HIGH COURT OF AUSTRALIA

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### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

**FRANCIS STOTT**
Plaintiff

and

**THE COMMONWEALTH OF AUSTRALIA**
First Defendant
**THE STATE OF VICTORIA**
Second Defendant

# OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFF

## PART I: CERTIFICATION



1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II: OUTLINE OF ORAL ARGUMENT

### A. "Essential element" of Plaintiff's claims: LTS unlawful as s 109 inconsistent with Art 24(1)

2. ***Art 24(1) and LTS*: PS [6]-[7]; PRS [2]-[3].** From 11 March 2010, International Tax Agreements Act, s 5(1) gave force of Commonwealth law to New Zealand Convention, Art 24(1). Art 24(1) confers on New Zealanders an immunity against "more burdensome" taxes than those imposed on Australians "in the same circumstances": *Addy* (2021) 273 CLR 613 (**V3 T30**), [6], [16]. The Parliament intended this immunity extend to State taxes: Art 24(5); EM to *ITAAB (No 2) 2009* (Cth) (**V19 T127**), [2.256]. Before 8 April 2024, Land Tax Act, ss 7, 8 and 35 and Sch 1 of Pt 4 purported to subject the Plaintiff, a New Zealander, to LTS. If Australian, he would not have been. This was s 109 inconsistent with Art 24(1) — impairing, altering or detracting from the immunity.

3. ***Plaintiff's claims*: PS [8]; PRS [4]-[5].** The Plaintiff's payment of LTS pre-8 April 2024 generated his restitutionary claims. His Art 24(1) immunity was "transformed into property recognised by the general law": *Yunupingu* [2025] HCA 6 (**V17 T108**), [306]. That the "moneys in question were unlawfully exacted" is an "essential element" of the claims: *Antill Ranger* (1955) 93 CLR 83 (HC) (**V3 T32**), 102-103. The claims vindicate the "fundamental principle of public law" settled in Bill of Rights, decl 4: no tax can be levied by the Executive absent valid Parliamentary authority: *Royal* (1994) 182 CLR 51 (**V5 T49**), 66-69; *BAT* (2003) 217 CLR 30 (**V5 T41**), [39]-[45].

### B. Section 5(3) with cl 2 of Sch 1 a law within s 51(xxxi)

4. ***Commonwealth amendment*: PS [9]-[10]; PRS [8]-[9].** On 8 April 2024, s 5(3) and cl 2 of Sch 1 was enacted. It was calculated to defeat claims for restitution of taxes paid within the ordinary limitation period by erasing an "essential element" of those claims: **[3] above**. That was Parliament's stated purpose (EM at [3.9] (**V19 T126**), and is the direct legal and practical effect of the law if valid: *Spence* (2019) 268 CLR 355 (**V14 T91**), [34], [371] (*Fairfax* (1965) 114 CLR 1, 7).

5. ***Prima facie acquisitive character:* PS [18]-[19]; PRS [12]-[13].** Section 5(3), in its application with cl 2 of Sch 1 to the past, would sterilise the Plaintiff's claims to the direct financial benefit of Victoria: **[4] above**; *ANL* (2000) 204 CLR 493 (**V13 T89**), [7]-[8], [19]-[35], [96], [194]; *ICM* (2009) 240 CLR 140 (**V8 T65**), [32]; *Butler* (1961) 106 CLR 268, 278, 283.

6. ***Prima facie acquisitive character not displaced:* PS [20]-[23]; PRS [11], [14]-[15].** Section 5(3) with cl 2 of Sch 1 is relevantly supported (if at all) by s 51(xxix), not s 51(ii); it does not impose "genuine" (or any) Commonwealth taxation: *cf Tape Manufacturers* (1993) 176 CLR 480 (**V4 T38**), 508-510. It does not "genuinely adjust" claims: *cf Mutual Pools* (1994) 179 CLR 155 (**V9 T76**), 167, 171-172, 182-183; *Peverill* (1994) 179 CLR 222 (**V7 T64**), 236-237. The Plaintiff's restitutionary claims were not statutory rights "inherently susceptible of variation". Once vested or

accrued, they were not dependent or conditional on the ongoing operation of Art 24(1): *Yunupingu*, [55], [68]; *Georgiadis* (1994) 179 CLR 297 (**V7 T61**), 304-306; VCLT, Art 70; Smit, 'Timing Issues Under Double Tax Treaties' (2016) 44(1) *Intertax* 29. Nor, once it had operated with respect to his circumstances in a particular period, was the Art 24(1) immunity itself so susceptible: *JT* (2012) 250 CLR 1 (**V8 T67**), [39], [102]; *WMC* (1998) 194 CLR 1 (**V6 T53**), [81].



7. ***Plaintiff's claims property.*** Whether the Plaintiff's restitutionary claims are, as Victoria initially admitted (**SCB 27-29 [17], 30-31 [26], 33 [30]**), "property" within s 51(xxxi) does not turn on their merits: **PRS [16]**; *Georgiadis*, 304-305; *Mewett* (1996) 191 CLR 471 (**V6 T51**), 507-9, 534-535. *Haskins* (2011) 244 CLR 22 (**V7 T63**), [42], [64]-[68] does not countenance otherwise. In any case:

(a) Limitation Act, s 20A irrelevant: **PS [17]; PRS [17]**. The Plaintiff's more recent claims are within s 20A. As for his older payments, s 20A: *(i)* does not deny the claims' proprietary character (*Mewett*, 507-9, 534-535); and *(ii)* may be postponed by s 27 (*ACN 005 057 34* (2017) 261 CLR 509 (**V5 T48**), [75]). Section 20A(4) is inapplicable; s 27 is self-actuating: *FII No 2* [2022] AC 1 (**V18 T116**), [177], [195], [213]. That the facts will engage s 27 is to be assumed: *Haskins,* [42].

(b) Administration Act, s 96(2) inapplicable: **PS [15]-[16]; PRS [6]-[7]**. Victoria cannot vest, divest or regulate federal jurisdiction: *Rizeq* (2017) 262 CLR 1 (**V13 T88**), [45]-[51], [58]-[60]. Section 96(2) is not picked up by Judiciary Act, s 79(1). Insofar as s 96(2) would devest jurisdiction, s 79(1) is not engaged: s 79(1) operates "only where there is already a court 'exercising federal jurisdiction'", applying State laws that regulate power in exercise of that jurisdiction: *Solomons* (2002) 211 CLR 119 (**V13 T90**), [23]; *Rizeq*, [32], [84]-[92], [125]-[134]. Insofar as s 96(2) would deny "power" to "consider", it is in substance a denial of jurisdiction (*Rizeq*, [87]), and/or the Federal Court Act (centrally, ss 22, 23, 33Z) "otherwise provides" (with provisions of the Federal Court Act not being "a provision of this Act" for the purposes of Judiciary Act, ss 79(2)-(4)).

(c) Administration Act, ss 17 and 127 inapplicable: **PRS [18]-[20]**. Even if the Commonwealth is granted leave to raise its unpleaded argument (**CS [43]**), that argument fails. Sections 17 and 127 (and *a fortiori* ss 14(3) and 96(2): see **(b) above**) do not in terms apply: *Futuris* (2008) 237 CLR 146 (**V7 T59**), [25], [67], [134]-[140]. If they did, they would themselves collide with the Art 24(1) immunity for s 109 and s 79(1) purposes: *Coleman* (2004) 220 CLR 1 (**V6 T50**), [142]. Section 127 cannot be applied by s 79(1) if s 17 is inoperative by s 109: *BAT,* [56], [67].

## C. Section 106A s 109 inconsistent with Art 24(1)

8. Art 24(1) continues with the force of Commonwealth law to immunise those with its benefit against discriminatory State taxes with respect to their circumstances before 8 April 2024: **PS [24], [34], PRS [23]-[26], [31].**

(a) Section 5(3) in its operation with cl 2 of Sch 1 with respect to State taxes payable, or tax periods ending, before 8 April 2024 is a law within s 51(xxxi). Clause 2 of Sch 1 must be severed: *Stephens* (2022) 273 CLR 635 (**V14 T92**), [29]; *Spence* [86]-[88]. Section 5(3) is then properly construed as

operating only in respect taxes payable, or tax periods ending, after that date.

(b) There is no textual basis to read down or disapply s 5(3) (with or without any residual operation for cl 2 of Sch 1) so that it tolerates future State laws which purport to reimpose for the past the very same taxes (in liability, amount, and date payable) as were invalid at the time.

(c) If s 5(3) *did* purport to tolerate future State laws which purport to reimpose the very same taxes, it would infringe s 51(xxxi) for a different reason. Its purported effect, on and from 8 April, would be to confer Victoria a new power to destroy, at its unfettered discretion, an "essential element" of the claims. This would be to "modify" or "mitigate [its] exposure to" the claims, or "effectively sterilise" them to its direct financial benefit: *ANL*, [7], [21], [22].

(d) The Commonwealth-authorised acquisition of property occurs whether or not Victoria later chooses to exercise its new power; but is in any event confirmed when Victoria, by passing s 106A, completed the sterilisation of the vested causes of action: *Magennis* (1949) 80 CLR 382 (**V12 T81**), 392, 402, 422-423, 429; *ICM*, [32], [36], [40]-[44], [137]-[141], [252]; *Yunupingu*, [36].

9. ***State law:*** **PS [34], PRS [25], [27]-[30].** The State law, s 106A, impairs, alters, detracts from the continuing operation of the Art 24(1) immunity with respect to circumstances before 8 April 2024 by imposing substantively identical and discriminatory LTS with respect to those circumstances.

10. The Defendants have not submitted that s 106A, if properly characterised as a retroactive law, would be valid: **CS [25]-[26], [46]; VS [40]-[42]**. Classifications should not matter. But if they do, s 106A is retroactive — not retrospective. It purports to reimpose the very same command of liability and payment at the same time in the past: *Metwally* (1984) 158 CLR 447 (**V14 T94**), 478, 484; *Stephens*, [29]; Juratowitch (**V19 T137**) at 15-17.

## D. *Metwally*

11. ***Parts B and C above consistent with Metwally*:** The 'proviso' requires synchronous 'retrospective' Commonwealth and State laws: *Metwally*, 469, 480; *Native Title Act Case* (1995) 183 CLR 373 (**V15 T100**), 451. Here, the Commonwealth law is invalid in its operation with respect to past circumstances because, unlike by Native Title Act, ss 19, 20, 51, just terms have not been provided: *Native Title Act Case*, 455; *Yunupingu*, [50], [52], [76], [81]: **PS [27]-[30], [33], PRS [21]**.

## E. Relief

12. **Relief should not be refused: PRS [32].** Victoria (**VS [9], [64]-[67]**) has identified no precedent for the refusal of declarations of constitutional validity in like circumstances. None should be set.

**7 May 2025**

| **Justin Gleeson SC** | **Sebastian Hartford-Davis** | **Samuel Hoare** | **Harry Rogers** |
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