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THE RISE AND TUMBLE OF NON-DISCRIMINATION IN AUSTRALIA'S TAX TREATIES

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In 1982, the US and Australia signed a replacement tax treaty that included, for the first time in an Australian treaty, a non-discrimination Article that overrode the primary Articles in the treaty to protect non-resident citizens of the treaty partner from taxation different from that applied to a resident in the same circumstances. Australia balked at the measure and declined to include it in the law needed to make the treaty effective. Less than two decades later, Australia reversed course and seemingly accepted and even endorsed the inclusion of non-discrimination Articles in tax treaties. However, when the potential revenue cost of the measures and their impact on state laws became apparent, Australia reversed course yet again and enacted legislation to override its international treaties and effectively nullify the effect of non-discrimination Articles in its international agreements. A short history of Australia's non-discrimination Articles sheds light on the slow rise and very rapid fall of these remarkable treaty provisions.

I. INTRODUCTION

In a world of global commerce, much of which is driven by multinational enterprises, conflicts over taxing rights over profits from cross-border trade and business activities are inevitable. In the absence of international agreements, there would be two competing claims to tax the same profits, with many nations taxing non-resident taxpayers on income sourced within the jurisdiction, and the residents' home countries taxing the same persons on the same income under rules that impose liability on resident taxpayers in respect of income derived worldwide. Australia, like all advanced economies and, to a lesser extent, developing economies, has entered into treaties with major trading and business partners that divide taxing rights between the source jurisdiction and, in the case of taxpayers resident abroad, the jurisdiction in which the taxpayers are resident. Australia's 46 tax treaties are similar to one another, with all adopting a foundation rule that allocates to the residence country sole taxing rights over most types of business income unless the non-resident operates its business through a permanent establishment in the source country. That general rule is subject to exceptions in later treaty Articles that permit the source country to retain limited taxing rights over three types of business profits — dividends, interest and royalties — and full taxing rights over capital gains related to real property in the jurisdiction.

Separately, 17 of Australia's 50 full income tax treaties contain a non-discrimination Article¹ that prohibits signatories from applying tax rules that might impose a greater tax burden on nationals

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¹ While Australia is a relatively recent adopter of the non-discrimination Articles, its treaty practice shows a consistent alignment with the Organisation for Economic Co-operation and Development ("OECD") framework. See Commentary on Article 24 in OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Publishing, 2019) C24-1–70 ("OECD Model").

of the treaty partner than faced by the country's citizens.² The non-discrimination Articles in Australia's tax treaties are surprising in two respects. To begin with, only five of the non-discrimination Articles limit their impact to citizens who are also residents of one or both of the treaty partners.³ The remaining 12 remarkably apply to citizens of the other country, even if the taxpayer is not a tax resident of the partner jurisdiction and has no liability in the other country.⁴ The rule thus overrides the introductory Article to Australia's tax treaties, which initially limits the application of the treaties to residents of the treaty partners, and extends far beyond the notional primary purpose of tax treaties, to prevent double taxation of income from cross-border transactions or investments by dividing taxing rights between two jurisdictions that claim the right to tax the same income.

Secondly, while eight of these treaties explicitly limit the application of the non-discrimination Articles to income tax and related taxes covered by the treaty,⁵ and one applies to income tax and related taxes covered by the treaty, goods and services tax and value added tax,⁶ eight other non-discrimination Articles apply to income tax and all other taxes levied in the treaty signatories, including those levied by subordinate governments not party to the treaties.⁷ All the non-discrimination Articles contain carve-outs, excluding some aspects of national laws from the application of the non-discrimination Article. The carve-outs differ from treaty to treaty but include tax measures such as general anti-avoidance rules, thin capitalisation rules, rules applicable to taxpayers holding working holiday visas, research and development incentives, measures dealing with the tax consequences of consolidations and loss transfer rules.⁸

The reach of non-discrimination Articles has been litigated in Australian courts in respect of both the income tax and state real property tax. The outcome in favour of the taxpayer in one leading income tax case⁹ prompted legislative intervention and the adoption of a sweeping treaty override measure that effectively sweeps aside the treaty clauses and, contrary to the terms of Australia's international agreements, affords primacy to both Commonwealth and state tax laws that explicitly discriminate against foreign nationals. While the treaty override has alarmed some commentators, to date, it has not provoked retaliatory responses by treaty partners.

The fact that only 20 per cent of Australia's tax treaties have a non-discrimination Article and that the Article provides protection for persons who may be completely outside the tax system of the

² In addition to the 14 treaties with non-discrimination Articles currently in force (see below nn 3–4), signed but not yet in force treaties with Portugal (2023), Slovenia (2024), and Croatia (2025) also have non-discrimination Articles.

³ They are treaties with Israel, Norway, Turkey, the UK and the US.

⁴ They are treaties with Chile, Croatia (not in force), Finland, Germany, Iceland, India, Japan, New Zealand, Portugal (not in force), Slovenia (not in force), South Africa and Switzerland.

⁵ They are treaties with Croatia (not in force), Iceland, Israel, Portugal (not in force), Slovenia (not in force), Turkey, the UK and the US.

⁶ The treaty with Chile.

⁷ They are treaties with Finland, Germany, India, Japan, New Zealand, Norway, South Africa and Switzerland.

⁸ The carve-out measure in the Japan-Australia treaty only applies to Australian law: see *Protocol to the Convention Between Japan and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 31 January 2008, [2008] ATS 21 (entered into force 12 March 2008) cls 20–1 ('Australia-Japan DTA').

⁹ *Addy v Commissioner of Taxation* 273 CLR 613 ('Addy').

treaty partner, and possibly in respect of taxes well beyond the apparent aim of the treaty,¹⁰ makes the non-discrimination Articles in some respects among the more interesting measures in Australian international tax law.

A. *What is the purpose of non-discrimination Articles?*

With precedent historical footprints from the 19th century,¹¹ in the modern era, a non-discrimination Article first appeared in a 1958 model treaty draft prepared by the Organisation for European Economic Co-operation,¹² the post-World War II predecessor to the current Organisation for Economic Co-operation and Development ('OECD'), and has been a feature of the OECD Model Tax Convention on Income and on Capital ('OECD Model') in Article 24 since its first iteration in 1963, as well as the UN model tax treaty since its first version released in 1980. However, it was not until 1982, when a replacement Australia-US treaty ('Australia-US DTA')¹³ was signed, that a non-discrimination Article first appeared in an Australian tax treaty.¹⁴ Prior to that time, Australia had signed 20 treaties with 17 jurisdictions,¹⁵ including, in 1953, a treaty with the US,¹⁶ and none contained a non-discrimination Article.

US pressure to include in its treaties a non-discrimination Article that puts US citizens resident outside the US in the same position as residents of the US can be traced to the foundation measure in US domestic tax law that imposes tax on the worldwide income of US residents *and* US citizens, wherever they are resident. In return for the obligation of non-resident citizens to pay US income tax on worldwide income, the US seeks extension to its citizens, wherever they may reside, of treaty benefits provided to its residents.

¹⁰ It its widest iteration, the non-discrimination Article applies to taxes of every kind and description a unique and distinguishable feature of treaties adopted to allocate taxing rights over income: see Carlo Garbarino, *Judicial Interpretation of Tax Treaties* (Edward Edgar Publishing, 2016) 543.

¹¹ Luc Hinnekens and Philippe Hinnekens, 'General Report' in International Fiscal Association (ed), *Studies on International Fiscal Law: Non-Discrimination at the Crossroads of International Taxation* (IBFD, 2008) vol 91A, 15, 43. The earlier version of the OECD Model Commentary cited in the chapter has been updated in OECD Model (n 1) (see Commentary on Article 24 Concerning Non-Discrimination, C(24)-2 para 6).

¹² John F Avery Jones et al, 'The Non-Discrimination Article in Tax Treaties' [1991] (October) *European Taxation* 310, 312.

¹³ *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 6 August 1982, [1983] ATS 16 (entered into force 31 October 1983) ('Australia-US DTA').

¹⁴ For a detailed account of the negotiation and implementation of the non-discrimination Article in the treaty, see C John Taylor, 'Much Ado About Non-Discrimination in Negotiating and Drafting of the 1982 Australia-US Taxation Treaty' in Peter Harris and Dominic de Cogan (eds), *Studies in the History of Tax Law* (Hart Publishing, 2021) vol 10, 253.

¹⁵ The pre-1982 treaties were, in chronological order, UK (1946, later replaced in 1967 and again in 2003), US (1953, replaced in 1982), Canada (1957, replaced in 1980), New Zealand (1960, replaced in 1972, replaced again in 1995, and replaced the third time in 2009), Japan (1969, replaced in 2008), Singapore (1969), Germany (1972, replaced in 2015), France (1976, replaced in 2006), Netherlands (1976), Belgium (1977), Philippines (1979), Switzerland (1980, replaced in 2013), Malaysia (1980), Denmark (1981), Sweden (1981), Norway (1982, replaced in 2006). The treaty with the Republic of Korea (1982) was signed only a month earlier than the treaty with the US in 1982, and at the time of signature had no non-discrimination Article. A subsequent (1984) protocol added a 'most favoured nation' clause that provided for the treaty partners to consult and amend if Australia subsequently entered into a treaty that contained a non-discrimination Article.

¹⁶ This treaty was replaced by the 1982 treaty, which in turn was substantially revised in 2001.

Australia strongly resisted US pressure to include a non-discrimination Article in a revised treaty with the US, leading to a protracted 12-year treaty negotiation¹⁷ and explicit acknowledgement in the Explanatory Memorandum to the Bill incorporating the Australia-US DTA into Australian law that the non-discrimination Article was included specifically at the request of the United States.¹⁸ Crucially, Australia agreed to the inclusion of the measure in the treaty on the understanding that it would not be given force of law in Australia through inclusion in Australian domestic law and would therefore effectively be unavailable to taxpayers seeking to challenge a taxation assessment on the basis of national discrimination.¹⁹

The rationale for later treaty partners seeking a similar measure is less clear, apart from not wanting another nation to have secured a benefit they missed out on. It is clear, however, that the Article is sought primarily by OECD members that generally pursue treaties based on the OECD model. Fourteen of the 17 treaties with non-discrimination Articles are with OECD members,²⁰ and a 15th is with an accession candidate country of the OECD.²¹

B. Are non-discrimination Articles an objective for Australia?

Non-discrimination Articles traditionally have not been a feature sought by Australia in its treaties. Australia has 46 signed tax treaties in effect²² with four further treaties that have been signed but which are not yet in force. Beginning with the 1982 Australia-US DTA, which was the first to contain a non-discrimination Article, Australia has signed 43 treaties with 41 jurisdictions,²³ only 17 of which (including three signed but not yet in force) have non-discrimination Articles. In two cases, the non-discrimination Articles were not in place in the original treaties but were subsequently added by way of protocols to the original treaties.²⁴ Australia has not included non-discrimination Articles in 26 of the 43 treaties it signed since it first agreed to incorporation of the Article in a treaty.²⁵ In six of the 26 post-1982 treaties in effect that do not have non-discrimination

¹⁷ Michael Dirkis, 'Chapter 32: Australia: Fears Realized in Respect of the Non-Discrimination Article in *Addy v Commissioner of Taxation*' in Eric Kemmeren et al (eds), *Tax Treaty Case Law around the Globe 2022* (IBFD, 2023) 373.

¹⁸ Explanatory Memorandum, Income Tax (International Agreements) Amendment Bill 1983 (Cth), 6.

¹⁹ Ibid 30–31.

²⁰ They are treaties with Chile, Finland, Germany, Iceland, Israel, Japan, New Zealand, Norway, Portugal (not in force), Slovenia (not in force), Switzerland, Turkey, the UK and the US.

²¹ The signed but not yet in force treaty with Croatia.

²² Australia also has nine tax agreements that are limited to the allocation of taxing rights in respect of certain income derived by specified individuals, including with Aruba, British Virgin Islands, Cook Islands, Guernsey, Isle of Man, Jersey, Marshall Islands, Mauritius and Samoa.

²³ They are treaties with the US (1982), Italy (1982), Ireland (1983), Finland (1984, 2006), Malta (1984), Austria (1986), China (1988), Papua New Guinea (1989), Sri Lanka (1989), Thailand (1989), Fiji (1990), Hungary (1990), India (1991), Kiribati (1991), Poland (1991), Indonesia (1992), Spain (1992), Vietnam (1992), Czech Republic (1995), New Zealand (1995, 2009), Taiwan (1996), Argentina (1999), Slovakia (1999), South Africa (1999), Romania (2000), Russia (2000), Mexico (2002), UK (2003), France (2006), Norway (2006), Japan (2008), Chile (2010), Turkey (2010), Switzerland (2013), Germany (2015), Israel (2019), Iceland (2022), Portugal (2023, not in force), Slovenia (2024, not in force), Ukraine (2025, not in force) and Croatia (2025, not in force).

²⁴ Treaties with India (1991, non-discrimination Article added by protocol signed in 2011) and South Africa (1999, non-discrimination Article added by protocol signed in 2008).

²⁵ The treaties without a non-discrimination Article that Australia has signed after the 1982 Australia-US DTA were Italy (1982), Ireland (1983), Finland (1984), Malta (1984), Austria (1986), China (1988), Papua New Guinea (1989), Sri Lanka (1989), Thailand (1989), Fiji (1990), Hungary (1990), Kiribati (1991), Poland

Articles, Australia had agreed to the inclusion either in a protocol to the treaty signed at the same time as the treaty²⁶ or in an annex to the treaty²⁷ a ‘most favoured nation’ clause, in essence, a promise to negotiate with a view to amending the treaty in the future should a later treaty with another jurisdiction contain a non-discrimination Article.²⁸ In every case, the most-favoured nation clause provides rights only to Australia’s treaty partners; if the treaty partner entered into subsequent treaties containing non-discrimination Articles, there is no obligation on the partners to inform Australia or to negotiate amendments giving Australia similar rights, reinforcing the conclusion that these Articles are not a priority for Australia. In every case, the trigger for negotiation has occurred, but none of the treaties have been altered to provide non-discrimination rights to the treaty partners.

Australia’s view of non-discrimination Articles altered with the 1999 *Review of Business Taxation*,²⁹ a government-commissioned study of Australia’s business income tax system to protect Australian enterprises expanding overseas.³⁰ All of Australia’s tax treaties containing non-discrimination Articles, apart from the 1982 Australia-US DTA, which was rewritten substantially by protocol in 2001, have been signed after the *Review of Business Taxation*. Given the fact that 14 of the 21 tax treaties Australia signed post the *Review* (July 1999) include the non-discrimination Articles,³¹ it might be most accurate to say Australia has become much more accepting of non-discrimination Articles since the *Review*.

(1991), Indonesia (1992), Spain (1992), Vietnam (1992), Czech Republic (1995), New Zealand (1995), Taiwan (1996), Argentina (1999), Slovakia (1999), Romania (2000), Russia (2000), Mexico (2002), France (2006) and Ukraine (2025, not in force). The 1984 Australia-Finland treaty did not have a non-discrimination Article, but the 2006 treaty that replaced it does contain a non-discrimination Article.

²⁶ Treaties with the Republic of Korea (1982), Spain (1992), Mexico (2002) and Romania (2000).

²⁷ Agreement with Taiwan (1996).

²⁸ A sixth treaty, the agreement between Australia and France, was signed on 19 June 1989 and terminated on 1 June 2009 when the new double tax agreement entered into force. See *Protocol Amending the Agreement between the Government of Australia and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 13 April 1976*, signed 19 June 1989, [1990] ATS 26 (entered into force 19 July 1990). The replacement treaty signed in 2006 did not contain a non-discrimination Article. It has been suggested that France was unwilling to accede to Australia’s insistence on carve-outs from the Article for the application of some provisions of Australian domestic law: see C John Taylor, ‘Some Distinctive Feature of Australian Tax Treaty Practice: An Examination of Their Origins and Interpretation’ (2011) 9(3) *eJournal of Tax Research* 294, 337.

²⁹ John Ralph, Rick Allert and Bob Joss, *Review of Business Taxation: A Tax System Redesigned* (Final Report, July 1999).

³⁰ Michael Bearman and Piotr Klank, ‘The Impact of NDAs on State and Federal Taxes’ (2023) 57(11) *Taxation in Australia* 691, 691; (‘Bearman and Klank’) Peter Scott, ‘Chapter 12: Australia’ in Guglielmo Maisto (ed), *The Non-Discrimination Provision in the OECD Model* (IBFD, 2025) 293, 295. (‘Scott’)

³¹ Australia signed 21 tax treaties post July 1999. The 14 treaties that include a non-discrimination Article are UK (2003), Finland (2006), Norway (2006), Japan (2008), New Zealand (2009), Chile (2010), Turkey (2010), treaties with Switzerland (2013), Germany (2015), Israel (2019), Iceland (2022), Portugal (2023, not in force), Slovenia (2024, not in force) and Croatia (2025, not in force). The seven tax treaties without a non-discrimination Article are Argentina (1999), Slovakia (1999), Romania (2000), Russia (2000), Mexico (2002), France (2006) and Ukraine (2025, not in force). In addition, Australia signed protocols amending the tax treaties to include a non-discrimination Article in its treaties with South Africa (2008) and India (2011).

C. *Who qualifies for relief under the Articles?*

The fallback rules for the application of Australia's tax treaties are set out in the first two Articles of the treaties. Article 1 specifies the taxpayers to which the treaty applies and Article 2 specifies the taxes to which it applies. Article 1 limits the application of the treaty to residents of the treaty partners. Article 2 describes income and related taxes either in generic terms or, in some cases, through a list of relevant legislation. A non-discrimination article that provides protection from tax rules purportedly applied to citizens of a treaty partner not resident in either jurisdiction or applied to taxes outside the scope of income taxes would need to explicitly override those Articles.

Of Australia's 17 in force or signed but not yet in force treaties with non-discrimination Articles, 12 extend the protection of the Article to citizens who are resident in neither Australia nor the treaty partner. This is normally done through an explicit override in the non-discrimination Article based on a precedent in the OECD model treaty that states the extension to mutual non-resident citizens 'notwithstanding' Article 1.³² The explicit override measure is not included in five of the treaties that extend the operation of the Article to citizens resident in neither treaty partner, however.³³ In these cases, statutory interpretation principles such as the dominance of later provisions over earlier provisions must be relied on to provide the needed override in respect of persons to whom the treaty measure is extended.

With the exception of the Australia-US DTA, all treaties provide for the non-discrimination Article to apply to 'nationals' of the country, a term that is defined to include corporations. The US treaty extends the non-discrimination Article to companies through an additional clause in the non-discrimination Article. No measure in Article 1 or the non-discrimination Article of this treaty explicitly provides for the non-discrimination Article to override the first Article setting out the scope of the treaty, and the override must be implicit based on the location of the measure.

Not all of the non-discrimination Articles in Australian tax treaties extend the operation of the Articles beyond the scope of relevant taxes set out in Article 2 of the treaties to all taxes imposed in a treaty partner. The treaties fall into four camps, with one group applying the non-discrimination Article only to the taxes identified as covered taxes in Article 2 of the treaty;³⁴ a second group applying the Article to taxes generally (for example, 'any taxation' or 'taxes of every kind'),³⁵ with some ambiguity as to whether this extends to taxes imposed by subordinate governments; a third group that explicitly extends non-discrimination protection to any taxes including those imposed by "political subdivisions" or subordinate levels of government;³⁶ and a fourth with a single treaty that applies the non-discrimination Article to taxes covered by Article 2 as well as GST or VAT.³⁷

D. *Taxpayer challenges and the legislative response*

While it has been argued that an ideal non-discrimination Article would provide for disputes concerning the Article to be resolved solely through the mutual agreement procedure based on

³² Treaties with Chile, Croatia (not in force), Finland, Germany, Iceland, India, Japan, New Zealand, Portugal (not in force), Slovenia (not in force), South Africa, and Switzerland.

³³ Treaties with United States, the United Kingdom, Israel, Norway, and Turkey.

³⁴ Treaties with Croatia (not in force), Iceland, Israel, Portugal (not in force), Slovenia (not in force), Turkey, the UK, and the US.

³⁵ Treaties with Germany, India, and Switzerland.

³⁶ Treaties with Finland, Japan, New Zealand, Norway, and South Africa.

³⁷ The treaty with Chile.

negotiations between tax authorities,³⁸ no treaty has adopted this approach. The first judicial consideration of a non-discrimination Article in an Australian tax treaty came almost four decades after the country's first treaty with a non-discrimination Article. The disputed assessment that gave rise to the case was litigated through the Australian appeal system to the High Court, which dismissed the Commissioner's assessment on the basis that the legislative foundation on which it was based was rendered void by the non-discrimination Article in the Australia-UK DTA.³⁹

The taxpayer in the case, *Addy v Commissioner of Taxation* ('Addy'),⁴⁰ was a UK national who had entered Australia on a 'working holiday' visa, a subclass of visa that allowed holders to reside temporarily in Australia and engage in employment during their stay. As a result of legislative amendments made halfway through her stay in Australia,⁴¹ persons holding this class of visa were subject to a tax rate different from that applied to both residents and non-residents. Importantly, the new rate scale denied the taxpayer access to the tax-free threshold available to residents, leaving her with a much higher tax liability than would be imposed on persons treated as residents of Australia under the ordinary definition of a resident in the income tax law. While it would be unusual for a person on a working holiday visa to satisfy the tests for residency, the taxpayer argued first that she qualified as a resident and consequently should be entitled to the same benefits as other residents, including access to the generous tax-free threshold available to resident individuals, and second that if she were a resident, the denial of the tax benefits because of her visa status amounted to discrimination on the basis of nationality.

The Commissioner of Taxation argued that the different treatment was attributable to her visa status, not her nationality, but the High Court agreed with the taxpayer that she satisfied the definition of a resident for tax purposes and, relying on both the text of the treaty and OECD commentary,⁴² concluded that the taxpayer's nationality was a cause of the discriminatory treatment. The Court ruled, consequently, that the assessment was incompatible with the non-discrimination Article in the Australia-UK DTA.⁴³

While the Australian Taxation Office initially downplayed the impact of the decision, indicating it could be limited to a confined group of taxpayers,⁴⁴ the fiscal consequences were not

³⁸ Catherine A Brown, *Non-Discrimination and Trade in Services: The Role of Tax Treaties* (Springer, 2017), 248, 257.

³⁹ *Convention Between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*, signed 21 August 2003, [2003] ATS 22 (entered into force 17 December 2003) ('Australia-UK DTA'),

⁴⁰ *Addy* (n 9).

⁴¹ *Income Tax Rates Act 1986* (Cth) sch 7 pt III.

⁴² Reliance on commentary available at the time of the treaty, with little reliance on post-signing commentary has been questioned: see John Azzi, 'Interpreting Tax Treaties: The Importance of Post-Treaty Commentary to the OECD Model Tax Convention for Achieving Uniformity and Ensuring the Success of the New International Tax Order' [2024] (3) *British Tax Review* 454.

⁴³ For a discussion of the 'direct' link between nationality and discrimination see Mark Brabazon, 'Nationality Non-Discrimination: Addy v FCT' (2021) 45 *Weekly Tax Bulletin* 1155; David Watkins, 'Some Observations on the Addy Decision' (2021) 45 *Weekly Tax Bulletin* 1157.

⁴⁴ Australian Taxation Office, 'Addy v Commissioner of Taxation' (Decision Impact Statement, 31 March 2022). See also Swapna Verna, 'Australia's Backpacker Tax: A Problem Child in Australia's Residence-Based Taxation System' (2024) 30 *New Zealand Journal of Taxation Law and Policy* 219, 220. ('Verna')

insignificant.⁴⁵ The Commonwealth quickly modified its treaty policy, and when negotiating new treaties, from that time, Australia sought carve-outs to explicitly exclude working holiday visa holders from the application of the non-discrimination Article.⁴⁶ This reduced the revenue risk going forward but left Australia with more than a dozen treaties that could have an impact on Australian revenue laws.

The potential impact of the broader non-discrimination Articles reached well beyond the federal income tax. A number of states had introduced various differentiated land taxes to discourage the acquisition of real property by non-resident absentee landlords and these, too, were challenged on the basis of non-discrimination Articles.⁴⁷ State governments recognised the problem⁴⁸ and in some cases moved to modify legislation possibly inconsistent with the Article so that discrimination in the laws would be based on factors other than nationality.⁴⁹ The risk to revenue remained, however.

Finally, three years after the *Addy* decision, the Commonwealth adopted legislation to override all existing treaties and effectively neuter the effect of the non-discrimination treaty, with retrospective operation to the commencement of the *Addy* litigation.⁵⁰ The constitutional validity of the treaty override legislation and its compatibility with other laws were questioned in some quarters⁵¹ and tested in the courts soon after it was enacted, following objections to a land tax surcharge imposed on Queensland land held by absentee foreign persons. The High Court in *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)*⁵² found the treaty override measure was constitutionally valid and could be used to shelter discriminatory state laws from the application of the non-discrimination Article.

The Australian government's decision to unilaterally nullify a critical treaty clause, possibly violating the *Vienna Convention on the Law of Treaties*⁵³ and, in the view of some observers, undermining the rule of law,⁵⁴ clearly has practical international law ramifications. Treaty partners will enter into negotiations with Australia knowing the agreement may not be honoured by the Australian government or upheld by its courts. This is not the first time that Australia has unilaterally overridden tax treaty protections, however,⁵⁵ and the practice seems to have had no impact on the

⁴⁵ The primary fiscal consequence of *Addy* is the loss of the 15% 'working holiday maker tax rates' on income up to \$18,200. It was suggested that more than half of Australian working holiday-makers are from countries which have a non-discrimination Article with Australia. See Verna (n 44) 236.

⁴⁶ Treaties with Iceland (2022), Portugal (2023, not in force), Slovenia (2024, not in force) and Croatia (2025, not in force).

⁴⁷ Na Li, Kerrie Sadiq and Richard Krever, 'Can Australia's Double Tax Treaties Invalidate State Real Estate Taxes?' (2024) 113(1) *Tax Notes International* 47.

⁴⁸ Bearman and Klank (n 30).

⁴⁹ Eu-Jin Teo and Kerrie Sadiq, 'High Court of Australia Upholds Retroactive Treaty Override' (2025) 120(7) *Tax Notes International* 1801. ('Teo and Sadiq')

⁵⁰ The *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) introduced ss 5(3)–(5) to the *International Tax Agreements Act 1953* (Cth).

⁵¹ Eu-Jin Teo, 'The Emperors' New Fig Leaf: Is Fiscal "Fortress Australia" (Still) Constitutionally Flaky?' (2025) 40(2) *Australian Tax Forum* 121.

⁵² (2025) 99 ALJR 1465.

⁵³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁵⁴ Scott (n 30) 12; Teo and Sadiq (n 49).

⁵⁵ Richard Vann, 'Australia's Future Tax Treaty Policy' in Chris Evans and Richard Krever (eds), *Australian Business Tax Reform in Retrospect and Prospect* (Thomson Reuters, 2009) 401, 414; Richard Krever, Kerrie

willingness of jurisdictions to sign treaties with Australia. It seems the perceived benefits of treaties outweigh the inconvenience of the occasional legislatively engineered loss of protection for a particular group of taxpayers.

The life cycle of the non-discrimination Article has thus, in one sense, completed a circle. Australian reluctance to embrace the measure gave way to acceptance and then support until the impact on Australian laws was recognised, at which time its scope was dramatically (and retrospectively) constrained. What role it plays in the future remains to be seen, but it is unlikely to be large.

Sadiq and Na Li, 'Australia Treaty Override: Restricting Non-discrimination Articles' (2024) 113(13) *Tax Notes International* 1839.