

Bond University

Revenue Law Journal

Volume 31 (2)

2026

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THE DOMESTIC IMPLEMENTATION OF AUSTRALIA'S TAX TREATIES: WHATEVER HAPPENED TO THE RULE OF LAW?

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In a landmark judgment, the High Court of Australia has upheld the constitutional validity of Victoria and Queensland's foreign land tax surcharges in *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)* [2025] HCA 39. The decision clarifies the Commonwealth's power to give domestic effect to Australia's tax treaties and to resolve inconsistencies with State tax laws through retroactive legislation. This article argues that the institutional responses to the potential invalidity of foreign surcharges reveal the deep fragility of the rule of law in the domestic implementation of Australia's tax treaties. It contends that a renewed commitment to rule of law principles is essential to safeguard the legitimacy of Australia's tax system and ensure certainty for taxpayers.

I. INTRODUCTION

The High Court's recent decision in *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)* (*'G Global'*)¹ represents a major development in Australia's constitutional landscape. The Court held that Victoria and Queensland's land tax surcharges on foreign nationals were inconsistent with the non-discrimination articles in certain tax treaties, which had been given the force of law by the *International Tax Agreements Act 1953* (Cth) (*'International Tax Agreements Act'*), and were therefore rendered inoperative by s 109 of the *Constitution*. However, it also held that the Commonwealth had the power to retroactively amend the *International Tax Agreements Act* to remove the inconsistency and revive the surcharges. In doing so, the Court clarified the scope of the Commonwealth's power to give domestic effect to international tax treaties using the external affairs power and to resolve inconsistencies between Commonwealth and State tax laws through retroactive legislation. While the High Court may have resolved the constitutional question, the institutional responses to the potential invalidity of the surcharges expose a deeper problem: the fragility of the rule of law in the domestic implementation of Australia's tax treaties.

This article argues that the true significance of *G Global* lies not only in the High Court's resolution of the constitutional issues, but in what the episode reveals about executive action, legislative reliance on retroactive fixes, and judicial willingness to depart from established precedent and accept retroactive treaty overrides. Taken together, these institutional responses demonstrate how lawful exercises of power may nonetheless undermine the law's capacity to guide conduct. This article contends that a renewed commitment to rule of law principles is essential to safeguard the legitimacy of Australia's tax system and ensure certainty for taxpayers.

* Barrister, Francis Burt Chambers. This article is dedicated to the late Professor Michelle Markham. Professor Markham examined my doctoral thesis and, sadly, passed away before I had the opportunity to thank her for her generous assessment. This article draws on aspects of my doctoral research and aligns with Professor Markham's long-standing scholarly interest in international tax. I would like to thank Professor Rick Krevier and the anonymous reviewers for their comments on this article.

¹ [2025] HCA 39 (*'G Global'*).

This article proceeds in five parts. Part II outlines the operation of State and Territory foreign land tax and duty surcharges and their interaction with Australia's tax treaties. Part III identifies the rule of law principles that frame the assessment of institutional responses. Part IV evaluates the executive, legislative and judicial responses to the potential invalidity of foreign surcharges in light of those principles. Finally, Part V concludes by reflecting on the cumulative implications of these institutional responses for the rule of law in the implementation of Australia's tax treaties.

II. FOREIGN SURCHARGES AND AUSTRALIA'S TAX TREATIES

A. *Overview of Foreign Land Tax and Duty Surcharges*

Foreign land tax and duty surcharges were introduced amid escalating housing prices in Australia's major cities and concerns that foreign investors were driving up prices and not contributing sufficiently to public infrastructure and services.² In response, most States and Territories introduced duty surcharges on foreign purchasers and land tax surcharges on foreign or absentee owners.³ While the definition of a "foreign person" differs between jurisdictions, the surcharges generally apply when land is purchased, owned or controlled by a non-resident individual, a foreign-incorporated or foreign-controlled entity, or a trust with foreign beneficiaries.

B. *Potential Inconsistency with Australia's Tax Treaties*

The imposition of foreign surcharges raises significant issues in light of Australia's tax treaty obligations. Australia is a party to 46 international tax treaties or double tax agreements, which are incorporated into domestic law through s 5(1) of the *International Tax Agreements Act*. Many of these treaties contain non-discrimination articles that prohibit Australia from imposing more onerous taxes on foreign nationals than those imposed on Australian residents. In several cases, these non-discrimination articles apply broadly to 'taxes of every kind and description',⁴ in effect extending the articles well beyond income tax and fringe benefits tax, the Commonwealth's intended policy position,⁵ to include other Commonwealth taxes as well as taxes imposed by State and Territory governments not party to the treaty.

² See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2015, 1444 (Tim Pallas); New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2016, 3 (Gladys Berejiklian); Queensland, *Parliamentary Debates*, Legislative Assembly, 14 June 2016, 2278 (CW Pitt).

³ Across Australia, foreign land tax and duty surcharges vary considerably. As of 1 January 2026, foreign or absentee owner land tax surcharges apply in the Australian Capital Territory (0.75%), New South Wales (5%), Queensland (3%), Tasmania (2%) and Victoria (4%). South Australia and Western Australia impose no land tax surcharges, and the Northern Territory does not levy land tax at all. A foreign purchaser duty surcharge applies in New South Wales (9%), Queensland (8%), South Australia (7%), Tasmania (8% for residential land; 1.5% for primary production land), Victoria (8%) and Western Australia (7%). No foreign purchaser duty surcharge applies in the Australian Capital Territory or the Northern Territory. In all jurisdictions, these surcharges are imposed in addition to general land tax and duty rates, and the availability of exemptions and concessions varies.

⁴ Eight of Australia's tax treaties, specifically those with Finland, Germany, India, Japan, New Zealand, Norway, South Africa and Switzerland, contain such a provision: see Explanatory Memorandum, Treasury Laws Amendments (Foreign Investment) Bill 2024 (Cth) [3.2]–[3.3].

⁵ Explanatory Memorandum, Treasury Laws Amendments (Foreign Investment) Bill 2024 (Cth) [3.2]–[3.3], [3.7]–[3.8].

In 2021, the scope of the non-discrimination articles in Australia's tax treaties was considered by the High Court in *Addy v Federal Commissioner of Taxation* ('*Addy*').⁶ The Court held that the Commonwealth's so-called "backpacker tax" contravened Australia's tax treaty with the United Kingdom because it imposed a higher rate of income tax on UK working holiday makers who were found to be Australian tax residents than on residents who were Australian citizens.⁷ *Addy* confirmed that the non-discrimination protections in Australia's treaties are capable of overriding domestic tax laws that impose more onerous taxation on foreign nationals. In the aftermath of the decision, attention shifted to whether State and Territory foreign land tax and duty surcharges might likewise conflict with the non-discrimination articles in Australia's tax treaties and be constitutionally invalid.⁸

C. Constitutional Inconsistency

Section 109 of the *Constitution* relevantly provides that if a State law is inconsistent with a Commonwealth law, the Commonwealth law prevails, and the State law is invalid to the extent of that inconsistency. When a State law is invalid under s 109, the High Court has made it clear that this does not render the law void or beyond State legislative power, but instead renders the State law inoperative.⁹ If the inconsistent Commonwealth law is later repealed, the State law resumes full force and effect.¹⁰ As Australia's tax treaties, including the non-discrimination protections within those treaties, are given the force of domestic law through s 5(1) of the *International Tax Agreements Act*, a question arises as to whether State-imposed foreign surcharges are constitutionally invalid.

The constitutional question is slightly different for foreign surcharges imposed by Australia's self-governing Territories, such as the Australian Capital Territory.¹¹ Section 109 of the *Constitution* does not apply to Territory laws,¹² and inconsistencies must instead be resolved by reference to the Territory's self-governing legislation and, in some cases, the common law doctrine of repugnancy.¹³ However, as a general rule, it is the Commonwealth law that prevails.

III. KEY RULE OF LAW PRINCIPLES

The rule of law provides a useful framework for evaluating the institutional responses to the potential invalidity of foreign surcharges.

⁶ (2021) 273 CLR 613.

⁷ *Ibid* [33]–[34].

⁸ See Eu Jin Teo, 'Are Existing Foreigner Property Taxes Constitutionally Unsafe?' (2023) 97(11) *Law Institute Journal* 30, 30–33; Na Li, Kerrie Sadiq and Richard Krever, 'Can Australia's Double Tax Treaties Invalidate State Real Estate Taxes?' (2024) 113 *Tax Notes International* 47, 47–50.

⁹ *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 286; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 464–465; *G Global* (n 1) [38].

¹⁰ *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 286; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 464–465; *G Global* (n 1) [38].

¹¹ As noted above at n 3, the Northern Territory does not impose land tax or a foreign duty surcharge.

¹² *Northern Territory v GPO* (1999) 196 CLR 553, 580 [53] (Gleeson CJ and Gummow JJ), 636 [219] (Kirby J).

¹³ See Anne Twomey, 'Inconsistency Between Commonwealth and Territory Laws' (2014) 42(3) *Federal Law Review* 521 for a detailed discussion of these issues.

The “rule of law” is a foundational legal and political principle, but resists precise definition.¹⁴ The core idea is that law, and not the arbitrary will of those in power, should govern society. As Lord Bingham explains, this requires that ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.’¹⁵ Thus, the rule of law requires the ‘ascendancy of law ... and of the institutions of the legal system in a system of governance.’¹⁶

The rule of law provided a foundation for framing the Australian Constitution.¹⁷ Despite this, its status and enforceability in the Australian constitutional context – including whether courts can give it any legal effect – is uncertain. Dixon J has suggested that rule of law principles may inform the outer limits of the Commonwealth’s incidental legislative powers,¹⁸ although it remains to be seen how far this principle can be taken.¹⁹

Notwithstanding this uncertainty, the rule of law is widely recognised as a cornerstone of democratic government and contemporary legal systems.²⁰ It provides legitimacy to legal rules, institutions and values,²¹ and enables individuals to plan their affairs with a degree of certainty.²² In the taxation context, adherence to the rule of law is especially important, as departures can erode taxpayer confidence and undermine the legitimacy of the tax system.²³

¹⁴ Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 3–8 (Bingham); Brian Tamanaha, ‘The Rule of Law for Everyone?’ 55(1) *Current Legal Problems* 97, 101–102.

¹⁵ Bingham (n 14) 8.

¹⁶ Jeremy Waldron, ‘The Rule of Law’, *The Stanford Encyclopedia of Philosophy* (Encyclopedia, 22 June 2016) <https://plato.stanford.edu/archives/spr2020/entries/rule-of-law/> (Waldron).

¹⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

¹⁸ *Ibid.*

¹⁹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ).

²⁰ See, eg, *United Nations Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res 67/1, UN Doc A/RES/67/1 (24 September 2012, adopted 30 November 2012) <<https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>>.

²¹ See generally Ricardo Gosalbo-Bono, ‘The Significance of the Rule of Law and its Implications for the European Union and the United States’ (2010) 72 *University of Pittsburgh Law Review* 229, 232; Bingham (n 14) 3; Nicole Wilson-Rogers and Dale Pinto, ‘Tax Reform: A Matter of Principle: An Integrated Framework for the Review of Australian Taxes’ (2009) 7 *eJournal of Tax Research* 72, 81–83.

²² James Maxeiner, ‘Some Realism About Legal Certainty in the Globalization of the Rule of Law’ (2008) 31 *Houston Journal of International Law* 27, 30; Régis Lanneau, ‘What Is Legal Certainty? A Theoretical Essay’ in Bertrand du Marais and David Marrani (eds), *Legal Certainty in Real Estate Transactions: A Comparison of England and France* (Intersentia, 2018) 23, 25; Wilson-Rogers and Pinto (n 21) 81; James Maxeiner, ‘Legal Certainty: A European Alternative to American Legal Indeterminacy’ (2007) 15 *Tulane Journal of International and Comparative Law* 541, 545–546; Nabil Orow, ‘Part IVA: Seriously Flawed in Principle’ (1998) 1 *Journal of Australian Taxation* 57, 71; Justice Michelle Gordon, ‘The Rule of Law – What We Share and Must Defend’ (Speech, Australian High Commission, 8 March 2018) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gordonj/The_Rule_of_Law.pdf> 2.

²³ Orow (n 22) 66; Helmut Wagner, ‘Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?’ (Conference Paper, Modern Law for Global Commerce Congress to Celebrate the Fortieth Annual Session of the United Nations Commission on International Trade Law, Vienna, 9–12 July 2007) 2. There are, of course, other factors such as taxpayers’ perceptions of the fairness of the tax system that may also influence taxpayer sentiment towards the law and, in turn, undermine the legitimacy of the tax system: see, eg, Jonathan Farrar, Morina Rennie and Linda Thorne, ‘Fairness, Legitimacy and Tax Compliance’ (2022) 19(2) *eJournal of Tax Research* 186, 187–204; Ken Devos, ‘Tax Evasion Behaviour and Demographic Factors: An Exploratory Study in Australia’ (2008) 18(1) *Revenue Law Journal* 1:1–43, 33–35.

Despite its central role in modern legal systems, there is no settled consensus on how the rule of law should be conceptualised or reconciled with contemporary democratic values.²⁴ The concept accommodates a wide range of perspectives,²⁵ and any discussion inevitably raises deep philosophical issues.²⁶ Nonetheless, several key principles are consistently recognised as fundamental to the rule of law, and provide an appropriate starting point for analysing the institutional responses to the potential invalidity of foreign surcharges.

A. *Tax Administrators Must Apply the Law as Enacted*

The rule of law requires that individuals be governed by general rules rather than by ad hoc exercises of administrative discretion.²⁷ At its core, this principle insists that law-making is the responsibility of the legislature, not officials tasked with administering or collecting taxes. The executive is therefore required to apply the law as enacted and has no authority to reshape its operation to serve administrative objectives. The rule of law is compromised whenever tax administrators depart from the requirements of the legislation they are bound to apply.²⁸

B. *Promulgation and Accessibility*

A further requirement of the rule of law is promulgation, which demands that legal rules be publicly accessible so that taxpayers are, or can become, aware of them through appropriate advice.²⁹ Contemporary scholarship recognises that promulgation extends beyond legislation to include judicial interpretations and administrative practices adopted by the executive.³⁰ A tax system that relies on unpublished or undisclosed rules, or administrative practices, undermines certainty for taxpayers and weakens the law's capacity to guide conduct.

²⁴ Gosalbo-Bono (n 21) 231; Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2nd ed, 1989) 3.

²⁵ Cf Aristotle, *The Politics*, tr Stephen Everson (Cambridge University Press, 1988); John Fortescue, *On the Laws and Governance of England* (Cambridge University Press, 1997); James Harrington, *The Commonwealth of Oceana* (Cambridge University Press, 1992); Charles Montesquieu, *The Spirit of the Laws* (Cambridge University Press, 1989); Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1959) (Dicey); Frederick Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960); Frederick Hayek, *The Road to Serfdom* (Dymocks Books, 1944); Joseph Raz, *The Authority of Law* (Oxford University Press, 1977) (Raz); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) (Finnis); John Rawls, *A Theory of Justice* (Belknap Press, 1999); Lon Fuller, *The Morality of Law* (Yale University Press, Revised Edition, 1964) (Fuller, *The Morality of Law*); Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985).

²⁶ See generally Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2nd ed, 1989) 3; Waldron (n 16).

²⁷ Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 232, 233 (Tamanaha); Fuller, *The Morality of Law* (n 25) 46; Waldron (n 16) [5.1]; Finnis (n 25) 268, 270; Dicey (n 25) 120.

²⁸ Fuller, *The Morality of Law* (n 25) 81; Finnis (n 25) 270–271.

²⁹ Fuller, *The Morality of Law* (n 25) 49–51; Raz (n 25) 214; Tamanaha (n 27) 233; Waldron (n 16) [5.1]; Finnis (n 25) 270.

³⁰ Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630, 631.

C. *Predictability and Stability*

The rule of law prioritises predictability and stability.³¹ Changes to the law undermine predictability and impede the law's core function of enabling individuals to understand and organise their affairs in accordance with legal requirements.³² Taxpayers, in particular, may struggle to appreciate the tax consequences of a transaction if they must continually adjust to shifting rules or if rules change unexpectedly. Stability, by contrast, enables taxpayers to plan their actions with confidence.

D. *Non-retroactivity*

The rule of law generally requires rules to operate prospectively.³³ This principle is especially important in the taxation context because retroactive rules deprive taxpayers of the ability to foresee the tax consequences of their actions.³⁴ Despite this, the High Court has long held that retroactive legislation is not constitutionally invalid for that reason alone.³⁵

A distinction is sometimes drawn between retroactive and retrospective laws.³⁶ Driedger, for example, argues:³⁷

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted.

The practical utility of this distinction, however, must be questioned, and the High Court has cautioned against allowing labels to distract 'from the underlying principle ... concerning how to interpret the temporal operation of legislation'.³⁸ Ultimately, the question is not how a statute should be labelled, but its operation in a particular context.³⁹ If a law takes effect from a date preceding its enactment and operates to impose new legal consequences in respect of a past event,⁴⁰ it may deprive individuals of the ability to foresee the consequences of their actions and contribute to uncertainty.

Not all retroactive laws, however, necessarily undermine rule of law principles. Some may even support it. Fuller explains that retroactive laws must be assessed within the broader context of a legal system that otherwise operates prospectively.⁴¹ Within such a system, a retroactive law may

³¹ Raz (n 25) 214–215; Finnis (n 25) 270; Fuller, *The Morality of Law* (n 25) 79.

³² Raz (n 25) 214–215; Finnis (n 25) 270; Fuller, *The Morality of Law* (n 25) 79.

³³ See generally Kameshwar Chaturvedi, 'Legislative Retrospectivity and Rule of Law' (2013) 34(3) *Statute Law Review* 207, 207; Fuller, *The Morality of Law* (n 25) 53; Raz (n 25) 214; Finnis (n 25) 270.

³⁴ Fuller, *The Morality of Law* (n 25) 60. See also Waldron (n 16) [5.1]; Raz (n 25) 214; Finnis (n 25) 270.

³⁵ See, eg, *R v Kidman* (1915) 20 CLR 425; *Polyukovich v Commonwealth* (1991) 172 CLR 501.

³⁶ See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, December 2015) 364 (Australian Law Reform Commission); Elmer Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264, 268–269 (Driedger).

³⁷ Driedger (n 36) 268–269. See also *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27, 31; *Robertson v City of Nunawading* [1973] VR 819, 824; *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379; *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 462 [67].

³⁸ *Stephens v The Queen* (2022) 273 CLR 635, 651 [29]; *G Global* (n 1) [62].

³⁹ *G Global* (n 1) [62].

⁴⁰ Driedger (n 36) 268–269.

⁴¹ Fuller, *The Morality of Law* (n 25) 60.

be warranted, or even essential, as a curative measure when the legal system has failed in some respect.⁴² Yet not all curative measures are compatible with rule of law principles, and retroactive tax laws in particular are especially difficult to justify. Tax laws enter directly into the planning of one's affairs and are often designed to influence behaviour in ways the legislature considers desirable.⁴³ When a tax is later imposed on gains arising from transactions undertaken under a different legal regime, taxpayers are effectively penalised for actions the law itself originally induced them to do.⁴⁴

As taxpayers make important decisions, such as whether to invest, buy, sell, incur expenses, or derive income, based on expected tax consequences, the threshold for justifying retroactive tax laws, even when enacted for curative purposes, is considerably higher than in most other areas of law. Conventional wisdom suggests that a retroactive tax measure will infringe upon the rule of law if it disadvantages taxpayers by altering anticipated tax outcomes or otherwise impacts taxpayers in unforeseen ways, even if enacted for curative purposes.⁴⁵

IV. EVALUATING INSTITUTIONAL RESPONSES

The potential invalidity of foreign surcharges prompted a range of institutional responses. Evaluating these responses through the lens of rule of law principles illustrates how lawful exercises of public power can undermine the law's capacity to guide conduct and provide certainty for taxpayers.

A. *The Executive's Failure to Apply and Promulgate Rules*

After State and Territory revenue authorities became aware of the potential invalidity of foreign surcharges, their initial responses diverged significantly. On 21 February 2023, Revenue New South Wales announced that it would stop applying foreign surcharges to nationals of New Zealand, Finland, Germany, and South Africa on the basis that the surcharges were inconsistent with the broad non-discrimination articles in Australia's tax treaties with those countries.⁴⁶ It also invited taxpayers who had incorrectly paid a surcharge to apply for a refund.⁴⁷ A further announcement on 29 May 2023 extended this treatment to nationals of India, Japan, Norway and Switzerland.⁴⁸

The State Revenue Office of Victoria announced on 15 March 2023 that, although it was aware of the constitutional issue and of the position taken in New South Wales, it would continue to apply surcharges to all foreign purchasers and absentee owners regardless of their nationality.⁴⁹ Meanwhile, the revenue authorities in other jurisdictions remained silent and did not acknowledge the issue or provide any guidance to taxpayers on how foreign surcharges would be administered amid the uncertainty.

⁴² Ibid 53, 74. See also Australian Law Reform Commission (n 36) 369.

⁴³ Fuller, *The Morality of Law* (n 25) 60.

⁴⁴ Ibid.

⁴⁵ See, e.g., Hayek, *The Road to Serfdom* (n 25) 72; Fuller, *The Morality of Law* (n 25) 62; Raz (n 25) 214.

⁴⁶ Revenue New South Wales, 'Surcharge Purchaser Duty and Surcharge Land Tax – International Tax Treaties' (Media Release, 21 February 2023).

⁴⁷ Ibid.

⁴⁸ Revenue New South Wales, 'Surcharge Purchaser Duty and Surcharge Land Tax – International Tax Treaties' (Media Release, 29 May 2023).

⁴⁹ State Revenue Office of Victoria, 'Taxes on Foreign Property Investors' (Media Release, 15 March 2023).

Evaluating these executive responses against rule of law principles invites some different perspectives. It is arguable that Revenue New South Wales adhered to rule of law principles. It formed a view on the constitutional validity of the surcharges, publicly communicated its approach, and sought to apply the law as enacted. Its approach stands in stark contrast to the State Revenue Office of Victoria, which continued to impose surcharges on foreign nationals despite their inconsistency with the non-discrimination protections in Australia's tax treaties and s 5(1) of the *International Tax Agreements Act*.

To the contrary, it might be suggested that the State Revenue Office of Victoria was not refusing to apply the law but was instead seeking to protect the revenue base pending clarification of a constitutional question. That argument, however, should not be accepted. The constitutional invalidity of the surcharges, insofar as they applied to nationals of affected treaty partners, was never seriously in doubt, and all the parties in the *G Global* proceedings, including Victoria, accepted that s 109 of the *Constitution* rendered the surcharges inoperative.⁵⁰ The only live issue was whether the Commonwealth could later revive the surcharges through a retroactive amendment, and when Victoria made its announcement, that legislation had not yet been enacted.⁵¹ The Victorian State Revenue Office's stance is tantamount to a refusal to apply the legislated rules.

The silence of other jurisdictions also raises rule of law concerns. Although Victoria maintained a legally flawed position, at least it articulated one. In the remaining jurisdictions, the absence of any guidance left taxpayers uncertain about whether surcharges applied and how they would be administered. In these jurisdictions, there was a failure to promulgate any administrative practice at all.

B. *The Legislature's Retroactive Amendments*

The potential invalidity of foreign surcharges also prompted a series of legislative developments. On 8 April 2024, the Commonwealth amended the *International Tax Agreements Act* to confine the operation of Australia's tax treaties to income tax and fringe benefits tax, with retroactive effect from 1 January 2018.⁵² It also inserted a new s 5(3) to ensure that State and Territory tax laws would prevail over Australia's tax treaties in the event of an inconsistency. These amendments were intended to ensure that foreign surcharges would continue to operate despite any inconsistency with Australia's treaty obligations.⁵³

Not long after, Victoria and Queensland enacted their own legislation to retroactively confirm the validity of their foreign land tax and duty surcharges and to validate assessments issued before the Commonwealth amendments took effect, providing an additional safeguard should the amendments to the *International Tax Agreements Act* be found invalid.⁵⁴ Queensland also introduced a contingent windfall tax, which would apply if its validating legislation was itself found to be invalid.⁵⁵

⁵⁰ *G Global* (n 1) [35]–[37].

⁵¹ The Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) was introduced to the House of Representatives on 7 February 2024 and received royal assent on 8 April 2024.

⁵² *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) s 2, sch 1.

⁵³ Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) 34–35.

⁵⁴ *Land Tax Act 2010* (Qld) ss 104, 105; *Duties Act 2001* (Qld) s 688; *Land Tax Act 2005* (Vic) s 106A; *Duties Act 2000* (Vic) s 282A.

⁵⁵ *Duties Act 2001* (Qld) ch 4A.

Victoria and Queensland's responses are best understood as curative measures capable of being justified on rule of law grounds. Taxpayers, including the litigants in the *G Global* proceedings, were well aware that foreign surcharges applied, and the enactment of retroactive validating legislation simply confirmed what had long been assumed to be the legal position. The retroactive validating legislation did not disadvantage taxpayers by altering anticipated tax outcomes or otherwise impact them in unforeseen ways. The same reasoning applies to Queensland's windfall tax, which was directed solely at neutralising unexpected taxpayer windfalls if the surcharges were ultimately found to be invalid. These measures, therefore, reinforce the rule of law rather than undermine it.

This argument, however, is more difficult to sustain in relation to the Commonwealth's retroactive amendments to the *International Tax Agreements Act*. Although the amendments function as curative measures to the extent that they revive State and Territory foreign surcharges, they achieve this by confining the domestic operation of Australia's tax treaties to income tax and fringe benefits tax. This, in practice, significantly narrows the treaty protections afforded to foreign nationals under Australia's tax treaties across a wide range of taxes and goes beyond what is strictly necessary to revive foreign surcharges. The Commonwealth's amendments cannot, accordingly, properly be characterised as curative measures justifiable on rule of law grounds.

The amendments also raise broader rule of law concerns. Under international law, Australia must perform its tax treaty obligations in good faith and cannot rely on domestic legislation to justify non-performance.⁵⁶ The use of retroactive domestic legislation to override clear and unambiguous treaty protections not only risks placing Australia in breach of those obligations, but also signals that Australia's treaty commitments operate only at the sufferance of Parliament.⁵⁷ Moreover, this is not the first time Australia has used domestic law to override the express wording of its international tax treaties.⁵⁸ The latest amendments to the *International Tax Agreements Act* are, therefore, not a one-off response to adverse court findings but appear to be part of an emerging pattern that arguably undermines the stability and predictability of Australia's tax system and casts doubt on Australia's trustworthiness as a treaty partner.

C. *The Judiciary's Acceptance of Retroactive Treaty Overrides*

Taxpayers ultimately challenged the constitutional validity of the Commonwealth's retroactive legislation in the High Court. In *G Global*, the High Court held that Queensland and Victoria's foreign land tax surcharges were inconsistent with the non-discrimination articles in the Australia–Germany and Australia–New Zealand tax treaties and s 5(1) of the *International Tax Agreements Act*

⁵⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 26, 27.

⁵⁷ Eu-Jin Teo and Kerrie Sadiq, 'High Court of Australia Upholds Retroactive Treaty Override' (2025) 120 *Tax Notes International* 1081, 1083–1084.

⁵⁸ In 2000, s 3A was inserted into the *International Tax Agreements Act* to address the effects of the Federal Court's decision in *Commissioner of Taxation (Cth) v Lamesa Holdings BV* (1997) 36 ATR 589. The amendment extended the alienation of property articles in Australia's tax treaties to include the alienation or disposal of shares or other interests in entities whose assets consist principally of Australian real property, whether held directly or through interposed companies or other entities. For more detail, see Kathrin Bain, Richard Krever and Anthony van der Westhuisen, 'The Influence of Alternative Model Tax Treaties on Australian Treaties' (2011) 26(1) *Australian Tax Forum* 31, 33; Richard Krever and Peter Mellor, 'Legal Interpretation of Tax Law: Australia' in Robert van Brederode and Richard Krever (eds), *Legal Interpretation of Tax Law* (Kluwer Law International, 2017) 15.

and therefore inoperative under s 109 of the *Constitution*. However, it also found that the Commonwealth could retroactively amend the law to remove that inconsistency and thereby revive the surcharges. In doing so, the Court overruled its earlier majority decision in *University of Wollongong v Metwally* (*Metwally*),⁵⁹ which had suggested that the Commonwealth Parliament could not retroactively undo or alter the invalidating effect of s 109 on a State law.⁶⁰

While the High Court's overruling of *Metwally* rests on detailed and principled reasoning,⁶¹ its willingness to depart from a majority decision raises broader rule of law concerns, particularly the need for predictability and stability. The High Court's decision in *G Global* not only affirms the Commonwealth Parliament's largely unfettered power to enact retroactive tax laws, but also recognises its capacity to introduce retroactive amendments that eliminate the basis of an inconsistency and thereby revive State tax laws that would otherwise be inoperative.⁶² Taxpayers who structure their affairs on existing tax laws may find the legal landscape shifts, undermining their ability to predict outcomes or plan with certainty.

V. CONCLUSION

The High Court's decision in *G Global* resolves the immediate constitutional uncertainty surrounding the validity of foreign surcharges and confirms that the Commonwealth may retroactively amend tax legislation to remove inconsistencies under s 109 of the *Constitution* and revive State laws that would otherwise be inoperative. Yet the institutional responses to the episode highlight a more fundamental concern – the fragility of the rule of law in the domestic implementation of Australia's tax treaties.

The divergent and, at times, unlawful approaches taken by State and Territory revenue authorities, the failure to promulgate administrative practices, the introduction of retroactive fixes that went well beyond legitimate curative measures, and the judiciary's willingness to depart from established precedent and accept retroactive treaty overrides together paint a troubling picture. Viewed

⁵⁹ (1984) 158 CLR 447 (*Metwally*).

⁶⁰ In *Metwally*, the High Court considered whether the Commonwealth could retroactively amend the *Racial Discrimination Act 1975* (Cth) to revive certain State laws that had been rendered inoperative by s 109 of the *Constitution*. Murphy, Brennan and Deane JJ held that the Commonwealth could not retroactively amend the law to alter or undo the validating effect of s 109: *Metwally* (n 59) 469 (Murphy J), 474 (Brennan J), 479 (Deane J). Gibbs CJ took a narrower view, holding that the Commonwealth could not retroactively undo or alter the invalidating effect of s 109 by declaring or asserting that the relevant Commonwealth law had never been intended to exclude the operation of the State law: *Metwally* (n 59) 455 (Gibbs CJ). The remaining members of the Court dissented: *Metwally* (n 59) 471 (Mason J), 485 (Wilson J), 487 (Dawson J).

⁶¹ In overruling *Metwally*, the High Court explained that the differences in the majority's reasoning, the absence of any principle firmly supported by prior or subsequent authority, and the decision's inconsistency with established cases recognising the Commonwealth's power to enact valid retroactive laws together justified a departure from the decision: *G Global* (n 1) [89]. It also noted that the principle in *Metwally* provided no meaningful safeguard, as the Commonwealth could always prospectively amend its legislation to avoid future inconsistencies, thereby clearing the way for States to enact their own retroactive legislation and achieve the same outcome that a retroactive Commonwealth law might otherwise have achieved: *G Global* (n 1) [89].

⁶² The Court noted, however, that such a law might fall outside Commonwealth legislative power if it infringes an express or implied constitutional prohibition, for example by weakening the capacity of the States to exercise their constitutional powers and functions, or by impermissibly interfering with the exercise of judicial power or with judicial processes: *G Global* (n 1) [94].

collectively, these responses expose a deep tension between the lawful exercise of institutional power and the rule of law principles that underpin a coherent and predictable tax system. A renewed commitment to rule of law principles in the domestic implementation of Australia's tax treaties is essential if the legitimacy of the tax system is to be preserved and public trust restored.