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

PLAINTIFF'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. ***First,*** whether s 5(3) of the ***International Tax Agreements Act*** *1953* (Cth) in its retroactive operation with cl 2 of Sch 1 to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**2024 Cth Amending Act**) is invalid because it is a law with respect to the acquisition of property from a person otherwise than on just terms within the meaning of s 51(xxxi) of the Commonwealth ***Constitution*** (**[12]-[24] below**)? ***Second,*** whether s 106A of the ***Land Tax Act*** *2005* (Vic) — which purports retroactively to re-exact invalid "land tax surcharge" (**LTS**) in reliance on the retroactive operation of s 5(3) with cl 2 of Sch 1— is invalid or inoperative by force of s 109 of the *Constitution* by reason of its inconsistency with Art 24(1) of the **New Zealand Convention**[1] as given legislative force by s 5(1) of the International Tax Agreements Act (**[32]-[34] below**)?

PART III: SECTION 78B NOTICES

3. The Plaintiff has issued notices under s 78B of the ***Judiciary Act*** *1903* (Cth) (**SCB 163**).

PART IV: FACTS & BACKGROUND

4. ***Plaintiff's circumstances.*** The Plaintiff has at all relevant times been a national of New Zealand and resided there: **SCB 43 [11]-[12]**. He became the "owner" of land in Victoria in 2014 and 2015, and has been absent from Australia on the 31st of December 2015 through 2023 (**SCB 43 [13]-[14]**). From 1 January 2016, he has been an "absentee owner" within the meaning of s 3(1) of the Land Tax Act: **SCB 43-44 [13]-[16]**. On 24 October 2016 he lodged the documents to which s 104B of that Act refers (**104B Documents**): **SCB 45 [19]**.[2] Between 20 March 2017 and 28 March 2024, he made payments of LTS to Victoria in respect of the 2016 - 2024 years (**LTS Payments**): **SCB 45-50 [20]-[37], [39]**.

5. ***Victoria's discriminatory taxes.*** From 1 January 2016, Victoria has imposed an added land tax — LTS — upon persons defined as "absentee owners" compared to other owners of land in Victoria. The Land Tax Act defines "absentee owner" to mean an "absentee

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1 Being the 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.

2 Land Tax Act, s 104B requires a person to notify Victoria's Commissioner if an "absentee owner" within s 3(1).

person who is an owner of land";[3] whilst an "absentee person" is defined to include a "natural person absentee"; which in turn is defined to mean a "natural person who is not an Australian citizen or resident",[4] "who does not ordinarily reside in Australia," and who was absent from Australia on 31 December in the year preceding the tax year or absent from Australia for at least six months therein: s 3(1); **SCB 43-44 [13]**. The higher rate of land tax is levied by ss 7, 8 and 35 of the Land Tax Act, which provide that "absentee owners" are liable to pay LTS in respect of each year on taxable land in Victoria at the rates prescribed in Sch 1, Pt 4: **SCB 42-43 [6], [8], [10]**. Since 1 January 2016, the rates of LTS have been higher than general rates of land tax in Sch 1, Pt 1: **SCB 42 [8]-[9]**.

6. ***Commonwealth's prohibition on discrimination*.** At all material times (but subject to **[9] below**), Commonwealth law prohibited the imposition of taxes which discriminated upon the basis of certain nationalities. The source of that prohibition is s 5(1) of the International Tax Agreements Act, which gives "the force of law according to its tenor" to certain double taxation treaties. From 11 March 2010, s 5(1) gave "the force of law according to its tenor" to (*inter alia*) the New Zealand Convention.[5] The Convention entered into force on 19 March 2010: **SCB 51 [42]-[43]**.[6] Article 24(1) of the Convention, which has the force of a law of the Commonwealth, provides that nationals of New Zealand[7] (such as the Plaintiff) "shall not be subjected" in Australia to taxation (or any connected requirement) which is "more burdensome" than the taxation and connected requirements to which nationals of Australia in the same circumstances, in particular with respect to residence, are or may be subjected. Article 24(7) makes clear that Art 24 applies to taxes like LTS imposed by the Victoria. This is because it extends the prohibition on discriminatory taxes to "*taxes of every kind and description*", including those imposed by "*political subdivisions*" of a contracting state.[8]

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3 See Land Tax Act, ss 3(1) ("owner") and 10.

4 Being a person who is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth), the holder of a permanent visa within the meaning of ***Migration Act** 1958* (Cth), s 30(1) or a New Zealand citizen who holds a special category visa within the meaning of Migration Act, s 32(1).

5 Upon the commencement of that *International Tax Agreements Amendment Act (No. 1) 2010* (Cth). Also International Tax Agreements Act, s 3AAA.

6 New Zealand Convention, Article 30; Commonwealth Gazette GN 13 [2010] 729.

7 Article 3(1)(i) defines a "national" of a Contracting State to include "any individual possessing the nationality or citizenship of that Contracting State".

8 Also **OECD Model Tax Convention** on Income and Capital (2008), Article 24(6); **OECD *Commentaries*** *on the Articles of the Model Tax Convention 2008* at 303 [81]; Reimer and Rust (eds), ***Klaus Vogel*** *on Double Taxation Conventions*, 4th ed (2015) at 1957-1958; Avery Jones, 'The Non-Discrimination Article in Tax Treaties: Part 2' (1991) 11/12 *British Tax Review* 421 at 447-449; ***Addy** v Federal Commissioner of Taxation* (2021) 273 CLR 613 at [11], [14] (the Court).

7. ***No dispute Victoria's taxes inconsistent.*** The Defendants admit that (prior to 8 April 2024:[9] see **[9] below**), the relevant provisions of the Land Tax Act (ie ss 7, 8, 35, 104B and Sch 1, Pt 4) were inoperative by force of s 109 of the *Constitution* by reason of their inconsistency with Art 24(1) of the New Zealand Convention as given legislative force by s 5(1) of the of the International Tax Agreements Act: **SCB 24-26 [5]-[11], 35-36 [32]-[33], 51-52 [42]-[49]**. This concession is properly made. Art 24 bears the same meaning "in the domestic statute as it bears in the treaty".[10] When Art 24 was given the force of law, the Commonwealth Parliament recognised that "in the case of Australia, the relevant taxes *include* the income tax..., the GST and fringe benefits tax" but that "the provisions of this Article *also apply to taxes imposed by the Australian states and territories*"[11] — which did and do not include income, goods and services or fringe benefits taxes but rather, principally, transfer duties and land, payroll and gambling taxes.[12] As explained in *Addy*, Art 24(1) here requires a comparison between a national of New Zealand and an Australian national who is, otherwise than with respect to nationality, "in the same circumstances, in particular with respect to residence".[13] "The underlying question is whether two persons who are residents of the same State are being treated differently solely by reason of having a different nationality",[14] with "circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* [including visa status]... to be excluded from the circumstances of the compar[ison]".[15] An Australian citizen in the same circumstances, in particular with respect to residence, as the Plaintiff (ie, residing in New Zealand) would not have been subjected to LTS or be required to lodge

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9 Putting to one side any retroactive operation of s 5(3) with cl 2 of Sch 1. Not all of the Plaintiff's LTS Payments (and Unjust Enrichment Claims) are affected by that retroactive operation: the earliest of the Plaintiff's LTS Payments were not payable on or after 1 January 2018 or in relation to tax periods that ended on or after 1 January 2018.

10 *Addy* (2021) 273 CLR 613 at [6] (the Court); also *Bywater Investments Limited v Commissioner of Taxation* (2016) 260 CLR 169 at [149], [165], [167] (Gordon J); Vienna Convention on the Law of Treaties [1974] ATS 2, Arts 31 and 32.

11 Explanatory Memorandum to the *International Tax Agreements Amendment Bill (No. 1) 2010* (Cth) at 117-118 [2.355]-[2.356] (also at 30 [2.6], 112 [2.329], 113 [2.332]).

12 See generally Grewal and Mathews, 'Economy, impact of Court's decisions on', in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001, Oxford University Press) 230 (cited with approval ***Vanderstock*** *v Victoria* (2023) 98 ALJR 208 at [460] (Edelman J) and, eg, Victorian Budget, 2009-10 Statement of Finances: Budget Paper No 4 (May 2009) at 23, 45.

13 *Addy* (2021) 273 CLR 613 at [24] (the Court).

14 OECD Commentaries at 286[8]; also *Klaus Vogel* at 1921 and *Addy* (2021) 273 CLR 613 at [28] (the Court). The comparison can be between two residents of the taxing Contracting State, two residents of the other Contracting State or two residents of a third country: see OECD Commentaries at 285 [6]; *Klaus Vogel* at 1918-1919; Avery Jones, 'The Non-Discrimination Article in Tax Treaties: Part 1' (1991) 10 *British Tax Review* 359 at 361-362.

15 *Addy* (2021) 273 CLR 613 at [30] (the Court).

104B Documents by the Land Tax Act (**SCB 52 [49]**). By exacting LTS from persons such as the Plaintiff, the Land Tax Act impairs, alters and detracts from the immunity against more burdensome treatment, and the right to equality of treatment, conferred by Art 24(1) (and like provisions).[16] There was and is a real conflict between the two laws, such that s 109 renders the State law inoperative.[17]

8. ***Plaintiff's Unjust Enrichment Claims.*** On 20 February 2024, the Plaintiff commenced a **Representative Proceeding** in the Federal Court of Australia claiming restitution of his LTS Payments (and payments made by those in like circumstances): **SCB 52-53 [50]-[51]**. In the Representative Proceeding, he claims that Victoria's receipt of the Payments was and is unjustified because ss 7, 8, 35, 104B and Sch 1, Pt 4 were and are inconsistent with Art 24(1) and inoperative by force of s 109;[18] and the Payments were, therefore, the result of mistake, made on a basis that failed,[19] in respect of unlawfully exacted taxes[20] and/or exacted duress *colore officii* (**Unjust Enrichment Claims**): **SCB 53-54 [52]**.[21] In the Representative Proceeding, the Plaintiff seeks to vindicate general law choses in action which are rights of property: **[13] below**. By consent of the parties, the Representative Proceeding has been stood over pending determination of this proceeding (and B48-B50/2024 (**G Global Proceedings**)).

9. ***The 2024 Cth Amending Act.*** On 8 April 2024, the 2024 Cth Amending Act commenced: **SCB 55 [54]**. It was "developed [by the Commonwealth] in consultation with the States".[22] It was enacted seeking to rely upon s 51(xxix) (external affairs) — *not* s 51(ii)

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16 *Addy* (2021) 273 CLR 613 at [16] (the Court), *Klaus Vogel* at 1683 [2]; ***Re McBain****; Ex p Aust Catholic Bishops Conf* (2002) 209 CLR 372 at [69] (Gaudron & Gummow JJ); *Gerhardy v Brown* (1985) 159 CLR 70 at 98-9 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 at [106]-[107] (Gleeson CJ, Gaudron, Gummow & Hayne JJ). As for the "like provisions" see **SCB 95-98 [10]-[12] & SCB 114-115**.

17 *Work Health Authority v Outback Ballooning P/L* (2019) 266 CLR 428 at [29]-[34] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ), [65]-[78] (Gageler J), [104]-[107] (Edelman J); *Jemena Asset Management (3) P/L v Coinvest Ltd* (2011) 244 CLR 508 at [37]-[41] (French CJ, Gummow, Heydon, Crennan, Kiefel & Bell JJ); ***Bell Group*** *NV (In liq) v Western Australia* (2016) 260 CLR 500 at [50]-[51] (French CJ, Kiefel, Bell, Keane, Nettle & Gordon JJ).

18 He also claims that allied provisions of the *Taxation* ***Administration Act*** *1997* (Vic) either did not apply as a matter of construction; or were outside Victoria's legislative power, inoperative by force of s 109 or not picked up and applied by s 79(1) of the Judiciary Act: **SCB 105-106 [37A]-[38A]**; **[14]-[15] & fn 52 below**.

19 In the sense referred to in ***Redland*** *City Council v Kozick* (2024) 98 ALJR 544 at [86] (Gageler CJ & Jagot J), [188] (Gordon, Edelman & Steward JJ) and ***Woolwich*** *Equitable Building Society v Inland Revenue Commissioners* [1993] AC 79 at 166 (Lord Goff).

20 For the purposes of the principle stated in *Woolwich* [1993] AC 79 at 172 (Lord Goff).

21 The Representative Proceeding has, by consent, been adjourned pending the resolution of this proceeding.

22 Package of correspondence relating to Senate Scrutiny of Bills Committee, Scrutiny Digest 5 of 2024 (27 March 2024) (see Scrutiny Digest 60 (fn 112)) (available here) (**Scrutiny Digest 5 Correspondence**) at 52 (letter from the Dr Chalmers MP to Committee 26 March 2024).

((Commonwealth) tax).[23] It inserted[24] a new s 5(3) into the International Tax Agreements Act. The Explanatory Memorandum states that s 5(3) "clarif[ies] that... [S]tate and [T]erritory property taxes prevail over Australia's double tax agreements".[25] The new s 5(3) provides:

> "the operation of a provision of an agreement provided for by subsection (1) is subject to anything inconsistent with the provision contained in a law of... a State..., that imposes a tax other than Australian tax[26], unless expressly provided otherwise in that law".

10. It is important in ascertaining the true character of s 5(3)[27] to observe that it was deliberately given a 6-year period of *retroactive*[28] operation in order to align its effect with the standard limitation period for restitutionary (and other) claims. Clause 2 of Sch 1 of the 2024 Cth Amending Act governs the "date of effect" of s 5(3),[29] and provides that "the amendment made by this Schedule applies in relation to: (a) taxes (other than Australian tax) payable *on or after 1 January 2018*; and (b) taxes (other than Australian tax) payable in relation to tax periods (however described) that end *on or after 1 January 2018*". As was explained in the House of Representatives, by "operating backwards", the section seeks to extinguish or sterilise "enforceable rights within the [sic] Australian domestic law"[30] to "refund[s]"

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23 Joint Special Case Book filed in G Global Proceedings on 24 January 2024 at 31 [52](2). Pursuant to orders 2 and 3 of 26 August 2024, the Respondents to the G Global Proceedings and the Commonwealth indicated that s 51(xxix) is the only placitum of s 51 they contend supports s 5(3) and cl 2 of Sch 1: see that SCB 6-12. See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [11]-[14] (Brennan CJ & McHugh J), [57] (Gummow & Hayne JJ). As to the inapplicability of s 51(ii) ((Commonwealth) tax): ***Spence** v Queensland* (2019) 268 CLR 355 at [66]-[67] (Kiefel CJ, Bell, Gageler & Keane JJ); *Allders International P/L v Cmmr of State Revenue (Vic)* (1996) 186 CLR 639 at 646-647 (Dawson J); *Victoria v Commonwealth* (1957) 99 CLR 575 (***Second Uniform Tax Case***) (1957) 99 CLR 575 at 614, 658 (Dixon CJ; Kitto J agreeing at 658), 625 (McTiernan J); *West v Cmmr of Taxation (NSW)* (1937) 56 CLR 657 at 686 (Evatt J); *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 at 232 (Griffith CJ).

24 2024 Cth Amending Act, s 3; cl 1 of Sch 1.

25 Explanatory Memorandum to *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024 & Treasury Laws Amendment (Foreign Investment) Bill 2024* (**Foreign Investment Bill EM**) at 2, 35 [3.9]; Hansard, House of Representatives (13 February 2024) at 784 (Ms Collins MP); Hansard, House of Representatives (13 February 2024) at 778-779 (Ms Stanley MP).

26 "Australian tax" is defined by s 3(1) of the International Tax Agreements Act to mean income tax imposed as such by an Act, or fringe benefits tax imposed by the *Fridge Benefits Tax Act 1986* (Cth). LTS is not an "Australian tax" in this sense.

27 See *Spence* (2019) 268 CLR 355 at [57]-[61] (Kiefel CJ, Bell, Gageler & Keane JJ). Also **[25]-[26] below**.

28 The Explanatory Memorandum incorrectly describes s 5(3) as having "retrospective" operation: Foreign Investment Bill EM at 2, 35 [3.9]-[3.12], 36 [3.14]. Also Senate Scrutiny of Bills Committee, Scrutiny Digest 3 2024 (28 February 2024) at 48–50; Senate Scrutiny of Bills Committee, Scrutiny Digest 4 2024 (20 March 2024) at 61–63. But this Court has made clear that provisions which, like s 5(3) by reason of cl 2 of Sch 1, "operat[e] backwards" and "change[] the law from what it was" are properly described as "retroactive": ***Stephens** v The Queen* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman & Gleeson JJ) citing **Juratowitch**, *Retroactivity and the Common Law* (2008, Bloomsbury Publishing) at 6-7 (also 16-17).

29 See Foreign Investment Bill EM at 2.

30 Hansard, House of Representatives (13 February 2024) at 685 (Mr Sukkar MP, indicating the Opposition's support for the Bill that became the 2024 Cth Amending Act).

from the States and Territories,[31] including claims in unjust enrichment.[32] The six-year period of retroactivity was selected to "align[] with statute of limitation periods generally provided under [S]tate… legislation" for such claims.[33] It was enacted with "urgency" to "reduce the opportunity for applications to be brought forward" upon, *inter alia*, these choses in action.[34] It will be observed that the 2024 Cth Amending Act was enacted after the commencement of the Representative Proceeding by the Plaintiff. The character of s 5(3) in its retroactive operation is that it purports to effect the extinguishment or sterilisation of rights held by persons like the Plaintiff to restitution of State taxes exacted inconsistently with provisions like Art 24(1).

11. ***Victoria's legislative response.*** On 4 December 2024, the ***State*** *Taxation Further* ***Amendment Act*** *2024* (Vic) commenced: **SCB 55 [55]**. Section 42 inserted s 106A into the Land Tax Act, which provides that s 106A applies if LTS was purportedly imposed and payable on or after 1 January 2018 and before 8 April 2024 but was "invalid only because the provisions... that purportedly imposed [it] were to any extent invalid or inoperative under s 109 of the *Constitution*... because of an inconsistency with a provision of an agreement given the force of law by s 5(1) of the International Tax Agreements Act". Sections 106A(2) through (7) provide that LTS that was purportedly imposed and payable on or after 1 January 2018 and before 8 April 2024 is retroactively reimposed and made payable as at the time it was purportedly imposed and payable; and that the rights, powers, duties and liabilities of persons are and always have been as if LTS that was purportedly imposed and payable on or after 1 January 2018 and before 8 April 2024 had been imposed and payable between those dates. Section 54 of the State Amendment Act inserted an allied provision (s 135A) into the Administration Act: see **[14] and fn 52 below**. The Victorian Parliament intended thus to achieve "alignment with the Commonwealth amendments" — ie, s 5(3) and cl 2 of Sch 1.[35]

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31 Scrutiny Digest 5 Correspondence at 52 (letter from Dr Chalmers MP to Committee 26 March 2024).

32 Scrutiny Digest 5 Correspondence at 22 (letter from Committee to Dr Chalmers MP 20 March 2024), 24 (email from Teo to Committee 11 March 2024), 26-50 esp 45-46 (Teo, 'Is Fiscal 'Fortress Australia' a Legal Sandcastle?', speech to the Australian Tax Teachers Conference, 18 January 2024).

33 Foreign Investment Bill EM at 2, 35 [3.9]; Hansard, House of Representatives (13 February 2024) at 778-779 (Ms Stanley MP). See *Sims v Commonwealth* [2022] NSWCA 194; 109 NSWLR 546 at [56]–[68] (esp [57]), [79] (Bell CJ), [153] (White JA) and *Limitation of Actions Act 1958* (Vic) (**Limitation Act**), s 5(1)(a).

34 Hansard, Senate (26 February 2024) at 414.

35 Hansard, Victorian Legislative Assembly (30 October 2024) at 4459, 4162.

PART V: ARGUMENT

A. Issue 1: Retroactive operation of s 5(3) with cl 2 of Sch 1 invalid — s 51(xxxi)

12. ***Introduction.*** Section 5(3) of the International Tax Agreements Act is invalid *in its retroactive operation* with cl 2 of Sch 1 to the 2024 Cth Amending Act because it is a law with respect to the acquisition of property — vested general law choses in action like the Unjust Enrichment Claims — otherwise than on just terms.[36] Section 51(xxxi) operates to "abstract" from[37] or "reduce the content of other grants of legislative power",[38] "fetter[ing] the legislative power by forbidding laws with respect to acquisition on any terms that are not just".[39] This fetter is a "very great constitutional safeguard".[40] It is, accordingly, to be given a liberal construction[41] and, in its application, the focus is on "substance not form".[42] Neither the 2024 Cth Amending Act nor International Tax Agreements Act contain any mechanism for the provision of just terms.[43] There is no compensation scheme analogous to that enacted as part of the retroactive validation of "past acts" by the ***Native Title Act 1993*** (Cth): **[33] below**.[44] That being so, the questions for determination are whether: ***first***, there is "property"; and, ***second***, s 5(3) in its retroactive operation with cl 2 of Sch 1 is properly characterised as a "law with respect to [its] acquisition".

13. ***Unjust Enrichment Claims "property".*** Section 51(xxxi) "extends to protect against the acquisition, other than on just terms, of '*every species of valuable right and interest*

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36 Specifically, the Plaintiff submits that cl 2 of Sch 1 to the 2024 Cth Amending Act, being the provision giving s 5(3) retroactive operation, is invalid. The invalidity of those provisions would leave s 5(3) in force as a law having a valid operation on and from the date of its enactment, if supported by s 51(xxix) — a matter in issue in the G Global Proceedings: see **fn 23** above.

37 See ***ICM*** *Agriculture P/L v Commonwealth* (2009) 240 CLR 140 at [135] (Hayne, Kiefel & Bell JJ); ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 at [185]-[186] (Gummow & Hayne JJ).

38 ***Nintendo*** *Co Ltd v Centronics Systems P/L* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); ***Grace Bro****thers P/L v Commonwealth* (1946) 72 CLR 269 at 291 (Dixon J).

39 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 (***Bank Nationalisation Case***) at 349-350 (Dixon J).

40 *Trade Practices Commission v* ***Tooth*** *& Co Ltd* (1979) 142 CLR 397 at 403 (Barwick CJ)

41 *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane & Dawson JJ), ***Australian Tape Manufacturers*** *Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane & Gaudron JJ).

42 ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 (Mason CJ, Deane & Gaudron JJ).

43 Cf *Wurridjal* (2009) 237 CLR 309 at [462]-[463] (Kiefel J); ***Cunningham*** *v Commonwealth* (2016) 259 CLR 536 at [114] (Gageler J); *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 300 FCR 354 at [49]-[64] (Katzmann, Derrington & Kennett JJ) (***Tapiki No 2***) (appeal dismissed on other grounds: *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 46).

44 See *Western Australia v Commonwealth* (1995) 183 CLR 373 (***Native Title Act Case***) at 456 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ) referring to Native Title Act, s 20(1).

including... choses in action'".[45] This reflects that "property" is in many cases best understood as a "bundle of rights" against another, and that a chose in action is a bundle of rights against another with respect to an intangible subject matter.[46] As Brennan J said in *Georgiadis*, "property" in s 51(xxxi) therefore readily "comprehends" a "common law chose[] in action... vested in an individual".[47] Just as a right to claim damages for negligence[48] or false imprisonment[49] is protected, so too is a right to claim restitution in one of the circumstances or categories falling within the taxonomy of unjust enrichment.[50]

14. ***Victoria's amended defences.*** Victoria initially admitted that the Plaintiff's Unjust Enrichment Claims were "property" thus protected by s 51(xxxi). By an amended defence, Victoria apparently seeks the Court's leave to withdraw that admission: **SCB 27-29 [17], 30-31 [26](b), 33 [30](a)(ii)**. None of the *three* bases upon which Victoria now asserts that the Unjust Enrichment Claims are not "property" should be accepted.[51] *First*, Victoria alleges that the retroactive operation of s 5(3) with cl 2 of Sch 1 somehow means the Unjust Enrichment Claims are not "property". This argument is circular, in that it assumes the validity of the very provisions that are impugned: **[25]-[26] below**. Equally circular is its reliance on impugned s 106A of the Land Tax Act — which, unless the retroactive operation of s 5(3) be *valid* (being the very point in issue), must also be inconsistent for the purposes of s 109 with Art 24(1) of the New Zealand Convention (**[32]-[34] below**) — and s 135A of the Administration Act, which applies only if s 106A does (s 135A(1)).[52]

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45 *ICM* (2009) 240 CLR 140 at [131] quoting *Minister of State for the Army v* ***Dalziel*** (1944) 68 CLR 261 at 290 (Starke J) (also 295 (McTiernan J)). Also *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 (Dixon J); *Commonwealth v Tasmania (****Tasmanian Dam Case****)* (1983) 158 CLR 1 at 246-247 (Brennan J); *Australian Tape Manufacturers* (1993) 176 CLR 460 at 509; *Georgiadis* (1994) 179 CLR 297 at 303-4 (Mason CJ, Deane & Gaudron JJ); *A-G (NT) v Chaffey* (2007) 231 CLR 651 at [21] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

46 ***Telstra*** *Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at [44] (the Court) referring to *Yanner v Eaton* (1999) 201 CLR 351 at [17]-[20] (Gleeson CJ, Gaudron, Kirby & Hayne JJ), [85]-[86] (Gummow J). Also *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [89] (Kiefel CJ, Bell, Gageler & Keane JJ); Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16.

47 (1994) 179 CLR 297 at 312; 305 (Mason CJ, Deane & Gaudron JJ), 319-20 (Toohey J), 325 (McHugh J).

48 *Georgiadis* (1994) 179 CLR 297.

49 ***Haskins*** *v Commonwealth* (2011) 244 CLR 22 at [41]-[42] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

50 *Redland* (2024) 98 ALJR 544 at [179] (Gordon, Edelman & Steward JJ); also [76] (Gageler CJ & Jagot J).

51 See As French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ said in *Haskins* (2011) 244 CLR 22 at [42], "it is important to begin consideration of this issue by dealing first with whether, in the circumstances he alleges in his pleading, the plaintiff has any action for false imprisonment".

52 Further or alternatively, s 135A would be inoperative as it forms part with s 106A of a "package of interrelated provisions which appear[ed] intended to operate fully and completely according to its terms" or not at all: *Bell Group* (2016) 260 CLR 500 at [69]-[70] (French CJ, Kiefel, Bell, Keane, Nettle & Gordon JJ).

15. *Second*, Victoria alleges that s 96(2) of the Administration Act means that the Unjust Enrichment Claims are not "property". This is a surprising contention. Section 96(2) provides that "no court … has jurisdiction or power to consider any question concerning an assessment or decision referred to in subsection (1), except as provided by this Part". Victoria is presumably not contending that the Federal Court of Australia could be denied of federal jurisdiction and power to determine the Representative Proceedings *by State legislation*. If that were the contention, s 96(2) would either be relevantly beyond power[53] or s 109 inconsistent with the conferral by s 39B(1A)(b) of the Judiciary Act of jurisdiction and ss 23 and 33Z of the *Federal Court of Australia Act 1976* (Cth) of power on the Federal Court with respect to such matters.[54] Yet it is difficult to understand how else the provision could be relevant. Section 96(2) purports only to "subtract from courts' jurisdiction and power"[55] — it says nothing about whether the Plaintiff holds Unjust Enrichment Claims, or whether those claims are "property" within the meaning of s 51(xxxi).

16. In any event, s 96(2) is not, in terms, engaged. The Representative Proceeding in which the Unjust Enrichment Claims are advanced does not involve any "question concerning an assessment". Provisions akin to s 96(2) "operate[] only where there has been what answers the statutory description of an 'assessment'".[56] A purported 'assessment' of a constitutionally invalid tax does not answer that description. An "assessment" is of "tax liability", being "liability to tax"; "tax" means a "a tax, levy, contribution or duty under a taxation law".[57] A constitutionally defective provision is, to the extent of that defect, a

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Section 135A(1) underlines this, as does the title to the provision ("Assessments related to… section 106A of the Land Tax Act 2005": see *Interpretation of Legislation Act 1984* (Vic), s 36(2A)); also Hansard, Victorian Legislative Assembly (30 October 2024) at 4459, 4162. Still further or alternatively, s 135A would suffer from the same problems as, eg, s 96(2); or itself be inconsistent with Art 24(1) for the same reasons as s 106A is (**[32]-[34] below**). In the latter regard, s 135A underlines the retroactive character of s 106A: it emphasises that the tax sought to be exacted by s 106A is exacted in the past; if validly engaged, it goes so far as to criminalise connected conduct that was not, at the time, unlawful (see, eg, s 59 in respect of s 104B).

53 *R v Kirby; Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270 (Dixon CJ, McTiernan, Fullagar & Kitto JJ); *Re Wakim; ex p McNally* (1999) 198 CLR 511 at [58] (Gleeson CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [230] (Gummow J); ***Rizeq*** *v Western Australia* (2017) 262 CLR 1 at [15], [22] (Kiefel CJ), [47], [51], [58]-[63], [103] (Bell, Gageler, Keane, Nettle & Gordon JJ); ***Burns*** *v Corbett* (2018) 265 CLR 304 at [15]-[26], [64] (Kiefel CJ, Bell and Keane JJ), [95]-[106], [120 (Gageler J), [162]-[171] (Gordon J); *Citta Hobart P/L v Cawthorn* (2022) 276 CLR 216 at [1], [29]-[33] (Kiefel CJ, Gageler, Keane, Gordon, Steward & Gleeson JJ).

54 *Rizeq* (2017) 262 CLR 1 at [67] (Bell, Gageler, Keane, Nettle & Gordon JJ); *Burns* (2018) 265 CLR 304 at [80]-[81] (Gageler J), [171], [179]-[180] (Gordon J), [129]-[134], [208] (Edelman J).

55 *Fyna Projects P/L v Chief Cmmr of State Revenue* [2018] NSWSC 1220 at [58].

56 *Federal Cmmr of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [25] (Gummow, Hayne, Heydon & Crennan JJ).

57 See Administration Act, ss 3(1), 4, 14.

"nullity" of no juristic force or effect[58] — "incapable of creating or affecting legal rights or obligations".[59] No exaction can be "under" such a nullity. One that *purports* to be is not a "tax", being neither "compulsory" nor "enforceable by law".[60]

17. *Third,* Victoria alleges s 20A of the Limitation Act[61] means the Unjust Enrichment Claims in respect of LTS Payments made before 20 February 2023 are not "property". This mistakes the basic nature of a limitation defence. Section 20A "does not extinguish... right[s] or underlying cause[s] of action".[62] As in *Commonwealth v* ***Mewett***,[63] s 20A does not, therefore, deny the Unjust Enrichment Claims the status of "property". Further, the running of the one-year period imposed by s 20A is subject to postponement for mistake: per its *chapeau*, "s 27 of the Limitation Act... applies in relation to a period of limitation prescribed by the Limitation Act – here, relevantly, s 20A".[64] "In the circumstances he alleges in his pleading" in the Representative Proceeding (ie, assuming all pleaded facts in the Plaintiff's favour),[65] that postponement applies to the older Unjust Enrichment Claims in the category of mistake. And all Claims in respect of LTS Payments made after 20 February 2023 are in any event in time.

18. ***Retroactive operation of s 5(3) a law "with respect to acquisition".*** The character of s 5(3), in its retroactive operation with cl 2 of Sch 1, is identified at **[9]-[10] above**. A law that extinguishes a vested general law chose in action is one with respect to its "acquisition" within the meaning of s 51(xxxi) when it "results in a direct benefit or financial gain (which,

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58 See eg *Second Uniform Tax Case* (1957) 99 CLR 575 at 613 (Dixon CJ); *South Australia v Commonwealth* (1942) 65 CLR 373 (*First Uniform Tax Case*) at 408 (Latham CJ); *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 342 (Latham CJ); *R v Brisbane Licencing Court; Ex p Daniell* (1920) 28 CLR 23 at 29-30, 32 (the Court).

59 *Metwally* (1984) 158 CLR 447 at 473 (Brennan J).

60 See *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276. Also *Australian Tape Manufacturers* (1993) 176 CLR 480 at 500-503 (Mason CJ, Brennan, Deane & Gaudron JJ).

61 Section 20A imposes a one-year limitation period on claims for recovery of money paid by way of or attributable to a "*purported* tax" under a mistake or colour of authority (sub-s (1)) or which is "recoverable because of the invalidity of a law or provision of a law" (sub s (2), (3)).

62 *Minister for Home Affairs v DMA18* (2020) 270 CLR 372 at [31] (the Court); [4] and fn 7. Cf *Recovery of Imposts Act 1963* (NSW), ss 2, 5; *Limitation of Actions Act 1974* (Qld), s 10A(3). If s 20A did affect substantive rights, it would be s 109 inconsistent with Judiciary Act, s 64, s 79(2)-(4) having no application: *Rizeq* (2019) 262 CLR 1 at [39] (Bell, Gageler, Keane, Nettle & Gordon JJ); *British American Tobacco v Western Australia* (2003) 217 CLR 30 at [68]-[87] (McHugh, Gummow & Hayne JJ).

63 (1997) 191 CLR 471 at 491-2 (Brennan CJ), 509-10, 512 (Dawson J), 534-5, 553 (Gummow & Kirby JJ).

64 *Cmmr of State Revenue v ACN 005 057 349 P/L* (2017) 261 CLR 509 at [75] (Bell & Gordon JJ). Generally: *Test Claimants in the FII Group Litigation v Revenue and Customs Cmmrs* [2022] AC 1 at [177] (Lords Reed & Hodge, Lords Lloyd-Jones & Hamblen agreeing); *Paciocco v ANZ Banking Group Limited* (2014) 309 ALR 249 at [365]-[366] (Gordon J); (2015) 236 FCR 199 at [382]-[397] (Besanko J, Allsop CJ agreeing at [192], Middleton J agreeing at [398]); (2016) 258 CLR 525 at [374] (Nettle J).

65 *Haskins* (2011) 244 CLR 22 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ); **SCB 150-152 [6]**.

of course, includes liability being brought to an end without payment or other satisfaction)"[66] — whether to the Commonwealth *or another*.[67] So too, as settled in *Smith v* ***ANL*** *Ltd*, a law which "modifies", "impairs" or "affects" such a chose "in a manner which will ordinarily cause disadvantage to one party and a corresponding advantage to another",[68] including one that (even if leaving the chose juridically intact) practically or "effectively sterilis[es] the rights in question".[69] Befitting its status as a constitutional guarantee, the focus is at all times upon the effect of the law, if valid, "in a real sense"; "circuitous devices" cannot be used to "acquire indirectly".[70]

19. *Prima facie acquisitive character of retroactive operation of s 5(3).* In its retroactive operation, s 5(3) has *prima facie* character as a law "with respect to the acquisition of property". As much is consistent with its transparent purpose: **[9] above**. The mechanism by which it is achieved is, depending on one's view of the law of unjust enrichment or the category of case within that taxonomy, either retroactively to negate the "'qualifying or vitiating' factor" or retroactively to supply a juristic reason for the affected LTS Payments.[71] This is, in a real and practical sense, to extinguish affected Unjust Enrichment Claims (and those of persons in like positions) or to adversely affect or sterilise them. This is plainly and deliberately to the direct benefit or advantage of Victoria (and the other States), which had a hand in the law's drafting: **[9] above**. The example in *Georgiadis* of

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66 *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane & Gaudron JJ) (followed and applied: *Mewett* (1997) 191 CLR 471); cf the dissenting reasoning of McHugh J at 328. Also ***Mutual Pools*** *& Staff P/L v Commonwealth* (1994) 179 CLR 155 at 185 (Deane & Gaudron JJ)*; ICM* (2009) 240 CLR 140 at [83] (French CJ, Gummow & Crennan JJ) and, eg. *Tapiki No 2* (2023) 300 FCR 354 at [44] (Katzmann, Derrington & Kennett JJ).

67 *ICM* (2009) 240 CLR 140 at [132]-[133] quoting *Tasmanian Dam Case* (1983) 158 CLR 1 at 145 (Mason J) and *Tooth* (1979) 142 CLR 397 at 452 (Aickin J). Also ***PJ Magennis*** *P/L v The Commonwealth* (1949) 80 CLR 382 at 401-402 (Latham CJ), 411 (Dixon J), 423 (Williams J).

68 (2000) 204 CLR 493 at [7]-[8], [10] (Gleeson CJ); also [22]-[23] (Gaudron & Gummow JJ), [96] (Kirby J), [194] (Callinan J).

69 *ANL* (2000) 204 CLR 493 at [22] (Gaudron & Gummow JJ) referring to ***Newcrest*** *Mining (WA) v The Commonwealth* (1997) 190 CLR 514 at 635 (Gummow J, Toohey J agreeing at 560 and Gaudron J agreeing at 561), 638 (Kirby J). Also *Dalziel* (1944) 68 CLR 261 at 290 (Starke J).

70 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 (Dixon J). Also references in previous fn and *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane & Gaudron JJ).

71 See *Redland* (2024) 98 ALJR 544 at [72]-[73] (Gageler CJ & Jagot J), [179]-[180] (Gordon, Edelman & Steward JJ); *Equuscorp Ltd v Haxton* (2012) 246 CLR 498 at [30] (French CJ, Crennan & Kiefel JJ). Also **Edelman and Bant**, *Unjust Enrichment* (2016, 2nd Ed, Hart) at 5, 140-141; Stevens, *The Laws of Restitution* (2023, Oxford University Press) at 72-73; and *Royal Insurance* (1994) 182 CLR 51 at 67 (Mason CJ), 89 (Brennan J). Note **SCB 30 [26](a)(iii)**.

a law "free[ing] [another] from a promise to pay" a debt is apt given much of the law of unjust enrichment "developed out of and is informed by" *indebitatus assumpsit*.[72]

20. ***Prima facie acquisitive character of retroactive operation of s 5(3) not displaced.*** At **SCB 33-34 [30](d)**, Victoria seeks to displace the *prima facie* character of s 5(3) in its retroactive operation. Sometimes "even though [a law] might perhaps fall *prima facie* within [s 51(xxxi), it is] to be regarded as authorised by the exercise of specific powers otherwise than on the basis of just terms", because either, *first*, of "the nature of the constitutional grant of legislative power pursuant to which [the law] was enacted" or, *second*, "the nature of the [law] itself".[73] Section 5(3) in its retroactive operation does not fall within this narrow carveout to the guarantee.[74]

21. *First*, s 5(3) and cl 2 of Sch 1 were not enacted under a placitum that inherently authorises the acquisition of property other than on just terms. The Defendants seek to sustain s 5(3) and cl 2 of Sch 1 under only s 51(xxix) (external affairs): **[9] above**. External affairs is not a power (cf s 51(ii) ((Commonwealth) tax) (**fn 23 above**) whose very nature is "inconsistent or incongruous" with "abstraction" by s 51(xxxi).[75]

22. *Second*, the acquisition effected by s 5(3) in its retroactive operation with cl 2 of Sch 1 is one that "fit[s] within the conception of an acquisition that can be on just terms".[76] Laws

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72 *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane & Gaudron JJ) (also *Australian Tape Manufacturers* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane & Gaudron JJ); *Redland* (2024) 98 ALJR 544 at [60] (Gageler CJ & Jagot J); [222] (Gordon, Edelman & Steward JJ). Generally Edelman and Bant at 8-15 and eg *Pavey and Matthews Ltd v Paul* (1987) 162 CLR 221 at 230-234 (Brennan J).

73 *Nintendo* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ). Also *Georgiadis* (1994) 179 CLR 297 at 306-307 (Mason CJ, Deane & Gaudron JJ); *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [56] (Gummow, Kirby, Hayne, Heydon & Crennan JJ); *A-G (NT) v* ***Emmerson*** (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ), [110] (Gageler J).

74 *Australian Tape Manufacturers* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane & Gaudron JJ); *ANL* (2000) 204 CLR 493 at [179]-[181] (Callinan J), [51] (Gaudron & Gummow JJ); *ICM* (2009) 240 CLR 140 at [218] (Heydon J).

75 *Nintendo* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); *Newcrest* (1997) 190 CLR 513 at 532 (Brennan CJ), 568-569 (Gaudron J); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 31 (Toohey J), 101 (Kirby J); ***Airservices Australia*** *v Canadian Airlines International Ltd* (2000) 202 CLR 133 at [151] (Gaudron J). Generally *Federal Cmmr of Taxation v Clyne* (1958) 100 CLR 246 at 263 (Dixon CJ (McTiernan, Williams, Kitto & Taylor JJ agreeing)); *A-G (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373 (Dixon CJ, Fullagar, Kitto, Taylor & Windeyer JJ agreeing); *Federal Cmmr of Taxation v Barnes* (1975) 133 CLR 483 at 494-495 (Barwick CJ, Mason & Jacobs JJ), 500 (Gibbs J); *MacCormick v Federal Cmmr of Taxation* (1984) 158 CLR 622 at 638 (Gibbs CJ, Wilson, Deane & Dawson JJ, Murphy J agreeing), 649 (Brennan J); *Mutual Pools* (1994) 179 CLR 155 at 170-171 (Mason CJ), 224 (McHugh J); *Airservices Australia* (2000) 202 CLR 133 at [339] (McHugh J).

76 *Cunningham* (2016) 259 CLR 536 at [59] (Gageler J). Also *Georgiadis* (1994) 179 CLR 297 at 306-307 (Mason CJ, Deane & Gaudron JJ); *Re Director of Public Prosecutions; Ex p* ***Lawler*** (1994) 179 CLR 270 at 285 (Deane & Gaudron JJ); *Mutual Pools* (1999) 179 CLR 155 at 187 (Deane & Gaudron JJ), 219

effecting the acquisition of property as a penalty for proscribed conduct,[77] from enemy aliens[78] or as a "genuine adjustment of competing claims or obligations of persons in a particular relationship or area of activity"[79] may not engage that "compound conception" in s 51(xxxi). As an all-embracing explanation of such laws, Brennan J in *Mutual Pools* suggested that they are those that acquire property incidentally to the achievement of a legitimate legislative purpose that is not the acquisition of property.[80] This suggestion is invoked by Victoria as a freestanding test at **SCB 33-34 [30](d)(ii)**. Brennan J, however, retreated from it in *Australian Tape Manufacturers*[81] and *Nintendo*,[82] and it has since been described as "difficult to apply" and "sap[ing] s 51(xxxi) of content in a manner inconsistent with its frequent recognition as an important constitutional guarantee".[83]

23. It is unnecessary to resolve whether the explanation offered by Brennan J has freestanding status. This is because s 5(3) in its retroactive operation does not affect the acquisition of property "as a side effect of the method chosen by Parliament to achieve its object"; it is, rather, a "law which selects acquisition as the means of achieving its objective":[84] **[9]-[10], [19] above**. Further, applying the well-established underlying principle Brennan J sought to explain, s 5(3) in its retroactive operation does not effect a "genuine adjustment of competing claims or obligations of persons in a particular relationship or area of activity"; it seeks *only* to advantage the States and Territories *by* extinguishing or sterilising the rights of persons in the Plaintiff's position (in dereliction of Australia's continuing treaty obligations (cf **fn 36** above)). It is more extreme than the law in *Georgiadis*, which

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(McHugh J); *Grace Bros* (1946) 72 CLR 269 at 290 (Dixon J); *Emmerson* (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [110]-[111] (Gageler J).

77 *Lawler* (1994) 179 CLR 270 at 278 (Brennan J); *R v Smithers; Ex p McMillan* (1982) 152 CLR 477 at 487-489 (the Court).

78 *Schmidt* (1961) 105 CLR 361 at 372-373 (Dixon CJ).

79 *Tasmanian Dam Case* (1983) 158 CLR 1 at 282 (Deane J); *Australian Tape Manufacturers* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane & Gaudron JJ); *Lawler* (1994) 179 CLR 270 at 285-266 (Deane & Gaudron JJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-238 (Mason CJ, Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297 at 306-307 (Mason CJ, Deane & Gaudron JJ); *Mutual Pools* (1994) 179 CLR 155 at 171-172 (Mason CJ), 180 (Brennan J), 189-90 (Deane & Gaudron JJ); *Nintendo* (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); *Airservices* (2000) 202 CLR 133 at [148] (Gaudron J), [498]-[501] (Gummow J); *Cunningham v Commonwealth* (2016) 259 CLR 536 at [60] (Gageler J).

80 (1994) 179 CLR 155 at 179-181 (Brennan J) (also at 171 (Mason CJ)). See also *Airservices Australia* (2000) 202 CLR 133 at [98]-[99] (Gleeson CJ & Kirby J); *Cunningham* (2016) 259 CLR 536 at [59]-[60] (Gageler J).

81 (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane & Gaudron JJ).

82 (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

83 *ICM* (2009) 240 CLR 140 at [222] (Heydon J). Also *Airservices* (2000) 202 CLR 133 at [148] (Gaudron J).

84 Griffith and Kennett, 'Constitutional Protection against Uncompensated Expropriations of Property' (1998) *Australian Mining and Petroleum Law Association Yearbook* 49 at 67.

benefitted the Commonwealth lopsidedly.[85] It is quite unlike, eg, zoning laws readjusting the "competing claims *between citizens*" of the kind contemplated in the *Tasmanian Dam Case*;[86] the law the subject of *Nintendo*, readjusting claims between intellectual property holders and those who benefit from their work;[87] or the law subject of *Mutual Pools*, readjusting claims between the Commonwealth, taxpayers and persons to whom an invalid tax had been passed on so as to "ensure that any refund of amounts so paid is made to a person who has in fact truly borne the burden of the payment".[88]

24. ***Conclusion*.** Section 5(3) in its retroactive operation with cl 2 of Sch 1 is a law "with respect to the acquisition of property other than on just terms" within s 51(xxxi). Clause 2 of Sch 1 can, however, be severed.[89] The consequence of this is to deny s 5(3) its acquisitive retroactive operation, saving any permissible prospective operation.

25. ***Correct order of analysis*.** In an inversion of the usual order of analysis of the validity of Commonwealth laws, Victoria apparently seeks to blunt the force of the Plaintiff's 51(xxxi) challenge by seeking to have the *Metwally* issue (see **[27]-[31] below**) determined first: **SCB 33 [30](b), 31 [27](b), 32 [28](a)(i), (ii)**. The Plaintiff does not accept that the order of analysis could or should (consistently with basic constitutional principle) be determinative. Section 51(xxxi) is an important constitutional safeguard which depends upon substance, rather than analytical sleight of hand: **[12] above**.

26. In case it matters, the Plaintiff submits that Victoria's heterodox approach is incorrect. *On the one hand*, it begs that which is in issue: it is only if the retroactive operation given to s 5(3) by cl 2 of Sch 1 is sustained by a head of power that it might affect the Plaintiff's "property". *On the other*, it cuts across two clear axioms: *First*, it traduces the axiom that the constitutional character of a law is "to be determined by reference solely to the operation which the enactment has *if it be [constitutionally] valid"*.[90] *Second*, it is inconsistent with the well-established axiom that "s 109 is concerned with... laws that are

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85 (1994) 179 CLR 297 at 306-308 (Mason CJ, Deane & Gaudron JJ)
86 (1983) 158 CLR 1 at 282 (Deane J).
87 (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).
88 (1999) 179 CLR 155 at 172 (Mason CJ), 191 (Deane & Gaudron JJ). See further *ICM* (2009) 240 CLR 140 at [220] (Heydon J).
89 *Acts Interpretation Act 1901* (Cth), s 15A; *Bank Nationalisation Case* (1948) 76 CLR 1 at 371 (Dixon J); *Bell Group* (2016) 260 CLR 500 at [69]-[70] (French CJ, Kiefel, Bell, Keane, Nettle & Gordon JJ).
90 *Fairfax v Federal Cmmr of Taxation* (1965) 114 CLR 1 at 7 (Kitto J); *Spence* (2019) 268 CLR 355 at [34] (Kiefel CJ, Bell, Gageler & Keane JJ) ("The retrospective operation of s 302CA(3)(b)(ii), if s 302CA were otherwise valid, can be assumed.")

otherwise [constitutionally] valid".[91] These axioms underscore that the character of a Commonwealth law for the purposes of s 51(xxxi) must be ascertained on the assumption it does what it purports to do, and that it is only those Commonwealth laws *first* determined to be compatible with the guarantee that might interact with s 109 — or, through it, State laws — in any respect.

B. *University of Wollongong v Metwally*[92] — controlling the operation of s 109

27. ***Issue does not arise*.** As s 5(3) of the International Tax Agreements Act in its retroactive operation with cl 2 of Sch 1 of the 2024 Cth Amending Act is invalid as a law within s 51(xxxi) (**[24] above**), there is no need to resolve whether that retroactive operation is constitutionally valid and effective to validate Victoria's exaction of LTS from the Plaintiff having regard to *Metwally*. This may be common ground: **SCB 32 [28](a)(ii)**.

28. ***Leave to re-open*.** If, however, *Metwally* does arise for consideration, any effort by the Defendants to overrule it requires leave: **SCB 31 [27](d)**.[93] The *ratio* of *Metwally* is clear: a Commonwealth law cannot, validly, retroactively undo the invalidating effect of s 109: **SCB 31 [27](a)**.[94] Leave should be refused. Leave is rare; successful re-openings are exceptional.[95] This reflects the "strongly conservative cautionary principle" that the law should be consistent.[96] Mindful of that principle, none of the recognised considerations point in favour of reopening;[97] it is not "manifestly wrong":[98] **[29]-[31] below**.

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91 *Rizeq* (2017) 262 CLR 1 at [47] (Bell, Gageler, Keane, Nettle & Gordon JJ); *Metwally* (1984) 148 CLR 447 at 477 (Deane J); *D'Emden v Pedder* (1904) 1 CLR 91 at 111. Also *Spence* (2019) 268 CLR 355 at [371] (Edelman J) (*Metwally* is only reached "on the assumption of the validity of retroactive laws"); *Burns* (2018) 265 CLR 304 at [173] (Gordon J); *Commission v O'Reilly* (1962) 107 CLR 46 at 56-57 (Dixon CJ).

92 (1984) 158 CLR 447.

93 ***Vunilagi** v The Queen* (2023) 97 ALJR 627 at [154]-[155] (Edelman J); Gageler and Lim, 'Collective Irrationality and the Doctrine of Precedent' (2014) 38 Melbourne University Law Review 525.

94 (1984) 158 CLR 447 at 455-458 (Gibbs CJ), 467-470 (Murphy J), 472-475 (Brennan J), 478ff (Deane J).

95 See Thomson and Durand, 'Overruling Constitutional Precedent' (2021) 95 *Australian Law Journal* 139.

96 *Vanderstock* (2023) 98 ALJR 208 at [426] (Gordon J); *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ); also *Queensland v Commonwealth* (1977) 139 CLR 585 at 602 (Stephen J), 620 (Aickin J); ***Lange** v ABC* (1997) 189 CLR 520 at 554 (the Court). This reflects the assumption referenced at **[31] below**.

97 ***John** v Federal Cmmr Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey & Gaudron JJ); *Wurridjal* (2009) 237 CLR 309 at [69] (French CJ). As to action in *Metwally* and endorsement see, eg, *Native Title Act Case* (1995) 183 CLR 373 at 451-455 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ). Any so-called "inconvenience" flows not from *Metwally* but from other constitutional restrictions on the Commonwealth and States' powers (like s 51(xxxi)): **[33] below**.

98 *Lange* (1997) 189 CLR 520 at 554 (the Court); *Vanderstock* (2023) 98 ALJR 208 at [609] (Edelman J).

29. ***Metwally* was correctly decided.** *Metwally* is a sound application of the doctrine in the *Communist Party Case*,[99] reinforced by powerful normative considerations. Each of Gibbs CJ, Murphy, Brennan and Deane JJ held the criterion of operation of s 109 — "*when* a law of a State is inconsistent" — to have a temporal aspect;[100] once it has been "in truth" engaged by the content of the law *at the time of* the alleged inconsistency, it is beyond the Commonwealth Parliament's power to change "the facts of history" so as to disengage it.[101] As Brennan J put it, the "period during which the State law was inconsistent with the Commonwealth law is a matter of history, not of legislative intention"; and, where the condition is "in truth satisfied", "it is not within the power of the Parliament to deem it not to be satisfied"; "Parliament is "unable legislatively to deny that the inconsistent laws existed contemporaneously".[102] As Deane J said, Parliament "cannot… expunge the past or 'alter the facts of history'" relevant "for the purposes of an organic law, such as the Constitution, which lies above the law which such a [P]arliament may make" and which, in the case of s 109, is "framed so as to act upon… reality" not "fictions".[103] As Gibbs CJ reasoned, when "inconsistency in fact existed" legislation therefore cannot "declare… the truth was other than it was".[104] In Murphy J's words, that would "elevate legislation above the *Constitution*".[105]

30. The concurrent existence of inconsistent laws is thus, for the purposes of s 109, a constitutional fact that cannot be altered by legislative fiction. This is not unique. In *Vunilagi* a similar conclusion was reached with respect to the criterion of operation of s 80 ("offence against the law of the Commonwealth").[106] As Edelman J said, "the

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99 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (***Communist Party Case***) at 205-206 (McTiernan J), 221 (Williams J), 258, 264 (Fullagar J); earlier *Ex p Walsh and Johnson; re Yates* (1925) 37 CLR 36 at 67-68, 71 (Knox CJ), 96 (Issacs J).

100 Also *Victoria v Commonwealth* (1937) 58 CLR 618 at 632 (Dixon J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 392 (Gleeson CJ & Gaudron J).

101 Also *Spence* (2019) 268 CLR 355 at [371] (Edelman J) and remarks in [2019] HCATrans 46 ("The third proposition that [the Commonwealth made in seeking to reopen and overturn *Metwally*] really needs to be that s 109 depends on the content of existing and future retroactive federal and State laws, or federal laws, not just those laws which might be read just as being existing laws". These remarks, with respect, do not fully capture the significance of s 109's textual temporality ("*when*") recognised in *Metwally*. The text makes clear, even absent normative reinforcement (cf *Spence* at [372]), it refers to laws "in the sense of existing social constructs at a particular time". See further *Royal Insurance* (1994) 182 CLR 51 at 100 (Dawson J).

102 *Metwally* (1984) 158 CLR 447 at 474-475.

103 *Metwally* (1984) 158 CLR 447at 478ff.

104 *Metwally* (1984) 158 CLR 447at 458.

105 *Metwally* (1984) 158 CLR 447 at 469.

106 (2023) 97 ALJR 627. The issue did not arise for Kiefel CJ, Gleeson & Jagot JJ or Gageler J: [47]-[48] and [65], [67], [71]-[72]. This was because of the temporal focus s 80's criterion of operation (also *R v Bernasconi* (1915) 19 CLR 629 at 636-637 (Issacs J)).

Commonwealth Parliament cannot avoid the constitutional characterisation of its law by deeming";[107] in Gordon and Steward JJ's words, "a Commonwealth Act cannot conclusively deem a law not to be a Commonwealth Act" for "that is a question that is ultimately for this Court to determine".[108] Each of their Honours cited the *Communist Party Case*. In doing so, their Honours recognised the doctrine in the *Communist Party Case* does not apply exclusively to facts upon which "the exercise of legislative power may depend" in the sense of facts determinative of whether a law is supported by a head of power; rather, it extends to facts determinative of the operation of provisions like ss 80 and 109.[109] This appears perhaps to have been overlooked by Mason J in *Metwally*, explaining his Honour's dissent.[110]

31. It is unsurprising that the criterion for the operation of s 109, like other aspects of the "organic law" of which it forms part, is so concerned with reality not fiction. As Gibbs CJ said in *Metwally*, s 109 is of "great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe"; as Deane J put it, the provision "serves the equally important function of protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws".[111] "The Court has repeatedly [and unanimously] stressed the [normative] importance of s 109" by reference to these remarks, affirming the significance of s 109 to "the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies".[112] As much reflects that its criterion for operation "was framed on the 'assumption' of the rule of law".[113] "At its narrowest", the "one 'cardinal principle' of the

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107 *Vunilagi* (2023) 97 ALJR 627 at [214]-[215] (Edelman J).

108 *Vunilagi* (2023) 97 ALJR 627 at [112]-[115] (Gordon & Steward JJ). Also *Re Governor, Goulburn Correctional Centre; Ex p Eastman* (1999) 200 CLR 322 at [43]-[44] (Gummow & Hayne JJ); *Eastman v The Queen* (2000) 203 CLR 1 at [159] (McHugh J), [196] (Gummow J).

109 Also *Sue v Hill* (1999) 199 CLR 462 at [38] (Gleeson CJ, Gummow & Hayne JJ); *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at [53]-[54] (Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [226] (Kirby J). Further *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon & Edelman JJ); Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630 at 650-651.

110 (1984) 158 CLR 447 at 465 (Mason J, Wilson J agreeing).

111 (1984) 158 CLR 447 at 458 (Gibbs CJ), 477 (Deane J).

112 *Momcilovic v The Queen* (2011) 245 CLR 1 at [347] (Hayne J) referring to *Croome v Tasmania* (1997) 191 CLR 119 at 129-130 (Gaudron, McHugh & Gummow JJ); *Dickson v The Queen* (2010) 241 CLR 491 at [19] (the Court). Also *Re McBain* (2002) 209 CLR 372 at [69] (Gaudron & Gummow JJ). See further *Heli-Aust Pty Limited v Cahill* (2011) 194 FCR 502 at [107] (Stone & Moore JJ), [196] (Flick J).

113 ***Palmer*** *v Western Australia* (2021) 274 CLR 286 at [22] (the Court) referring to *Communist Party Case* (1951) 83 CLR 1 at 193 (Dixon J); ***MZAPC*** *v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [91] (Gordon & Steward JJ). Also, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [31] (Gleeson CJ).

rule of law, the irreducible minimum about which there is not and cannot be any debate" (the "'agreed beginning' for debates") is "that State power must be exercised in accordance with promulgated, non-retrospective law made according to established procedures".[114] "Acceptance of the rule of law as a constitutional principle [thus] requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it".[115]

C. Issue 2: Section 109 inconsistency between Article 24(1) and s 106A

32. ***Summary.*** Section 106A of the Land Tax Act is inoperative by force of s 109 of the *Constitution* by reason of its inconsistency with Art 24(1) of the New Zealand Convention. By reason of the invalidity of s 5(3) of the International Tax Agreements Act in its retroactive operation, Art 24(1) continues to have the force of law by s 5(1) of the International Tax Agreements Act in respect of the period on or after 1 January 2018 and before 8 April 2024 (being the period to which s 106A is exclusively applicable) despite s 5(3). Section 5(3) could validly operate only prospectively given cl 2 of Sch 1 to the 2024 Cth Amending Act is invalid as a law within s 51(xxxi): **[12]-[24] above**.

33. ***Need for valid synchronous laws.*** Murphy and Deane JJ contemplated in *Metwally* that if the Commonwealth and a State are able *validly* to legislate retroactively "*in combination*", they may overcome the effect of s 109 on the past.[116] The Commonwealth cannot do so alone because the doctrine in the *Communist Party Case* prevents it from altering the constitutional fact of inconsistency: **[29]-[31] above**. A State cannot alone because, as six members of the Court said in the *Native Title Act Case*, absent valid retroactive Commonwealth legislation, "a State law which purports to confirm retrospectively [ie, retroactively] the validity of the act [rendered a nullity by s 109] cannot restore effect to the act in question" in the face of (what Deane J called in *Metwally*) the "subsisting Commonwealth law"[117] that founded the underlying s 109 inconsistency.[118] It is only if the Commonwealth has validly "cleared the way" for a State that the latter may

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114 *MZAPC* (2021) 273 CLR 506 at [91] (Gordon & Steward JJ) (approved *Palmer* (2021) 274 CLR 286 at [22] (the Court)) quoting Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue* 8 at 8 and Laws, *The Constitutional Balance* (2021, Bloomsbury) at 15.

115 *Black-Clawson International v Papierwerke Waldhof-Aschaffenberg* [1975] AC 591 at 638 (Lord Diplock). Also *Spence* (2019) 268 CLR 355 at [372] fn 564; Juratowitch at 47-48; *Stephens* (2022) 273 CLR 635 at [33] (Keane, Gordon, Edelman & Gleeson JJ); *Haskins* (2011) 244 CLR 22 at [72] (Heydon J).

116 (1984) 158 CLR 447 at 480 (Deane J); also 469 (Murphy J) (the federal Parliament "itself cannot undo", but "both Parliaments can").

117 (1984) 158 CLR 447 at 450 (Deane J).

118 (1995) 183 CLR 373 at 451 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

act.[119] That is what the Commonwealth achieved by ss 19(1) and 228 of the Native Title Act in respect of States' discriminatory "past acts"; this was, however, only on the s 20(1) and Div 5 (esp s 53(1)) proviso that just terms satisfactory of s 51(xxxi) be provided to native title holders whose property was acquired by any validation of States' "past acts".[120] Here, there is no synchronous Commonwealth law because the retroactive operation of s 5(3) is invalid.

34. ***Inconsistency between Art 24(1) and s 106A.*** As s 5(3) only validly operates prospectively, Art 24(1) (with s 5(1)) continues to confer an immunity against more burdensome tax treatment and right to equality of tax treatment in respect of the pre-8 April 2024 period: **[7] above**. The retroactive exaction by s 106A of LTS from persons with the benefit of Art 24(1) (and like provisions) is in real conflict with this "subsisting" operation of Art 24(1): s 106A imposes precisely the same exaction "upon the same person and events, at the same time [ie, pre-8 April 2024] and in the same amount" as the provisions that conflicted with Art 24(1): **[7]-[11] above**.[121] Applying exclusively in such circumstances (s 106A(1)), s 106A is entirely inoperative by force of s 109.[122]

PART VI: ORDERS SOUGHT

35. The questions of law stated for the opinion of the Full Court be answered, and orders made, as follows:

(1) Yes to both (a) and (b).

(2) If reached: No.

(3) Yes.

(4) Yes.

(5) The following declarations should be made:

[those sought at **SCB 20-21 [C](b) (and if reached, (a)), [D] and [DA]** (with the words after "*Constitution*" to end of **[DA]** omitted)].

(6) The Defendants.

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119 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J). Also *Spence* (2019) 268 CLR 355 at [371] (Edelman J) ("On the assumption of validity of retroactive laws"). Further *Vunilagi* (2023) 97 ALJR 629 at [115] (Gordon & Steward JJ) ("while… s 34(4) [of the Commonwealth Act] was not constitutionally effective in itself to make those enactments laws of the Territory… contained the potential for a law to be patriated to the Territory by the Territory, by… by [a law of] the Legislative Assembly").

120 See *Native Title Act Case* (1995) 183 CLR 373 at 456, 458-459, 481-482 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); also *Griffiths v Northern Territory of Australia (No 3)* (2016) 337 ALR 362 at [141], [143] (Mansfield J).

121 Like a State law of the kind contemplated by s 19(1) of the Native Title Act would be with s 10(1) of the *Racial Discrimination Act 1975* (Cth) absent s 19(1): see further **fns 16 and 52 above**.

122 See further **fn 52 above;** cf **[24] above**.

PART VII: ESTIMATE FOR HEARING

36. The Plaintiff estimates that he will need 2.5 hours for the presentation of his argument.

24 February 2025

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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

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFF

Pursuant to paragraph 4 of *Practice Direction No.1 of 2024*, the Plaintiff 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 version	Applicable date or dates
Constitutional provisions					
1.	Commonwealth *Constitution*	Current	Sections 51(ii), 51(xxix), 51(xxxi), 80, 109, 122; Ch III	In force at all relevant times.	All relevant times.
Statutory provisions					
2.	*Acts Interpretation Act 1901* (Cth)	Current C2024C00838	Section 15A	In force at all relevant times.	All relevant times.
3.	*Australian Citizenship Act 2007* (Cth)	Current C2024C00431		No material difference.	All relevant times.

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
4.	Convention between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Bridge Benefits and the Prevention of Fiscal Evasion (done at Paris on 26 June 2009) [2010] ATS 10	Current	Articles 1, 3, 24	In force (by s 5(1) of the *International Tax Agreements Act 1953* (Cth)) at all relevant times.	All relevant times.
5.	*Federal Court of Australia Act 1976* (Cth)	Current C2024C00819	Sections 23, 33Z	In force at all relevant times.	All relevant times.
6.	*International Tax Agreements Act 1953* (Cth)	Current C1953A00082	Sections 3, 3AAA, 5	Following amendment by Impugned Commonwealth Act.	From 8 April 2024, subject to retroactivity of s 5(3).
7.	*International Tax Agreements Amendment Act (No. 1) 2010* (Cth)	As enacted C2010A00013		Amending Act giving force of Commonwealth law to New Zealand Convention.	All relevant times.
8.	*Interpretation of Legislation Act 1984* (Vic)	Current Version 131	Section 36(2A)	In force at all relevant times.	All relevant times.
9.	*Judiciary Act 1903* (Cth)	Current C2024C00864	Sections 39B, 64, 78B, 79	No material difference.	All relevant times.
10.	*Land Tax Act 2005* (Vic)	Current Version 081	Sections 3, 4, 7, 8, 10, 35, 104B, 106A, Sch 1	No material difference, save insertion of s 106A.	All relevant times, subject to retroactivity of s 106A.

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
11.	*Limitation of Actions Act 1958* (Vic)	Current Version 110	Sections 5, 20A, 27	No material difference.	All relevant times.
12.	*Limitation of Actions Act 1974* (Qld)	Current 23 September 2023	Section 10A	For illustrative purposes.	All relevant times.
13.	*Migration Act 1958* (Cth)	Current C2024C00800	Sections 30, 32	No material difference.	All relevant times.
14.	*Native Title Act 1993* (Cth)	Current C2024C00224	Sections 19, 20, 53, 228; Div 5	For illustrative purposes.	All relevant times.
15.	*Racial Discrimination Act 1975* (Cth)	Current C2022C00366	Section 10	For illustrative purposes.	All relevant times.
16.	*Recovery of Imposts Act 1963* (NSW)	Current 1 January 1996	Sections 2, 5	For illustrative purposes.	All relevant times.
17.	*State Taxation Further Amendment Act 2024* (Vic)	As enacted 50/2024	Sections 42, 54	Impugned Victorian Amendment Act.	From enactment, subject to retroactivity.
18.	*Taxation Administration Act 1997* (Vic)	Current Version 088	Sections 3, 4, 14, 18, 96, 135A	No material difference, other than insertion of s 135A.	All relevant times, subject to retroactivity of s 135A.
19.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	Current C2024A00018	Section 3; Sch 1, cll 1, 2	Impugned Cth Amendment Act.	From 8 April 2024, subject to retroactivity of cl 1 of Sch 1.

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
International instruments					
20.	OECD, *Model Tax Convention on Income and on Capital (Full Version)*	17 July 2008	Art 24	As at time New Zealand Convention drafted.	All relevant times.
21.	*Vienna Convention on the Law of Treaties* [1974] ATS 2	Current	Arts 31 and 32	In force at all relevant times.	All relevant times.