HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M60 of 2024

BETWEEN: **FRANCIS STOTT**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

STATE OF VICTORIA
Second Defendant

FIRST DEFENDANT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. There is no dispute that "land tax surcharge" (**LTS**) purportedly imposed on the Plaintiff was not validly imposed between 1 January 2018 and 8 April 2024 by the **relevant provisions** of the *Land Tax Act 2005* (Vic) (**VLTA**).[1] Section 109 of the Constitution rendered the relevant provisions inoperative by reason of their inconsistency with Art 24(1) of the **NZ Convention**,[2] as given force by s 5(1) of the *International Tax Agreements Act 1953* (Cth) (**Agreements Act**).

3. The key issue raised by the Special Case is whether LTS for the 2018-2024 tax years is now validly imposed on the Plaintiff. The Commonwealth submits that it is. That conclusion may be reached by two independent paths. Either:

   (a) Section 5(3) of the Agreements Act is effective to limit the operation of s 5(1) of the Agreements Act *prospectively*, thereby allowing s 106A of the VLTA validly to impose LTS for the 2018-2024 tax periods (that operation of s 106A being *retrospective*, not *retroactive*: *cf* **PS [11]**). If resolved in that way, it is not necessary for the Court to decide the effect and validity of s 5(3) in a *retroactive* operation; or

   (b) Section 5(3), read with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Commonwealth Amendment Act**), is effective in its *retroactive* operation (contrary to *University of Wollongong v* ***Metwally***[3]) to make room for the relevant provisions of the VLTA to regain the operative effect of which they had been deprived by s 109 of the Constitution. In that *retroactive* operation, s 5(3) is valid notwithstanding s 51(xxxi) of the Constitution.

PART III: SECTION 78B NOTICES

4. The Plaintiff has given notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**): **SCB 164**. No further notice is required.

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1 Sections 7, 8, 35 and cll 4.1 to 4.5 of Sch 1 to the VLTA, together with s 104B.

2 Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion (done at Paris on 26 June 2009) [2010] ATS 10.

3 (1984) 158 CLR 447.

PART IV: FACTS

5. The Commonwealth relies upon the facts in the Special Case and agrees with the factual matters stated in the Plaintiff's Submissions (**PS**) at paragraphs 4 and 8 (without admitting that the Plaintiff's Unjust Enrichment Claims, as there defined, are rights of property for the purposes of s 51(xxxi) of the *Constitution*: see **Part G**).

PART V: ARGUMENT

A. OVERVIEW

6. This Court has explained "that it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise *if the provision, if invalid in that operation, would be severable and otherwise valid*".[4] Consistently with that approach, it is open to the Court to determine the validity of s 106A of the VLTA (**Question 4**) *on the assumption, but without deciding,* that any retroactive operation that is otherwise given to s 5(3) of the Agreements Act by cl 2 of Sch 1 to the Commonwealth Amendment Act is not effective (by reason of the principle in *Metwally*[5]) to revive the operative effect of the relevant provisions of the VLTA. If, on that assumption, s 106A would validly impose LTS on the Plaintiff for the 2018-2024 tax years, it would be unnecessary to decide whether *Metwally* should be reopened and overruled (**Question 2**) or whether s 5(3) in a *retroactive* operation was invalid in its application to the Plaintiff by reason of s 51(xxxi) (**Question 3**).[6]

7. However, as s 106A(1)(d) of the VLTA provides that s 106A applies *only* if the purported imposition of LTS under the VLTA was invalid or inoperative under s 109 of the Constitution because of inconsistency with an agreement given the force of law by s 5(1) of the Agreements Act, and as that condition would not be satisfied if s 5(3) in its *retroactive* operation is effective to remove that inconsistency, the Court may prefer to

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4 *Knight v Victoria* (2017) 261 CLR 306 at [33] (the Court) (emphasis added); ***Mineralogy*** *Pty Ltd v Western Australia* (2021) 274 CLR 219 at [56]-[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

5 (1984) 158 CLR 447. The application of *Metwally* is a question of effectiveness, not validity: *cf* **PS [27]-[28]**. Neither the text of s 109, nor the decision in *Metwally,* supports the proposition that s 109 can invalidate a Commonwealth law: *Metwally* at 467 and 470 (Murphy J), see also at 458-459 (Gibbs CJ, with whom Brennan J at 475 and Deane J at 481 relevantly agreed in the answers). See also *Western Australia v Commonwealth (**Native Title Act Case**)* (1995) 183 CLR 373 at 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); ***Spence*** *v Queensland* (2019) 268 CLR 355 at [237] (Gordon J).

6 The Plaintiff's s 51(xxxi) challenge to s 5(3) is limited to any *retroactive* operation: **PS [2], [12], fn 36, [19]-[24], [32]-[33]**; the Plaintiff accepts that any such operation would be severable: **PS [24]**.

decide Questions 2 and 3 (in which case, unless those questions are answered adversely to the Defendants, Question 4 would not arise). It is a matter for the Court which path it adopts. By either path, the Commonwealth submits that the Court should hold that LTS for the 2018-2024 tax years has been validly imposed on the Plaintiff.

8. As to the first path, the Commonwealth submits that s 5(3) of the Agreements Act in its *prospective* application is effective to make the operation of Art 24(1) of the NZ Convention subject to the imposition of LTS by s 106A of the VLTA after 8 April 2024:[7] see **Part E**. Section 106A "re-imposes" LTS afresh in relation to the 2018-2024 tax years, by taking as its criterion of operation the invalidity of purported LTS and attaching new legal consequences to it. That operation of s 5(3) and s 106A does not offend any principle for which *Metwally* stands, nor does it depend on any *retroactive* operation of s 5(3) (*cf* **PS [33]**).

9. As to the second path, the Commonwealth submits that s 5(3) is effective *retroactively* to make the operation of Art 24(1) of the NZ Convention subject to the imposition of LTS by the relevant provisions of the VLTA before 8 April 2024: see **Part F**. In that way, s 5(3) made room for the relevant provisions of the VLTA to regain the operative effect of which they had been deprived by s 5(1) and s 109. *Metwally* stands in the way of s 5(3) having such an operation, but that decision should be reopened and overruled. Section 5(3) is not invalid in its retroactive operation by reason of s 51(xxxi) because s 5(3) is not properly characterised as a law with respect to the acquisition of property for three reasons: (i) the fact that a Commonwealth law makes room for a State law to operate does not mean that the Commonwealth law takes its character from the effects of the State law; (ii) the "immunity" conferred by s 5(1) and Art 24 was inherently susceptible to variation; and (iii) no "property" was affected by s 5(3) in any event: see **Part G**.

10. It would not "invert" the proper order of analysis for the Court to determine **Question 2** (*Metwally*) before **Question 3** (s 51(xxxi)): *cf* **PS [25]-[26]**. Only if *Metwally* is wrong could s 5(3) have the challenged "retroactive" effect that is said to involve an acquisition of property.[8]

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7 See cl 2(b) of Sch 1 to the Commonwealth Amendment Act. Under the VLTA, a "tax year" is a calendar year and means "a year for or in which land tax is being assessed": s 3(1).

8 As to **PS fn 90**, in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7, Kitto J said that the character of the law is to be determined by reference "solely to the operation which the enactment has if valid, that is to say by reference to the nature of the rights, duties, power and privileges which it changes,

B. INCONSISTENCY BETWEEN THE NZ CONVENTION AND THE VLTA (Q1)

11. The purpose of the Commonwealth's double taxation agreements is "to prevent individuals and companies being taxed twice on the same taxable event in two different countries".[9] Generally, the agreements apply only to income and fringe benefits tax ("Australian tax").[10] Eight such agreements include a "non-discrimination clause" like Art 24 of the NZ Convention, the application of which, by Art 24(7), extends to "taxes of every kind and description".[11] Article 24 operates to confer an immunity[12] on nationals of the other contracting state from taxation and connected requirements "more burdensome" than those to which Australian nationals "in the same circumstances, in particular with respect to residence, are or may be subjected". By s 5(1) of the Agreements Act, the provisions of those agreements have "the force of law according to [their] tenor".

12. Section 109 inconsistency arose because the relevant provisions of the VLTA subjected the Plaintiff, a "national" of a "contracting state" (New Zealand), in Australia, to "taxation" and connected requirements which were "more burdensome" than the taxation and connected requirements to which nationals of Australia were subject. That was inconsistent with the "immunity" granted by Art 24(1) in its extended application with Art 24(7): **SCB 51-52 [42]-[49]**.[13]

C. THE COMMONWEALTH AMENDMENT ACT

13. The Commonwealth Amendment Act commenced on 8 April 2024, inserting s 5(3) into the Agreements Act: **SCB 55 [54]**. Section 5(3) is directed to the interaction of the Agreements Act with both Commonwealth and State taxes. It was intended "to clarify the interaction between foreign investment fees, similar state and territory property taxes, and Australia's double tax agreements" so as to "ensure[] that the foreign investment fees and similar imposts prevail so that they can continue to be imposed on foreign nationals who

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regulates or abolishes". And, unlike in *Spence* (2019) 268 CLR 355, the alleged retroactive operation of s 5(3) is critical to the question of characterisation.

9 See Agreements Act, s 5(1); **Explanatory Memorandum** to the Commonwealth Amendment Act, [3.1]-[3.2].

10 See, for example, NZ Convention, Art 2.

11 See Explanatory Memorandum, [3.2]-[3.3].

12 See [41] and fn 88 below.

13 The Commonwealth made no "admission" that, prior to 8 April 2024, the relevant provisions of the VLTA were inoperative by force of s 109 of the *Constitution*: *cf* **PS [7]**. Such an admission would be inappropriate and inutile because constitutional validity is a question for this Court, not the parties, to determine: *Unions NSW v New South Wales* (2023) 277 CLR 627 at [33] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

purchase Australian property".[14] The Bills Digest explained that, since 2015, foreign owners of property in Australia have been subject to Commonwealth "foreign investment fees" based on the value of their property and (since 2017) to "annual vacancy fees" based on the value of the foreign investment fees; and that similar property taxes have been imposed at the State level through higher rates of State-based stamp duties, or land taxes such as LTS.[15] The Explanatory Memorandum stated that the Commonwealth Amendment Act would implement the position announced in the December 2023 mid-year economic and fiscal outlook,[16] to "clarify the uncertainty associated with the interaction between" those fees and taxes and the double taxation agreements implemented by the Agreements Act, so as to "ensure that the foreign investment fees and similar imposts prevail" and "further encourage foreign owners to increase Australia's housing stock and support the integrity of the foreign investment rules".[17]

14. The second reading speech and Explanatory Memorandum described the amendment as having "retrospective effect" or a "retrospective application".[18] In its terms, s 5(3) ordinarily would be presumed to operate only *prospectively*.[19] However, cl 2 of Sch 1 to the Commonwealth Amendment Act makes s 5(3) applicable in relation to taxes (other than Australian tax) payable: (a) on or after 1 January 2018; or (b) in relation to tax periods that end on or after 1 January 2018. Accordingly, constitutional issues aside, in addition to its *prospective* application, cl 2 prima facie gives s 5(3) *retroactive* application in relation to those taxes. The Explanatory Memorandum stated that this application was necessary "to ensure that there has been no unintended expansion of the [Agreements Act] which may undermine other Australian taxation regimes and the intended policy position" and that it was "appropriate to reassure taxpayers who have been applying the

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14 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 February 2024, p 134 (Ms Collins).

15 Bills Digest, pp 4-7. See *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth), which imposes the relevant fees "as a tax": s 5. No issue arises in this proceeding as to the effectiveness or validity of s 5(3), in its application with cl 2 of Sch 1, to those fees nor to any other Commonwealth taxes.

16 Explanatory Memorandum, [4.25]; this was before the Representative Proceeding commenced: *cf* **PS [10]**.

17 **MYEFO**, December 2023, p 194; see also Scrutiny Digest 5 of 2024 (27 March 2024) at 52 (**letter from Treasurer** Jim Chalmers MP to Committee dated 26 March 2014).

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 February 2024, p 134; Explanatory Memorandum, [3.9]-[3.14]. See also MYEFO, p 194.

19 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 (Dixon CJ); see, for example, ***Australian Education Union** v General Manager, Fair Work Australia* (2012) 246 CLR 117 at [30] (French CJ, Crennan and Kiefel JJ); *Stephens v The Queen* (2022) 273 CLR 635 at [29]-[35] (Keane, Gordon, Edelman and Gleeson JJ); but "there is no constitutional proscription even against retroactive criminal laws": ***Palmer** v Western Australia* (2021) 274 CLR 286 at [22] (Edelman J), citing *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

law as intended have a sufficient level of certainty both for previous years and into the future".[20] The Commonwealth consulted with the States about the interaction between the Commonwealth Amendment Act and State laws, and proceeded on the basis that "how the operation of a state tax law to certain persons is ultimately impacted by the [Commonwealth Amendment Act] will be a matter for each of the state governments and Parliaments."[21]

D. THE VICTORIAN AMENDMENT ACT

15. Separately, and subsequently, the Victorian Parliament enacted s 106A of the VLTA and a related provision dealing with assessment (s 135A of the *Taxation Administration Act 1997* (Vic) (**VTAA**)), both commencing 4 December 2024:[22] **SCB 55 [55]**. Section 106A applies if LTS was purportedly imposed and payable between 1 January 2018 and 8 April 2024, and the purported imposition was invalid only because the provisions of the VLTA that purportedly imposed it were to any extent invalid or inoperative under s 109 because of an inconsistency with a provision of an agreement given the force of law by s 5(1) of the Agreements Act: s 106A(1). If those criteria are satisfied, s 106A(2) operates to impose LTS on that land afresh, albeit that it does so in respect of past events. That is, it is *retrospective*, not *retroactive*.

16. If LTS is imposed by s 106A(2): (i) liability for that tax is "taken to have arisen, and to have always arisen" at the same time liability would have arisen if purported LTS had been validly imposed: s 106A(3); (ii) that tax is payable and is "taken to have always been" payable by the same person, and in the same amount, as the purported LTS: ss 106A(4) and (5); and (iii) a person's rights and liabilities in relation to that tax "are taken to be, and to have always been" the same as if the purported LTS had been validly imposed: s 106A(6). Pursuant to s 106A(7), anything done by a person in relation to the purported land tax "has, and is taken to have always had" the same force and effect "as if" it were done in relation to the tax imposed under s 106A(2).[23]

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20 Explanatory Memorandum, [3.11]-[3.12]. The Plaintiff's reliance on third-party statements in debates, and the Scrutiny Digest provide no indication as to Parliament's purpose, let alone that it was to "sterilise enforceable rights": *cf* **PS [10]**, especially **fns 30 and 32**.

21 Scrutiny Digest 5 of 2024 (27 March 2024) at 52 (letter from Treasurer).

22 *State Taxation Further Amendment Act 2024* (Vic), s 2(1).

23 Section 135A of the VTAA applies if s 106A applies and an assessment of tax liability was made or purportedly made under the VTAA in respect of purported land tax: s 135A(1)(a). Section 135A(2) provides that such an assessment and anything done in respect of it has, and is taken to have always had, the same force and effect as if it were made in respect of the LTS imposed under s 106A(2): s 135A(2) and

17. The second reading speech described these amendments as intending "to ensure that the liability of … absentee owners of land from certain countries to pay [LTS] … for the period 1 January 2018 to 8 April 2024 [is] imposed as [it was] intended to be imposed" and that assessments of LTS "are taken to have the same force and effect as if made in respect of the new taxes". This was "intended to address a risk that the existing provisions … were invalid by reason of an inconsistency with the [Agreements Act]" and so to "align with the Commonwealth amendments and ensure that the Victorian taxes are imposed as they were intended to be imposed". Where the amendments apply, they "operate to impose a new … land tax upon the same person and events, at the same time and in the same amount, as if [LTS] had been validly charged. The practical effect is that if a person had already paid [LTS] and the imposition of those taxes is found to be invalid, their payment will satisfy their liability under the new provisions".[24]

E. LTS IS VALIDLY IMPOSED BY SECTION 106A OF THE VLTA (Q4)

18. ***Summary:*** Section 5(3), in its prospective operation, clears the way for s 106A of the VLTA to impose *fresh* LTS on the Plaintiff in respect of the 2018-2024 tax years. That operation is not contrary to any principle established by *Metwally*. To the contrary, such a mechanism was expressly contemplated by Murphy and Deane JJ in *Metwally*, and subsequently was accepted by six judges of this Court in the *Native Title Act Case*,[25] and by the Full Court of the Federal Court in ***Doyle*** *v Queensland*.[26]

19. ***The Metwally principle:*** In *Viskauskas v Niland*,[27] this Court held that between 1978 and 1981 certain provisions of a State law were inconsistent with the *Racial Discrimination Act 1975* (Cth) (**RDA**) and therefore invalid. The Commonwealth subsequently amended the RDA to state that it was "not intended, and shall be deemed never to have been intended", to exclude or limit the operation of State laws. In *Metwally*, a majority (Gibbs CJ, Murphy, Brennan and Deane JJ) held that the amendments did not give the State laws a valid operation between 1978 and 1981.[28]

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(4). The rights and liabilities of a person in relation to such an assessment are taken to be, and to always have been, the same as if it had been made in respect of LTS imposed under s 106A(2) (s 135A(3)) and any amount so paid is taken to be, and to always have been, paid in respect of such LTS (s 135A(5)).

24 Victoria, *Hansard*, Legislative Assembly, 30 October 2024, p 4162 (Mr Pallas).

25 (1995) 183 CLR 373.

26 (2016) 249 FCR 519.

27 (1983) 153 CLR 280.

28 (1984) 158 CLR 447 at 457-458 (Gibbs CJ), 469 (Murphy J), 474 (Brennan J), 478 (Deane J).

20. The result of *Metwally*, as described in the *Native Title Act Case*, is that "a law of the Commonwealth cannot retrospectively avoid the operation of s 109 of the Constitution on a State law that was inconsistent with a law of the Commonwealth".[29] Although described as "retrospective" in *Metwally*, the amendment was "retroactive" in that it "operate[d] backwards and … 'change[d] the law from what it was'"; by contrast, a "retrospective provision 'operates for the future only' albeit that it looks backwards and 'imposes new results in respect of a past event'".[30] As Edelman J explained in *Spence*, the majority's judgments proceeded on the basis that, "although a Commonwealth Act can have retroactive effect, it cannot contradict s 109 of the *Constitution* by retroactively endowing a State law with the operative effect of which it had been deprived by s 109".[31]

21. Two aspects of the majority judges' reasoning warrant closer examination. ***First,*** each of Gibbs CJ, Brennan, Deane and Murphy JJ concluded that the Commonwealth could not, by "retrospectively" changing the content of a Commonwealth law, affect the operation of s 109.[32] ***Secondly,*** underscoring that conclusion for each of Gibbs CJ, Brennan and Deane JJ (but not Murphy J) was a temporally linear or immutable view of inconsistency: the "content" of the law for the purpose of s 109 was to be determined by what was "in fact" the law at the time of the impugned intersection.[33] By contrast, Murphy J, and the three Justices who constituted the minority, considered that the "content" of the "law" in s 109 includes retroactive Commonwealth and State laws.[34]

22. ***Metwally does not preclude the Commonwealth clearing the way:*** Although the majority in *Metwally* concluded that the Commonwealth amendments were not effective, of their own force, to give the State laws a valid operation in the past, it is no part of the ratio that neither the Commonwealth nor a State can ever subsequently alter an invalidity arising from the past operation of s 109. The majority reasons in *Metwally* cast no doubt on the proposition that "when inconsistency between a Commonwealth law and a State law is

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29 *Native Title Act Case* (1995) 183 CLR 373 at 454-455 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); see also *Spence* (2019) 268 CLR 355 at [34] (Kiefel CJ, Bell, Gageler and Keane JJ).

30 *Stephens v The Queen* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman and Gleeson JJ), quoting *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 at [39], in turn quoting Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264 at 268-269.

31 *Spence* (2019) 268 CLR 355 at [370] (Edelman J).

32 (1984) 158 CLR 447 at 457-458 (Gibbs CJ), 469 (Murphy J), 474 (Brennan J), 478 (Deane J).

33 (1984) 158 CLR 447 at 457-458 (Gibbs CJ), 475 (Brennan J), 478 (Deane J); see also *Spence* (2019) 268 CLR 355 at [371] (Edelman J) and **PS fn 101**.

34 (1984) 158 CLR 447 at 461 (Mason J), 468 (Murphy J), 471 (Wilson J), 485 (Dawson J).

removed by an amendment of the Commonwealth law, the condition which governs the operation of s 109 is no longer satisfied".[35]

23. Both Murphy and Deane JJ in *Metwally* expressly contemplated means by which the Commonwealth and State Parliaments could "*in combination*" overcome the effect of the past invalidity of a State law brought about by the operation of s 109.[36] Their Honours considered that, although the Commonwealth could not alone give the State law a valid operation prior to the Commonwealth amendment, it could "allow" the State to do so. As Murphy J said, the Commonwealth could "clear the way for the State Parliament to make *a fresh State Act to apply retrospectively* in the same terms" and "both Parliaments can legislate retrospectively so that a fresh State law would come into existence *giving present legal force to the procedures which have been followed and the remedies which have been obtained*".[37] Similarly, Deane J said that the Commonwealth could not "retrospectively impose as State law the provisions of a law which the Constitution has said was invalid … *That is something which, if it is to be done, must be done retrospectively by the relevant State*."[38] His Honour went on to say that if a State were to pass legislation "to the effect of" the invalid provisions, "and to provide that those provisions would have retrospective operation, the question whether that new law was valid or operative would fall to be determined by reference to the time when it was in fact on the statute book as distinct from the time in which, under its provisions, it was, for the purposes of the law of the State, deemed to have been operative. That being so, the provisions of s 109 *would operate to render such a subsequent State law invalid only if, and to the extent that, there was some present inconsistency with subsisting Commonwealth law*".[39] Chief Justice Gibbs and Brennan J did not address the State's capacity to achieve what the Commonwealth could not alone, but nor do their reasons exclude such a possibility. To the contrary, their temporally linear view of s 109 must embrace that possibility.

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35 *Metwally* (1984) 158 CLR 447 at 456 (Gibbs CJ), 460-461 (Mason J); 469 (Murphy J); 474 (Brennan J); see ***Butler*** *v Attorney-General (Vic)* (1961) 106 CLR 268 at 274 (Fullagar J), 278 (Kitto J), 282-283 (Taylor J), 286 (Windeyer J).

36 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J) and 479-480 (Deane J); see also *Doyle* (2016) 249 FCR 519 at [34] (North, Barker and White JJ).

37 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J) (emphasis added).

38 *Metwally* (1984) 158 CLR 447 at 479 (Deane J) (emphasis added).

39 *Metwally* (1984) 158 CLR 447 at 480 (Deane J). Thus, on a temporally linear view of s 109, "subsisting Commonwealth law" can only be content of the law as it *presently* stands: *cf* **PS [33]**.

24. The Plaintiff accepts that *Metwally* contemplated such a mechanism, but submits that it can only be achieved by synchronous "retroactive" laws: **PS [33]**. That is not consistent with the majority's reasons, nor what was contemplated by Murphy and Deane JJ. Each of the majority judges considered that Commonwealth law was ineffective to change an inconsistency that had occurred in the past, but could by amendment remove an inconsistency for the future. Murphy J expressly referred to "a fresh State law … *giving present legal force*" to prior events — that is, a retrospective law *in the narrow sense*, not a retroactive law.[40] Deane J's reasons are to the same effect.[41]

25. Similarly, in the *Native Title Act Case*, the Court said that if native title had been protected by the RDA at a particular point in time, only a law of the Commonwealth could be effective to modify the operation of the RDA "*and then only for the future*".[42] The principle in *Metwally* did not, however, affect a Commonwealth law providing for "the future validation of past acts attributable to a State".[43] Section 19 of the *Native Title Act 1993* (Cth) did just that: it operated for the future to authorise the future validation of past State Acts and in doing so was not affected by the principle in *Metwally* (*cf* **PS [33]**). The validation of the past acts was then "effected by a State law which, at the time of its enactment, is not subject to an overriding law of the Commonwealth". [44]

26. That operation was again recognised by the Full Federal Court in *Doyle*.[45] The Court there rejected a challenge to validating State legislation enacted after s 19 of the *Native Title Act* that "attache[d] a new legal significance to past acts and then provide[d] that the new legal significance is to be taken to have attached to the acts at the time they occurred", on the basis that it was contrary to the principle established by *Metwally*.[46] Relying on the relevant passages from the reasons of Murphy and Deane JJ in *Metwally* and the plurality

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40 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J) (emphasis added).

41 *Metwally* (1984) 158 CLR 447 at 479-480 (Deane J).

42 *Native Title Act Case* (1995) 183 CLR 373 at 451 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (emphasis added).

43 *Native Title Act Case* (1995) 183 CLR 373 at 454-455 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

44 *Native Title Act Case* (1995) 183 CLR 373 at 454-455 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), see fn 304. See also *Doyle* (2016) 249 FCR 519 at [50] (North, Barker and White JJ): neither s 19 of the NTA nor the Qld Act "purport to alter the provisions in force in the period between the enactment of the RDA in 1975 and the enactment of the [Qld Act] in 1993. Nor do they purport to reverse the past operation of s 109. On the contrary, they … leave that operation intact"; *cf Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362 at [141], [143] (Mansfield J) cited in **PS fn 120**.

45 (2016) 249 FCR 519.

46 *Doyle* (2016) 249 FCR 519 at [50] (North, Barker and White JJ).

in the *Native Title Act Case* referred to in **[22]-[25] above**,[47] the Court concluded that the *Metwally* principle is "concerned with attempts to alter, retrospectively, the meaning or operation of the law which brought about the inconsistency", and not with "a legislative alteration of rights and liabilities by reference to events which occurred in the past".[48]

27. ***Section 5(3) clears the way for s 106A of the VLTA*:** There is no dispute that s 5(3) of the Agreements Act is both valid and effective in its "prospective" operation after 8 April 2024: **PS fn 36, [32], [34]**. From that date, the operation of Art 24 of the Convention is subject to anything inconsistent contained in a State law that imposes a tax. Any such State law operating after that date will not be invalid by reason of inconsistency with s 5(1) of the Agreements Act.

28. In that operation, s 5(3) of the Agreements Act "clear[s] the way" for Victoria to impose LTS *afresh* and to "attach new legal significance" to past acts,[49] "giving present legal force to the procedures which have been followed",[50] in the manner contemplated by Deane and Murphy JJ in *Metwally* and by this Court in the *Native Title Act Case*. The way being clear, that is what s 106A does. Thus, in its prospective operation, s 5(3) does not deem or declare the law *prior to 8 April 2024* to be something "other than it was"; it does not "expunge the past" or "alter the facts of history":[51] *cf* **PS [29]**. The "period during which the State law was inconsistent with the Commonwealth law" is not denied.[52]

29. Contrary to the Plaintiff's submissions, neither the Commonwealth nor the State law need be *retroactive* to have this effect: *cf* **PS [32]-[33]**. In this operation s 5(3) is *prospective,* not *retroactive*; and even if it were required to express a *retrospective* application*,* to clear the way for a State law that is also retrospective (attaching new future consequences to *past events*), cl 2 gives s 5(3) that operation: *cf* **PS [12] [18], [24], [27], [32]**. Section 106A likewise is not *retroactive*: it does not operate backwards and change the law from what it was. Instead, by attaching new legal consequences to a historical fact, it adopts an orthodox mechanism recognised by this Court in a succession of cases.[53]

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47 *Doyle* (2016) 249 FCR 519 at [34], [39], [43] (North, Barker and White JJ).

48 *Doyle* (2016) 249 FCR 519 at [48] (North, Barker and White JJ).

49 *Doyle* (2016) 249 FCR 519 at [4] (North, Barker and White JJ).

50 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J).

51 *Metwally* (1984) 158 CLR 447 at 458 (Gibbs CJ); 478 (Deane J).

52 *Metwally* (1984) 158 CLR 447 at 474-475 (Brennan J).

53 ***Nelungaloo*** *Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 579-580 (Dixon J); *R v* ***Humby****; Ex parte Rooney* (1973) 129 CLR 231 at 239 (McTiernan J), 240 (Gibbs J) 243-244 (Stephen and Menzies JJ

30. ***No inconsistency and s 51(xxxi) does not arise:*** It follows that there is no inconsistency between Art 24(1) of the NZ Convention and s 106A of the VLTA: *cf* **PS [34]**. Section 5(3) cleared the way for s 106A to impose LTS *afresh* and (with s 135A) retrospectively to impose new legal consequences on the past events. The Plaintiff's argument that s 5(3) is not effective to "clear the way" because of asserted invalidity in its *retroactive* operation should be rejected: **PS [32]-[33]**. It is not by retroactive operation that s 5(3) clears the way, but by *prospective* operation (or, alternatively, by *retrospective* operation). The Plaintiff does not submit that s 5(3) is ineffective or invalid in that operation, by reason of s 51(xxxi) or at all.[54]

F. ALTERNATIVE PATH: SECTION 5(3) OPERATES RETROACTIVELY (Q2)

31. Separately and independently of the operation described above, s 5(3) (with cl 2 of Sch 1) is capable of applying *retroactively* in relation to State taxes that had been rendered inoperative by s 109 of the Constitution. In that application, s 5(3) made the operation of s 5(1) subject to the relevant provisions of the VLTA insofar as they imposed LTS on the Plaintiff between 2018 and 2024. In doing so, its effect was to "eliminate the basis on which s 109 can operate".[55] That is not to assert that legislation can or does override s 109 of the Constitution. It is simply to recognise that the operation of s 109 depends on the legal meaning of intersecting Commonwealth and State laws. If that meaning is changed with retroactive effect, that necessarily alters how s 109 operates on those laws.[56] So much follows from an orthodox understanding of the principles explained in the minority's reasons in *Metwally*.

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agreeing at 240), 248-250 (Mason J); ***Re Macks****; Ex parte Saint* (2000) 204 CLR 158 at [31] (Gleeson CJ), [76]-[77] (Gaudron J), [110]-[111] (McHugh J), [208]-[211] (Gummow J), [353]-[355] (Hayne and Callinan JJ); ***Haskins*** *v Commonwealth* (2011) 244 CLR 22; *Australian Education Union* (2012) 246 CLR 117; *Duncan* (2015) 256 CLR 83. See also ***Mutual Pools*** *& Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 167-168 (Mason CJ); like *Mutual Pools,* this is not a case where "the invalidity of the taxing statute had its origin in some want of legislative power or irremediable contravention of a constitutional prohibition". As to retrospective taxes generally, see *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation* (2017) 251 FCR 40.

54 If the Plaintiff submits that a *prospective* Commonwealth law that "clears the way" for a retrospective State law would be invalid by reason of s 51(xxxi) absent just terms (**PS [33]**, the fact that the *Native Title Act 1993* (Cth) provides for compensation upon validation of a past act does nothing to demonstrate that proposition. Section 53 of the *Native Title Act* is a "shipwrecks clause" or "safety net": *Northern Territory v Griffiths* (2019) 269 CLR 1 at [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [240] (Gageler J), [330] (Edelman J).

55 *Metwally* (1984) 158 CLR 447 at 461 (Mason J).

56 Leeming, *Resolving Conflicts of Laws* (2011) at 175.

32. ***Metwally should be reopened and overruled:*** The majority reasons in *Metwally* stand in the way of that operation of s 5(3) of the Agreements Act: see **[20] above**. However, on this limb of the argument, the Commonwealth submits that *Metwally* should be reopened and overruled because its *ratio* or result cannot be justified as a matter of legal principle, and the consequences of departing from it are not significant.[57]

33. ***First,*** *Metwally* does not rest upon a principle carefully worked out in a significant succession of cases. To the contrary, the majority judgments sit uneasily with the orthodox principles reflected in the minority reasons, and place a limit on the Commonwealth's power to make laws that finds no warrant in principle or in s 109 itself.[58] The reasoning of the minority follows logically from four uncontroversial propositions: ***(i)*** the Commonwealth Parliament, generally speaking, has power to make retroactive laws[59] (being the power to deem the law to have been different at the time past events occurred); ***(ii)*** the Commonwealth Parliament may address the relationship between Commonwealth and State laws expressly, including by specifying an intention not to cover the field;[60] ***(iii)*** the operation of s 109 depends on the content of the Commonwealth and State laws that are said to be inconsistent[61] — including, it must follow, the content of retroactive Commonwealth or State laws;[62] ***(iv)*** the effect of s 109 of the Constitution is to render a State law inoperative to the extent of any inconsistency but not void or invalid for all time: the State law "revives" in the absence of inconsistency.[63] It follows from those propositions that, if at a particular point in time there is an inconsistency between Commonwealth and State law but the Commonwealth law is retroactively amended to remove that inconsistency, the basis upon which s 109 rendered the State law inoperative is also removed. As Mason J, who wrote the leading dissent, reasoned in *Metwally*: "there is no objection to the enactment of Commonwealth

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57 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); see also *Vunilagi v The Queen* (2023) 97 ALJR 627 at [160]-[165] (Edelman J); *Commonwealth v Yunupingu* [2025] HCA 6 at [35]-[44] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); [179], [200] (Gordon J).

58 *Metwally* (1984) 158 CLR 447 at 461-463, 466 (Mason J) and 486 (Dawson J).

59 *Mabo v Queensland* (1988) 166 CLR 186 at 211-212 (Brennan, Toohey and Gaudron JJ); *Polyukovich v Commonwealth* (1991) 172 CLR 501.

60 See *Native Title Act Case* (1995) 183 CLR 373 at 467 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Work Health Authority v* ***Outback Ballooning*** *Pty Ltd* (2019) 266 CLR 428 at [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), and cases referred to therein.

61 *Outback Ballooning* (2019) 266 CLR 428 at [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

62 *Spence* (2019) 268 CLR 355 at [371] (Edelman J).

63 *Butler* (1961) 106 CLR 268 at 283 (Taylor J).

legislation whose effect is not to contradict s 109 of the Constitution but to remove the inconsistency which attracts the operation of that section".[64]

34. The Plaintiff's assertion that *Metwally* is a "sound application" of the principle in the *Communist Party Case* ignores the actual reasoning in *Metwally*:[65] **PS [29]-[30]**. By retroactively changing the *content* of the law, Parliament does not purport to "make a conclusive determination on an issue, factual or legal, on which constitutionality depend[s]".[66] It remains for the courts to determine the operation of s 109.[67] And to describe the content of that law as a "constitutional fact" (**PS [30]**) does not take the position any further, for the application of that label cannot make the content of a law unalterable by Parliament (including with retroactive effect).

35. As to the Plaintiff's appeal to "normative" considerations (**PS [31]**), the majority's departure from orthodox principles in *Metwally* reflected the view that s 109 operates as "a source of protection to the individual against the unfairness and injustice of a retrospective law".[68] Though s 109 might serve a function of informing citizens of which of two laws they are required to observe,[69] the question whether that is a *purpose* or merely a *consequence or effect* of s 109 is not settled.[70] Contrary to the reasoning of Gibbs CJ, Brennan and Deane JJ in *Metwally*, the better view is that s 109 — a provision designed to achieve the paramountcy of Commonwealth law — has no such protective purpose.[71] Such a purpose would be no more served by the permitted practice of retroactive Commonwealth legislation that "creates" an inconsistency than by retroactive legislation that "removes" one. In either case, s 109 operates to inform the citizen that the Commonwealth law prevails over an inconsistent State law. If it be accepted that the Commonwealth may legislate retroactively, the rule of law's preference for non-

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64 (1984) 158 CLR 447 at 460 (Mason J).

65 In fact, the *Communist Party Case* is cited only once in *Metwally*, and that is in Mason J's dissent: (1984) 158 CLR 447 at 465.

66 *Thomas v Mowbray* (2007) 233 CLR 307 at [226] (Kirby J), quoting Kenny 'Constitutional Fact Ascertainment' (1990) 1 *Public Law Review* 134 at 155.

67 See, for example, *Nelungaloo* (1947) 75 CLR 495 at 503-504 (Williams J); on appeal (1948) 75 CLR 495 at 579-580 (Dixon J).

68 (1984) 158 CLR 447 at 463 (Mason J).

69 See **PS [31]** and cases cited at **fn 112**.

70 *Spence* (2019) 268 CLR 355 at [372] (Edelman J).

71 (1984) 158 CLR 447 at 463 (Mason J); see also Stellios, *Zines and Stellios's The High Court and the Constitution* (7th ed, 2022), 704-707 and 711-712; Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38(3) *Federal Law Review* 445, 459-460.

retrospectivity is not to the point.[72] As Edelman J explained in *Palmer,* "there are laws permitted by the *Constitution* which exhibit features, at least individually, that are contrary even to aspects of common, 'thin' notions of the rule of law" — including that "there is no constitutional proscription even against retroactive criminal law".[73]

36. ***Secondly***, the reasoning of the majority is not uniform. In particular, Gibbs CJ, Brennan and Deane JJ (but not Murphy J) adopted a temporally linear or immutable view of inconsistency for the purposes of s 109, which limited the content of the laws to that at the time of intersection: see **[21] above**. ***Thirdly***, *Metwally* does not achieve a useful result but, to the contrary, is apt to cause considerable inconvenience. *Metwally* renders ineffective any attempt by the Commonwealth unilaterally to remedy a situation where it had not intended that its own legislation would exclude the operation of State legislation — but does not prohibit the Commonwealth clearing the way for the States to do so (see **Part E** above). That suggests the ultimate nature of the concern is one of form and not substance. ***Fourthly***, *Metwally* has not been acted on in a manner which militates against its reconsideration. To the contrary, although *Metwally* has been referred to, it has not been determinative in any decision of this Court.[74] It has previously been challenged (although the challenge was not reached),[75] and it has not been relied upon by the Commonwealth or the States in such a way that would militate against overruling it.

37. ***No inconsistency*:** It follows that, if *Metwally* were re-opened and the minority approach adopted, s 5(3), with cl 2 of Sch 1 to the Commonwealth Amendment Act, is effective to avoid inconsistency between Art 24(1) of the NZ Convention and the relevant provisions of the VLTA between 1 January 2018 and 8 April 2024. That being so, LTS is (and was) validly imposed on the Plaintiff.

G. NO ACQUISITION OF PROPERTY (Q3)

38. If any question of the validity of s 5(3) arises, it is limited to any retroactive operation that cl 2 of Sch 1 gives to s 5(3) in its application to the Plaintiff with respect to LTS

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72 *cf* **PS [31], fns 114, 115**; see *Metwally* (1984) 158 CLR 447 at 472 (Wilson J).

73 *Palmer* (2021) 274 CLR 286 at [22] (Edelman J), also [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *cf* **PS [31], fn 113**.

74 For example, *Metwally* was referred to in *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 100 (Dawson J); *Native Title Act Case* (1995) 183 CLR 373; *Croome v Tasmania* (1997) 191 CLR 119; *Dickson v The Queen* (2010) 241 CLR 491; *Momcilovic v The Queen* (2011) 245 CLR 1; *Spence* (2019) 268 CLR 355.

75 *Spence* (2019) 268 CLR 355.

Payments for the 2018 to 2024 tax years (**PS [12]**), each of which was assessed by the **Commissioner** of State Revenue and paid by the Plaintiff prior to 8 April 2024: **SCB 42 [7], 46-49 [24]-[37], 56 (Q3)**.[76] However, even assuming that s 5(3) has the effect described in **Part F**: ***(i)*** in any such retroactive operation, s 5(3) is not a law "with respect to the acquisition of property" within s 51(xxxi) for two separate reasons; and ***(ii)*** in any event, the Plaintiff had no "property" to acquire.

39. ***Section 5(3) is not a law "with respect to the acquisition of property": First***, to answer that description, a law must at least "authorise or effect" an acquisition of property.[77] Section 5(3) does not do so. In its retroactive operation with respect to State taxes, s 5(3) does no more than to remove an obstacle to the VLTA operating to impose LTS according to its terms.[78] That obstacle removed, State tax law could have whatever effect it would otherwise have had. Here, that meant that the relevant provisions of the VLTA "resumed the full force and effect which [they] had" with effect from 1 January 2018.[79] No acquisition of property was "authorised or effected" by Commonwealth law, which neither invalidated *nor validated* the State law "of its own force".[80] The mere fact that a Commonwealth law leaves room for a State tax to operate does not mean that any effects of the State tax on legal rights, duties or liabilities can be attributed to the Commonwealth. To hold otherwise would be inconsistent with the role of the States as independent bodies politic within the Federation. A Commonwealth law that is originally designed not to be inconsistent with a State tax obviously is not, for that reason, a law with respect to the acquisition of property. As a matter of principle, the same must be true if the same result is achieved by rolling back an existing Commonwealth law, allowing State law to operate.

40. The Plaintiff's reliance on cases such as ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation*,[81] *Commonwealth v* ***Mewett***,[82] and *Smith v* ***ANL***,[83] is

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76 Accordingly, each of those LTS Payments fell within both sub-clauses of cl 2 of Sch 1.

77 ***Cunningham*** *v Commonwealth* (2016) 259 CLR 536 at [58] (Gageler J); see also at [31] (French CJ, Kiefel and Bell JJ).

78 Section 5(3) can be described as a "roll-back" mechanism, the effect of which is to remove the occasion for any direct inconsistency: see, for example, *Momcilovic v The Queen* (2011) 245 CLR 1 at [104], [110] (French CJ), [254]-[255] (Gummow J).

79 *Butler* (1961) 106 CLR 268 at 274 (Fullagar J), 286 (Menzies J). See also *Metwally* (1984) 158 CLR 447 at 460-461 (Mason J).

80 *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120 (Dixon J).

81 (1994) 179 CLR 297.

82 (1997) 191 CLR 471.

83 (2000) 204 CLR 493.

misplaced: **PS [18]-[19]**. Each of those cases concerned Commonwealth legislation that in its terms operated directly to extinguish or limit a cause of action.[84] Section 5(3) does no such thing. Nor does it require a State to acquire property, let alone to do so on other than just terms.[85] There is no "circuitous device" effecting an "indirect" acquisition (cf **PS [18]**). The Plaintiff's submission that s 5(3) "effected" the extinguishment of his asserted Unjust Enrichment Claims must be rejected: **PS [10], [19]**. The Plaintiff's (selective) reliance on matters from debate on the Bill for the Commonwealth Amending Act to establish that its purpose is to acquire property (**PS [9]-[10], [19]**) does not establish the asserted purpose, let alone that s 5(3) operates to acquire property.

10 41. ***Secondly***, and in any event, the immunity from more burdensome taxation conferred by Art 24(1) of its nature was, from the time it was created, subject to modification or extinguishment by the Commonwealth Parliament or by the Commonwealth and New Zealand executive governments. "If a right or entitlement was always, of its nature, liable to variation, apart from the fact that it was created by statute, a variation later effected cannot properly be described as an acquisition of property".[86] Here, any impingement on the Plaintiff's "immunity" arises from what was always "a limitation inherent in [that immunity]".[87] Thus, prior to the commencement of the Commonwealth Amendment Act, s 5(1) of the Agreements Act, by giving the force of law to Art 24(1) of the NZ Convention, conferred an immunity[88] from laws imposing more burdensome taxation. But
20 that "immunity" had no existence apart from s 5(1). By the opening words of s 5(1), its existence was at all times "*Subject to this Act*", meaning the Agreements Act as amended from time to time.[89] It was, therefore, subject to variation by a provision such as s 5(3).

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84 *Georgiadis* (1994) 179 CLR 297 at 302-303, 306 (Mason CJ, Deane and Gaudron JJ), 310-311 (Brennan J); *Mewett* (1997) 191 CLR 471 at 558 (Gummow and Kirby JJ); *ANL* (2000) 204 CLR 493 at [7] (Gleeson CJ).

85 *cf* ***ICM*** *Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [36], [46] (French CJ, Gummow and Crennan JJ, Heydon J agreeing at [174]), referring to *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 and *Pye v Renshaw* (1951) 84 CLR 58.

86 *Cunningham* (2016) 259 CLR 536 at [46] (French CJ, Kiefel and Bell JJ) and [66] (Gageler J). See also *Georgiadis* (1994) 179 CLR 297 at 305-306 (Mason CJ, Deane and Gaudron JJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ).

87 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [364] (Crennan J).

88 *cf Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, in which a Commonwealth non-discrimination requirement was described as conferring an "immunity" from relevant State laws.

89 *cf Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [18], [20], [28] (Gleeson CJ, Gummow, Hayne and Crennan JJ). See also *JT International SA v Commonwealth* (2012) 250 CLR 1 at [104] (Gummow J). The "immunity" was also subject to modification by the executive governments of the Commonwealth and New Zealand from time to time, Art 24(5)(g) of the NZ Convention permitting the parties to agree, by way

42. ***In any event, the Plaintiff had no "property"*:** The extinguishment or modification of a vested chose in action may constitute an "acquisition" of "property".[90] However, if as a matter of fact or law a party has no cause of action, then the party has no "property" notwithstanding that the party has commenced a proceeding *claiming* to have that cause of action.[91] Here, the Plaintiff's Unjust Enrichment Claims were not "property" for the following reasons.[92]

43. ***First***, the assessments rendered by the Commissioner were "assessments" within the meaning of the VTAA. As such, they were effective to create statutory debts that the Plaintiff was obliged to pay: cf **PS [16]**). Like other such regimes,[93] the VTAA includes "validity of assessment" and "conclusive evidence" provisions: ss 17, 127. In *Futuris*, this Court recognised only two circumstances in which a purported assessment will not be an "assessment" preserved by such provisions: "so-called tentative or provisional assessments"; and assessments produced by "conscious maladministration".[94] Applying *Futuris*, an assessment "issued without power", though affected by error and so "excessive", is still an "assessment".[95] Here, even if the Commissioner's assessments were "excessive" because the higher LTS rates were invalid,[96] they were nonetheless "assessments" for the purposes of the VTAA. That being so, "once assessed, tax is a debt due and payable to the Crown" and, the assessment being conclusive evidence of the existence of that debt, the Commissioner may recover the tax despite any pending objection, review or appeal.[97] The assessments described in **SCB 46-49 [24]-[37]** created

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of an exchange of notes, that any provisions of the laws of a contracting State are unaffected by Art 24.

90 *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ), 311 (Brennan J).

91 *Haskins* (2011) 244 CLR 22 at [41]-[42], [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Georgiadis* (1994) 179 CLR 297 at 304 (Mason CJ, Deane and Gaudron JJ).

92 The Plaintiff's claim not being wholly outside the period in s 20A(2) of the *Limitation of Actions Act 1958* (Vic), the question whether s 20A(4) would bar any right of restitution need not be determined (**PS [17]**).

93 Eg *Income Tax Assessment Act 1936* (Cth), ss 175 and 177(1) discussed in *Federal Commissioner of Taxation v* ***Futuris*** *Corporation Ltd* (2008) 237 CLR 146.

94 (2008) 237 CLR 146 at [24]-[25] (Gummow, Hayne, Heydon and Crennan JJ); see also [10], [45]-[48].

95 See *Chhua v Federal Commissioner of Taxation* (2018) 262 FCR 228 at [32] (Logan, Moshinksy and Steward JJ); *Deputy Commissioner of Taxation v Buzadzic* (2019) 348 FLR 213 at [106] (Kyrou, McLeish and Niall JJA). See also ***Landcom*** *v Commissioner of Taxation* (2022) 114 ATR 639 at [135] (Thawley J).

96 The "LTS Payments" are the difference between what was payable under Pt 4 of Sch 1 compared to Pt 1 of Sch 1 to the VLTA: **SCB 10-12 [14], [16(a)], 20-21 (Prayers D and DA), 50-51 [38]-[39]**. See, by analogy, *Landcom* (2022) 114 ATR 639 at [130]-[142] (Thawley J).

97 *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [54] (Nettle and Mandie JJA and Hargrave AJA). Section 14(3) of the VTAA provides that "[a]n amount of tax assessed in a notice of assessment is payable on or before the day specified by the Commissioner in the notice of assessment"; and s 44 provides that "[t]ax that is payable is a debt due to the State and payable to the Commissioner".

debts that were discharged by the payments described therein. The Plaintiff had no cause of action in restitution with respect to those payments, because those payments were made "in discharge of a legally enforceable obligation to pay".[98]

44. ***Secondly***, and in any event, taxpayers who seek to dispute an assessment of LTS are confined to the objection process in Pt 10 of the VTAA.[99] Specifically, s 96(2) of the VTAA "establishes Part 10 as an exclusive code for the resolution of Victorian tax disputes" and its effect is that "a taxpayer may not challenge their assessment in any other way, for instance by seeking restitution on a common count".[100] That is consistent with constitutional principle, it being well established that reasonable limits may be placed on recovery, even in cases of constitutional invalidity.[101] The Plaintiff, being confined to the statutory objection process in Pt 10, had no a cause of action in restitution to recover the LTS he had paid, and thus no "property" of the kind he asserts was acquired by the Commonwealth Amendment Act: **cf PS [13], [15]**. The Plaintiff does not contend that his right to invoke the objection procedure in Pt 10 constitutes "property" that has been acquired. In any case, that is a right "to have a claim or application considered in accordance with the statute that governs its determination" on the law *as it exists at the time of the determination*, not to any particular outcome.[102] Those rights are not "property", let alone property that is acquired by the Commonwealth Amendment Act.

45. By its own force, s 96(2) applies only in respect of Victorian courts and tribunals. For that reason alone, there is no inconsistency that would enliven s 109 of the Constitution between s 96(2) and s 39B(1A)(b) of the Judiciary Act or the other provisions to which the Plaintiff refers: **PS [15]**. However, in so far as s 96(2) concerns the "power of a court

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98 *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509 at [87] (Bell and Gordon JJ); also [11] (Kiefel and Keane JJ), [106] (Gageler J); see also *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 at [100] (Sackvillle J); compare *Haskins* (2011) 244 CLR 22 at [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

99 The alternative regime in Pt 4 of the VTAA is not available if the taxpayer claims to be entitled to receive a refund or to recover tax by reason of the invalidity of a taxation law: VTAA, s 18(3). Pt 10 contains no equivalent provision, and thus clearly contemplates that it may apply in such a case.

100 *Vicinity Funds Re Ltd v Commissioner of State Revenue (No 2)* [2021] VSC 687 at [76] (Nichols J); affirmed *Vicinity Funds Re Ltd v Commissioner of State Revenue* [2022] VSCA 176 at [14] (Kyrou, Sifris and Walker JJA) referring to *FJ Bloeman Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 360 at 375 (Mason and Wilson JJ, Stephen J agreeing at 365).

101 *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633 at 641 (Dixon CJ), referring to the principle in *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83. See also *Mutual Pools* (1994) 179 CLR 155 at 167 (Mason CJ), 175 fn 63 (Brennan J), 183 (Deane and Gaudron JJ).

102 *Attorney-General (Qld) v AIRC* (2002) 213 CLR 485 at [40], [46] (Gaudron, McHugh, Gummow and Hayne JJ); *Minogue v Victoria* (2018) 264 CLR 252 at [19] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

to consider any question concerning an assessment", it is picked up and applied in federal jurisdiction as Commonwealth law by s 79(1) of the Judiciary Act.[103] No Commonwealth law "otherwise provides". In particular, s 64 of the Judiciary Act does not do so, as s 79(2)-(4) of the Judiciary Act make clear.[104] Thus, whether in State or federal jurisdiction, the Plaintiff could not recover LTS he had paid except under Pt 10.

46. ***Reading down:*** Even if the retroactive operation of cl 2 of Sch 1 in relation to State taxes is invalid, it should be read down or disapplied, not severed (*cf* **PS [24]**):[105] "taxes payable" in cl 2 should be read down or disapplied in its retroactive operation in relation to State taxes. That would leave intact the full operation of s 5(3) with respect to *Commonwealth* taxes and its *prospective* application to *State* taxes (including retrospective State taxes). Section 106A would then operate: see **Part F**.

H. ANSWERS TO SPECIAL CASE QUESTIONS

47. The Questions in the Special Case should be answered: (1) Yes; (2) Yes (or, if Question 4 is answered "No", unnecessary to answer); (3) No (or, if Question 4 is answered "No", unnecessary to answer); (4) No (or, if Question 2 is answered "Yes" and Question 3 is answered "No", unnecessary to answer); (5) None; (6) The Plaintiff.

PART VI: ESTIMATED TIME

48. The Commonwealth estimates that up to 2 hours will be required for oral argument (jointly in this matter and the G Global matter).

Dated: 24 March 2024

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103 It is analogous to provisions "which bar the court absolutely or conditionally by reason of effluxion of time from entertaining a claim": *Rizeq v Western Australia* (2017) 262 CLR 1 at [87], [89] (Bell, Gageler, Keane, Nettle and Gordon).

104 Section 79(2)-(4) were introduced to reverse the effect of the decision in *British American Tobacco v Western Australia* (2003) 217 CLR 30 at [68]-[87], to which the Plaintiff refers at **PS fn 62**. See Explanatory Memorandum to the Judiciary Amendment Bill 2008 (Cth), [5]-[11].

105 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Acts Interpretation Act 1901* (Cth) s 15A.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M60 of 2024

BETWEEN: **FRANCIS STOTT**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

STATE OF VICTORIA
Second Defendant

10 **ANNEXURE TO THE SUBMISSIONS OF THE FIRST DEFENDANT**

Pursuant to Practice Direction No.1 of 2024, the First Defendant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
Constitutional provisions					
1.	*Constitution*	Current	ss 51(xxxi), 109	In force at all relevant times.	All relevant times.
Statutory provisions					
Commonwealth statutes					
2.	*Acts Interpretation Act 1901* (Cth)	Version 38 (11 December 2024 to current)	s 15A	No material difference.	All relevant times.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
3.	*Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth)	Version 6 (9 April 2024 to current)	s 5	No material difference.	All relevant times.
4.	*Income Tax Assessment Act 1936* (Cth)	Version in force between 20 September 2004 and 31 December 2004	ss 175, 177	For illustrative purposes only.	As in force in *Futuris*.
5.	*International Tax Agreements Act 1953* (Cth)	Version 45 (11 December 2024 to current)	s 5	Version includes amendment inserting sub-s 5(3).	From 8 April 2024.
6.	*International Tax Agreements Act 1953* (Cth)	Version 43 (29 June 2023 to 7 April 2024)	s 5	Version prior to insertion of sub-s 5(3).	Prior to 8 April 2024.
7.	*Judiciary Act 1903* (Cth)	Version 51 (11 December 2024 to current)	ss 39B, 64, 78B, 79	No material difference.	All relevant times.
8.	*Native Title Act 1993* (Cth)	As made (24 December 1993 to 31 May 1995)	s 19	For illustrative purposes only.	Version as in force in *Native Title Act Case*.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
9.	*Racial Discrimination Act 1975* (Cth)	Version in force between 19 June 1983 and 9 December 1986	s 6A	For illustrative purposes only.	Version as in force in *Metwally*.
10.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	As made (8 April 2024 to current)	Sch 1 cl 2	Inserted sub-s 5(3) into the Agreements Act.	From 8 April 2024.
Victorian statutes					
11.	*Land Tax Act 2005* (Vic)	Version 81 (1 January 2025 to current)	s 3, s 7, s 8, s 35, s 104B, s 106A, Sch 1 Pt 1, Sch 1 Pt 4	No material difference, save insertion of s 106A.	All relevant times.
12.	*Limitation of Actions Act 1958* (Vic)	Version 110 (11 October 2023 to current)	s 20A	No material difference.	All relevant times.
13.	*State Taxation Further Amendment Act 2024* (Vic)	As made (3 December 2024 to current)	ss 42, 54	Inserted s 106A into the VLTA; inserted s 135A into the VTAA.	All relevant times.
14.	*Taxation Administration Act 1997* (Vic)	Version 88 (1 January 2025 to current)	ss 14, 17, 18, 44, 96, Pt 10, 127, 135A	No material difference, save insertion of s 135A.	All relevant times.