IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B60 of 2017

BETWEEN: THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

Appellant

10

and

MARTIN ANDREW THOMAS

Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B61 of 2017

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

Appellant

and

MARTIN ANDREW PTY LTD
ACN 063 993 055

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Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. This submission is in a form suitable for publication on the Internet.

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Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland
Form 27C

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Dated: 18 January 2018
Per James Potter
Ref PL8/ATT110/3685/BKE

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PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary 1903* (Cth) without supporting any party.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

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PART IV: Statutory provisions

4. Annexure 1 sets outs the relevant constitutional and statutory provisions additional to those set out in the annexure to the appellant's submissions in proceeding No B60 of 2017.

PART V: Submissions

A. Summary

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5. The Attorney-General's submissions are confined to the constitutional matter raised by the respondents. The issue raised – as articulated by the respondents – is whether the Commissioner of Taxation of the Commonwealth of Australia (‘***the Commissioner***’) was bound by s 118 of the Constitution to administer the relevant taxation legislation in accordance with an order made by the Supreme Court of Queensland (Applegarth J) (‘***the Supreme Court***’).

6. That issue raises questions as to the jurisdiction conferred by s 96 of the *Trusts Act 1973* (Qld) and the Federal income taxation legislation. The Attorney-General also intends to make submissions on those issues, as they may bear upon whether s 118 is engaged in the circumstances of the present case.

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7. The Attorney-General's submissions – which are in support of neither party – are to the following effect:

   (a) There is uncertainty about the precise scope of the injunction in s 118 of the Constitution that full faith and credit be given throughout the Commonwealth to, relevantly, the judicial proceedings of every State. Nevertheless, it seems sufficiently clear that:

      (i) s 118 is not confined in its utility to facilitating the proof of the judicial proceeding of one State in some other area of the Commonwealth. Rather, it is a substantial provision of the Constitution, and an important one in the context of a federation with an integrated legal system. The few relevant cases (referred to below) recognise this;

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      (ii) s 118 renders a judgment or order of a State court effective throughout the Commonwealth even where common law principles otherwise would not;

(iii) the exact consequence of giving full faith and credit to judicial proceedings will depend on the nature – to use a general expression – of the judicial proceeding which faith and credit are to be given to;

(iv) as the Supreme Court had the jurisdiction to make the orders of 12 November 2010 the question of whether s 118 operates subject to an exception where orders are made without jurisdiction does not expressly arise in this case;

10 (b) By s 96 of the *Trusts Act 1973*, the directions given by Applegarth J were in the nature of personal advice given to the trustee. In giving that advice, his Honour had jurisdiction to construe the relevant provisions of the *Income Tax Assessment Act 1997* (Cth) and the *Income Tax Assessment Act 1936* (Cth). Although his Honour's orders went beyond directions to declarations, the Supreme Court had the jurisdiction to make those declarations, and the orders are binding as between the trustee and the beneficiaries (at the least);

(c) By pt IVC of the *Taxation Administration Act 1953* (Cth), the Federal Court of Australia (***'the Federal Court'***) is vested with jurisdiction to hear an appeal from
20 an objection decision of the Commissioner. Accordingly, the Federal Court and not the Supreme Court may finally determine the taxpayers' tax liabilities. However, pt IVC does not, and cannot, remove the authority of the Supreme Court by virtue of covering clause 5 to interpret Commonwealth legislation, including the *Income Tax Assessment Act 1997*.

8. It is acknowledged that it may not be necessary for the Court to determine the constitutional issue to decide the appeals. That is at least because the Court may reach the conclusion that the Commissioner cannot, here and now, dispute the circumstances as determined by the Supreme Court's order of 12 November 2010, because of:

30 (a) s 185 of the *Evidence Act 1995* (Cth); or

(b) the reasons of various members of this Court in *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxation (SA)*[1] relied on by the respondents (if it is decided that the Supreme Court's order of 12 November 2010 established 'taxable facts'); or

(c) the principle recognised in *Cameron v Cole*[2] referred to by Perram J in the Full Court of the Federal Court in the decision under appeal.

40 ***B. The requirement to afford full faith and credit***

Introduction

9. The respondents (in Nos B60 and B61 of 2017) contend that the Commissioner was bound by s 118 of the Constitution to administer the relevant taxation legislation on the

[1] (1939) 62 CLR 545.
[2] [1944] HCA 5; (1944) 68 CLR 571 at 585.

basis that each respondent had a vested and indefeasible interest as a beneficiary in the trust income in the amounts directed and declared by the Supreme Court.

10. 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.

11. It was modelled on art IV, § 1 of the United States Constitution, which in turn was modelled upon art IV of the Articles of Confederation.[3] Article IV, § 1 of the present United States Constitution provides that:

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> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

12. The second sentence provides a head of legislative power which is replicated in the Australian Constitution in s 51(xxv) (considered further below).

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13. Whilst the United States Constitution provided the inspiration for s 118 of our own Constitution different language was chosen by our drafters. That choice must have been deliberate, in particular the requirement that full faith and credit be given 'throughout the Commonwealth' as opposed to 'in every other State'. This language is consonant with there being one common law of Australia and the integrated legal system (including the administration of that system) which prevails in Australia.[4]

14. The many authorities from the United States interpreting art IV, § 1 in the context of divorce cases should not be viewed as determining the scope of s 118 of the Australian Constitution and must be considered with some care.

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Some background

15. 'Faith and credit' is a term with a long pedigree. It was originally used to describe the effect of decisions of one court on another when the law of England was administered by separate ecclesiastic courts, common law courts and courts of equity, among others, within the one domestic legal system.[5] In this sense it performed a similar role to 'what would now be considered a branch of the law of res judicata and issue estoppel'.[6]

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[3] Article IV provided: 'Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.'

[4] Subsequent to the creation of the Australian federation and its constitution, art 261(1) of the Constitution of India 1949 and art 150 of the Constitution of Pakistan 1973 were enacted, in terms analogous to s 118 of the Australian Constitution. Also, see generally B Shiva Rao (ed), *The Framing of India's Constitution* (Universal Law Publishing, 1967) vol 2, 79 (as cl XII(6)).

[5] See *Caudrey's Case* (1591) 5 Co Rep 1a, 7a; 77 ER 1, 9 ('Judges of the Common Law ought to give faith and credit to their sentence, and to allow it to be done according to the ecclesiastical law').

[6] Justice WMC Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 982.

16. English courts also came to apply 'faith and credit' to foreign judgments.[7] Although the enforcement of foreign judgments had become common practice by the time English colonies were erected in the Americas, 'the English law of foreign judgments was still in a nebulous and formative state',[8] and some American colonies proved unwilling to give effect to the judgments of other colonies towards the end of the eighteenth century.[9] The requirement to give faith and credit was therefore put on a 'mandatory basis'[10] in the Articles of Confederation 'to better secure and perpetuate mutual friendship'.[11]

10 17. There may also have been doubt as to whether giving faith and credit to a judgment meant it was merely received as evidence (rebuttable by evidence to the contrary)[12] or whether the recognising court was required to 'accept and abide by its contents'.[13] To resolve any doubt, according to Joseph Story, the framers of the US Constitution prefaced the constitutional command with the word 'full' to indicate that 'positive and absolute verity' was to be attributed to the judgments of each State.[14]

18. As the development of the law in England inspired art IV of the Articles of Confederation, art IV, § 1 served as the inspiration for s 118 of the Australian Constitution.

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19. The convention debates say 'almost nothing' about the full faith and credit clause.[15] Edmund Barton did however express the view that the clause would merely embrace matters of evidence and judicial notice.[16] Against this, the writings of A Inglis Clark and HB Higgins indicate that other delegates had a broader conception of the full faith and credit clause.[17]

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[7] See *Cottington's Case* (1678) set out in *Kennedy v Cassillis* (1818) 2 Swans 313, 326; 36 ER 640 ('it is against the law of nations not to give credit to the judgment and sentences of foreign countries').
[8] William H Page, 'Full Faith and Credit: The Discarded Constitutional Provision' [1948] *Wisconsin Law Review* 265, 288.
[9] William H Page, 'Full Faith and Credit: The Discarded Constitutional Provision' [1948] *Wisconsin Law Review* 265, 299.
[10] Willis LM Reese, 'Full Faith and Credit to Statutes: The Defense of Public Policy' (1952) 19 *University of Chicago Law Review* 339, 340.
[11] William H Page, 'Full Faith and Credit: The Discarded Constitutional Provision' [1948] *Wisconsin Law Review* 265, 300. See also George P Costigan Jr, 'History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of That Section and of Federal Legislation (1904) 4 *Columbia Law Review* 470, 471-472.
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[12] See, for eg, *Trial of the Duchess of Kingston for Bigamy* (1776) 20 State Trials 355, 540.
[13] *Breavington v Godleman* (1988) 169 CLR 41, 129 (Deane J). Cf Justice WMC Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 982.
[14] Joseph Story, *Commentaries on the Constitution of the United States* (Hillard, Gray & Co, 1833) vol 3, 180, § 1304.
[15] *Breavington v Godleman* (1988) 169 CLR 41, 133 (Deane J).
[16] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 1005 (Edmund Barton).
[17] A Inglis Clarke, *Studies in Australian Constitutional Law* (1901) 97-98; *Jones v Jones* (1928) 40 CLR 315, 320-321 (Higgins J).

20. There are two textual differences between s 118 and its American forebear. First, s 118 adds 'laws' to the list of things to be credited.[18] (In any event, 'judicial proceedings' is sufficient for present purposes.) Second, whereas art IV, § 1 requires that full faith and credit be given 'in each State', s 118 requires it to be given 'throughout the Commonwealth'. There was no discussion about either of these alterations in the convention debates.[19] Although the drafters likely selected 'throughout the Commonwealth' to ensure that Territory courts were caught by the requirement to give full faith and credit to State judgments,[20] it is submitted the words also capture the recognition of judgments of the courts of the States by the Federal courts in Australia.

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Purpose of the full faith and credit clause

21. It is submitted that s 118 recognises two competing aspects of a federation: the unity of the polity but a degree of independence of its constituent elements. As to the first, the US Supreme Court has held that the purpose of art IV, § 1 is to render States 'integral parts of a single nation'[21] and Professor Lawrence Tribe has said that it serves to 'bind the country together as a single nation.'[22] It does this by ensuring a uniform system of law.

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22. As Deane J held in *Breavington v Godleman*,[23] s 118 'serves to confirm, if confirmation be necessary, the national character ("throughout the Commonwealth") of the system of law which the Constitution established.'[24] In this connection, although s 118 does not ensure an integrated court system,[25] it is conducive to one.[26] It helps to integrate the judicial system by removing the ability of 'each of the country's court systems ... to speak at the same time in conflicting terms about the lawfulness, consequences or attributes of a particular act or thing in a particular place at a particular time.' It thus replaces the 'bedlam of a Babel [with] an ordered system of law'.[27]

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[18] On the addition of 'laws', see *Breavington v Godleman* (1988) 169 CLR 41, 83 (Mason CJ); Peter E Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, 418-419.

[19] For example, 'throughout the Commonwealth' was suggested by Sir Samuel Griffith and adopted without discussion: *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 April 1891, 883.

[20] In *Embry v Palmer*, 107 US 3, 9 (Matthews J, delivering the opinion of the Court) (1882) the US Supreme Court held that art IV, § 1 does not cover territory courts, though Congress was competent to extend the obligation of full faith and credit pursuant to other heads of legislative power. Cf *Lamshed v Lake* (1958) 99 CLR 132, 142 (Dixon CJ, Webb and Taylor JJ concurring).

[21] *Milwaukee County v ME White Co*, 296 US 268, 277 (Stone J) (1935).

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[22] Lawrence H Tribe, *American Constitutional Law* (Foundation Press, 3rd ed, 2000) vol 1, 1247 n 50.

[23] (1988) 169 CLR 41.

[24] *Breavington v Godleman* (1988) 169 CLR 41, 129 (Deane J). This starting point can be accepted without embracing Deane J's ultimate conclusion that s 118 displaces conflict of laws rules at common law.

[25] The US does not have an integrated court system in spite of art IV, § 1: Robert H Jackson, 'Full Faith and Credit – The Lawyer's Clause of the Constitution' (1945) 45(1) *Columbia Law Review* 1, 18.

[26] That there is a connection between the integrated system of law and the integrated court system can be seen clearly in the reasoning in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 138-139 (Gummow J); *Kruger v Commonwealth* (1997) 190 CLR 1, 175 (Gummow J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 [11] (Gummow and Hayne JJ).

[27] *Breavington v Godleman* (1988) 169 CLR 41, 135 (Deane J).

23. As to the second aspect, s 118 was designed 'among other things, to ensure comity between the States',[28] and thereby recognise and respect the independence of the laws and judgments of the States. Thus, the federal nature of the Australian legal system led this Court in *John Pfeiffer Pty Ltd v Rogerson* to adopt the *lex loci delicti* rule due to the need to 'recognise and give effect to the predominant territorial concern of the statutes of State and Territory legislatures'.[29]

Related legislative powers

10 24. Section 118 is closely related to two heads of legislative power. The first is the power in s 51(xxiv) to make laws with respect to the service and execution of processes and judgments. Neither the placitum nor the *Service and Execution of Process Act 1992* (Cth) enacted pursuant to it are presently relevant. However, it should be noted as an Australian innovation[30] that relieves s 118 of much of the work performed by art IV, § 1 in the US.[31]

25. The following placitum, in s 51(xxv), is relevant. It empowers the Commonwealth Parliament to make laws with respect to 'the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States'.
20 Textually, it is similar to the second sentence of art IV, § 1, with the notable omission of the power to prescribe the 'effect thereof'.[32]

26. Pursuant to ss 51(xxv) and 122, the Commonwealth has enacted s 185 of the *Evidence Act 1995* (Cth), which provides:

> All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

30 27. The precursor to s 185 of the *Evidence Act* was s 18 of the *State Laws and Records Recognition Act 1901* (Cth),[33] which in turn was modelled upon a US law originally passed in 1790.[34]

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[28] *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 474 [201] (Callinan J). See also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 83 [192] (Callinan J).

[29] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 540 [86] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

40 [30] Robert H Jackson, 'Full Faith and Credit – The Lawyer's Clause of the Constitution' (1945) 45(1) *Columbia Law Review* 1, 20, cf at 5. Perhaps this is because the origins of s 51(xxiv) are not American: see *Federal Council of Australasia Act 1885* (Imp) 48 & 49 Vic, c 60, s 15(d)-(f).

[31] Justice WMC Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 994.

[32] Georgina Whitelaw, 'Interstate Conflicts of Laws and Section 118' (1994) 5 *Public Law Review* 238, 250-251.

[33] Later the *State and Territorial Laws and Records Recognition Act 1901* (Cth).

[34] Act of 26 May 1790, ch 11, 1 Stat 122, now codified as 28 USC § 1738. That provision presently provides: 'Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.'

28. The interaction between s 51(xxv) and s 118 is a vexed question. In *Breavington*, Mason CJ suggested that s 51(xxv), rather than s 118, may be the source of a solution to interjurisdictional conflicts of law, whereas Deane J suggested the opposite.[35] In *Harris v Harris*, Fullagar J preferred to base his decision on s 18 of the (then) *State and Territorial Laws and Records Recognition Act* (Cth) rather than s 118 because *inter alia* it was a 'more specific and precise direction'.[36]

29. The position in the US appears to be that the constitutional and legislative requirements to give full faith and credit are essentially the same, save that the legislation extends the scope of the requirement beyond State courts to include all courts.[37] Accordingly, US judgments often refer to art IV, § 1 and the Act of Congress cumulatively, as in '[t]he constitutional command of full faith and credit, as implemented by Congress'.[38] However, it is generally agreed that even without the 'implementing' legislation, the first sentence of art IV, § 1 would be self-executing.[39] Thus, the first sentence (equivalent to s 118) 'declare[s], and by its force establish[es] that full faith and credit should be given to the judgments of every other State'. The second sentence (equivalent to s 51(xxv)) 'authorize[s] Congress to prescribe the manner of authenticating [State judgments and] to prescribe their effect when so authenticated.'[40]

30. It is submitted that the same approach should be adopted in Australia, despite the omission of 'effect thereof' in s 51(xxv).[41] That is, s 118 is self-executing, but s 185 of the *Evidence Act* 'back[s] up'[42] the constitutional mandate with the more precise direction to give State judgments the same faith and credit due in their home State (with that Act providing elsewhere the manner in which the judgment may be proved).[43]

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[35] *Breavington v Godleman* (1988) 169 CLR 41, 83 (Mason CJ), 140 (Deane J).

[36] *Harris v Harris* [1947] VLR 44, 59 (Fullagar J). See also *Bond Brewing Holdings Ltd v Crawford* (1990) 1 WAR 517, 528 (Ipp J), adopting the same approach.

[37] *Mills v Duryee*, 11 US (7 Cranch) 481, 485 (Story J, delivering the opinion of the Court) (1813); *Davis v Davis*, 305 US 32, 40 (Butler J, delivering the opinion of the Court) (1938) ('The Act extended the rule of the Constitution to all courts, federal as well as state'); *Kremer v Chemical Construction Corp*, 456 US 461, 484 n 24 (White J, delivering the opinion of the Court) (1982); George P Costigan Jr, 'History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of That Section and of Federal Legislation (1904) 4 *Columbia Law Review* 470, 489.

[38] *Durfee v Duke*, 375 US 106, 109 (Stewart J, delivering the opinion of the Court) (1963). See also *Riley Executors v New York Trust Co*, 315 US 343, 348 (1942); *Morris v Jones*, 329 US 545, 547 (1947).

[39] *McElmoyle v Cohen*, 38 (13 Peters) US 312, 324-325 (Wayne J, delivering the opinion of the Court) (1839). The position is clearer in respect of full faith and credit to State Acts which were not covered by legislation until 1948: see *Hughes v Fetter*, 341 US 609, 613-614 n 16 (Black J, delivering the opinion of the Court) (1951).

[40] *Huntington v Attrill*, 146 US 657, 684-685 (Gray J, delivering the opinion of the Court) (1892).

[41] Peter E Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, 433-434. Cf W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co, 5th ed, 1976) 174; Georgina Whitelaw, 'Interstate Conflicts of Laws and Section 118' (1994) 5 *Public Law Review* 238, 250-251.

[42] Gabriël Moens and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7th ed, 2007) 424 [810].

[43] Anything less than the same recognition due in the home State would in any event be 'some' rather than 'full' credit: *Haddock v Haddock*, 201 US 562, 567 (1906); *Davis v Davis*, 305 US 32, 40 (1938). See also *Franchise Tax Board of California v Hyatt*, 578 US __; 136 S Ct 1277, 1284 (Roberts CJ, dissenting).

Submissions on the scope of s 118

31. The Australian jurisprudence on the full faith and credit clause has been described as 'meagre'.[44] As Kirby J said in *John Pfeiffer Pty Ltd v Rogerson*, s 118 'has rarely come under the scrutiny of this Court'.[45] Of the few cases that have explored s 118, most have concerned the recognition of interstate legislation.[46] When it comes to the recognition of interstate judgments, this Court has made only passing references to the requirement to give full faith and credit.[47]

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32. It is submitted there are at least three possible ways of reading the direction given in s 118 to give full faith and credit to State judgments throughout the Commonwealth.

33. The *first* – narrow reading – is that s 118 is merely an evidentiary provision and requires other State and Federal courts to take judicial notice of judgments of the courts of other States. Such a reading would find support in the conventional debates. For example, at the Constitutional Convention in 1897, Edmund Barton explained that 'the effect of this clause 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.'[48] It would also find support in the obiter of Kirby P (as his Honour then was) in *Shoard v Palmer*, where his Honour expressed the tentative view that s 118 'would appear to be addressed to the form and contents of judgments and other records and not to the detailed factual issues determined by their content'.[49] However, that view was rejected early in the United States on the basis that it would render the clause 'utterly unimportant and illusory'.[50] Adopting an evidentiary role for s 118 in respect of interstate judgments would also be out of step with the substantive role it plays in respect of legislation.

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34. *Second*, s 118 may contain a substantive requirement, though one which lacks content. That is, s 118 makes 'conflicts principles enforceable as a matter of constitutional command',[51] but it 'affords no assistance where there is a choice to be made'[52] because

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[44] Brian Opeskin, 'Constitutional Dimensions of Choice of Law in Australia' (1992) 3 *Public Law Review* 152, 173.

[45] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 557 [141] (Kirby J).

[46] See *Sweedman v Transport Accident* (2006) 226 CLR 362, 399 [20] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 532-534 [59]-[65] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 555-558 [137]-[143] (Kirby J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 227 [194] (Gummow J).

[47] See *Posner v Collector for Interstate Destitute Persons* (1946) 74 CLR 461, 479 (Dixon J); *Re Heerey; Ex parte Heinrich* (2001) 185 ALR 106, 108 [7] (Kirby J); *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 452 [124] (Kirby J).

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[48] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 1005 (Edmund Barton). See also John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1976 ed) 962-963 § 465; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 56 [118] (Kirby J).

[49] *Shoard v Palmer* (1989) 98 FLR 402, 408 (Kirby P, Priestley and Meagher JJA agreeing).

[50] *Mills v Duryee*, 11 US (7 Cranch) 481, 485 (Story J, delivering the opinion of the Court) (1813).

[51] *Sun Oil Co v Wortman*, 486 US 717, 723 n 1 (Scalia J, in which as to that part, Rehnquist CJ, White, Stevens and O'Connor JJ joined) (1988).

[52] *Breavington v Godleman* (1988) 169 CLR 41, 150 (Dawson J). See also at 116 (Brennan J).

it 'does not [in terms] state any rule which dictates what choice is to be made'.[53] On this approach, s 118 would simply direct a court to comply with common law principles about the recognition of foreign judgments, including res judicata and issue estoppel.[54]

35. This approach would, however, 'leave ... the provision with little to do.'[55] As Justice Gummow pointed out in respect of recognising interstate legislation, '[g]iven the unitary nature of the common law in Australia, what would be the point of mandating by section 118 the choice made by the common law?'[56] Likewise, what is the point of s 118 if it does no more than what res judicata and its related doctrines already achieve?

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36. The *third* possible reading – which gives a broader construction – is that s 118 renders a judgment or order of a State court effective throughout the Commonwealth even where common law principles otherwise would not.

37. This was the approach of Fullagar J (when a Judge of the Supreme Court of Victoria) in *Harris v Harris*,[57] which provides the most detailed consideration in Australia of the requirement to afford full faith and credit to interstate judgments. The question for determination in *Harris* was whether the Victorian Supreme Court should recognise a divorce decree issued by the New South Wales Supreme Court even though it had been made beyond jurisdiction because the parties had not been domiciled in that State. Justice Fullagar considered that but for s 118 of the Constitution and s 18 of the *State and Territorial Laws and Records Recognition Act*, the position at common law was that the decree was open to challenge in Victoria on the ground that it was pronounced without jurisdiction.[58] However, his Honour found that the requirement to give full faith and credit had altered that position. His Honour recognised that American jurisprudence had 'introduce[d]' an exception to the requirement to afford full faith and credit where the judgment of a sister State had been given without jurisdiction. Yet, no such exception could be extracted from the words of s 18 of the *State and Territorial Laws and Records Recognition Act*.[59]

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38. A first instance decision subsequent to *Harris* gave s 118 a substantial and strict operation (i.e. an operation not subject to qualifications or exceptions, other than perhaps fraud).[60] Other decisions have relied on the legislative provisions.[61]

[53] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533 [63] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
[54] See also Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, 2nd ed, 1910) 456.
[55] Justice WMC Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 1004.
[56] Justice WMC Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 1010.
[57] [1947] VLR 44 (hereinafter, '***Harris***').
[58] *Harris* at 49.
[59] *Harris*, at 56-59.
[60] See *Rowe v Silverstein* [1996] 1 VR 509 at 511-512 (Batt J).
[61] A number of authorities are collected in *Re DEF and the Protected Estates Act 1983* (2005) 192 FLR 92, 106-113 [37]-[69] (Campbell J).

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39. It is submitted that this Court should give s 118 the (third) broad interpretation. It is unlikely that the purpose of s 118 was only to constitutionalise the common law. Further, that interpretation better secures the efficient and effective administration of justice in our federation where the administration of the law in Australia is (substantially) integrated.[62]

40. That the full faith and credit clause of the Constitution does more than simply point in the direction of the common law is reinforced by the case law on recognising interstate legislation. For example, at common law, conflict of law rules recognised that a forum court could refuse to apply foreign law on the grounds of public policy. Yet it is now settled that s 118 precludes recourse to public policy in Australia.[63] So, in at least some situations, s 118 is more than a signposting provision.

41. The difference between the second and third approaches to s 118 may be more apparent than real. In *John Pfeiffer Pty Ltd v Rogerson*, the joint judgment resolved the questions in that case respecting s 118 'by developing the common law' to take account of constitutional considerations.[64] The result may be the same whether s 118 alters the common law directly or whether it merely points to the common law which is 'develop[ed]' so as to be consistent with the principles underlying s 118, namely the national and federal nature of the Australian legal system.[65]

42. In any event, the proper construction of s 118 of the Constitution is the broader one; it is a substantial provision which, in the present context, required the Federal Court to recognise the orders of the Supreme Court as absolutely veracious and determinative of the controversy adjudicated by that court. As Deane J put it in *Breavington v Godleman*,[66] '[t]o give full faith and credit to a judgment means ... not only to recognise its existence but, while it stands, to accept and abide by its contents'.

43. However, in the instant case, there is the further issue of what controversy was actually adjudicated by the Supreme Court. The answer to that question appears to turn on the nature of the proceeding before the Supreme Court.

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[62] As recognised by Campbell J in *Re DEF and the Protected Estates Act 1983* (2005) 192 FLR 92, 115-116 [76].

[63] *Sweedman v Transport Accident* (2006) 226 CLR 362, 404 [35] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533-534 [64] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Breavington v Godleman* (1988) 169 CLR 41, 81 (Mason CJ), 96-97 (Wilson and Gaudron JJ), 116 (Brennan J), 133-134 (Deane J), 150 (Dawson J).

[64] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [65] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[65] See also Peter E Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, 428 ('There is ... some support for the view that implications from our federal structure, as evidenced by provisions such as section 118 of the Constitution, may have the effect of modifying, but not abrogating, the common law choice of law rules').

[66] *Breavington v Godleman* (1988) 169 CLR 41, at 129.

C. *Other relevant matters – jurisdiction of the courts, s 96 of the Trusts Act 1973, and pt IVC of the Taxation Administration Act 1953*

44. In the ordinary course, constitutional questions are best addressed only once the relevant legislation has been construed.[67] For example, this Court has repeatedly stated that when addressing questions of inconsistency under s 109 of the Constitution, '[t]he starting point is an analysis of the laws in question and their true construction.'[68] Thus, where a conflict is said to arise between the orders of the Federal Court and the orders of a State court, the relevant federal law must be construed to determine whether the Federal Court order was made within jurisdiction and the relevant State law must be construed to determine whether it permitted a State court to provide in a manner contrary to the Federal Court order.[69] It is submitted that in a similar vein, the enquiry whether one court must afford full faith and credit to another court must begin with identifying the jurisdiction[70] of each court and therefore with construing the statutes conferring their respective jurisdictions.

The jurisdiction of the Supreme Court

45. Section 58 of the *Constitution of Queensland 2001* (Qld) provides that the Supreme Court has 'all jurisdiction necessary for the administration of justice in Queensland' including 'subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise.'[71] The Supreme Court's power to make declarations is sourced in s 58 which preserves its inherent jurisdiction.[72] In addition, pt 7 of the *Trusts Act 1973* vests certain powers in the Supreme Court or a judge thereof.[73] Within pt 7, s 96 provides for a right of trustees to apply to the Supreme Court for directions.

46. Before moving on to the jurisdiction conferred by s 96 of the *Trusts Act 1973*, it should be noted that the Supreme Court's authority to decide the trustee's application for directions derives from 'the State Constitution and laws'. The orders of Applegarth J

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[67] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ), 625-262 [149] (Keane J). See also *Brown v Tasmania* (2017) 91 ALJR 1089, 1179 [485], 1180 [487] (Edelman J); *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ), 84 [219]-[220] (Kirby J). As to the relevance of statutory construction in the context of s 118, see Brian Opeskin, 'Constitutional Dimensions of Choice of Law in Australia' (1992) 3 *Public Law Review* 152, 153 and fn 9.

[68] *Bell Group NV (in liquidation) v Western Australia* (2016) 90 ALJR 655, 666 [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 115 [258] (Gummow J).

[69] *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 186 [54] (Gaudron J); *Momcilovic v The Queen* (2011) 245 CLR 1, 113 [249] (Gummow J).

[70] In the sense of '[j]urisdiction with respect to a particular subject matter [being] authority to adjudicate upon a class of questions concerning that subject matter': *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 349 [24] (French CJ, Kiefel, Bell and Keane JJ).

[71] Of course 'there is no Australian court with unlimited jurisdiction': *New South Wales v Kable* (2013) 252 CLR 118, 132 [30] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). This reference to 'unlimited jurisdiction' in s 58 simply indicates that the Supreme Court is 'a court of general jurisdiction' (*R v Gray; Ex parte Marsh* (1985) 157 CLR 351, 393-394 (Dawson J)) and that 'no matter is deemed to be beyond [the Supreme Court's] jurisdiction unless it is expressly shown to be so': *Cameron v Cole* (1944) 68 CLR 571, 585 (Latham CJ).

[72] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 17 [37] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

[73] See definition of 'court' in s 5.

were therefore made in the exercise of State jurisdiction.[74] To the extent that the Supreme Court construed the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* in the exercise of that jurisdiction, it was able to do so by virtue of covering clause 5 which provides that 'all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State'. The jurisdiction of State courts by virtue of covering clause 5 is part of their 'belonging' jurisdiction.[75] It may be taken away by the Commonwealth Parliament and reinvested as federal jurisdiction under s 77 of the Constitution but only in respect of the subject matters of federal jurisdiction listed in ss 75 and 76. Of those, s 76(ii) refers to matters 'arising under any laws made by the Parliament'. However, the interpretation of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* for the purpose of giving advice under s 96 is not a matter 'arising under' a Commonwealth law.[76] Nor do those Acts give rise to a 'right, immunity or defence' in the advice proceeding.[77] The Supreme Court proceeding therefore did not fall within the subject matter of federal jurisdiction mentioned in s 76(ii). It follows that Applegarth J exercised State jurisdiction.

The jurisdiction of the Federal Court

47. Part IVC of the *Taxation Administration Act* sets out a regime for how a taxpayer who is dissatisfied with a tax assessment may object to it (ss 14ZU-14ZW) and how the Commissioner is to deal with such objections (ss 14ZX-14ZYB). If the taxpayer remains dissatisfied, s 14ZZ(1)(a)(ii) and (1)(b) provides that the taxpayer may 'appeal to the Federal Court against the decision.' Thus, s 14ZZ vests jurisdiction[78] in the Federal Court to hear appeals against objection decisions made by the Commissioner, and therefore to finally determine tax liability.

48. It may be accepted that 'Part IVC operates as a comprehensive regime for the resolution of disputes to which it applies'.[79] However, nothing in s 14ZZ, pt IVC or the *Taxation Administration Act 1953* as a whole evinces an intention to oust the jurisdiction of the Supreme Court to consider and interpret the provisions of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* in other proceedings within its jurisdiction. Indeed, the Commonwealth Parliament would not have a head of legislative power to give effect to such an intention. Covering clause 5 makes all valid laws of the Commonwealth binding on State courts.[80] That includes the power to 'declare' the

[74] *Baxter v Commissioners of Taxation* (1907) 4 CLR 1087, 1142 (Isaacs J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [23] (Gleeson CJ, Gummow and Hayne JJ).
[75] *Lorenzo v Carey* (1921) 29 CLR 243, 255 (Higgins J).
[76] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ).
[77] *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 262-263 [32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
[78] See also Constitution ss 76(ii), 77(i), (ii); *Judiciary Act 1903* (Cth) s 39B(1A)(c); *Federal Court of Australia Act 1976* (Cth) s 19.
[79] Appellant's submissions in B60 of 2017, 13 [59].
[80] *Felton v Mulligan* (1971) 124 CLR 367, 394 (Windeyer J); Alfred Deakin, *Opinion No 20: Federal Jurisdiction of State Courts source and nature: Actions for compensation for land acquired by Commonwealth*, 9 October 1901.

meaning of federal laws.[81] The Supreme Court cannot be 'bound' by Commonwealth legislation unless the Court may determine its meaning.[82] The Commonwealth Parliament has power under s 77 of the Constitution to 'withdraw from State courts the jurisdiction they would have had to apply federal laws by reason of covering cl 5'[83] but only in respect of matters 'arising' under federal laws within the meaning of s 76(ii). The interpretation of federal law does not 'arise' under federal law.[84] The authority of the Supreme Court to interpret federal laws is therefore part of the residuary of covering clause 5 beyond the Commonwealth Parliament's control under s 77. The 'simple constitutional truth' is that the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* are 'part of the ... single composite body of law that is applicable to cases determined in the exercise of State jurisdiction', because it is a law.[85]

49. As the Supreme Court had the jurisdiction to make the orders of 12 November 2010 the question of whether s 118 operates subject to an exception where orders are made without jurisdiction does not expressly arise in this case.

Origins of s 96 of the *Trusts Act 1973*

50. Section 96 derives from a procedure which originally was available in the courts of equity in the United Kingdom. It is designed to provide a 'summary' procedure allowing a trustee to obtain the direction or opinion of the court on a matter of administration or management of a trust or construction of a trust instrument.

51. This 'summary' character was considered by this Court in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* ('***Macedonian Church***'),[86] which concerned the equivalent to s 96 in New South Wales, being s 63 of the *Trustee Act 1925* (NSW).

52. The majority considered the provenance of s 63 and noted that the origins of the first limb of s 63(1), relating to questions respecting the management or administration of the trust property, lay in s 30 of the *Law of Property Amendment Act 1859* (UK) 22 & 23 Vic c 35 (*Lord St Leonards' Act*) and s 9 of the *Law of Property Amendment Act 1860* (UK) 23 & 24 Vic c 38.[87] Their Honours cited Palmer J in *Re Application of*

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[81] *South Australia v Totani* (2010) 242 CLR 1, 45 [65] (French CJ); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 620 [26] (Gleeson CJ, Gummow and Hayne JJ), quoting A Inglis Clark, *Studies in Australian Constitutional Law* (1901) 177.

[82] Indeed, 'the task of determining meaning is the role of the judiciary': *Brown v Tasmania* (2017) 91 ALJR 1089, 1180 [487] (Edelman J).

[83] *Rizeq v Western Australia* (2017) 91 ALJR 707, 712 [6] (Kiefel CJ). See also *Felton v Mulligan* (1971) 124 CLR 367, 394 (Windeyer J); *Lorenzo v Carey* (1921) 29 CLR 243, 255 (Higgins J).

[84] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ).

[85] *Rizeq v Western Australia* (2017) 91 ALJR 707, 719 [56] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[86] (2008) 237 CLR 66.

[87] *Macedonian Church* (2008) 237 CLR 66, 83 [37] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

Macedonian Orthodox Community Church St Petka Inc [No 2], who explained that prior to *Lord St Leonards' Act*:[88]

> [I]f a trustee wished to obtain the direction or opinion of the court on a matter of administration or management or as to a question of construction of the trust instrument, the trustee had to commence an administration suit. The trustee would raise on the pleadings in the suit the particular point upon which the court's advice was sought. Having obtained the court's direction or advice on that point, the trustee would then obtain a stay of all further proceedings in the administration suit.

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53. However, *Lord St Leonards' Act* was intended:[89]

> to give trustee a summary right by petition, without rendering it necessary to file bills, to obtain the opinion of the Court of Chancery upon any point which might arise in the administration of the trust estate. This would be a great benefit to trustees and, by substituting a cheap and simple process of determining questions, prevent the necessity of expensive suits.

Broad nature of s 96 of the *Trusts Act*

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54. In *Macedonian Church*, the majority stressed the broad nature of the discretion on the court to give advice to trustees. The majority held that there were no implied limitations on the power to give advice and the power was not limited to 'non-adversarial proceedings'.[90] There was only one jurisdictional bar to s 63 relief – namely that 'the applicant must point to the existence of a question respecting the management of the trust property or a question respecting the interpretation of the trust instrument'.[91]

Purpose of s 96 is to provide 'private and personal advice'

55. In *Macedonian Church*, the majority held that:[92]

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> s 63 operates as 'an exception to the Court's ordinary function of deciding disputes between competing litigants'; it affords a facility for giving 'private advice'. It is private advice because its function is to give personal protection to the trustee.

56. Because of this, s 63(2) precludes a trustee who acts in accordance with the 'private advice' from being held liable for breach of trust 'in the event that in conventional proceedings it is later held that the legal position does not correspond with the advice given'.[93]

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[88] *Macedonian Church* (2008) 237 CLR 66, 90-91 [61]-[62] (Gummow A-CJ, Kirby, Hayne and Heydon JJ), quoting *Re Application of Macedonian Orthodox Community Church St Petka Inc [No 2]* (2005) 63 NSWLR 441, 445 [20] (Palmer J).

[89] *Macedonian Church* (2008) 237 CLR 66, 91 [62], citing the First Reading Speech on the *Trustees Relief Bill*, which became *Lord St Leonards' Act* (United Kingdom, House of Lords, Parliamentary Debates (Hansard), series 3, vol 145, 11 June 1857, col 1557).

[90] *Macedonian Church* (2008) 237 CLR 66, 89 [56] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

[91] *Macedonian Church* (2008) 237 CLR 66, 89-90 [58] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

[92] *Macedonian Church* (2008) 237 CLR 66, 91 [64] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

[93] *Macedonian Church* (2008) 237 CLR 66, 91-92 [65] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

57. The majority went on to consider the relationship of s 63 to rights of indemnity, particularly in the context of the use of s 63 to obtain judicial advice from the court about the prosecution or defence of litigation. The majority concluded that:[94]

> provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.
>
> It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust.

58. The majority in *Macedonian Church* went on to hold that providing judicial advice about whether to sue or defend proceedings is 'radically different from deciding the issues that are to be agitated in the principal proceeding. The two steps are not to be elided. In particular, the judicial advice proceedings are not to be treated as a trial of the issues that are to be agitated in the principal proceedings'.[95]

59. In an appropriate case the proper course is to refuse to give judicial advice in a taxation context as in *Re Atlantis Holdings Pty Ltd*[96] and *Platypus Leasing Inc v Commissioner of Taxation [No 3]*.[97]

60. However, here Applegarth J did provide the 'advice' sought, and made the orders relied on by the respondents. Those orders have not been set aside, and the Supreme Court had jurisdiction to make them.

D. Is section 118 engaged in this case?

61. The requirement to give full faith and credit to a judgment necessarily engages an analysis of what full faith and credit is to be given to. In other words, the enquiry is as to what controversy was judicially determined. Thus, the ultimate question on the constitutional issue here is whether s 118 of the Constitution is effective in the present case in the way the respondents contend. That is a matter for debate between the appellant and the respondents about the legal effect of the Supreme Court's orders; one which the Attorney-General should not (and therefore does not), as an impartial intervener, enter.

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[94] *Macedonian Church* (2008) 237 CLR 66, 93-94 [71]-[72] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).
[95] *Macedonian Church* (2008) 237 CLR 66, 94 [74] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).
[96] [2012] NSWSC 112 (22 February 2012), [22] – [23] (Rein J).
[97] (2005) 189 FLR 441, 453 [77]-[78] (Gzell J).

PART IV: Estimate of time

62. The Attorney-General estimates that no more than 60 minutes will be required for the presentation of oral argument.

Dated 18 January 2018

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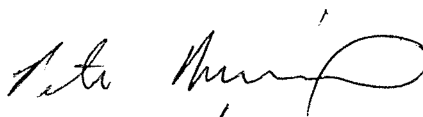

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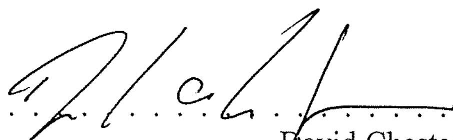

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Annexure 1

PART IV: Statutory Provisions

The Constitution

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;

...

118 Recognition of laws etc. of States

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.

(current version, No C2005Q00193)

Evidence Act 1995 (Cth)

185 Faith and credit to be given to documents properly authenticated

All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

(current version, No C2017C00386)

State Laws and Records Recognition Act 1901 (Cth)

18. All public acts records and judicial proceedings of any State, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office within the Commonwealth as they have by law or usage in the Courts and public offices of the State from whence they are taken.

(no longer in force, as enacted, version No C1901A00005)