of taxation power within s 51(ii).

According to the most recent set of published figures, the value of taxation debts owed to the Commonwealth is some $57.8 billion.[55] This is a substantial amount of uncollected tax and it is essential that the Parliament be able to enact laws to secure its collection. It is appropriate that those persons from whom it is sought to collect a tax bear some connection with the legal incidence of the tax imposed, absent good policy reasons to the contrary.

However, the Foreign Tax Collection Rules seek to collect and recover an impost which is not itself authorised by the express grant of taxation power, as a quid pro quo for the collection by a foreign government of an unrelated Australian impost, being a Constitutional Tax, which is so authorised. There is no commonality between the members of the group of taxpayers prima facie liable to pay the Constitutional Tax to Australia (albeit collected by the foreign government) and the members of the different group of taxpayers liable to pay the foreign tax to the foreign government (albeit collected by Australia by force of the Foreign Tax Collection Rules). To my mind, regardless of whether the test for the valid exercise of an incidental power is determined by reference to "reasonable adaptation", "direct effectuation", "reasonable necessity", "appropriate means", "proportionality" or some other test of connection with the express grant, it must be failed where the means selected by the Parliament is to impose liability for payment upon members of a class of persons who are strangers to the Constitutional Tax itself.

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[54] *Leask v Commonwealth*[1996] HCA 29, (1996) 187 CLR 579 per Brennan CJ, Dawson, McHugh, Gummow JJ.

[55] Australian Taxation Office, Commissioner of Taxation Annual Report 2020-2021, Appendix 6, Table 6.13, p 197. The total debt comprises activity statement debt of $28.0 billion, income tax debt of $26.9 billion and superannuation guarantee charge debt of $2.9 billion.

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In the case of the Foreign Tax Collection Rules, the selection of "persons who are subject to Australian law and who are liable to pay tax to a foreign government" as the object of a recovery provision for an unrelated Constitutional Tax seems tenuous at best. Equally, it would have been tenuous had the Parliament instead selected:

- "women who give birth to at least two children within Australia during an income year"; or
- "registered members of the Sydney Cricket Ground"; or
- "persons whose immunisation records disclose a lack of vaccination against Covid-19"

to be *the object of collection* of a Constitutional Tax, the statutory incidence of which falls on unconnected persons. Certainly, there would seem to be nothing to prevent Parliament *imposing* a tax on such disparate groups of persons within the express grant of taxation power conferred by s 51(ii); but this does not resolve the question of the validity of an exercise of the incidental power to *collect* tax where no such Constitutional Tax has been imposed in connection with those persons.

The foregoing argument does <u>not</u> fall into the same trap as that which ensnared the unsuccessful taxpayers in *MacCormick's* case.[56] In that case it was argued that a recoupment obligation imposed upon taxpayers could not constitute taxation under the *Constitution* because it represented an attempt by the Parliament to satisfy the liability of another entity (an asset-stripped company) to pay company tax. Further, the taxpayers contended that liability to pay recoupment tax was imposed invalidly upon persons who had no relevant connection with the company whose overdue company tax was the measure of the recoupment tax.[57] Both arguments failed for the reason that the recoupment tax was *itself* a valid exercise of the express grant of taxing power conferred by s 51(ii). Any ultimate collection of *that* tax from a person upon whom it was imposed would have been merely incidental to the collection of something which was a Constitutional Tax. The same cannot be said of the Foreign Tax Collection Rules because they are not a law with respect to taxation within the express grant of s 51(ii). I repeat my reasons for this which are set out above in relation to Q2.

Q4: The acquisitions power and its 'just terms' requirement

Based on the three foregoing questions, it seems apparent that the Foreign Tax Collection Rules are authorised by the external affairs power but not by the taxation power, whether expressly or impliedly. This characterisation has consequences for the applicability of the acquisitions power located in s 51(xxxi).

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[56] *MacCormick v FCT* [1984] HCA 20, (1984) 158 CLR 622.

[57] *MacCormick v FCT* [1984] HCA 20, (1984) 158 CLR 622 at 635.

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The High Court has said of s 51(xxxi), inter alia, that:

(i) it is to be given the liberal construction appropriate to such a constitutional provision;[58]

(ii) it "abstracts" from the other heads of power located within s 51 of the *Constitution* in the sense that where a law may be supported either by s 51(xxxi) *and/or* another source of power, the 'just terms' limitation applies beyond the scope of its own terms and limits also that alternative source of power;[59] and

(iii) consequently, it has the status of an overriding or freestanding constitutional guarantee against acquisition without just terms.[60]

Q4(a) Whether the prohibition in s 51(xxxi) is attracted

In order for s 51(xxxi) to apply, first there must be something that the *Constitution* recognises as meeting the description of an "acquisition" of "property". The Foreign Tax Collection Rules (s 263-30(1)) and the machinery of TAA53 sch 1 pt 4-15 (ss 255-5(1)) provide that a foreign revenue claim constitutes a pecuniary liability of the debtor party owed to the Commonwealth. The High Court has held that the imposition of a pecuniary liability upon a person will constitute an acquisition of property within the conception of s 51(xxxi) provided that

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58 *Attorney-General v Schmidt* [1961] HCA 21, (1961) 105 CLR 361 per Dixon CJ at 371; *Clunies-Ross v Commonwealth* [1984] HCA 65, (1984) 155 CLR 193 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ at 201-202; *Australian Tape Manufacturers Assn Ltd v Commonwealth* [1993] HCA 10, (1993) 176 CLR 480 per Mason CJ, Brennan, Deane, Gaudron JJ at 509; *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Deane and Gaudron JJ at 184; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513 per Gaudron J at 568, Gummow J at 595; numerous others.

59 Refer *Attorney-General v Schmidt* [1961] HCA 21 , (1961) 105 CLR 361 per Dixon CJ at 371; see also for example *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Brennan J at 177, Deane and Gaudron JJ, Dawson and Toohey JJ at 193 at 185-186, McHugh J at 219; *Nintendo Company Ltd v Centronic Systems Pty Ltd* [1994] HCA 27, (1994) 181 CLR 134 per Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ at 160, Dawson J at 166; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513 per Brennan CJ at 532 and ors, Dawson J at 548, McHugh J at 582-583; *Cunningham v Commonwealth* [2016] HCA 39, (2016) 259 CLR 536 per Gageler J at [61], Gordon J at [271]

60 *Tasmania v Commonwealth* [1983] HCA21, (1983) 158 CLR 1 per Deane J at 282; *Australian Tape Manufacturers Assn Ltd v Commonwealth* [1993] HCA 10, (1993) 176 CLR 480 per Mason CJ, Brennan, Deane, Gaudron JJ at 509; *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Mason CJ at 168, Brennan J at 180, Deane and Gaudron JJ at 184, 185; *Re Director of Public Prosecutions; ex parte Lawler* [1994] HCA 10, (1994) 179 CLR 270 per Brennan J at 277, Deane and Gaudron JJ at 283, 285; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513 per Brennan J at 552, Gaudron J at 561, Gummow J at 589, 595, 600, 602, 603, 605, 607, 608 and ors, Kirby J at 653, 654; *Airservices Australia v Canadian Airlines* [1999] HCA 62, (1999) 202 CLR 133 per Gaudron J at 193; also numerous other cases; contra *Commonwealth v WMC Resources Ltd* [1998] HCA 8, (1998) 194 CLR 1 per McHugh J at [126].

provision is otherwise attracted.[61] Consequently, I am of the view that the Foreign Tax Collection Rules cause an acquisition of property in the relevant sense.

However, in numerous cases, the High Court has held that it is not axiomatic that wherever there is an acquisition of property, the constitutional guarantee which s 51(xxxi) provides for is engaged. The case law is complex, diffuse and hard to reconcile. In the discussion that follows, I adopt the framework of Professor Dixon[62] when considering the exclusions to the overriding application of s 51(xxxi), subject to a re-ordering of my own.

Category I – exclusions arising from contrary constitutional intention

Certain legislative heads of power within s 51 demonstrate by the express terms upon which they have been conferred, or by the very nature of their subject matter or what is included within them, a contrary intention that displaces the operation of s 51(xxxi).[63] Crucially, a head of power which has been held to exclude the operation of s 51(xxxi) is the s 51(ii) taxation power.[64] However, neither the express terms or the subject matter of the s 51(xxix) external affairs power have been held by the High Court to indicate a contrary intention that excludes s 51(xxxi).[65]

Consistent with my view above that the Foreign Tax Collection Rules are not authorised by s 51(ii), the operation of s 51(xxxi) therefore is not excluded by this category.

Consistent also with my view that the Foreign Tax Collection Rules are authorised by s 51(xxix), they must be subject to the constitutional protection afforded by s 51(xxxi) unless some other category of exclusion applies.

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[61] *Australian Tape Manufacturers Assn Ltd v Commonwealth* [1993] HCA 10, (1993) 176 CLR 480 per Mason CJ, Brennan, Deane, Gaudron JJ at 509-510; see also *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Deane and Gaudron JJ at 187.

[62] Dixon R, "Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution", (2005) 27 *Sydney Law Review* 639 at 644-651.

[63] *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Mason CJ at 169-170.

[64] *Australian Tape Manufacturers Assn Ltd v Commonwealth* [1993] HCA 10, (1993) 176 CLR 480 per Mason CJ, Brennan, Deane, Gaudron JJ at 510; *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Mason CJ at 170-171; *Re Director of Public Prosecutions; ex parte Lawler* [1994] HCA 10, (1994) 179 CLR 270 per Deane and Gaudron JJ at 284. See further the discussion in Dixon R, "Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution", (2005) 27 Sydney Law Review 639 at 651 which lists other heads of power that have been held to provide a contrary intention that excludes the operation of s 51(xxxi).

[65] See for example *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513; *Commonwealth v WMC Resources Ltd* [1998] HCA 8, (1998) 194 CLR 1.

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Category II – exclusion of laws that affect rights 'inherently susceptible to variation'

In various cases, the High Court has held that rights afforded to a person by Parliament cannot benefit from the protection afforded by s 51(xxxi) where those rights always have been subject to repeal or modification at the discretion of Parliament.[66]

This issue does not arise in the context of the Foreign Tax Collection Rules because the property acquired is not of a kind created by Parliament in the relevant sense.

Category III – exclusion of laws where the provision of compensation would be 'incongruous'.

A line of High Court authority excludes the operation of s 51(xxxi) where the provision of compensation for property acquired would be irrelevant or incongruous or where no question of 'just terms' sensibly could arise.[67] Examples provided within this category include those laws which impose fines or penalties on persons or require forfeiture of property in circumstances where a Commonwealth law has been breached.

To my mind, this category of exception is not in point in the circumstances of the Foreign Tax Collection Rules. The members of the class of persons whose property is to be acquired have breached no law of the Commonwealth. Further, as discussed in preceding pages, there is no connection between members of that class and those other persons who have defaulted in their obligation to pay Australian tax due to the Commissioner, which is the subject of the mutual collection obligation in 7 of Australia's DTAs. When Parliament legislated to enact the Foreign Tax Collection Rules on the authorisation of the external affairs power in 2006, the requirement for it to observe the constitutional guarantee afforded by s 51(xxxi) could not be said to be incongruous.[68]

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[66] *Health Insurance Commission v Peverill* [1994] HCA 8, (1994) 179 CLR 226 per Mason CJ, Deane and Gaudron JJ at 237, McHugh J at 264-265; *Commonwealth v WMC Resources Ltd* [1998] HCA 8, (1998) 194 CLR 1 per Brennan CJ at [16], Gaudron J at [78]-[79], McHugh J at [141], Gummow J at [179].

[67] See for example *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 per Deane and Gaudron JJ at 187, McHugh J at 219-220; *Re Director of Public Prosecutions; ex parte Lawler* [1994] HCA 10, (1994) 179 CLR 270 per Deane and Gaudron JJ at 285; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513 per Gummow J at 595; *Airservices Australia v Canadian Airlines* [1999] HCA 62, (1999) 202 CLR 133 per Gaudron J at [158], McHugh J at [340]-[342], Gummow J at [486]-[488].

[68] The High Court reached this conclusion on the facts of *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513 when the Commonwealth passed a law to cancel mining leases authorised by the external affairs power without compensation.

Category IV – exclusion of laws where there is no acquisition of property 'as such'

There is High Court authority to the effect that where a law does no more than adjust genuine competing claims between citizens in a field that falls for regulation by the Commonwealth, then there will not be a relevant acquisition of property within s 51(xxxi).[69]

Once again, to my mind, this category of exclusion is not relevant in the circumstances of the Foreign Tax Collection Rules. The Commonwealth is not seeking to regulate any competing claim asserted by the putative debtors under those rules as against any counterparty or in defence of any claim asserted by same.

Conclusion

Based on the foregoing, it seems to me that the enactment of the Foreign Tax Collection Rules by authorisation of the external affairs power attracts the constitutional guarantee of 'just terms' afforded by s 51(xxxi), which is the usual case for laws enacted by the Parliament.

Q4(b) Whether the prohibition in s 51(xxxi) has been infringed

The Foreign Tax Collection Rules impose a pecuniary obligation on members of the class of persons identified by the legislation to pay money to the Commonwealth, which in turn, is to be paid across to a foreign government. Although the meaning of the phrase "just terms" is not synonymous with that of the phrase "full compensation", payment of the total money value of all property acquired is the usual order that the High Court makes under s 51(xxxi) in favour of the deprived person.[70]

The Foreign Tax Collection Rules, deliberately, eschew the availability of 'just terms' to the person against whom a foreign revenue claim is registered. This is unsurprising. It is the manifest intention of governments which negotiate DTAs that include an article modelled on art 27 of the OECD Model. The collection of tax by one government from persons within its jurisdiction owed to a foreign government as a quid pro quo for a mutual obligation to do the same is the

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[69] *Australian Tape Manufacturers Assn Ltd v Commonwealth* [1993] HCA 10, (1993) 176 CLR 480 per Mason CJ, Brennan, Deane, Gaudron JJ at 510; *Nintendo Company Ltd v Centronic Systems Pty Ltd* [1994] HCA 27, (1994) 181 CLR 134 per Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ at 160-161; *Airservices Australia v Canadian Airlines* [1999] HCA 62, (1999) 202 CLR 133 per Gleeson CJ and Kirby J at [101]; McHugh J at [166].

[70] See for example *Nelungaloo Pty Ltd v Commonwealth* [1947] HCA 58, (1947) 75 CLR 495; *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] HCA 6, (1994) 179 CLR 297 per Brennan J at 310-311.

essence of the bargain struck by the two governments. But where a law of the Parliament has been authorised by the external affairs power and not by the taxation power, this executive bargain remains subordinate to the constitutional guarantee of just terms. I apprehend the Foreign Tax Collection Rules, as presently drafted, breach the prohibition on the acquisition of property by the Commonwealth because they fail to provide for just terms.

(b) Deficiencies in the Foreign Tax Collection Rules

Should Treasury be of the view that the Foreign Tax Collection Rules, as presently drafted, are valid under the *Constitution* then there remains the issue that those rules lack a mechanism to provide the Commissioner (in the circumstance where Australia is collecting the tax of a foreign government) with information to determine the applicability of certain of the exclusions from the collection obligation provided for by paragraph 8 of the DTA article.

In this context, and using the German DTA as an example, the particular sub-paragraphs of paragraph 8 in point are:

(i) the exclusion which entitles Australia not to carry out measures which would be contrary to public policy (sub-para (b)); and
(ii) the exclusion which entitles Australia not to provide assistance where it considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles (sub-para (e)).

The Commentary to the OECD Model provides some non-exhaustive examples of measures falling within paragraph 8(b) and taxes falling within paragraph 8(e).

Both exclusions relate (at least in part) to information about the scope and operation of foreign tax laws which is not in the possession of the Commonwealth, despite the DTA obligation imposed on the Commonwealth to collect those taxes in Australia. At present, the Foreign Tax Collection Rules do not provide an adequate mechanism for Australia to obtain this information from the foreign government in order to put itself in a position where we can assess the applicability of the exclusions.

This can be remedied by Treasury:

- proposing that Parliament amend s 263-15 of the Foreign Tax Collection Rules to require that the "approved form" on which a foreign revenue claim is to be made includes questions that oblige the foreign

government claimant to disclose matters that Australia deems relevant to assessing paragraphs 8(b) and 8(e);

- conducting a consultation inviting feedback from the public as to what matters, in an Australian legal context, should be regarded as so relevant; and
- proposing that Parliament amend s 263-25 to make it clear that Australia retains a discretion not to register a foreign revenue claim on the basis of paragraph 8 of the relevant DTA provision.

In respect of sub-paragraphs 8(b) and 8(e), I am of the view that a relevant consideration for Australia must be whether the foreign government has fettered access to its courts of the person against whom the foreign revenue claim is sought to be collected in Australia. Such fettering might arise by numerous means. One of the methods that has been adopted in certain foreign jurisdictions in recent times is to provide that the amount of tax in dispute between a taxpayer and a revenue authority will be increased by a substantial percentage penalty unless the complaining taxpayer disclaims all legal rights and remedies to challenge the correctness of the tax assessed in the courts and tribunals of that jurisdiction.[71]

Submission

I submit to Treasury that government conduct a review which considers:

(a) whether the enactment of the Foreign Tax Collection Rules by *International Tax Agreements Amendment Act (No. 1) 2006* sch 1 fails as a valid exercise of legislative power for the reason that it was required to observe the "just terms" restriction imposed by s 51(xxxix) of the *Constitution* but does not do so; and

(b) should the enactment of the Foreign Tax Collection Rules otherwise be within power of the Parliament, whether those rules are defective for want of a mechanism that engages with the exclusions provided for in paragraph 8 of each DTA that includes an article modelled on art 27 of the OECD Model.

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[71] An example of such legislation has been described as "draconian" and as intruding upon the right of access to the courts – its widespread and inapposite use by Her Majesty's Revenue Commissioners ("HMRC") recently has been curtailed by the Supreme Court of the United Kingdom: *R (on the application of) Haworth v HMRC* [2021] UKSC 25 per Lady Rose (with whom Lord Briggs, Lady Arden, Lord Leggatt and Lord Stephens concurred). I understand that this decision of the Supreme Court, handed down on 2 July 2021, subsequently has drawn into question the lawfulness of thousands of coercive settlement agreements entered into by UK taxpayers with HMRC who operated under the assumption that the threatened 50% penalty was valid.