IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE No.11 OF 2009

BETWEEN: **GROUPE NAIROBI (VANUATU) LIMITED**
Appellant

AND: **THE GOVERNMENT OF THE REPUBLIC OF VANUATU**
Respondent

Coram: *Chief Justice Vincent Lunabek*
Justice J. Bruce Robertson
Justice John von Doussa
Justice Oliver Saksak
Justice Nevin Dawson

Counsel: *Mr John Malcolm for the Appellant*
The Acting Attorney General, Viran Molisa Trief for the Respondent

Date of hearing: *10th July 2009*
Date of Judgment: *16th July 2009*

JUDGMENT

This is an appeal against the decision of a single judge of the Supreme Court which dismissed an application by the appellant to set aside a decision of the Acting Director of the Customs and Inland Revenue Department to refuse the appellant a refund of VT14,602,248 of Value Added Tax (VAT). The Acting Director's decision now relies on a change to the definition of "second hand goods" effected by the Value Added Tax (Amendment) Act No.47 of 2005 (the Amendment Act) enacted after the appellant sought the refund.

The application to the Supreme Court was framed as one for Judicial Review. The principal relief claimed was a declaration that the Amendment Act was of no effect in relation to the appellant's claim as it purported to be a retrospective tax and as

such amounted to an unjust deprivation of property contrary to Article 5(j) of the Constitution of the Republic of Vanuatu.

As the application in substance challenged the constitutional validity of the Amendment Act, it should have been framed as a Constitutional Application brought under the Constitutional Procedures Rules. However as the application was brought against the Government of Vanuatu, as if it were a Constitutional Application, the procedural irregularity has no substantive significance in this instance. We simply note the irregularity in passing.

There is no dispute about the facts giving rise to the proceedings.

(a) In April 2005, the appellant agreed to purchase leasehold land from Wilmax Holdings Limited, being leasehold titles numbered 11/0C24/021 and 11/0C24/022 (the land) for VT130,522,248;

(b) On 27th May 2005, the appellant filed a VAT return for the month of April 2005 seeking a refund of VAT in the amount of VT14,602,248 on the basis that the land constituted "second hand goods" under s.19(4)(c) of the Value Added Tax Act [CAP.247] (VAT Act) used by the appellant in the course of carrying on a taxable activity in Vanuatu;

(c) On 8th July 2005, the refund claim was disallowed by the Acting Director of the Customs and Inland Revenue Department;

(d) On 1st January 2006, the Parliament of the Republic of Vanuatu enacted the Amendment Act so that the definition in s.2 of the VAT Act was changed by adding the words "and land" to the existing definition of second hand goods. The definition then read – " 'second hand goods' does not include live stock and land";

(d) The Amendment Act provided that the change to the definition of second hand goods "is taken to have commenced on 1st August 1998", that being the initial date of commencement of the VAT Act;

(e) The effect of the change to the definition was to give legislative force to the Acting Director's decision to disallow the appellant's April 2005 claim for a VAT refund.

Before the trial judge the appellant contended, first, that properly construed the change to the definition of second hand goods should operate only prospectively from the date when the Amendment Act was gazetted to come into operation, namely 27 February 2006. Secondly, if the amendment as a matter of construction operated from 1st August 1998, the appellant contended that the retrospective effect in relation to the appellant's application for a VAT refund was invalid as it contravened Article 5 (j) of the Constitution.

The respondent denied both contentions. It contended that the change to the definition of second hand goods operated from 1st August 1998; that the change justified the decision of the Acting Director to refuse the VAT refund; and that this legislative effect did not contravene Article 5(j) of the Constitution.

The trial Judge held that the change to the definition of second hand goods had retrospective effect as the intention of Parliament to backdate the change was "perfectly clear". The trial Judge further held that the amending Act was within the legislative power of Parliament and that there was no suggestion that it was not enacted in accordance with due process. His Lordship considered that "unjust" meant contrary to justice. As the amending Act had been duly passed by Parliament the fact that the statutory change may have had an unfortunate effect on an individual does not make the legislation contrary to justice. As he held that the resulting deprivation could not be unjust there was no need for him to consider whether the effect of the statutory change was to deprive the appellant of "property".

Before this Court the appellant and the respondent developed the same arguments that had been made in the Court below.

To understand the reasons advanced by the Government for seeking the Amendment Act it is necessary to understand the basic scheme of the VAT Act.

The long title to the VAT Act and s.10(1) identify the purpose of the VAT Act, which is to impose VAT and to provide for its collection for the use of the State. Relevant to the circumstances of this case, VAT is payable by any registered person on account of any supply of goods and services made in Vanuatu in the course of carrying on a taxable activity, with the amount of tax being assessed by reference to the value of the supply. Subject to a number of qualifications not presently relevant, a taxable activity means any activity (personal, professional, corporate or otherwise) carried on continuously or regularly and including the supply of goods and services to any other person for a consideration (s.4(1)). Under Part 3 of the VAT Act every person who carries on a taxable activity is required to be registered where the total value of the supplies made in Vanuatu exceeds or is anticipated to exceed the prescribed registration threshold amount (s.12). Under Part 4 a registered person will be assigned a category which determines whether the registered person must lodge a VAT return monthly or quarterly (s.15). The appellant was a registered person and, it seems, was assigned a category A classification that required a VAT return each month. It seems that the taxable activities of the appellant were, or included, the activity of land development, and the land in question was acquired for that purpose.

Section 16 requires that the periodic VAT returns be made in a prescribed form showing the amount of tax payable in respect of each period and calculated under s.19.

In relevant respect, s.19 reads:

"19. CALCULATION OF TAX PAYABLE OR REFUND DUE

(1) Every registered person will calculate the amount of tax payable by, or refund due to, the registered person in respect of each taxable period under the rules in this section.

(2) The tax payable or refund amount is calculated by-

(a) adding the amounts referred to in subsection (3); and

(b) deducting the amounts referred to in subsection (4) but subject to subsections (5), (6) and (7).

(3) The amounts to be added are-

(a) *in respect of supplies made by the registered person-*

(i) *if the registered person accounts for tax on an invoice basis, all amounts of tax payable in respect of supplies where the time of supply falls during the taxable period; and*

(ii) *if the registered person accounts for tax on a payments basis, all amounts of tax payable in respect of supplies to the extent that payment for the supply has been received during the taxable period; and*

(b) *all amounts to be added under section 22(2) or (7) (which related to subsequent period adjustments) or section 23(2) (which relates to recovered bad debts).*

(4) *The amounts able to be deducted are-*

(a) *all amounts of tax payable by other registered persons in respect of supplies made to the first registered person-*

(i) *if the first registered person accounts for tax on an invoice basis, where the time of supply falls during the taxable period; and*

(ii) *if the first registered person accounts for tax on a payment basis, to the extent that a payment in respect of the supply has been made during the taxable period,*

but subject to subsections (5), (6) and (7); and

(b) *....*

(c) *amounts equal to one-ninth of the consideration in money for all supplies of second-hand goods to the registered person-*

(i) *if the registered person accounts for tax on an invoice basis, the time of supply falls during the taxable period; and*

(ii) *if the registered person accounts for tax on payments basis, to the extent the consideration is paid during the taxable period; and*

(iii) *the place of supply is in Vanuatu; and*

(iv) *the goods are not supplied by a supplier who is not resident in Vanuatu and who has previously supplied the goods to a registered person who has entered the goods for home*

consumption under the Import Duties (Consolidation) Act [Cap.91],

and subject to subsections (5) and (6) of this section; and

(d) ...

(e) ..."

For present purposes it is not necessary to set out subsections 19(5) to (10).

Section 24(1) provides:

"ASSESSMENT OF TAX

The Director may, from time to time, from returns furnished under this Act or from other information, make assessments of the amount which the Director considers is the tax payable under this Act by any person."

Under s.19(2) the process for calculating a refund may result in an entitlement to a refund even when a deduction made under s.19(4) exceeds the amount of tax payable in respect of the taxable period. It is not a requirement of the Act that a deductable amount can only be claimed as a refund where and when it is set off against an amount of tax payable for the supply of the goods or services in respect of which the deductable amount is claimed. The deduction can be made to calculate a refund in advance of the later supply of particular goods and services to a purchaser which will incur to a liability to pay VAT.

In the course of argument before this Court there was discussion whether a deduction could be made in advance of the creation of liability to pay VAT in respect of the particular goods or services to which value was being added. Upon reflection we consider that s.19 lays down the process for calculating amounts of VAT payable or refundable in respect of each taxable period and the ordinary meanings usually attributed to "refund" or "deduct" do not lead to any inference that there must be tax payable before there can be a deduction and refund under s.19(4). That subsection establishes a process where credit can be obtained on outlays to acquire inputs for goods and services before the final output is supplied.

In the present case the appellant's refund claim made in the April 2005 VAT return was made in the month in which the land was acquired, and before any subdivided allotments were supplied so as to attract a liability to pay VAT on that supply. The appellant has asserted throughout that it was entitled to the refund of VAT in question when the claim was made in April 2005.

In the Court below it seems that the trial judge implicitly accepted this to be the situation before the Amendment Act came into force. Before this Court, counsel for the respondent felt constrained not to concede this point, but offered no argument to the contrary. The reluctance of counsel to make the concession reflects an observation made in the early stages of the correspondence between the parties to the effect that the concept of land ever being "second hand" is a doubtful one.

Article 73 of the Constitution of the Republic of Vanuatu provides that all land in the Republic belongs to the indigenous custom owners and their descendants, and Article 75 provides that indigenous citizens who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of the land. However, s.2 of the VAT Act gives an extended meaning to "goods". "Goods" are defined to mean "all kinds of real and personal property, but does not include choses in action or money". This is a wide definition.

Under common law and equitable principles, historically leasehold interests in real estates were not treated as real property, but as personalty. See Megarry and Wade "The Law of Real Property", 6th Edition, 2000 at para.1.009. In the present case, what was acquired by the appellant was a leasehold interest in the land. We consider that such an interest plainly falls within the extended definition of goods. In turn, it must follow that in some circumstances the sale and purchase of a leasehold interest in land in Vanuatu could have constituted "second-hand goods" as defined in s.2 prior to the change to the definition effected by the Amendment Act.

If a new leasehold interest was acquired for the first time from custom owners that leasehold interest would not have the quality of being second-hand in the sense

that the lease had earlier been used by another party. However if an existing leasehold interest is resold, then, before the Amendment Act, it would have had the quality of being "second-hand goods" within the meaning of the definitions, and for the purpose of s.19(4)(c).

In this case the appellant acquired an existing registered leasehold interest from Wilmax Holdings Ltd. As Wilmax Holding Ltd was not carrying on a taxable activity and was not a registered person, no VAT had become payable on the transfer of the leasehold interest from Wilmax Holdings Ltd to the appellant. However, under the provisions of s.19(4)(c) an amount equal to one-ninth of the consideration paid by the appellant could be subject of a deduction for the purpose of calculating a refund due to the appellant even though no VAT had been paid on the supply (transfer) of the land to the appellant. The appellant made such a claim in its April 2005 VAT return.

It seems that a refund claim by a registered person who had acquired an existing leasehold interest from a non-registered person had not previously been made although many such transactions must have occurred in the past. Upon receiving the appellant's refund claim, the Acting Director of the Customs and Inland Revenue Department determined he should disallow the claim. The Acting Director, in correspondence to the appellant on 8 July 2005 said:

> *"Land purchased in Vanuatu would commonly be from an unregistered person. And if such expense is to be treated as second-hand goods as in this case, everybody would seek a reimbursement from the government and we all know the government would not have enough funds to pay out everyone who everyone who claim for land as second-hand goods".*

As correspondence between the parties developed, the Acting Director appears to have accepted that s.19(4)(c) could have the effect contended for by the appellant, but nevertheless refused to accept the claim pending passage of the Amendment Act.

Against this background, we turn to consider the competing arguments of the parties.

We consider that it is beyond any doubt that Parliament intended to change the definition of second-hand goods retrospectively from 1st August 1998. The Amendment Act altered only two sections of the principal Act, in each case by inserting a new provision. In the case of s.2, the insertion of the words "and land" were added to the definition of "second-hand goods". In the case of the other amendment, a new section 51A was inserted. The Amendment Act provided expressly for the commencement of each of these amendments. In the case of the amendment to s.2 the Amendment Act said "Item 1 of this Act is taken to have commenced on 1st August 1998". In contrast, the new s.51A was said to commence on 1st January 2006. We cannot agree with the appellant's argument that there was any possibility of ambiguity in these commencement provisions.

The retrospective effect of the Amendment Act has the consequence of excluding from the operation of s.19(4)(c) consideration paid for the acquisition by a registered person of a leasehold interest in land, and on the basis of the Amendment Act the Acting Director's disallowance of the appellant's refund claim cannot be challenged.

It is therefore necessary to consider whether the Amendment Act in its application to the appellant's refund claim constituted an unjust deprivation of property within the meaning of Article 5(j).

The parties in their submissions sought to rely on passages from Australian decisions concerning section 51(xxxi) of the Australian Constitution, a provision dealing with acquisition of property on just terms. Considerable caution must be exercised in the use of the Australian cases. Section 51 of the Australian Constitution enumerates specific topics on which the Federal Parliament is empowered to enact legislation. Section 51(xxxi) is a source of power to legislate for the acquisition of property. That power is conditioned upon an acquisition under the legislation being on "just terms". Section 51, unlike Article 5(j), is not a provision directed to protecting fundamental rights. The requirement of "just

terms" is by the context directed to the adequacy of the consideration or compensation paid in respect of the acquisition. In contrast, the context of Article 5(j) of the Vanuatu Constitution does not suggest that the notion of "unjust" is similarly centred on issues of compensation. It should also be noted that under s.51(xxxi) there must be an "acquisition" of property whereas Article 5(j) concerns a "deprivation" of property. The two concepts are very different. A party can suffer a deprivation of property even though another party does not acquire that property.

It is important to recognise that the two constitutional provisions have very different origins. Section 51(xxxi) has its genesis in the fifth Amendment to the United States Constitution which prohibits the taking of property without just compensation whereas Article 5(j) has its genesis in the principles of modern international human rights law which developed in the aftermath of the Second Wold War.

The fundamental rights protected by Article 5 reflects the fundamental human rights recognised in the Universal Declaration of Human Rights (the UDHR). The UDHR was adopted by United Nations General Assembly on 10th December 1948. Article 17 of the UDHR provides:

Article 12

No-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.

"Article 17

(1) Everyone has the right to own property alone as well in association with others.

(2) No one shall be arbitrarily deprived of his property."

Article 17 in substance is reflected in Article 1 of the First Protocol to the European Convention on Human Rights (ECHR). The ECHR was adopted under

the auspices of the Council of Europe on 4th November 1950 and came into effect on 3rd September 1953. The ECHR has significantly influenced the development of legal principles in the United Kingdom, and in 1998 the Human Rights Act 1998 (UK) gave direct force to most of the ECHR rights in the United Kingdom. The ECHR is a schedule to the Human Rights Act. The influence is also clear in provisions for the protection of fundamental rights and liberties in the Westminster model constitutions which have been broadly followed in many Commonwealth constitutions. See **Ong Ah Chuan v. Public Prosecutor** [1981] AC 648 at 669-170. The provisions of Article 5 of the Vanuatu Constitution are drawn from this source.

Article 1 of the First Protocol reads:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

The jurisprudence that has developed under the ECHR and Human Rights Act provide a valuable source of authority on the interpretation of the fundamental rights protected in Article 5.

The fundamental human rights recognised in these instruments have a common base, and decisions from international human rights tribunals, and from the Courts of countries which have human rights charters contribute to the growing understanding of the protection which these rights afford. As fundamental human rights are recognised by international law to be universal in their application, the domestic courts of UN Members States will look to decisions about fundamental human rights in other States for assistance.

Article 1 of the First Protocol has been construed by the European Court of Human Rights as a provision which guarantees in substance the right to property. Article 1 protects the rights of every person to the peaceful enjoyment of his "possession". Although differently expressed, Article 1 is in substance a protection against unjust deprivation of property. Notably, Article 1 recognises that State may interfere with the right under certain circumstances, but interference must be lawful, must serve the public interest, and must comply with general principles of international law. Moreover, Article 1 recognises that the levying of taxes will not constitute a breach of the protection of property which is otherwise guaranteed. See generally "Human Rights, the 1998 Act and the European Convention" by Grosz Beatson QC and Duffy QC, Sweet and Maxwell, 2000 at 333 and following.

Whilst Article 1 in terms guarantees the peaceful enjoyment of possessions, the case law from the European Court provides guidance as to the kinds of property rights which are protected. In the Human Rights text just cited at pp.335-336 decisions are discussed which established that the protection extends to enforceable debts and to legal rights of the kind that can be enforced by a claim made in accordance with the general law. On the other hand in **National and Provincial Building Society and others v. United Kingdom** (1998) 25 EHRR 127 the European Court expressed considerable doubt whether a claim that had not yet evolved into an enforceable right could be protected. The facts of that case bear similarity to those presently before this Court. A number of building societies had sought to recover tax already paid by them on certain interest payments on the ground that the regulation that imposed the tax was unlawful. Before the proceedings were resolved Parliament enacted legislation that retrospectively validated the regulations. The building societies brought proceedings in the European Court alleging a violation of Article 1 of the First Protocol. Whilst the European Court decided the case against the applicants on other grounds, the Court expressed considerable doubt whether their claims constituted possessions. The Court said at para. 66:

> *"... the Commission considers it doubtful whether the claims made by the applicant societies in the proceedings commenced in May and June 1992*

are properly to be regarded as amounting to a possession for the purposes of Article 1. Not only were the claims to recover the sums not established by any judgment of a court, but they were contingent on the applicant succeeding in establishing that the Treasury Orders were invalid. Whilst the applicant societies may have had good prospects of success in the judicial review proceedings, it is open to question whether the applicants' claims were, viewed alone, sufficiently clear or certain to amount to a possession".

In the present case the appellant had an expectation because of the advice of its accountants when the April 2005 VAT return was lodged that its claim for a refund would be allowed. However the appellants had no enforceable rights to a refund at that stage. No enforceable legal right to a refund could arise until the Acting Director made a favourable assessment under s.24 of the VAT Act. Not only was there no favourable assessment, the Acting Director had disallowed the claim.

We consider that the absence of a favourable assessment under s.24 is fatal to the appellant's argument that the prospect of obtaining a refund constituted property that could be the subject of unjust deprivation within the meaning of Article 5(j).

Even if the appellant's expectation that it would receive a refund constituted "property", to succeed the appellant would need to establish that the removal of that expectation by the Amendment Act constituted an "unjust" deprivation.

In re the Constitution, Timakata v. Attorney General [1992] VUSC 9; [1990 – 1994] **Van LR 691 at para.10, Chief Justice Vaudin d'Imecourt** said:

"For an act to constitute 'unjust deprivation' he must have been deprived a property [ultra vires] the Act, or show that there had been a failure to observe the rules of natural justice – re ***Kempthorne Prosser and Co*** *[1994] NZLR 49 at 51;* ***State of West Bengal v. Subodh Gopal*** *[1964] AIR 92 at 92".*

The trial judge in this case gave a similar meaning to "unjust" again relying on the decision in re **Kempthorne Prosser and Co**.

In **François & ors v. Ozols & ors** [1998] VUCA 5 it was contended that an Order of the Court of Appeal which overturned a decision of the trial Judge operated to unjustly deprive a litigant of property constituted by the judgment at first instance. This contention was dismissed by the Court of Appeal as misconceived. The Court said, at page 11 of 11:

> *"The Court of Appeal was acting in accordance with its ordinary functions under the Constitution, and the Courts Act [CAP.122]. If the effect of one of its orders was to remove property or money from a litigant, such a removal could not constitute an "unjust deprivation of property "within the meaning of Article 5(1)(f). The deprivation would be one effected in accordance with the law."*

The statement that the deprivation was not unjust as it would be effected in accordance with the law at first sight appears to support the observations of the Chief Justice in **Timakata v. Attorney-General**, and the trial Judge in this case. However, the argument in **François v. Ozols** was so obviously misconceived that the need to consider in detail the operation and scope of Article 5(j) did not arise. The generality of the concluding sentence in the passage just cited from **François & ors v. Ozols & ors** should not be taken as an exhaustive statement on the meaning of "unjust" in Article 5(j).

Again, we consider the principles developed by the European Court under Article 1 of the First Protocol of the UCHR are instructive. Once a deprivation of property is found to have occurred it is necessary to examine whether the deprivation was lawful, whether it was in the public interest, and whether a reasonable and fair balance was struck between the public interest and individual rights (see Human Rights at 343). Whether the deprivation is lawful turns on whether it has occurred in accordance with the substantive and procedural requirements of the law. In determining whether the deprivation is one in the public interest, in **James v. United Kingdom** [1986] 8 EHRR 123 at para.47 the European Court said:

"Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

Furthermore, the notion of 'public interest' is necessarily extensive. In particular, ..., the decision to enact law expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of the Protocol No.1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted."

In our opinion the notion of "unjust deprivation" in Article 5(j) is not confined solely to whether the deprivation occurred in accordance with law, and in that sense was not arbitrary. The notion also incorporates consideration of whether the act which effects the deprivation can be justified in the public interest having regard to the considerations discussed by the European Court.

In considering the public interest, the Supreme Court, as the body with responsibility for determining constitutional rights in Vanuatu, must allow Parliament a wide margin of appreciation in determining where the public interest lies. This will be particularly so where the legislative provisions concerned the allocation of public resources, as is the case with taxation and welfare laws. In

considering whether a fair balance has been struck issues of compensation may in some cases be a relevant consideration. However this will depend on the kind of property right in question. If the right is one arising under the general law the question of compensation for the removal of that right may be an important consideration. However in the case of taxation and welfare laws the situation is different.

In **Health Insurance Commission v. Peverill** (1994) 119 ALR 675 the appellant contended that a legislative amendment which defeated a claim for a medical benefit payment which had been assigned to him by a patient after the delivery of a service constituted an acquisition of property other than on just terms contrary to s.51(xxxi) of the Australian Constitution. The legislative change to the benefits payable operated retrospectively. The Court held that there was not an acquisition of property for the purposes of s.51(xxxi). However the Court went on to make observations which would have been relevant to the question whether an acquisition, had there been one, occurred otherwise than on just terms. Mason CJ, Deane and Gaudron JJ in their joint judgment at 680 observed:

> *"... the Amending Act brought about a genuine legislative adjustment of the competing claims made by patients, pathologists including Dr Peverill, the Commission and taxpayers. Clearly enough, the underlying perception was that it was in the common interest that these competing interests be adjusted so as to preserve the integrity of the health care system and ensure that the funds allocated to it are deployed to maximum advantage and not wasted in "windfall" payments.*
>
> *It is significant that the rights that have terminated or diminished are statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognised by the general law. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation. That is particularly so in the case of both the nature and quantum of welfare benefits, such as the provision of Medicare benefits in respect of medical services. Whether a particular Medicare benefit should be provided and, if so, in what amount, calls for a*

carefully considered assessment of what services should be covered and what is reasonable remuneration for the service provided, the nature and the amount of the Medicare benefit having regard to the community's need for assistance, the capacity of government to pay and the future of health services in Australia. All these factors are susceptible of change so that it is to be expected that the level of benefits will change from time to time. Where such change is effected by a law which operates retrospectively to adjust competing claims or to overcome distortion, anomaly or unintended consequences in the working of the particular scheme, variations in outstanding entitlements to receive payments under the scheme may result."

Similar considerations apply in relation to legislation which imposes tax regimes. Circumstances will change, imposing greater or lesser obligation on the revenue to meet the policies and commitments of government. Variations in rates and changes in the imposition of tax liability will occur from time to time. As the High Court of Australia observed, anticipated rights and obligations under legislation of this kind are inherently liable to variations. By way of example, registered persons under the VAT Act could budget on the anticipation of certain liabilities and refunds, but then find that rates change at short notice, even midway through a reporting period.

The reasons which prompted the Amendment Act involved a perceived urgent need on the part of Government to protect the revenue against a source of refund claims which hitherto had not been anticipated, and to protect the revenue. These were legitimate concerns which the Government was obliged to take into account. In our opinion the Government's decision to amend the legislation by changing the definition of second-hand goods was a matter for the Government to decide. The information before the Court raises no suggestion that the resulting adjustments and balance between the interest of the revenue, and interest of individual registered persons under the VAT Act was not a reasonable one.

Were we to hold that the appellant's anticipated right to receive a favourable assessment granting a refund of VAT constituted property, we would nevertheless

hold that the removal of the entitlement to that benefit retrospectively did not constitute an unjust deprivation within the meaning of Article 5(j).

For these reasons the appeal must be dismissed, and the appellant must pay the respondent's costs of the appeal.

DATED at Port-Vila this 16th day of July 2009

BY THE COURT

.....
Vincent LUNABEK CJ

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Bruce ROBERTSON J

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John von DOUSSA J

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Oliver SAKSAK J

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Nevin DAWSON J