HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M60/2024
File Title:	Stott v. The Commonwealth of Australia & Anor
Registry:	Melbourne
Document filed:	Form 27E - Reply
Filing party:	Plaintiff
Date filed:	17 Apr 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

PLAINTIFF'S REPLY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ARGUMENT

A. The constitutional context in which the Questions arise

2. ***The Art 24(1) prohibition on discrimination.*** Question 1 asks whether, prior to 8 April 2024, Victoria's imposition on the Plaintiff of LTS was invalid by reason of s 109 inconsistency with Art 24(1) (applied via s 5(1)). There is no dispute that the answer is "yes", in substance because the Victorian provisions subjected the Plaintiff (a New Zealand national) to taxation and connected requirements which were "more burdensome" than those to which an Australian national were subjected (**CS [12], PS [5]-[7]; see also VS [5]**). A central reason why Art 24(1) was "more burdensome" is the difference in quantum: the land tax that was being levied on foreign nationals was higher compared to the amount of land tax imposed on Australian nationals (**PS [7]**). But it is important also to note that the aegis of Art 24(1) extends to "other or more burdensome taxes", which includes bespoke taxes (like s 106A) other than those to which the resident is subjected.[2] Further, it is important to note that the legislative command expressed in Art 24(1) is that nationals "shall not be subjected" to such discriminatory taxes. Where it applies, Art 24(1) "disapplies any domestic taxing provision which imposes different or more onerous tax treatment".[3] As the learned authors of Klaus Vogel say, "the treaty acts like a stencil that is placed over the pattern of domestic law and covers over certain parts".[4] The substantive immunity so conferred is capable of being impermissibly impaired, altered or detracted from in different ways (**Part D below**).

3. ***Prior to 8 April 2024, s 5(1) operated in accordance with the Commonwealth's international obligations, exactly as the Parliament intended*** (**PS [6]-[7]**). The Explanatory Memorandum to the *International Tax Agreements Amendment Bill (No. 2) 2009* (Cth), which enshrined the New Zealand Convention into the legislation, correctly identified that the provisions of Art 24(1) would apply to "all federal and state taxes", and specifically to "taxes imposed by the Australian states and territories".[5] The same is true for the other double taxation treaties.[6] Before implementing the

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1 These submissions reply to those of the Commonwealth (**CS**) and Victoria (**VS**) filed 24 March 2025; and the submissions for the Attorneys-General for NSW (**NSWS**), South Australia (**SAS**) and Western Australia (**WAS**) each filed 2 April 2025. Where relevant, this reply refers to the submissions in the G Global Proceedings of the Appellants filed 26 February 2025 (**GG-AS**); Commissioner of State Revenue, Queensland filed 26 March 2025 (**GG-QS**); the Attorney-Genereal of the Commonwealth (**GG-CS**) filed 2 April 2025; and the reply submissions of the Appellants of even date (**GG-ReplyS**).

2 See eg *Woodend Rubber Co v Comr of Inland Revenue* [1971] AC 321 at 332F (PC); Avery-Jones, "The non-discrimination article in tax treaties: Part 1" (1991) 10 British Tax Review 359 at 12 fn 176.

3 *Addy* (2021) 273 CLR 613 at [16] (the Court).

4 Klaus Vogel at 37 [71].

5 **EM** to the *International Tax Agreements Amendment Bill [**ITAAB**] (No. 2) 2009* (Cth) at 42 [2.38] and 118 [2.356].

6 See EM to the *ITAAB (No. 1)* 2007 (Cth) at 141 [2.256] (also at 86, 89-90 [2.12], 90 [2.15]) (Norway); EM to the *ITAAB (No. 2) 2007* (Cth) at 67 [1.264]-[1.265] (also at 12, 16 [1.12], 17 [1.15]) (Finland); EM to the *ITAAB (No. 1) 2008* (Cth) at 88 [1.337]-[1.338] (also at 12, 17 [1.11]) (Japan); EM to the *ITAAB (No. 2) 2008* (Cth) at 50 [1.163]-[1.164] (also at 14, 17-8

Convention into domestic law, the State and Territory governments were consulted through the Commonwealth/State Standing Committee on Treaties, and information on the negotiation of the Convention was included in the Schedule of treaties provided to State and Territory representatives from early March 2009.[7] Any submission that the legal effect of Art 24(1) was "unintended" (eg **VS [54]**), or that s 5(1) was "originally designed not to be inconsistent with a State tax" (eg **CS [39]**), must be rejected as revisionist history.

4. ***Plaintiff's Unjust Enrichment Claims.*** The result of Victoria's contravention of Art 24(1), prior to 8 April 2024, is that the exaction of LTS from the Plaintiff without legislative authorisation to do so was illegal. When the Plaintiff paid Victoria's discriminatory LTS, the Plaintiff's right or "immunity" (conferred by s 5(1), Art 24(1) and s 109) was "transformed into property recognised by the general law"[8] in the form of the Unjust Enrichment Claims.

5. Because the Defendants impeach the nature and value of the Unjust Enrichment Claims, it is necessary to expose the constitutional principle which underpins them. It is a "fundamental principle of public law",[9] tracing to the *Bill of Rights 1688* (Imp),[10] that tax cannot be levied by the Executive without Parliamentary authority.[11] This is then reflected in the further principle that "the Crown cannot assert an entitlement to retain money paid by way of causative mistake as and for tax that is not payable".[12] While the (belatedly discarded) mistake of law rule once operated in some cases to deny recovery of invalid taxes, taxpayers have long been recognised[13] to have what is appropriately described as a "common law entitlement"[14] to recover invalid or incorrectly levied taxes where they had been paid under compulsion, extortion or undue influence. In dealing with that entitlement, this Court has been astute not to endorse any proposition of law which would authorise retention of payments by the Executive which it lacked legislative authority to receive,

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[1.10]-[1.11]) (South Africa); EM to the *ITAAB 2012* (Cth) at 24 [1.43]-[1.44] (India); EM to the *ITAAB 2014* (Cth) at 103 [1.281] (also at 11, 51 [1.14]) (Switzerland); EM to the *ITAAB 2016* (Cth) at 187 [1.415] (also at 19, 107 [1.59]) (Germany).

7 EM to the *ITAAB (No. 2) 2009* (Cth) at [5.81] (New Zealand).

8 *Yunipingu* [2025] HCA 6 at [306] (Edelman J), quoting *Peverill* (1994) 179 CLR 226 at 265-266 (McHugh J).

9 *Cmmr of State Revenue (Vict) v* ***Royal Insurance Australia*** *Ltd* (1994) 182 CLR 51 at 69 (Mason CJ).

10 *The Bill of Rights* (1688) 1 William and Mary sess 2 c 2, the continued force of which in Victoria is given by *Imperial Acts Application Act 1980* (Vic), ss 3, 8; Pt II Div 3 ("Justice and liberty"), p 39 ("[1688] I William and Mary Sess. II (*Bill of Rights*) c. II") (see also *Constitution Act 1975* (Vic), s 3(1); also Pt V Div 1).

11 Eg ***Pape*** *v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [58] (French CJ).

12 *Royal Insurance Australia* (1994) 182 CLR 51 at 69 (Mason CJ). This Court has underlined the strength of the "fundamental principle of public law" in its recent recognition that an absence of legislative authority to tax in itself grounds restitutionary liability: *Redland* [2024] HCA 7; 98 ALJR 544 at [86] (Gageler CJ & Jagot J) [188] (Gordon, Edelman & Steward JJ); *Woolwich* [1993] AC 79 at 166 (Lord Goff). This finds root as far back as 1653 in the same soil as the allied and converse principle associated with *Auckland Harbour Board v The King* [1924] AC 318 at 326-7: see *Dodington's Case* (1653) Cro Eliz 545; 78 ER 791; *Sims* (2022) 109 NSWLR 546 at [34]-[50], [70], [76]-[78] (Bell P).

13 See *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676 at 680-1 (Lord Mansfield) and, eg, *Whiteley Ltd v The King* (1909) 101 LT 741; ***Werrin*** *v The Commonwealth* (1938) 59 CLR 150 at 158 (Latham CJ); *Mason v New South Wales* (1959) 102 CLR 108 at 117 (Dixon CJ); also Peter Birks, 'Restitution from the Executive: A Tercentenary Footnote to the *Bill of Rights*' in P D Finn (ed), *Essays on Restitution* (Law Book, 1990).

14 *Redland* [2024] HCA 7; 98 ALJR 544 at [75]-[76] (Gageler CJ & Jagot J).

and were paid by mistake.[15] Any bureaucratic imperative to retain in the treasury money paid under unconstitutional provisions can be allowed neither to subvert these constitutional principle, nor obliterate the distinction between constitutional and unconstitutional taxes.

6. ***Administration Act, s 96(2).*** Despite the foregoing, the Defendants are so bold as to submit that the Plaintiff never had any restitutionary cause of action, relying upon s 96(2) of the Administration Act (**CS [44]-[45]; VS [58]-[59], [63]; WAS [43]-[44]**).[16] Section 96(2) of the Administration Act in terms provides that "[n]o court" has either "jurisdiction or power to consider any question concerning an assessment or decision … except as provided by this Part." The Plaintiff's claim is in federal jurisdiction and is brought in the Federal Court of Australia. The Defendants' submission must therefore entail that the Parliament of a State can divest the Federal Court of federal jurisdiction, or deprive the Federal Court of powers granted to it in exercising that jurisdiction. That submission is untenable.[17] Section 79(1) of the *Judiciary Act* cannot "pick up" s 96(2) insofar as it seeks to divest jurisidiction because the laws with which s 79(1) is concerned are those that regulate power.[18] Section 79 operates "only where there is already a court 'exercising federal jurisdiction', 'exercising' being used in the present continuous sense."[19] Insofar as s 96(2) purports to deny all courts all "power to consider any question" in relation to the Unjust Enrichment Claims,[20] it is, in substance, a denial of jurisdiction.[21]

7. If the denial of power has any separate operation, it could only be as a purported withdrawal of power to award any remedy. Such a law is not "picked up" by s 79(1) because it directly collides with the provisions of the Federal Court Act (centrally, ss 22,[22] 23 and 33Z) that confer powers on the Court in relation to matters within its jurisdiction (**PS [15]**).

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15 *Royal Insurance Australia* (1994) 182 CLR 51 at 69 (Mason CJ).

16 On its proper construction, s 96(2) does not in terms apply to the Plaintiff's Claims: **PS [16]** and **[19] below**.

17 *Rizeq* (2017) 262 CLR 1 at [45]-[51], [58]-[60] (Bell, Gageler, Keane, Nettle & Gordon JJ). Also *Burns* (2018) 265 CLR 304 at [1]-[5], [64] (Kiefel CJ, Bell & Keane JJ); C*itta Hobart* (2022) 276 CLR 216 at [29] (Kiefel CJ, Gageler, Keane, Gordon, Steward & Gleeson JJ).

18 *Rizeq* (2017) 262 CLR 1 at [32] (Kiefel CJ), [52], [84]-[92] (Bell, Gageler, Keane, Nettle & Gordon JJ), [125]-[134] (Edelman J). Also *Harris v Caladine* (1991) 172 CLR 84 at 136 (Toohey J); *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at [5] (Gleeson CJ, Gummow, Hayne & Crennan JJ); *Osland v Secretary to Department of Justice* (2010) 241 CLR 320 at [19] (French CJ, Gummow & Bell JJ); *Burns* (2018) 265 CLR 304 at [21] (Kiefel CJ, Bell & Keane JJ); *Australia Bay Seafoods Pty Ltd v Northern Territory of Australia* (2022) 295 FCR 443 at [187] (Besanko, Charlesworth & O'Bryan JJ).

19 ***Solomons*** *v District-Court (NSW)* (2002) 211 CLR 119 at [23] (Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ). Moreover, 96(2) of the Administration Act could not be applied by s 79(1) in this Court, because that would detract from the entrenched original jurisdiction conferred by ss 75(i) (*Re East; Ex parte Nguyen* (1998) 196 CLR 354 at [16]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ)) and 75(iii).

20 *Fyna Projects Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2018] NSWSC 1220 at [58] (Leeming JA). As his Honour also observed, s 96(2) and its equivalents cannot be effective in terms even as to State jurisdiction and power, given *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

21 "Characteristically an exercise of jurisdiction is attended by an exercise of power": *Rizeq* (2017) 261 CLR 1 at [87] (Bell, Gageler, Keane, Nettle & Gordon JJ). The denial of "power to consider" is a denial of jurisdiction.

22 As to which see *Philip Morris Inc v Adam P Brown Male Fashions P/L* (1981) 148 CLR 457 at 489 (Gibbs J), 505-506 (Mason J), 529 (Aickin J), 547 (Wilson J).

8. ***Characterisation of the Commonwealth amendment.*** The legal situation which prevailed prior to 8 April 2024 was therefore one in which the Plaintiff had vested general law rights of restitution, by reason of mistake, duress *colorii officii* and/or failure of basis,[23] against Victoria to recover tax that had been levied on him illegally and without Parliamentary authority. An "essential element in the[se] cause[s] of action is that the moneys in question were unlawfully exacted from [the Plaintiff]".[24] On 8 April 2024, the Commonwealth enacted s 5(3) with cl 2 of Sch 1 (the **amendment**). Three features of the amendment inform its proper characterisation. ***First,*** it does not apply for all times or all persons, but instead applies only in relation to "taxes … payable" (Sch 1, cl 2(a)), and only "on or after 1 January 2018" or in relation to tax periods "that end on or after 1 January 2018". In that aspect, it is calibrated to defeat restitutionary claims to recovery of "taxes paid" within the normal limitation period for such claims. As the Explanatory Memorandum puts it, the amendment "ensures that such taxes prevail", and quite deliberately selected the six year period because it "broadly aligns with statute of limitation periods under state and territory legislation".[25] ***Second***, the direct legal effect of the amendment is to remove "an essential element" of the exigent restitutionary claims available for suit within the six year period by invigorating, effectuating or enlivening the discriminatory taxes that were otherwise legal nullities by force of s 109. The very purpose of the amendment was to "bring to nought the justifiable reliance" which the Plaintiff placed upon s 109 in prosecuting his Unjust Enrichment Claims.[26] ***Third***, in removing that "essential element", the amendment extinguished or sterilised the Plaintiff's accrued rights to restitution and the correlative liabilities of Victoria to make restitution of those unlawful taxes (**PS [9]-[10], [18]-[19]**; ***cf*** **CS [39]**). The amendment's legal and practical effect is to authorise or carry into execution the extinction or sterilisation of vested general law choses in action. That is what grounds its acquisitive character.

9. The Defendants ignore these central features of the amendment. They resort to soothing metaphors: the amendment just "remove[s] an obstacle", or "makes room for a State law" (**CS [9], [39]; VS [53]**). Such a characterisation would undermine the constitutional values at stake (**[4]-[5] above**).[27] It would also be incorrect as a matter of technique to ignore the operative effects of the amendment on the rights and liabilities of the persons to whom it applies, and its relevant textual, contextual and purposive features (**PS [10]-[11], [19]**).

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23 *Redland* [2024] HCA 7; 98 ALJR 544 at [75]-[78], [86] (Gageler CJ & Jagot J), [188] (Gordon, Edelman & Steward JJ).
24 *Antill Ranger* (1955) 93 CLR 83 at 102-103 (Fullagar J); *BAT* (2003) 217 CLR 30 at [42] (McHugh, Gummow & Hayne JJ).
25 Foreign Investment Bill EM at 2.
26 *Antill Ranger* (1955) 93 CLR 83 at 100 (Dixon CJ, McTiernan, Williams, Webb, Kitto & Taylor JJ).
27 *Cf Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at [103] (Gageler J).

B. Question 3: Section 51(xxxi)

10. It is logical to approach in the following order the Defendants' arguments against the invalidating application of s 51(xxxi) to s 5(3) with cl 2 of Sch 1: ***first***, to deal with the submission that s 51(xxxi) does not apply at all to the amendment; ***second***, to deal with the submission that the amendment does not "acquire" anything; ***third,*** to deal with submissions that anything the amendment acquires is not "property".

11. ***Section 51(xxxi) applies to the amendment.*** Victoria (with the support of Western Australia) submits that the just terms guarantee in s 51(xxxi) does not apply to the amendment, because its "concern with taxation" presupposes an absence of *quid pro quo* (**VS [54]; WAS [47](b)**). The authorities explain that laws which impose *Commonwealth* taxation do not engage s 51(xxxi), including on the basis that s 51(xxxi) does not "abstract" from s 51(ii) (**PS [21]**).[28] The amendment does not engage that line of principle because it is not a law made under s 51(ii), and *a fortiori*, because it does not impose "genuine"[29] (or any[30]) Commonwealth taxation. The amendment is relevantly sustained, if at all, by s 51(xxix) (external affairs) not s 51(ii) (**GG-AS [12]-[35]; GG-CS [13]-[24]; GG-QS [12]-[26]**). Section 51(xxxi) unquestionably "abstracts" from s 51(xxix) (**PS [21]**). Further, the amendment is not a law in respect of which "'just terms' is an inconsistent or incongruous notion" (**PS [22]**). In dereliction of the Commonwealth's treaty obligations, the amendment extinguishes the "immunity" against State discrimination and, with it, the Unjust Enrichment Claims (**[8] above, [12] below**). Nor does the amendment effect a "genuine adjustment" of claims. The law in *Mutual Pools* was entirely different (see **PS [22]**). So too was the law in *Peverill*, which adjusted claims as between, and "in the common interest" of, the Commonwealth, medical practitioners and patients.[31] *Peverill* does not support any freestanding notion that laws asserted to "correct a defect" or "overcome... unintended consequences" are outside s 51(xxxi). And it is quite wrong to suggest that the earlier operation of s 5(1) was unintended: see **[3]** above.

12. ***The Amendment effects an acquisition.*** The Defendants submit that the amendment is not directly acquiring anything: **CS [39]; VS [55]**. This is not correct. A law which removes from a restitutionary claim the circumstance that renders the conferral of a benefit unjust has removed "an

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28 See *Mutual Pools* (1994) 179 CLR 155 at 224 (McHugh J) ("What is validly within s 51(ii) is outside s 51(xxxi), for the two powers are mutually exclusive"), see also 170-171 (Mason CJ), 178 (Brennan J), 187 (Deane & Gaudron JJ). See further, eg, *Federal Cmmr of Taxation v Clyne* (1958) 100 CLR 246 at 263 (Dixon CJ (McTiernan, Williams, Kitto & Taylor JJ agreeing)). Compare *Yunupingu* [2025] HCA 6 at [16]-[17], [30]-[32] (Gageler CJ, Gleeson, Jagot & Beech-Jones JJ), [182], [186], [189] (Gordon J), [268], [272] (Edelman J), [373] (Steward J).

29 See *Australian Tape Manufacturers*, (1993) 176 CLR 480 at 509-510 ("in a case where an obligation to make a payment is imposed as genuine [Commonwealth] taxation... it is unlikely that there will be any question of an 'acquisition of property' within s 51(xxxi)" (emphasis added)). The imposition of Commonwealth tax in the amount of a debt or liability owed by the Commonwealth might be other than "genuine" in this sense. Were it otherwise, the s 51(xxxi) guarantee could be avoided by that simplest of devices.

30 If it did impose Commonwealth taxation, it would be invalid: *Constitution*, s 55 ("tax bill").

31 (1994) 179 CLR 226 at 236-237 (Mason CJ, Deane & Gaudron JJ).

essential element" of the cause of action and thus freed the defendant from its burden, and has thereby "acquired" the cause of action (**[8] above**). The relevant acquisitive effect arises directly from Commonwealth law, without the need for a State action.[32]

13. In any event, the premise that only a direct acquisition attracts the constitutional guarantee is false. What the *Constitution* forbids directly "cannot be achieved indirectly or by means of some circuitous device".[33] Laws authorising or effecting the acquisition of property by the States are not exempt from s 51(xxxi);[34] indeed, this is one premise of the "past acts" regime of the Native Title Act.[35] The "independence of the States" could hardly demand that the Commonwealth have power to pass laws effecting or validating State acquisitions of property other than on just terms (***cf* CS [39]; VS [53]**). An analogy can be drawn with the abstraction from s 96 of the power to include any term or condition in a grant which would "directly or indirectly require the State" to acquire property otherwise than on just terms.[36] To characterise the amendment by reference to the features in **[8] above —** and to recognise that its practical effect was to extinguish or sterilise restitutionary causes of action by its targeted operation over the ordinary 6-year limitation period to re-enliven or re-invigorate the invalid discriminatory taxes — is not to attribute it a character from the effects of State law (***cf* CS [9]**). But even if it were, there is no analytical impediment to characterising the amendment by reference to its legal impact in re-invigorating inoperative State laws where that was its purpose and effect **(PS [9]–[10]**).

14. ***Claims not 'inherently defeasible'.*** The Defendants submit (with the support of Western Australia) that any rights of the Plaintiff "arising from the agreements given force by s 5(1) ... were inherently susceptible of variation" (**CS [41], [44]; VS [56]; WAS [47](c)**). This submission mischaracterises the property acquired (***cf* [4]-[5] above**). Once "vested" or "accrued",[37] the Plaintiff's Unjust Enrichment Claims were not dependent or conditional upon the ongoing operation of Art 24(1) or s 5(1).[38] They were no more or less susceptible to variation than: **(a)** native title outside of the Territories (which is vulnerable to retroactive or retrospective repeal of the immunity conferred by

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32 Compare a hypothetical law purporting to repeal, retroactively or retrospectively, ss 9 and 10 of the Racial Discrimination Act (and s 11 of the Native Title Act) and thereby re-enlivening State laws or acts that would, but for ss 9 and 10, have extinguished native title.

33 *Mutual Pools* (1979) 179 CLR 155, 173 (Mason CJ).

34 **PS [18] fn 67**; see also *McClintock v The Commonwealth* (1947) 75 CLR 1, 23 (Starke J), 36 (Williams J).

35 Subject to provision of just terms satisfactory of s 51(xxxi), the Native Title Act carved out from the protections of the Racial Discrimination Act any State laws providing that "past acts attributable to the State… are valid, and are always taken to have been valid" (***cf* VS [37]; PS [33] fn 120**): see ss 7(3), 19(1) and 20(1), Div 4 (esp s 53(1)).

36 *Yunupingu* [2025] HCA 25 at [36] (Gageler CJ, Gleeson, Jagot & Beech-Jones JJ); also *PJ Magennis* (1949) 80 CLR 382, 403 (Latham CJ), 423 (Williams J, Rich J agreeing), 429-430 (Webb J); *ICM* (2009) 240 CLR 140 at [32] (French CJ, Gummow & Crennan JJ).

37 *Georgiadis* (1994) 179 CLR 297 at 304-306 (Mason CJ, Deane & Gaudron JJ).

38 Any susceptibility of s 5(1) and Art 24(1) to future legislative modification was not "characteristic" of or "integral" to the Unjust Enrichment Claims: *cf Yunupingu* [2025] HCA 6 at [55] (Gageler CJ, Gleeson, Jagot & Beech-Jones JJ).

ss 9 and 10 of the Racial Discrimination Act);[39] **(b)** a claim in trespass (which is vulnerable to the retroactive or retrospective conferral of lawful authority);[40] or **(c)** the claim in debt contemplated in *Georgiadis* (which was vulnerable to a law retroactively or retrospectively "free[ing] [another] from [the] promise to pay": see **PS [13], [19]**). It is against that very susceptibility to variation that the guarantee in s 51(xxxi) protects. There is no parallel with the kind of inherent defeasibility that may[41] characterise statutory entitlements that have "no [ongoing] existence except pursuant to a law of the Commonwealth",[42] like those the subject of the authorities cited in **VS fn 67** and **CS fn 86**.

15. To suggest that the Unjust Enrichment Claims are somehow inherently defeasible because the Commonwealth Executive entered into the New Zealand Convention (**VS [56]**) is to overlook that the Convention has been implemented by the Parliament as a law of the Commonwealth[43] — thus engaging s 109 and generating "an essential element" of the vested Unjust Enrichment Claims. The character of the Unjust Enrichment Claims is also not affected by the theoretical possibility of some future exchange of notes under Art 24(5)(g) (***cf* CS fn 89)**. A contingency that has not arisen cannot deny that there has been an acquisition of property.[44] Futher, **(a)** Art 24(5)(g) cannot empty Art 24(1) of content and its intended effect (see **[2] above**); **(b)** the Art 24(5)(g) procedure does not permit the Commonwealth Executive unilaterally to alter the Convention (for it depends upon the agreement of New Zealand); and (**c)** the hypothetical future exchange of notes could not alter the application of Art 24(1) to past tax payments or periods.[45]

16. ***Unjust Enrichment Claims are "property".*** Despite Victoria's initial admission (**PS [14]**), various submissions are now advanced by the Defendants to deny that the Unjust Enrichment Claims are "property" protected by s 51(xxxi). One strand of argument, based on s 96(2) of the Administration Act, has already been addressed at **[7]–[8] above**. Common to these submissions is their tendency to undermine two important constitutional values: ***first***, that s 51(xxxi) extends to "every species of valuable right and interest" (see **PS [13] fn 45**); and ***second***, the "fundamental principle of public law" described at **[5] above**. To uphold these values, this Court should deny the Unjust Enrichment

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39 See **PS [12], [33]** and *Native Title Act Case* (1995) 183 CLR 373, 456, 458-459, 481-482 (Mason CJ Brennan, Deane, Toohey, Gaudron & McHugh JJ).

40 *Cf Haskins* (2011) 244 CLR 22 at [41] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

41 *Yunupingu* [2025] HCA 6 at [68] (Gageler CJ, Gleeson, Jagot & Beech-Jones JJ), [152]–[155] (Gordon J).

42 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 29 (Toohey J), see also 16-17 (Brennan CJ), 36-38 (Gaudron J), 68-73 (Gummow J); *Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane & Gaudron JJ); *Cunningham* (2016) 259 CLR 536 at [46]-[47] (French CJ, Kiefel & Bell JJ), [66] (Gageler J).

43 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ & Deane J).

44 *Cf Yunupingu* [2025] HCA 6 at [55]-[56] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

45 See Juratowitch and McArthur, 'Article 28 of the VCLT: Non-retroactivity of treaties' in Kulick and Waibel (eds) *General International Law in International Investment Law: A Commentary* (2024, Oxford University Press) at 84-85 referring to *The Island of Palmas Case (or Miangas)* (*United States of America v The Netherlands*), Award, PCA (ad hoc), 4 April 1928, (1928) II RIAA 829 ("a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled").

Claims the status of "property" only if they are incapable on their face of legal argument,[46] or alternatively hopelessly defective in a *General Steel* sense.[47]

17. ***Limitation Defences do not denude the Claims of their status.*** Victoria argues that the (contestable) application of a limitation defence denudes some, but not all, of the Claims of their status as "property" (**VS [57], [60]-[62]**). Two key issues which will be in dispute in the Representative Proceeding are: ***(a)*** whether the limitation period in s 20A is capable of being postponed by s 27 of the Limitation Act; and if so ***(b)*** whether the facts support postponement. ***As to the first***, there is considered *dicta* in this Court that s 20A is capable of being postponed[48] and Victoria travels no distance in having this Court rule that the *dicta* is so hopelessly wrong that the possibility of postponement can be ruled out at this stage. If, however, the Court decides to rule on the point finally now, the Plaintiff will contend that this *dicta* is correct. Section 27 provides that the "period of limitation shall not begin to run", such that it relevantly "commences not on the date when the cause of action accrues, but on the date when the claimant discovers, or could with reasonable diligence discover, the mistake".[49] Section 20A(4) does not preclude the application of s 27 because no "order" "extending" the period is required; s 27 postpones and is self-actuating. Application of ss 20A and 27 other than in terms would be productive of impermissible conflict between the provisions.[50] ***As to the second***, whether s 27 in fact applies to the pre-2023 Claims turns on issues not before this Court (**SC [53]**), which Victoria must implicitly concede are to be left for the Federal Court. The balance of the Claims are unaffected by this defence, which is why the Commonwealth correctly acknowledges the unsuitability of this defence being considered at the "property" stage (**CS [42] fn 92**).

18. ***The Commonwealth's impermissible argument.*** This Court should not entertain the Commonwealth's further argument, with the support of Western Australia, that ss 17 and 127 of the Administration Act denude the Unjust Enrichment Claims of the status of "property" (**CS [43];**

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46 See *Citta Hobart* (2022) 276 CLR 216 at [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward & Gleeson JJ).

47 *General Steel Industries Inc v Cmmr for Railways (NSW)* (1964) 112 CLR 125 at 128–129 (Barwick CJ). This is consistent with *Georgiadis* (1994) 179 CLR 297 at 304 (Mason CJ, Deane and Gaudron JJ) and **VS [57]** ("a claim with no real prospect of success has no value and is not property"). *Haskins* (2011) 244 CLR 22 does not countenance any broader approach (*cf* **CS [42]**). In that case, the Court merely answered the questions posed by the Special Case; [42] of the plurality's reasons is also consistent with the *Citta Hobart* or *General Steel* approach.

48 *ACN 005 057 34* (2017) 261 CLR 509 at [75] (Bell and Gordon JJ): "s 27 of the Limitation Act… applies in relation to a period of limitation prescribed by the Limitation Act – here, relevantly, s 20A".

49 *FII No 2* [2022] AC 1 at [177] (also [195], [213]) (Lords Reed & Hodge, Lords Lloyd-Jones & Hamblen agreeing). *Cf* Limitation Act, ss 23A, 23B, 27K and their analouges: *State of Queensland v Stephenson* (2006) 226 CLR 197 at [9], [11] (Gummow, Hayne & Crennan JJ), [46] (Kirby J).

50 The conflict resolution devices invoked at **VS [61]** are irrelevant because those devices are engaged only where conflict is first identified in the terms of an enactment; they cannot be used manufacture it: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby & Hayne JJ) ; *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at [100] (Kirby J); *BDR21 v Australian Broadcasting Corporation* (2023) 298 FCR 1 at [94]-[97] (the Court) referring to *Price v J F Thompson (Qld) Pty Ltd* (1990) 1 Qd R 278.

WAS [45]).[51] In a proceeding under Pt 27 of the *High Court Rules 2004* (Cth) commenced by Writ of Summons and Statement of Claim, the Defendants were required to plead any fact or matter which they alleged made the Plaintiff's claim not maintainable, and which (if not pleaded specifically) might take the Plaintiff by surprise (r 27.05). The purpose of the pleadings procedure and rules, obviously enough, is to afford procedural fairness and to define the issues for decision.[52] The Commonwealth declined to file any pleading; and Victoria did not by its pleading identify ss 17 and 127 as making the claim unmaintainable.[53] Consequently, the Plaintiff did not address the point in chief, and the Special Case entirely omits reference to it. In what is already a complex (double) matter, under significant time constraints for oral argument, the Court should decline to entertain unpleaded issues.

19. If the Court decides to entertain the unpleaded argument, it should be rejected for two reasons, in summary. ***First,*** textually, ss 17 and 127 do not apply to a purported "assessment" to a constitutionally invalid exaction. The Commonwealth offers no response to the textual analysis at **PS [16]**. The purported "assessment" is not saved by s 17, which in its terms has no application to a situation like the present where there was no valid "provision" imposing the tax, which provision could then be said "not [to have] been complied with". Section 127 likewise has no work to do in respect of a constitutionally invalid exaction. A notice of assessment cannot be "conclusive evidence of the due making of the assessment" to what is (on this hypothesis) an exaction which Parliament never authorised or intended (or could authorise or intend). An assessment cannot be "duly made" where it is unconstitutional and illegal. These conclusions cohere with this Court's recognition in *Futuris* that there are "limits beyond which" ss 17 and 127 "do not reach", namely that these sections operate "only where there has been what answers the statutory description of an 'assessment'."[54] *Futuris* identifies two examples of this general proposition: provisional assessments and conscious maladministration. But these cannot be taken to exhaust the circumstances in which a purported "assessment" does not have legal character as an assessment under the Administration Act.[55] Nothing could be further from the "statutory description of an 'assessment'" than one made in the absence of valid Parliament authority. So to conclude would conform with the established principle that a law with a purported operation in excess of that which the *Constitution* permits is not and never has been an operative law at all – likewise, an executive

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51 The Plaintiff wrote to the Commonwealth on 7 April 2025 objecting to the Commonwealth's further argument (**annexed** to these submissions).

52 *Dare v Pulham* (1982) 148 CLR 658 at 664 (the Court).

53 Victoria's Amended Defence at **SCB 22ff** (esp **[17]**) and **SC [53]**. On 20 September 2024, the Commonwealth "inform[ed the Plaintiff] that [it did] not intend to file a defence, but reserve[d] its right to do so in the event that the parties do not agree a draft special case or a special case is not ultimately referred to the Full Court".

54 *Futuris* (2008) 237 CLR 146 at [25] (Gummow, Hayne, Heydon & Crennan JJ), [134]-[140] (Kirby J).

55 Nor does anything in the other lower court decisions cited at **CS [43]**; to the contrary, *Buzadzic* (2019) 348 FLR 213 at [101], [110]-[111] (Kyrou, McLeish & Niall JJA) did not treat the *Futuris* examples as covering the field.

act dependent upon such a "pretended law", like the 'assessments' of LTS, is not and never has been an act in law.[56] Constitutional values compel this conclusion: see **[6] above**.

20. ***Second***, ss 17 and 127 of the VTA Act, in their asserted operation, are inoperative by force of s 109 and/or not applied by s 79(1) of the *Judiciary Act*. Sections 17 & 127 would be inoperative by force of s 109 because their effect would otherwise be to validate (or render immune from challenge) the liability or duty to pay constitutionally invalid LTS, and thereby to impair, alter or detract from the operation of the Art 24(1) immunity.[57] They would fail for the same reason as the provisions struck down in *Antill Ranger*[58] and *Antill Ranger PC*,[59] affirmed in *Mutual Pools*[60] and *BAT*.[61] It is not only the law imposing LTS which is inoperative but also "any consequential law that seeks to validate conduct that occurred under the first law".[62] Section 127 cannot be picked up without s 17 because their operation is inextricably linked.[63]

C. Question 2: *Metwally* – controlling the operation of s 109

21. ***Metwally does not arise and should not be reopened.*** If s 5(3) with cl 2 of Sch 1 is invalid by force of s 51(xxxi), then the *Metwally* issue cannot arise. This is because s 109 can only be engaged (or disengaged) by a valid Commonwealth law (**PS [27]**). For this reason, it is essential to consider s 51(xxxi) first: **Part B above**. If s 5(3) is otherwise valid in its backward looking operation, then *Metwally* would mean that it is ineffective to disengage s 109. Issue is joined relatively clearly as to this (**PS [27]-[31]; CS [31]-[36]**). The Plaintiff adopts **VS [7]**, **QS [23]** and **SAS [5.2]** as to why the Commonwealth should be refused leave to reopen *Metwally* and otherwise adopts **SAS [12]-[15]** and **GG-ReplyS [24]-[25]**.

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56 *First Uniform Tax Case* (1942) 65 CLR 373 at 408 (Latham CJ); *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* (1956) 94 CLR 177 (PC) (***Antill Ranger PC***) at 180 (the Board); *Second Uniform Tax Case* (1957) 99 CLR 575 at 637 (Willams J); *Metwally* (1984) 158 CLR 447 at 473 (Brennan J); *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [58]-[59] (Kirby J); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [51] (Gaudron & Gummow JJ). Also **PS [16] fn 58**.

57 In that way, it is directly inconsistent with s 5(1) and Art 24(1): *Outback Ballooning* (2019) 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [72] (Gageler J); *New South Wales v The Commonwealth* (1983) 151 CLR 302 at 330 (Mason J).

58 (1955) 93 CLR 83 at 102-103 (Fullagar J) ("If the unlawfulness of the exaction depended upon State law, the State could, of course, by statute make the exaction retrospectively lawful, or abolish the common law remedy in respect of the exaction. But the unlawfulness of the exaction does not depend upon State law. It depends on the *Constitution*. No State law can make lawful, either prospectively or retrospectively, that which the *Constitution* says is unlawful.")

59 (1956) 94 CLR 177 (PC) at 180 (the Board).

60 (1994) 179 CLR 155 at 166-167 (Mason CJ, Brennan J agreeing), 182-183 (Deane & Gaudron JJ), 204 (Dawson & Toohey JJ) and 209 (McHugh J), their Honours contrasting *Werrin* (1938) 59 CLR 150 in which the "the payment was made under a valid taxing statute which, on its true construction, did not impose tax on the plaintiff in respect of the relevant transactions of sale".

61 (2003) 217 CLR 30 at [19]-[22] (Gleeson CJ), [42] (McHugh, Gummow & Hayne JJ). Also *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633 at 650 (Webb J), 659-660 (Fullagar J); *Amax Potash Ltd v Saskatchewan* [1977] 2 SCR 576 at 590-592.

62 *Coleman v Power* (2004) 220 CLR 1, [42] (McHugh J).

63 As to the inextricable relationship: *Futuris* (2008) 237 CLR 146 at [67] (Gummow, Hayne, Heydon & Crennan JJ). As to the consequences: *Bell Group* (2016) 260 CLR 500 at [70]-[72] (French CJ, Kiefel, Bell, Keane, Nettle & Gordon JJ) (s 109); *Solomons* (2002) 211 CLR 119 at [19]-[29] (Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ) and *Putland v R* (2004) 218 CLR 174 at [36]-[37] (Gummow & Heydon JJ) (s 79). Compare *BAT* (2003) 217 CLR 30 at [22] (Gleeson CJ), [52]–[56] (McHugh, Gummow & Hayne JJ), dealing with ss 5 and 6 of the *Crown Suits Act 1947* (WA).

D. Question 4: Section 109 inconsistency between Article 24(1) and s 106A

22. ***Order of analysis***. Question 4 cannot be reached without first determining that s 5(3) with cl 2 of Sch 1 is either constitutionally invalid (for non-compliance with s 51(xxxi)), or ineffective (because of *Metwally*) (***cf*, eg, CS [6])**. Without first determining Question 3, and (if necessary) Question 2 (see **[21] above**), Question 4 would be purely academic or hypothetical[64]: s 106A(1)(d) of the Land Tax Act adopts as a criterion of operation the very s 109 inconsistency which, if it is valid and effective, s 5(3) would reach back in time to remove (see **CS [7]**).

23. ***Summary*. (1)** Section 106A, in seeking to reach back in time and impose a fresh obligation on the Plaintiff to pay the very same tax, for the very same period, as an obligation arising at the very same past point in time, is inoperative under s 109 by reason of inconsistency with Art 24(1). **(2)** This conclusion follows whether s 106A is classified as retroactive or retrospective, albeit the better view is that it is retroactive. **(3)** The Defendants' notion that cl 2 of Sch 1 can be "severed" (**VS [35], [38]**) or "read down or disapplied, [but] not severed" (**CS [46]**) so as to permit the rest of the amendment to allow s 106A a "prospective, yet retrospective" operation that escapes s 109 misstates the nature of severance but, even if accepted, would see the Commonwealth amendment fail under s 51(xxxi).

24. ***(1[a]) Art 24(1) immunity 'subsists' prior to 8 April 2024.*** Question 4 arises on the basis that there is a substantive immunity conferred by Commonwealth law on the Plaintiff in respect of taxes and tax periods prior to 8 April 2024. That is either because, under Question 3, cl 2 of Sch 1 of the amendment is invalid under s 51(xxxi); or, under Question 2, cl 2 of Sch 1 is inoperative to overcome a past operation of s 109.

25. With that substantive immunity in place, s 109 will operate to render s 106A inoperative insofar as s 106A purports to impose tax upon or with reference to the period prior to 8 April 2024 protected by the immunity. This conclusion follows regardless of whether s 106A is classified as retroactive or retrospective. The situation is analogous to the New Zealand Convention coming to an end on 8 April 2024 by termination.[65]

26. The question whether s 106A of the Land Tax Act is inconsistent under s 109 with the subsisting immunity prior to 8 April 2024 must be answered as a matter of substance (rather than casuistry) having regard to the operation and effect of the relevant laws.[66] The Defendants' reliance on the

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64 See, eg, *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 278 CLR 512 at [35], [42] (Kiefel CJ, Gordon & Steward JJ), [141] (Gleeson J); *Mellifont v AG (Qld)* (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron & McHugh JJ).

65 Article 31 of the Convention makes plain that in this event the Convention continues to apply with respect to taxes paid prior to termination and tax periods prior to termination. This would, in any event, be the effect of the usual international law principle against retroactivity referred to at **[16] above**.

66 *Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [32], [34] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ); *Native Title Act Case* (1995) 183 CLR 373 at 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

metaphor of "clearing the way" impermissibly avoids the necessary analysis (***cf*** **CS [27], [28], [30]; VS [6], [25], [29], [32]-[34], [39]; NSWS [3], [12], [18]; WAS [6]-[7], [19]-[20], [47]**).

27. ***(1[b]) Section 106A collides with the subsisting Art 24(1) immunity.*** Section 106A purports to impose a tax in and for the past, acting only upon past events, and which is deemed to have been payable in the past. Thus, s 106A provides that liability for LTS is "taken to have always arisen"; LTS is "taken always to have been payable"; LTS is "taken to have always been the same amount"; rights and liabilities in relation to LTS are "taken to… have always been" as if validly imposed; and acts or things in relation to LTS are "taken to… have always had" the same force and effect (**PS [11], [34]**). As the Victorian Parliament was told, it "impose[s]… land tax upon the same person and events, at the same time and in the same amount" as the invalid tax.[67] There is no difference in substance between s 106A and the invalid exaction.[68] In the language of Art 24(1), it is either a "more burdensome" land tax by quantum, or it is a different tax which is "other" than that which is imposed on residents: **[2]** above. Either way, s 106A directly collides with that subsisting immunity for taxes and tax periods prior to 8 April 2024.

28. To seize on s 106A as first commanding that the tax be paid in December 2024 (**CS [15]; VS [42]**) is to fail to grapple with the full effect of s 106A in context. The tax is imposed, payable and to be paid in and with reference to the precise period for which the Plaintiff has a subsisting immunity. If the Plaintiff is immune from a discriminatory tax on particular activities on Monday, he cannot be subjected to a substantially identical discriminatory tax *on* Tuesday *with respect to* his activities on Monday, because that would undermine the substance of the immunity. So much is even clearer where (as here) the tax is said to have been imposed, payable and to be paid on Monday.

29. ***(2[a]) Section 106A is retroactive.*** If classifications matter, the Defendants and intervenors are wrong to say that s 106A is retrospective instead of retroactive (**CS [8], [28]-[30], [46]; VS [40]-[47]; NSWS [5]-[22]; WAS [13]-[20], [49]-[49]).** Section 106A "deems the law at the time of a past event to have been as [it] provide[s]…, where the law at the time of the event was actually something different".[69] Commencement in the past is not the only way a law may be retroactive (***cf*** **VS [42]**).[70] Deeming of the kind deployed by s 106A is "a shorthand associated with retroactive

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67 Explanatory Memorandum to State Amendment Act at 26.

68 That is confirmed by s 135A of the Administration Act, which seeks to validate the purported "assessments" levied in the past for invalid LTS by providing that those purported "assessments" are "taken to have always been" assessments in respect of land tax imposed under s 106A: **PS [11], [14], fn 52**. Despite its amended defence, Victoria appears no longer to press any point based on s 135A.

69 Juratowitch at 6. The authorities cited at **CS [29] fn 53** and **VS [26] fn 21** do not speak to whether a law is properly characterised, in today's language, as "retroactive" or "retrospective": see, centrally, *Nelungaloo* (1948) 75 CLR 495 at 579-580; *Humby* (1973) 129 CLR 231 at 240-243; *Re Macks* (2000) 204 CLR 158 at [31], [81]-[82], [208], [353]-[355]. In any case, in today's language, the laws in *Nelugaloo* and *Humby* are retroactive.

70 See *R v Marshall* [1986] VR 19 at 24 (Brooking J, Murphy & Southwell JJ agreeing), noting that his Honour's references to "retrospectivity" would in today's language be to "retroactivity".

laws", because it serves to "state the effect" of the law as in the past.[71] That "shorthand" is the device by which s 106A "operates backwards" and "changes the law from what it was".[72] Dr Juratowitch specifically discussed the application of the trichotomy to retroactive taxes in expressing a point of disagreement with Lon Fuller. Juratowitch explained that the retroactive classification will be appropriate where the "command to pay" and its trappings, albeit notionally expressed in the present, are "stated to" arise in the past. He cites Fuller's example of a "tax law first enacted, let us say, in 1963 imposing a tax on financial gains realised in 1960 at a time when such gains were not yet subject to tax". Juratowitch explains that this is a retroactive law, for "it would be artificial to sever the legislative command of liability (which is deemed by the law to have accrued at an earlier time) from the legislative command to pay (which [in Fuller's example] arises at the time that it is imposed)".[73] Section 106A is more blatant even than Fuller's example: it is not just that LTS is being imposed for the first time for the past and payable in the past: it is being imposed in direct contradiction of the legal command operative in and for the past period that Victoria's attempt to impose such a tax offended the *Constitution* and generated a right to restitution of monies paid under the invalid command.

30. ***(2[b]) Section 106A would impair or detract from the immunity even if retrospective.*** Although the trichotomy is analytically helpful in some contexts, s 109 does not pivot upon such distinctions,[74] and is not to be imprisoned within a formal abstract dilemma. To tax someone on Tuesday with respect to their activities on Monday would just as much impair or detract from their immunity for Monday as if the tax was imposed on Monday; all the more so when civil and criminal consequences are said to flow from the Monday.[75] Section 106A would "in its operation and effect [] undermine the Commonwealth law"[76] by reimposing, through the simple device of a "retrospective law", substantially the same obligations forbidden by Art 24(1). Even if labelled as retrospective, s 106A attaches "new legal consequences to facts or events which occurred before its enactment",[77] which

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71 Juratowitch at 15 referring to *Hunter Douglas Australia v Perma Blinds* (1970) 122 CLR 49 at 65 (Windeyer J). See *Coleman v Shell Co of Australia* (1943) 45 SR (NSW) 27 at 30-31 (Jordan CJ, Davidson & Halse Rogers JJ agreeing) approving *West v Gwynne* [1911] 2 Ch 1 at 11-12 (Buckley LJ) ("the words 'retrospective' and 'retroactive' have been repeatedly used, and the question has been stated to be whether s. 3 of the *Conveyancing Act, 1892* , is retrospective. To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective… If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective" (ie, in today's language, retroactive)). Also *Metwally* (1984) 158 CLR 447 at 478 (Deane J).

72 *Stephens* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman & Gleeson JJ).

73 Juratowitch at 16-17 referring to Lon Fuller, *The Morality of Law* (1969, Yale University Press) at 59. As Juratowitch continued: "a tax law, commencing in 2008 to apply to transactions occurring in 1998 so as, in 2008, to create tax liability deemed to have accrued at the time of the transactions and payable, for the first time, in 2008. That would be retroactive."

74 See, eg, *Outback Ballooning* (2019) 266 CLR 428 at [105] (Edelman J).

75 Interest would run in respect of LTS from the past (Administration Act, Pt 5 Div 1); penalty tax would be imposed on failure to pay LTS in the past (Administration Act, Pt 5 Div 2) and, remarkably, criminal liability would be imposed on acts or omissions in the past — including any omission to lodge s 104B Documents (Administration Act, Pt 8).

76 *Outback Ballooning* (2019) 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ).

77 Juratowitch at 6 referring to Driedger 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264 at 268-9 and *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 at [39].

facts or events continue to be immunised against those very legal consequences by s 5(1), Art 24(1) and 109 (**[24]-[25] above**). As Dixon CJ put it in the *Second Uniform Tax Case*,[78] in relation to competing federal and state taxes on income, "by virtue of s 109 of the *Constitution* any State law which assumed to place upon [a taxpayer] a duty to pay State income tax irrespective of his prior payment of his federal tax for the same year of income would be void *pro tanto*" and "[w]hether a State could escape inconsistency with s 221(1)(a) by imposing an income tax otherwise than upon a 'year of income' may be doubted". In each case, the date the State command to pay was given does not matter because s 109 looks to the substance.

31. ***(3) 'Prospective/retrospective' operation of s 5(3) goes nowhere.*** The Defendants contend that, after cl 2 of Sch 1 is severed, s 5(3) has a prospective operation on and from 8 April 2024, by way of exposing taxpayers to any State law after 8 April 2024 retrospectively exacting tax even in respect of past periods protected by the immunity (***cf* CS [8], [29]-[30], [46]; VS [36]-[38]**). The contention fails for three reasons. *First*, the subsisting "immunity" in relation to past tax periods is not so flimsy (**[28], [30] above**). Unless that immunity is modified by a valid law, which it is not, the inconsistency with s 106A will persist.[79] *Second*, once cl 2 of Sch 1 is severed, s 5(3) is properly construed as operating only in respect of taxes payable on or after 8 April 2024 or in respect of tax periods ending after that date.[80] *Third*, even if s 5(3) has the operation contended for by the Commonwealth, then in that operation s 5(3) would be a "law with respect to the acquisition of property". Section 51(xxxi) is a "constitutional guarantee" that is concerned with substance, not form.[81] While the better view is that s 5(3) in this respect would be retroactive, the distinction between retroactive and retrospective laws cannot determine the operation of s 51(xxxi).[82] A Commonwealth law which validates or authorises future State laws that reach back in time to extinguish vested rights against the States is one with respect to the acquisition of property (**[13] above**). That is why ss 7(3) and 19(1) the Native Title Act permit the States to validate their discriminatory "past acts" — whether this validation is labelled retrospective or retroactive

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78 (1957) 99 CLR 575 at 613.

79 That is why the proviso to *Metwally*, which the Defendants seek to invoke, requires the passage by both Parliaments of valid "retrospective" laws: (1984) 158 CLR 447 at 469 (Murphy J) ("both Parliaments can legislate retrospectively"), 480 (Deane J) ("in combination, to legislate retrospectively").

80 That is the natural reading of s 5(3) having regard to the (invalid) enactment of cl 2 of Sch 1. It is also what would otherwise be suggested by the presumption against both retroactivity and retrospectivity (see *Stephens* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman & Gleeson JJ)), and the related presumption against interference with vested rights or immunities: see *Acts Interpretation Act 1901* (Cth), s 7(2)(c) and, eg, *Registered Organisations Cmmr v Australian Workers Union* (2020) 281 FCR 518 at [217] (Besanko J, Allsop CJ & White J agreeing).

81 *Clunies-Ross* (1984) 155 CLR 193 at 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane & Dawson JJ); *Cunningham* (2016) 259 CLR 536 at [59] (Gageler J); *Yunupingu* [2025] HCA 6 at [128] (Gordon J).

82 What is material is that both retroactive and retrospective laws are capable of defeating existing rights: *Stephens* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman & Gleeson JJ).

(***cf* VS [37]**) — only if "just terms" compensation is provided by the States in accordance with ss 20 and 51 (**PS [33]; fn 35 above**).[83]

E. Entitlement to relief

32. ***Relief should issue if s 5(3) with cl 2 of Sch 1 and s 106A are invalid or inoperative (cf* [VS [9], [64]-[67]).** The Plaintiff has properly invoked this Court's original jurisdiction to seek declarations as to the constitutional validity of the amendment and of s 106A.[84] Victoria has identified no precedent for the discretionary refusal of a declaration of constitutional invalidity in like circumstances.[85] In any case, its argument for discretionary refusal of relief is unsound. *First*, it must fail if the objections regime is found to be inapplicable or non-exclusive as a step towards invalidity (**PS [15]-[16]; [6]-[7], [19]-[20] above**). *Second*, the objections process is not a "statutory remedy" for constitutional questions; the issues raised are patently unsuited for resolution by the objections process and, given the Commonwealth's position on *Metwally*, could only ever have been determined in this Court (***cf* VS [65]**).[86] *Third*, the declarations sought will have significance not only for the Plaintiff but for the public, the Commonwealth and the States.[87]

17 April 2025

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83 Contrary to **CS fn 54**, the requirement for payment of just terms is not simply the result of a "historic shipwrecks" clause. By s 20(1), it is a condition imposed by the Commonwealth on the States' validation of their discriminatory "past acts".

84 *Unions NSW v New South Wales* (2023) 277 CLR 627 at [17] (Kiefel CJ, Gageler, Gordon, Gleeson & Jagot JJ); *Croome v Tasmania* (1997) 191 CLR 119 at 136–137 (Gaudron, McHugh & Gummow JJ); *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 (Latham CJ).

85 It is not difficult to find cases where declarations as to constitutional validity have been refused because the question is hypothetical or the plaintiff has no real interest, but those are not discretionary points. Further, discretion is less relevant where constitutional questions are raised: *Re Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375 (Mason J).

86 *Dranichnikov v MIMA* (2003) 77 ALJR 1088 at [33] (Gummow & Callinan JJ).

87 By the grant of declarations, "the resolution pursuant to Ch III of the Constitution of the plaintiff's particular controversy acquires a permanent, larger and general dimension": *Pape* (2009) 238 CLR 1 at [158], [273].

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 REPLY SUBMISSIONS OF THE PLAINTIFF

Pursuant to paragraph 1 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 reply 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), 55 109; Ch III	In force at all relevant times.	All relevant times.
Statutory provisions					
2.	*Acts Interpretation Act 1901* (Cth)	Current C2024C00838	Section 7(2)(c)	In force at all relevant times.	All relevant times.
3.	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	Article 24	In force (by s 5(1) of the *International Tax Agreements Act 1953* (Cth)) at all relevant times.	All relevant times.
4.	*Constitution Act 1975* (Vic)	Current Version 225	Section 3; Pt V Div 1	In force at all relevant times.	All relevant times.
5.	*Crown Suits Act 1947* (WA)	9 May 2003 Reprint (not amended after 1996)	Sections 5 and 6	For illustrative purposes.	Version as in force in *BAT* (2003) 217 CLR 30.
6.	*Federal Court of Australia Act 1976* (Cth)	Current C2024C00819	Sections 22, 23, 33Z	In force at all relevant times.	All relevant times.

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
7.	*Imperial Acts Application Act 1980* (Vic)	Current Version 016	Sections 3, 8; Pt II Div 3	In force at all relevant times.	All relevant times.
8.	*International Tax Agreements Act 1953* (Cth)	Current C1953A00082	Section 5	Following amendment by Impugned Commonwealth Act.	From 8 April 2024, subject to retroactivity of s 5(3).
9.	*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.
10.	*High Court Rules 2004* (Cth)	Current Statutory Rules No. 304, 2004	Pt 27	In force at all relevant times.	All relevant times.
11.	*Judiciary Act 1903* (Cth)	Current C2024C00864	Sections 79	No material difference.	All relevant times.
12.	*Land Tax Act 2005* (Vic)	Current Version 081	Sections 104B, 106A	No material difference, save insertion of s 106A.	All relevant times, subject to retroactivity of s 106A.
13.	*Limitation of Actions Act 1958* (Vic)	Current Version 110	Sections 20A, 23A, 23B, 27K and 27	No material difference.	All relevant times.
14.	*Native Title Act 1993* (Cth)	Current C2024C00224	Sections 7, 11 19	For illustrative purposes.	All relevant times.
15.	*Racial Discrimination Act 1975* (Cth)	Current C2022C00366	Sections 9, 10	For illustrative purposes.	All relevant times.
16.	*State Taxation Further Amendment Act 2024* (Vic)	As enacted 50/2024	Sections 42, 54	Impugned Victorian Amendment Act.	From enactment, subject to retroactivity.
17.	*Taxation Administration Act 1997* (Vic)	Current Version 088	Section 17, Pt 5 Pt 8, ss 96, 127, 135A	No material difference, other than insertion of s 135A.	All relevant times, subject to retroactivity of s 135A.
18.	*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.

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7 April 2025

Ms Brigid McManus
Senior Lawyer
Australian Government Solicitor
Level 10, 60 Martin Place
SYDNEY NSW 2000

BY EMAIL brigid.mcmanus@ags.gov.au

Dear Ms McManus

Reliance on ss 17, 27 of the Taxation Administration Act 1997 (Vic) (Administration Act)

1 We refer to the above matter (in which we act for the plaintiff, Mr Stott) and the submissions filed by the Commonwealth on 24 March 2025 (**CS**).

2 At **CS [43]**, the Commonwealth relies on ss 17 and 127 of the Victorian Administration Act in support of its submission that Mr Stott had no 'property' protected by s 51(xxxi) of the Constitution, because the land tax assessments are conclusive evidence that the (unconstitutional) land tax surcharge (**LTS**) was due and payable to Victoria. At **WAS [45]**, the State of Western Australia adopts **CS [43]**. Neither Victoria nor any of the other intervenors advance the submission based on ss 17 and 127 of the Administration Act.

3 The Commonwealth's argument in reliance on ss 17 and 127 is not within the pleadings or the special case. Our client objects to the argument being raised at this stage of the proceeding, when procedural steps have already been taken on the basis of the issues identified in the pleadings and special case as necessary to be determined by the Full Court — including, perhaps most significantly, the formation of time estimates for the hearing.

4 Our client's primary position is that the Commonwealth should not be permitted to raise the argument based on ss 17 and 127 in these proceedings. The argument should be left to be addressed in the Federal Court proceedings, where it is squarely raised. However, for abundant caution, and under protest, he intends to outline his response to the Commonwealth's argument in his written reply.

5 We will shortly circulate draft further amended notice of constitutional matter in relation to the issues raised by the Commonwealth's reliance on ss 17 and 127.

Issue not within pleadings or special case

6 The Commonwealth declined on 20 September 2024 to file a defence to Mr Stott's statement of claim. The correspondence we received from your office stated:

We are writing to inform you that our client does not intend to file a defence, but reserves its right to do so in the event that the parties do not agree a draft special case or a special case is not ultimately referred to the Full Court.

7 Victoria's original defence filed 11 October 2024 (amended copy at SCB 22):

(a) admitted "that, subject to the operation of s 20A of the *Limitation of Actions Act 1958* (Vic) (**Limitation Act**) upon any of the [Stott's] claims in respect of [Stott's] LTS Payments made before 20 February 2023, [Stott's] LTS claims in the LTS & FPAD Representative Proceeding are vested general law choses in action" ([17](b)); and

(b) denied that the LTS Provisions were s 109 inconsistent with the New Zealand Convention ([32]) by reason of the retroactive/retrospective effect of s 5(3) of the International Tax Agreements Act.

8 No mention was made in our original statement of claim or Victoria's original defence of ss 17 or 127 of the Administration Act.

9 The special case was near finalised prior to the enactment of the Victorian Amendment Act on 28 November 2024. Between 28 November and 1 December 2024, the parties agreed to orders noting the enactment of the new Victorian provisions and providing for the filing of an amended statement of claim by Stott and any amended defences by the defendants (plural).

10 Mr Stott amended his statement of claim (3 December 2024: see SCB 6ff) to impugn the new s 106A of the Land Tax Act: see [34]-[39]. However, [17] of the statement of claim was not amended.

11 Victoria then amended its defence (10 December 2024: SCB 22ff). While the amendments sought to withdraw the earlier admission that Stott had property protected by s 51(xxxi), they did not involve any allegation based on ss 17 or 127 of the Administration Act: see [17] of Victoria's amended defence. They relied only on s 96(2) of the Administration Act and s 20A of the Limitation Act.

12 Again, the Commonwealth filed no defence to the amended statement of claim. No further correspondence was received from your office in this regard.

13 The only substantive addition made to the special case after Victoria filed its amended defence (aside from some back and forth about the precise framing of the questions, none of which refer to ss 17 and 127 of the Administration Act) was [55] (stating that the Victorian Amendment Act commenced on 4 December 2024).

14 The special case ultimately agreed by all parties on 12 December 2024 makes no reference to ss 17 or 127 of Administration Act. Although the pleadings in the Federal Court proceedings are annexed to the special case, it does not follow that all of the issues raised in the Federal Court proceedings are raised in these proceedings. That is obviously not an available reading of the special case, given **(1)** the number and complexity of the issues in the Federal Court proceedings and **(2)** the fact that both Victoria's amended defence and the special case itself identify specific provisions that are said to make the claims in the Federal Court proceedings not maintainable.

15 The amended notice of constitutional matter issued on 17 January 2025 likewise does not refer to ss 17 or 127 of the Administration Act.

16 The upshot is that the first time any party foreshadowed an argument that Mr Stott had no 'property' protected by s 51(xxxi) of the Constitution because of the operation of ss 17 and 127 of the Administration Act was when that argument was made by the Commonwealth at

CS [39]. It is not raised by any of the pleadings and is not explicitly identified in the special case referred to the Full Court or in any notice of constitutional matter issued to date.

Next steps

17 Our client will object at the hearing of these matters to the Commonwealth raising any argument based on ss 17 and 127 of the Administration Act in these proceedings. The issues raised by the argument are complex, as will be apparent from the further notice of constitutional matter. Our client reasonably expected that, if the argument was to be made, it would be foreshadowed by the Commonwealth in the usual way. The Commonwealth not having done so, the issues raised by ss 17 and 127 should be left where they sit on the current pleadings — to be determined in the Federal Court proceedings.

18 Against the possibility that the Commonwealth is permitted to raise the argument, our client will outline his response to the argument in his written reply. Our client will write separately in relation to the page limit and time for filing of his written reply. However, we note that the Commonwealth's decision to rely on an argument that it had not previously pleaded or foreshadowed is one of the matters which explains our client's request for an increase to the usual page limit and an extension of time in which to file it.

19 If it becomes necessary to hold a directions hearing regarding other timetabling issues, including the length of the reply and the oral hearing, we reserve the right to agitate this issue at such a directions hearing.

20 Please contact Kathryn Bertram on (03) 8611 1351 if you would like to discuss this letter.

Yours faithfully,

Johnson Winter Slattery