IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO. B60 OF 2017

BETWEEN: THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA
Appellant

AND: MARTIN ANDREW THOMAS
Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

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BETWEEN: THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA
Appellant

AND: MARTIN ANDREW THOMAS PTY LTD
ACN 063 993 055
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Attorney-General**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). In each proceeding, the Attorney-General intervenes in support of the Appellant (**Commissioner**).

PART III WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV ISSUES PRESENTED BY THE APPEAL

4. The Attorney-General's submissions are limited to two issues:

   4.1. *first*, the arguments advanced in relation to s 118 of the Constitution by the Respondent in each proceeding (**Respondents**) and by the Attorney-General for Queensland (**Queensland**); and

   4.2. *secondly*, the submissions advanced by Queensland on the jurisdiction exercised by the Supreme Court of Queensland.

5. In relation to the s 118 issue, the Attorney-General submits that:

   5.1. section 118 does not assist in resolving the questions upon which this appeal turns;[1]

[1] To the extent that the Respondents and/or Queensland rely on s 185 of the *Evidence Act 1995* (Cth) (**Evidence Act**), neither appears to argue that it has any effect that is relevantly different or additional to s 118. As such, the application of that section is not addressed in detail in these submissions.

5.2. to the extent the Respondents and/or Queensland contend only that s 118 requires that orders of a State court be recognised throughout the Commonwealth, in the sense that they have the same degree of finality and conclusiveness as they would have in the State in which they were made, that contention is uncontroversial and should be accepted. On that approach, the effect of Applegarth J's orders on the Commissioner and the Federal Court depends on the effect (if any) of those orders under common law principles concerning *res judicata* and issue estoppel[2] and, more importantly, on the proper interpretation of this Court's judgment in *Executor Trustee and Agency Co of South Australia v Deputy Federal Commissioner of Taxes (South Australia)*.[3] Section 118 has no effect on those matters;

5.3. if, and to the extent that, the Respondents and/or Queensland submit that s 118 has any other effect on Applegarth J's orders, the argument should be rejected on the basis that it is unsupported by authority and principle.

6. As to the issue concerning the nature of the jurisdiction exercised by Applegarth J (which is not currently the subject of a notice under s 78B of the Judiciary Act), the Attorney-General submits that whether his Honour was exercising state or federal jurisdiction is not determinative of the issues raised in these appeals. Whatever the character of the relevant jurisdiction, the determinative issue remains the effect (if any) of the declarations made by Applegarth J, having regard to the character of the proceeding in which those declarations were made and *Executor Trustee*.

Section 118

7. Section 118 of the Constitution provides that:

> Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

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[2] Which have no relevant effect here, as their operation turns, amongst other things, on privity of parties: *Blair v Curran* (1939) 62 CLR 464, 531 (Dixon J); *Jackson v Goldsmith* (1950) 81 CLR 446, 466 (Fullagar J); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597 (Gibbs CJ, Mason and Aickin JJ).

[3] (1939) 62 CLR 545 (***Executor Trustee***).

History and purpose

8. In drafting ss 118 and 51(xxv) of the Constitution, the framers drew upon Art IV, s 1 of the United States Constitution.[4] However, they did not entirely replicate the United States approach.[5] Unlike Art IV, s 1, the framers dealt separately with the power to legislate with respect to the recognition of State laws, public Acts and records, and judicial proceedings (in s 51(xxv)).[6] Moreover, the language of the first sentence of Art IV, s 1 (being the equivalent to s 118) was changed. Among other things, the word "laws" was included.[7] Further, whereas Art IV, s 1 requires full faith and credit to be given "in each State", s 118 requires it to be given "throughout the Commonwealth".

10 9. During the Convention Debates little time was devoted to s 118.[8] Accordingly, the Debates do not shed much light on the purpose of s 118, including the reasons why the framers chose to depart in certain ways from the drafting of Art IV, s 1 of the United States Constitution.[9] Perhaps the clearest statement was made at the 1897 Adelaide Convention, when Edmund Barton (referring to commentary on Art IV, s 1 of the United States Constitution) said that the effect of the provision:[10]

> would be to cause the courts of the Commonwealth to take judicial notice of the laws, acts and records of the States without the necessity of requiring them to be proved by cumbrous evidence ... I shall give another illustration, so that we may be quite sure as to the effect of the clause ... If there had been a suit between two parties in one State touching certain causes of action that dispute would only be taken judicial notice of in

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4 *Breavington v Godleman* (1988) 169 CLR 41, 79 (Mason CJ), 132 (Deane J) (***Breavington***).

5 *Breavington* (1988) 169 CLR 41, 79-83 (Mason CJ), 132 (Deane J).

6 At the 1897 Adelaide Convention, in response to a question from Mr Isaacs regarding the Commonwealth's legislative power in s 51(xxv), Mr Barton explained the distinction between s 118 and s 51(xxv) as follows: "One clause means that as a matter of evidence judicial notice is to be taken; the other means that there is legislative power, not only to define the matter in which that shall be done, but it may also mean further than that, that there is a legislative power to cause recognition of these matters in substance as well as in evidence': *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 1006.

7 As discussed by Mason CJ in *Breavington* (1988) 169 CLR 41, 83. See also Zelman Cowen, 'Full Faith and Credit – The Australian Experience' in Else-Mitchell (ed), *Essays on the Australian Constitution* (1961, 2nd ed) 293, 296-97.

8 *Breavington* (1988) 169 CLR 41, 133 (Deane J).

9 The amendments proposing changes to the text of the provision that is now s 118 were adopted at the 1891 Sydney Convention without debate: *Official Record of the Debates of the Australasian Federal*
30 *Convention*, Sydney, 18 April 1891, 883 (amendment proposed by Sir Samuel Griffith).

10 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 20 April 1897, 1005-6.

any State, but as regards the subject matter of the dispute between them it would be conclusive between them.

10. The purpose of s 118 is principally one of equality in the Federation.[11] It ensures (as will be discussed) that every State of the Federation will have its laws, public Acts and records, and judicial proceedings, recognised throughout the Commonwealth. Accordingly, s 118 was aptly described by Quick and Garran as containing "a constitutional declaration in favour of inter-state official and judicial reciprocity".[12]

Authority

11. Since Federation, s 118 has been considered in relatively few cases, and little clarity has emerged as to its operation. The authorities do, however, support interpreting s 118 as a "recognition" provision, which ensures that State laws, public Acts and records, and judicial proceedings, are recognised throughout the Commonwealth.[13]

12. In *Breavington*, Dawson J adopted the "recognition" approach. In doing so, his Honour recognised that this approach "tends to confine s 118 to matters of evidence", although he correctly acknowledged the possibility that s 118 would have some substantive effect.[14]

13. The clearest substantive effect is that s 118 precludes the courts of one State – having determined that the applicable law is the law of another State – from declining to apply that State's law on public policy grounds. The leading case that supports that proposition is *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd*,[15] where Rich and Dixon JJ rejected an argument that certain provisions of the *Moratorium Act 1930-*

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[11] P H Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997), 812.

[12] Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 961.

[13] See, eg, *Breavington* (1988) 169 CLR 41, 148-149 (Dawson J). While Wilson and Gaudron JJ rejected the "recognition" approach in *Breavington* (at 96), their Honours favoured instead the view that the purpose of s 118 was to create a choice of law rule addressing the potential problem of conflicts between State law (at 98). That approach did not find favour in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533 [63] (***Pfeiffer***), where Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ observed that s 118 does not – by its terms – state a choice of law rule or state a rule "which would dictate what common law choice of law rule should be adopted". See also *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 399 [20] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Breavington* (1988) 169 CLR 41, 83 (Mason CJ), 150 (Dawson J).

[14] *Breavington* (1988) 169 CLR 41, 150 (Dawson J).

[15] (1933) 48 CLR 565 (***Merwin Pastoral***).

1931 (NSW) not be given effect by a Victorian court because they "contravened notions of morality or the fundamental policy of the law".[16] Their Honours reasons for rejecting that argument included that "it appears to be contrary to sec. 118 of the Constitution".[17] Justice Evatt also relied on s 118 in rejecting the public policy argument.[18] In subsequent cases, this aspect of s 118's operation has proved uncontroversial. In *Breavington*, for example, six members of the Court referred to the substantive effect given to s 118 on the *Merwin Pastoral* approach with apparent approval.[19] Reference was made to the same point in *Pfeiffer*, and nothing was said against it.[20]

14. The Attorney-General submits that the "recognition" approach to s 118 is useful in addressing what it means to give "full faith and credit" to the judicial proceedings of every State, that being the aspect of the operation of s 118 that arises in these appeals. As Batt J put it in *Rowe v Silverstein*,[21] it is clear from authority that "full faith and credit, that is, recognition, is to be accorded" to the order of a court of one State in a court of another.

15. The leading case on this issue is *Harris v Harris*,[22] which was cited with apparent approval by this Court in *Lipohar v The Queen*.[23] In *Harris*, a husband petitioned for divorce in the Supreme Court of Victoria. The material in support of the petition disclosed a prior marriage in New South Wales, which the petitioner said had been dissolved by the Supreme Court of New South Wales.[24] A question arose before Fullagar J about whether the Supreme Court of New South Wales had jurisdiction to dissolve the former marriage (because the petitioner may not have been domiciled in

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16 *Merwin Pastoral* (1933) 48 CLR 565, 577.

17 *Merwin Pastoral* (1933) 48 CLR 565, 577.

18 *Merwin Pastoral* (1933) 48 CLR 565, 587-588.

19 *Breavington* (1988) 169 CLR 41, 81 (Mason CJ), 96-97 (Wilson and Gaudron JJ), 116 (Brennan J), 136-137 (Deane J), 150 (Dawson J).

20 *Pfeiffer* (2000) 203 CLR 503, 533 [63]-[64] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 404 [35] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

21 [1996] 1 VR 509, 511 (emphasis added).

22 [1947] VLR 44 (***Harris***).

23 (1999) 200 CLR 485, 533 [117] (Gaudron, Gummow and Hayne JJ) (***Lipohar***). In fn 215 of *Lipohar*, their Honours also cited *G v G* (1996) 64 ALR 273, which is discussed below.

24 *Harris* [1947] VLR 44.

New South Wales at the relevant time).[25] If the divorce decree was not entitled to be recognised by the Supreme Court of Victoria, there would have been no valid second marriage for Fullagar J to dissolve.[26]

16. Justice Fullagar found that the common law rule concerning the recognition of a foreign decree of divorce was such that, if the local court was persuaded that the jurisdiction of the foreign court did not exist, it would not recognise the decree.[27] It followed that, had that common law rule been applied, the decree of divorce respecting the first marriage in New South Wales would not have been recognised.[28]

17. However, relying on s 18 of the *State and Territorial Laws Recognition Act 1901-1928* (Cth) (**1901 Act**),[29] Fullagar J held that a Victorian court was required to give to a New South Wales judgment the same effect that judgment would receive in the courts of New South Wales.[30]

18. In New South Wales, the divorce decree – as an order of a superior court of record – was a conclusive determination (subject to any appeal), even if it transpired that the Supreme Court had no jurisdiction to make the decree.[31] Further, it was required to receive "in any proceeding between any parties in any Court, the full force of a final and conclusive judgment determining the status of the petitioner and his former wife".[32] Critically, however, that statement depended on his Honour's prior conclusion that a judgment or degree of divorce – being a judgment that determines a person's status –

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25 *Harris* [1947] VLR 44, 44-45.

26 *Harris* [1947] VLR 44, 45.

27 *Harris* [1947] VLR 44, 48-49.

28 *Harris* [1947] VLR 44, 56. Whether the common law rule would apply in relation to a decision of a State court exercising federal jurisdiction may be doubted, given the national character of federal jurisdiction and this Court's recognition that the Commonwealth of Australia is a single "law area": *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 258 [8] (Gleeson CJ, McHugh, Gummow Hayne and Heydon JJ); *Pfeiffer* (2000) 203 CLR 503, 514 [2] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

29 Being a law enacted pursuant to s 51(xxv) of the Constitution: see *Harris* [1947] VLR 44, 45.

30 *Harris* [1947] VLR 44, 59. The same conclusion was reached in *Re DEF* (2005) 192 FLR 92, 110 [58]; *G v G* (1996) 64 ALR 273, 276; cf *Jones v Jones* (1928) 40 CLR 315 at 320-1 (Higgins J).

31 *Harris* [1947] VLR 44, 46-47. See also *Cameron v Cole* (1944) 68 CLR 571, 585 (Latham CJ), 590 (Rich J), 598 (McTiernan J), 605 (Williams J); *New South Wales v Kable* (2013) 252 CLR 118, 133 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

32 *Harris* [1947] VLR 44, 48 (emphasis added).

was a judgment *in rem*. "It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognised as binding in all suits by all parties."[33] Accordingly, *Harris* neither holds nor suggests that the effect of s 118 of the Constitution is to make the judgment of a court in another State binding "in all suits by all parties". It is only if the judgment would be treated as a judgment *in rem* in the State within which it is given that s 118 requires it to be recognised as having that same effect in other States.[34] There is nothing to suggest that a judicial advice proceeding under s 96 of the *Trusts Act 1973* (Qld) (**Trusts Act**) is a proceeding of that character.

19. In *G v G*,[35] McLelland J dealt with a case where an order had been made by the Supreme Court of Queensland concerning the custody of a child. The question was whether, having regard to s 118 of the Constitution and s 18 of the 1901 Act, the Supreme Court of New South Wales could make a different custody order. His Honour concluded that it could, on the basis that a custody order was inherently an interim order. His Honour correctly observed that:[36]

> [T]he Constitutional and statutory provisions to which I have referred require this Court to treat the Queensland order ... as having the same degree of finality and conclusiveness (but no more) as that order would have in Queensland.

Applying that approach, his Honour held that s 118 could not give a custody order of the Supreme Court of Queensland an effect (finality) that it would not have had in Queensland.

20. The approach taken in *G v G* with respect to the effect of orders of a court is analogous to a principle applied under s 118 in the context of the recognition or application in one State of legislation of a different State. In that context, it is recognised that s 118 cannot be used to confer upon that legislation any greater effect than it has as a matter of its

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[33] *Harris* [1947] VLR 44, 47, quoting *Niboyet v Niboyet* [1878] 4 PD 1, 12 (Brett LJ dissenting, but which Fullagar J held was authoritative since *Le Mesurier v Le Mesurier* [1895] AC 517).

[34] That is consistent with the discussion in A Inglis Clarke, *Studies in Australian Constitutional Law* (1901) 97-98, concerning recognition of the public acts of the State that affect *status*, such as naturalisation and marriage.

[35] *G v G* (1996) 64 ALR 273.

[36] *G v G* (1996) 64 ALR 273, 276.

own proper construction (as to do so would go beyond giving recognition to such provisions).[37]

21. *G v G* was cited with apparent approval by this Court in *Lipohar*.[38] It was also approved by Campbell J in *Re DEF*.[39]

22. The Attorney-General submits that the approach adopted in the authorities summarised above is correct. It follows that s 118 of the Constitution required the Federal Court to give Applegarth J's orders "the same degree of finality and conclusiveness (but no more) as that order would have in Queensland". On that approach, s 118 does not assist in determining what degree of finality or conclusiveness, if any, those orders had with respect to the Commissioner, having regard to their character as orders given in "private advice" proceedings[40] to which the Commissioner was not a party.

23. That issue, which turns in particular on the effect of the judgment in *Executor Trustee*, is a matter addressed in the detailed submissions of the parties. The Attorney-General does not seek to be heard on that point.

The Respondents' argument concerning s 118

24. The Respondents address s 118 only briefly in their submissions.[41] They refer to *Harris*,[42] which they submit establishes that s 118 of the Constitution[43] and s 185 of the Evidence Act required the Federal Court (at least in Queensland) to give Applegarth J's

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37 *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338; *In Will of Lambe* [1972] 2 NSWLR 273, 279-280; *Re DEF* (2005) 192 FLR 92, 111-3 [64]-[67].

38 *Lipohar* (1999) 200 CLR 485, fn 215 (Gaudron, Gummow and Hayne JJ).

39 *Re DEF* (2005) 192 FLR 92, 109 [53], 110 [58].

40 See *Macedonian Orthodox Community Church St Petka Inc v Eminence Petar* (2008) 237 CLR 66, 91 [64] (Gummow ACJ, Kirby, Hayne and Heydon JJ), 127 [195] (Kiefel J).

41 The Respondent's s 118 argument in No. B60 of 2017 is found in his submissions at [53]-[55] (**RS**). The Respondent in No. B61 of 2017, in its submissions at [16], relies upon the Respondent's submissions in No. B60 of 2017 (in relevant part).

42 *Harris* [1947] VLR 44.

43 In fact, as noted in [27], Fullagar J did not ground his decision in *Harris* on s 118, expressly relying only on s 18 of the 1901 Act (to which s 185 of the Evidence Act is relevantly equivalent): *Harris* [1947] VLR 44, 56, 59.

orders "the same effect as would a Queensland court (unless and until they were set aside by or on appeal from the Supreme Court)".[44]

25. If that is the extent of the Respondents' reliance on s 118, then there is no controversy between the Respondents and the Attorney-General. However, that approach does not take the Respondents very far. That follows because, while s 118 precluded the Federal Court from giving Applegarth J's judgment a different effect to that which it would have been given by a Queensland court, it did not alter the principles governing the effect of Applegarth J's orders as between the Respondents and the Commissioner.

26. The s 78B notices[45] and the Notices of Contention[46] filed by the Respondents suggest that an argument was to be advanced that the Commissioner was "bound" by s 118 to administer the taxation legislation on the basis "as declared" by Applegarth J in his order. No such argument has been developed by the Respondents in their written submissions. The Attorney-General therefore takes any such argument to have been abandoned. There is, in any event, no foundation for it, for there is no principled basis upon which s 118 could give Applegarth J's orders a binding effect on the Commissioner that they would not have possessed in Queensland.

Queensland's argument concerning s 118

27. Queensland contends that s 118 renders a judgment or order of a State court "effective" throughout the Commonwealth even where common law principles otherwise would not.[47] Queensland supports that submission solely by reference to *Harris*,[48] which in fact supports it only to a (quite limited) extent. The support arises from the fact that Fullagar J held that effect should be given to the relevant order of the New South Wales Supreme Court whether or not it was made without jurisdiction, notwithstanding that under the common law[49] it would have been open not to give effect to a foreign judgment made without jurisdiction. However, that conclusion was expressly based on

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[44] RS [55]. The Respondents do not explain why this is said to be the case "at least in Queensland". For the purposes of these appeals, it is unnecessary to consider whether s 118 or s 185 of the Evidence Act apply differently depending on the State in which the Federal Court is sitting, although it is not obvious why that would be so.

[45] In each appeal, at [2] of the s 78B Notice.

[46] In each appeal, ground (a) of the Notice of Contention.

s 18 of the 1901 Act,[50] rather than s 118 of the Constitution. Further, even if it were to be accepted that s 118 required the same result as was reached on the basis of s 18 of the 1901 Act (a possibility that Fullagar J left open), *Harris* does not support any further role for s 118 in extending the common law.

28. Accordingly, even if it is correct to say that s 118 requires a judgment of a State court to be treated as "effective" even when common law principles would not have that result, there is no basis for treating *Harris* as supporting the general proposition that s 118 of the Constitution operates to make a judgment binding on any person in circumstances where, under the common law, the judgment would not be binding on that person if the person was present in the State in which the judgment was given.

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29. It is not, in fact, clear that Queensland advances any such proposition. It may well be that Queensland does not seek to extend the operation of s 118 beyond a requirement that courts throughout the Commonwealth give the judgments of a court of a State the same degree of finality and conclusiveness as they would have within that State.[51] That is consistent with Queensland's recognition that the determinative issue is "what controversy was actually adjudicated by the Supreme Court", for it is only in respect of that controversy that it is said that the Federal Court was required to recognise the orders of the Supreme Court as determinative.[52] To that extent, the Attorney-General and Queensland are in agreement.

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30. If, however, Queensland submits that s 118 has a wider operation, that submission should be rejected for the following reasons.

31. *First*, any wider operation for s 118 is unsupported by authority, as the authorities go no further than supporting the principle that a State judgment must be given the same

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47 Queensland's Submissions [7(a)], [36], [39] (**QS**).

48 QS [37].

49 And also under American jurisprudence concerning Art IV, s 1: see *Harris* [1947] VLR 44, 56.

30 50 *Harris* [1947] VLR 44, 56, 59.

51 That is a possible reading of QS [40]-[42].

52 QS [42]-[43].

degree of finality and conclusiveness (but no more) as it would have within that State where it was given.

32. *Secondly*, the scope of s 118 (on the expanded reading) is unclear, creating uncertainty about the consequences of accepting the proposed construction. It is said that s 118 renders a judgment (or order) of a State court effective throughout the Commonwealth "even where common law principles otherwise would not",[53] but it is not explained how (or why) s 118 might require a different answer than the common law, or in what respect the common law principles are inconsistent with s 118.

33. *Thirdly,* to the extent Queensland relies on the fact that s 118 has been understood as having a substantive effect (in the form of the *Merwin Pastoral* principle),[54] this does not support any extension in the recognition that s 118 requires to be given to judgments of State courts. Queensland's submissions do not articulate how the fact that s 118 has a substantive effect of one kind in relation to State laws translates into some extension on the effect of judgments of State courts beyond that they would have in the State where they were made, or how such an approach "better secures the efficient and effective administration of justice in our federation".[55]

34. For these reasons, the Attorney-General submits that s 118 should be relevantly understood as requiring courts throughout the Commonwealth to recognise judgments or orders of the courts of each State, in the sense that those judgments or orders must be given the same degree of finality and conclusiveness (but no more) as they would be given in the State where they were pronounced.[56] If, and to the extent that, Queensland's submissions go further, they should not be accepted.

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[53] QS [36].
[54] QS [40].
[55] QS [39].
[56] That formulation is not concerned with the recognition to be given to the reasoning that leads to a judgment or order, as opposed to the judgment or order itself. In particular, s 118 does not require a judgment of, for example, the Supreme Court of Queensland to be given the same effect in Victoria as a precedent as must be given to a judgment of the Supreme Court of Victoria.

Federal or state jurisdiction?

35. Although no party to the appeals has raised a question about whether Applegarth J was exercising state or federal jurisdiction, Queensland's submissions address that subject in detail. They do so on the footing that the enquiry whether a court must afford full faith and credit to a judgment of a court of another State "must begin with identifying the jurisdiction of each court and therefore with construing the statutes conferring their respective jurisdictions".[57]

36. The proposition that the starting point in applying s 118 is the jurisdiction of the court that gave the relevant judgment is hard to reconcile with *Harris*, which expressly holds that effect may be given to a judgment of a superior court of another State even if it is made without jurisdiction. That alone provides reason to doubt that it is necessary to commence the analysis under s 118 with the statutes that confer jurisdiction on the respective courts, and as part of that exercise to decide whether the court in question was exercising federal or state jurisdiction.

37. The more appropriate starting point is to construe the order to which it is said full faith and credit must be given, having regard to the status of the court that made that order (given that an order of a superior court is binding until set aside). That must be done so as to identify what was actually determined by that order. Only then is it possible to identify the effect of the order within the State in which it was made (that being the effect that s 118 requires the order to be given in other States).

38. In many cases, the construction of the order made by a court will not vary depending on the source of the jurisdiction that is exercised by the court. However, in cases where the order might exceed the jurisdiction of a court, the order may properly be read down so that it falls within the power of the court.[58] That is potentially significant in this case,

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[57] QS [44].

[58] See P Herzfeld, T Prince and S Tully, *Interpretation and Use of Legal Sources* (2013) [25.4.720] citing *Cawood v Green* (unreported, NSWCA, Hardie, Hope and Reynolds JJA, 26 June 1974) per Hope JA, with reference to the maxim *ut res magis valeat quam pereat*. It is undoubted that orders are subject to the "ordinary rules of construction", which include that maxim: *Repatriation Commission v Nation* (1995) 57 FCR 25, 33-34 (Beaumont J, Black CJ and Jenkinson J agreeing).

given the particular limits on the jurisdiction conferred by s 96 of the Trusts Act that was exercised by Applegarth J in the Supreme Court of Queensland.

39. Queensland contends that Applegarth J exercised state jurisdiction in making the declarations that are in issue in these appeals,[59] on the basis that his Honour's authority to decide the trustee's application derived from the State Constitution and from State laws. Queensland submits that, while Applegarth J was required to interpret Commonwealth legislation in exercising that jurisdiction (specifically, Div 207 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**)), that requirement did not alter the character of the jurisdiction, because it did not alter the source of his Honour's "authority to decide"[60] the issues the subject of the application under s 96 of the Trusts Act. In that respect, Queensland relies on the distinction between a matter "arising under" a Commonwealth law and a matter "involving the interpretation" of a Commonwealth law,[61] and on the fact that it is only matters of the former kind that fall within s 76(ii) of the Constitution, with the result that any jurisdiction exercised in such a matter is necessarily federal (any overlapping state jurisdiction being excluded by s 39(2) of the Judiciary Act).

40. It is doubtful that the nature of the jurisdiction exercised by the Supreme Court is determinative of any issue in this appeal.

41. In the event that Queensland is correct that Applegarth J's function in determining the Respondents' application under s 96 of the Trusts Act was limited to the interpretation of Commonwealth law, Queensland is correct that his Honour was exercising state jurisdiction, because, in that event, while the matter before his Honour involved the

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[59] QS [46].

[60] *Rizeq v Western Australia* (2017) 344 ALR 421, 431-2 [49], [50] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Lipohar* (1999) 200 CLR 485, 517–8 [78] (Gaudron, Gummow and Hayne JJ); *Baxter v Commissioners of Taxation* (1907) 4 CLR 1087, 1142 (Isaacs J).

[61] QS [46], referring to, inter alia, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ) (***Barrett***). See also *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

interpretation of Commonwealth law, that matter would not have "arisen under" Commonwealth law.[62]

42. That approach is consistent with the Commissioner's submission that Applegarth J's declarations should be understood as going no further than the legal context in which they were made,[63] being the product of an application for "judicial advice" concerning the proper administration of a trust.[64] On that approach, whilst Applegarth J had to interpret Div 207 of the 1997 Act in order to give the advice sought, the rights and liabilities that were determined arose as between the trustee and beneficiaries under the relevant trust deed and trust resolutions. The proceeding did not determine any rights or liabilities that owed their existence to Commonwealth law. That is so even if the effect of *Executor Trustee* is that, while Applegarth J's orders were not binding on the Commissioner, they conclusively determined the rights of any beneficiary to particular income, such that the Commissioner can apply any taxing statute only to that income (there being no mechanism by which the income in fact received by the beneficiary could differ from that determined by the Court).[65]

43. By contrast, if (which is not contended by any of the parties) the Supreme Court had purported to determine the tax liability of the beneficiaries and trustee under Div 207 of the 1997 Act, the matter would necessarily have involved the exercise of federal jurisdiction, because the rights in issue would owe their existence to Commonwealth law. In that event, any State laws purporting to confer jurisdiction on the Supreme Court to determine that tax liability would be excluded by s 39(2) of the Judiciary Act. Further, to the extent that Pt IVC of the *Taxation Administration Act 1953* (Cth) relevantly constitutes a code,[66] it qualifies the general conferral of federal jurisdiction

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[62] See, eg, *Felton v Mulligan* (1971) 124 CLR 367, 374, 408-409 (Walsh J); *Barrett* (1945) 70 CLR 141, 154 (Latham CJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.

[63] See, eg, Commissioner's Submissions in No. B60 of 2017 at [70]-[71].

[64] *Macedonian Orthodox Community Church St Petka Inc v Eminence Petar* (2008) 237 CLR 66, 91 [64] (Gummow ACJ, Kirby, Hayne and Heydon JJ), 127 [195] (Kiefel J).

[65] As to which, see *Executor Trustees* (1939) 62 CLR 545, 562-563 (Latham CJ), 569-570 (Dixon J) and 572 (McTiernan J).

[66] As to which, see the Commissioner's submissions in No. B60 of 2017 at [59]-[62].

on the Supreme Court by s 39(2) of the Judiciary Act,[67] such that the Court would also not have federal jurisdiction to determine that issue.

44. Even if Applegarth J had purported to exercise federal jurisdiction that the Supreme Court did not possess, his Honour's orders would remain valid unless and until set aside.[68] In that case, however, the same ultimate question would still arise – namely, the effect of those orders on the Commissioner and, in particular, the extent to which the Court's declarations bind the Commissioner in his administration of the income tax legislation.[69]

45. It follows that it is unnecessary to determine whether Applegarth J exercised state jurisdiction, federal jurisdiction, or purported federal jurisdiction (if the Supreme Court lacks any jurisdiction to determine issues under Div 207 of the 1997 Act because Pt IVC of the *Taxation Administration Act 1953* (Cth) is a code). On each of those possibilities, the determinative issue would remain the true effect of this Court's judgment in *Executor Trustee*. That is a matter on which the parties have joined issue, and with respect to which the Attorney-General does not seek to be heard.

46. Finally, to the extent that Queensland's submissions raise other constitutional issues, those issues should not be decided. In particular, the Court should not address the issue raised in paragraphs 46 and 48 of Queensland's submissions to the effect that, by reason of covering cl 5 and s 77 of the Constitution, the Commonwealth lacks legislative power to prevent a State Supreme Court from interpreting Commonwealth legislation.[70] That is an issue of some complexity and potential importance. It has not been fully argued, as is not surprising given that the issue plainly does not require

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[67] See, eg, *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

[68] See, eg, *Cameron v Cole* (1944) 68 CLR 571, 585 (Latham CJ), 590 (Rich J), 598 (McTiernan J) and 605 (Williams J); *Re Macks; ex parte Saint* (2000) 204 CLR 158; *New South Wales v Kable* (2013) 252 CLR 118, 133 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[69] The Commissioner argues the decision did not so bind him: Commissioner's Submissions in No. B60 of 2017 at [84].

[70] That submission is, in fact, contrary to the full passage from A Inglis Clarke, *Studies in Australian Constitutional Law* (1901) 177 upon which Queensland relies in fn 81 of its submissions.

determination in this case. Given its character as a constitutional issue that need not be decided, it should not be decided (particularly in the absence of a s 78B notice).[71]

Conclusion

47. The determinative question in these appeals concerns the legal effect of the Supreme Court's orders with respect to the Commissioner, in circumstances where the Commissioner was not a party in the Supreme Court proceedings. Neither s 118 of the Constitution, nor the issue of whether Applegarth J was exercising state or federal jurisdiction, affect the answer to that question.

PART V ESTIMATED HOURS

48. The Attorney-General estimates that he will require no more than 30 minutes for the presentation of oral argument.

Dated: 25 January 2018

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[71] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 437 [355] (Crennan J); *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ).