HIGH COURT OF AUSTRALIA

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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

SECOND DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The questions of law arising in this proceeding for the opinion of the Full Court are recorded in the special case (Special Case Book (**SCB**) 55-56).

PART III: SECTION 78B NOTICE

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

PART IV: MATERIAL FACTS

4. The material facts are recorded in the special case (SCB 40-159).

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PART V: ARGUMENT

A. OVERVIEW

5. In Victoria, ss 7, 8, 35, 104B and cll 4.1 to 4.5 of Sch 1 of the ***Land Tax Act*** *2005* (Vic) impose land tax on "absentee owners" at a higher rate than is imposed on Australian citizens and residents. It is not now in dispute that, prior to 8 April 2024, those provisions were invalid or inoperative in their application to the plaintiff by force of s 109 of the Constitution, because they were inconsistent with s 5(1) of the *International Tax Agreements Act 1953* (Cth) (**ITA Act**).

6. However, on 8 April 2024 the Commonwealth Parliament enacted the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) (**Commonwealth Amendment Act**),
20 which commenced the same day, and on 3 December 2024 the Victorian Parliament enacted the *State Taxation Further Amendment Act 2024* (Vic) (**State Amendment Act**), which relevantly commenced on 4 December 2024. In Victoria's submission, those laws in combination remedy the effect of the past invalidity brought about by s 109, because the Commonwealth law clears the way for the State law to impose new land tax on "absentee owners" in the same amount and circumstances as if the original imposition of land tax had been valid.

7. That is sufficient to dispose of this proceeding. In circumstances where the plaintiff does not seek to re-open *University of Wollongong v* ***Metwally***,[1] and applying the High Court's

[1] (1984) 158 CLR 447.

well-established prudential approach of only deciding constitutional questions where necessary to do justice in the case, it is unnecessary to consider whether *Metwally* should be reopened or whether, if it is overruled, s 51(xxxi) of the Constitution is engaged by the Commonwealth Amendment Act (**Part C**).

8. Alternatively, if the Court considers it necessary to reach such questions, and if *Metwally* is overruled, Victoria submits that the Commonwealth Amendment Act on its own remedies the past invalidating effect of s 109 by removing any historical inconsistency between s 5(1) of the ITA Act and the impugned provisions of the Land Tax Act. Victoria also submits that s 51(xxxi) would not be engaged in such a case (**Part D**).

10 9. On either view, the result is that there is no basis for the grant of the relief sought by the plaintiff. In any event, the Court should, in its discretion, decline to grant the plaintiff relief on the ground that the plaintiff has repeatedly and unjustifiably chosen not to invoke the detailed statutory procedures in the *Taxation* ***Administration Act*** *1997* (Vic) for challenging the imposition of tax in Victoria (**Part E**).

B. LEGISLATIVE SCHEME

B.1 Land Tax Act

10. Under ss 7-8 of the Land Tax Act, land tax is imposed in respect of each year on all owners of taxable land in Victoria. It is assessed by applying the applicable rate of land tax to the total taxable value of the land owned by the taxpayer at midnight on
20 31 December of the immediately preceding year: ss 35 and 36(1).

11. The applicable rate of land tax is set out in Sch 1 of the Land Tax Act: Part 1 of Sch 1 sets out a "general rate"; and Part 4 of Sch 1 sets out a "surcharge rate", which is higher than the general rate. The difference between land tax imposed at the general rate and the surcharge rate can be referred to as the "land tax surcharge" (**LTS**) (SCB 49-50 [39]).

12. The surcharge rate is applicable to land held by "absentee owners". "Absentee owner" is defined in s 3(1) to include all "natural person absentees" who own land. "Natural person absentee" is, in turn, defined in s 3(1) to mean a natural person who: is not an Australian citizen or resident; does not ordinarily reside in Australia; and either (i) "was absent from Australia on 31 December in the year immediately preceding the tax year", or (ii) "in the
30 year immediately preceding the tax year, was absent from Australia for a period of at least 6 months or for periods that when added together equal a period of at least 6 months".

13. The Land Tax Act is administered by the Commissioner of State Revenue in accordance with the Administration Act.

B.2 ITA Act and the New Zealand Convention

14. The ITA Act gives the force of Commonwealth law to certain treaties with respect to taxation entered into by the Commonwealth executive. Section 5(1) relevantly provides that, "[s]ubject to this Act, on and after the date of entry into force of a provision of an agreement mentioned below, the provision has the force of law according to its tenor". The section then sets out a list of "current agreements", one of which is the New Zealand Convention.[2]

10 15. The New Zealand Convention entered into force on 19 March 2010. Article 24(1) of that Convention relevantly provides that "[n]ationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected". The effect of s 5(1) of the ITA Act is that, subject to that Act, Art 24(1) has the force of law according to its tenor.

B.3 Commonwealth Amendment Act

16. On 8 April 2024, the Commonwealth Amendment Act commenced, inserting s 5(3) into the ITA Act. Section 5(3) relevantly states that the operation of a provision of an
20 agreement given the force of law by s 5(1) "is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax, unless expressly provided otherwise in that law".[3]

17. The Commonwealth Amendment Act also expressly addresses the taxes to which the new s 5(3) applies. Clause 2 of Sch 1 of that Act relevantly provides that the insertion of s 5(3) into the ITA Act 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.

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[2] *Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion* [2010] ATS 10 (entered into force 19 March 2010). See also ITA Act, s 3AAA(1) (definition of "New Zealand convention").

[3] The term "Australian tax" is defined in s 3(1) of the ITA Act to mean "income tax imposed by such an Act" or "fringe benefits tax imposed by the *Fringe Benefits Tax Act 1986*".

B.4 State Amendment Act

18. On 4 December 2024, the State Amendment Act relevantly commenced, inserting s 106A into the Land Tax Act. Section 106A relevantly applies if land tax was purportedly imposed at the surcharge rate, on or after 1 January 2018 and before 8 April 2024, and the purported imposition of tax was invalid because of an inconsistency under s 109 of the Constitution between s 5(1) of the ITA Act and the operative taxation provisions of the Land Tax Act: s 106A(1).

19. In broad terms, if s 106A applies, new land tax is imposed in the same amount and on the same person as if the purported land tax had been validly imposed: s 106A(2), (4)-(5). Further, the taxpayer's liability for the new land tax is taken to have arisen, and to have always arisen, at the same time as liability for the purported land tax would have arisen if the purported land tax had been validly imposed: s 106A(3), (6)-(7).

20. The State Amendment Act also inserted s 135A into the Administration Act. In broad terms, s 135A provides that, if s 106A applies, a purported assessment of tax liability made in respect of the invalid imposition of land tax has, and is taken to have always had, the same force and effect as if it were made in respect of new land tax imposed under s 106A: s 135A(2)-(5).

C. THE COMBINED EFFECT OF THE COMMONWEALTH AND STATE AMENDMENT ACTS

C.1 The *Metwally* principle and its limits

21. ***The* Metwally *principle:*** It is well established that when a State law is inconsistent with a Commonwealth law, s 109 of the Constitution resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid or inoperative to the extent of the inconsistency.[4] It is also well established that, subject to presently irrelevant limits, the Commonwealth Parliament can enact laws that have retrospective effect.[5] Nonetheless, in *Metwally*, a majority of this Court held that a retrospective Commonwealth law will not be effective on its own to undo the past invalidating effect of s 109 on an inconsistent State law, and thus cannot give the provisions of the State law

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4 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [29] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

5 *R v Kidman* (1915) 20 CLR 425 at 442-443 (Isaacs J), 450-451, 453-454 (Higgins J), 455-457 (Gavan Duffy and Rich JJ). See also *Mabo v Queensland* (1988) 166 CLR 186 at 211-212 (Brennan, Toohey and Gaudron JJ); ***Mutual Pools*** *& Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 210 (McHugh J).

a valid operation for the period of time prior to the date of the enactment of the retrospective Commonwealth law (the ***Metwally* principle**).[6]

22. That case concerned an amendment to the ***Racial Discrimination Act** 1975* (Cth), which, it was argued, overcame the past application of s 109[7] by providing that the Act "shall be deemed never to have been intended" to exclude or limit the operation of State anti-discrimination laws.[8] By a 4:3 majority,[9] the Court held that the Commonwealth's amendment was ineffective to give the State law a valid operation for the period of time prior to the date of commencement of the amendment.[10]

23. While the majority judges wrote separately, they reasoned substantially to the same effect.
10 Their Honours observed that, when s 109 is engaged, its operation is "automatic", "self-executing", and "immediate".[11] Moreover, the invalidity of the State law that follows is brought about by the Constitution itself, not by a law of the Commonwealth.[12] In those circumstances, the operation of s 109 at a particular point in time is a matter of historical fact and its past operation cannot be excluded later by a retrospective Commonwealth law only.[13] In other words, a retrospective Commonwealth law, on its own, "cannot render valid what s 109 made invalid".[14]

24. ***Limits on the* Metwally *principle:*** There are important limits on the *Metwally* principle, however, as recognised in *Metwally* and later in the ***Native Title Act Case***.[15]

25. In *Metwally*, Murphy and Deane JJ made clear that the *Metwally* principle did not deny
20 the competence of the Commonwealth and State Parliaments each to legislate in such a way that the combined effect of the new laws would "remedy" the past invalidating effect of s 109 on the inconsistent State law. That is because, their Honours found, although the Commonwealth Parliament cannot undo the past invalidating effect of s 109, it can "retrospectively legislate for *itself*"[16] to remove the relevant inconsistency arising from

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6 *Metwally* (1984) 158 CLR 447 at 458 (Gibbs CJ), 469 (Murphy J), 475 (Brennan J), 479 (Deane J).
7 *Viskauskas v Niland* (1983) 153 CLR 280.
8 *Metwally* (1984) 158 CLR 447 at 452-453 (Gibbs CJ).
9 Gibbs CJ, Murphy, Brennan and Deane JJ; Mason, Wilson and Dawson JJ dissenting.
10 *Metwally* (1984) 158 CLR 447 at 458 (Gibbs CJ), 470 (Murphy J), 475 (Brennan J), 479 (Deane J).
11 *Metwally* (1984) 158 CLR 447 at 468 (Murphy J), 474 (Brennan J), 478 (Deane J); see also 457 (Gibbs CJ).
12 *Metwally* (1984) 158 CLR 447 at 455 (Gibbs CJ), 469 (Murphy J), 473 (Brennan J), 478 (Deane J).
13 *Metwally* (1984) 158 CLR 447 at 457-458 (Gibbs CJ), 469 (Murphy J), 474-475 (Brennan J), 478-479 (Deane J).
14 *Metwally* (1984) 158 CLR 447 at 469 (Murphy J).
15 *Western Australia v Commonwealth* (1995) 183 CLR 373.
16 *Metwally* (1984) 158 CLR 447 at 479 (Deane J) (emphasis added).

its law and thereby "clear the way" for the relevant State Parliament to legislate.[17] A State Parliament can then legislate in the same terms and with retrospective effect.[18]

26. In the *Native Title Act Case*, the Court relevantly considered s 19(1) of the ***Native Title Act 1993*** (Cth), which (read with ss 7, 15 and 16) authorised the States and Territories to enact laws that provided that "past acts" attributable to the State or Territory, which would have extinguished or impaired native title but for their inconsistency with the Racial Discrimination Act, "are valid, and are taken always to have been valid".[19] Critically, the joint judgment recognised that the *Metwally* principle did not deny the effect of s 19(1). Section 19(1) modified the operation of the Racial Discrimination Act "only for the
10 future", and thus removed any invalidating inconsistency between the Racial Discrimination Act on the one hand, and a State law enacted in the future in conformity with the requirements of s 19(1) on the other hand.[20] In other words, the Court recognised that once an inconsistency has been removed by the Commonwealth *prospectively*, a State Parliament can enact a new State law to give new legal consequences to past acts or events that were invalid or ineffective at the time they occurred because of the inconsistency.[21]

27. It is important at this juncture to be clear about the senses in which the terms "retrospective" and "retroactive" are used in relation to legislation. A "retroactive" law is one that "operat[es] backwards", having effect as if it had commenced on an earlier date.[22] In contrast, a law may be described as "retrospective" in an "extended" sense if it operates
20 for the future only but imposes new results in respect of past events.[23] While the reasons in *Metwally* described the Commonwealth law in that case as "retrospective", it is clear that it was "retroactive" in the current vernacular, as it deemed the law in the past to have been other than it was. Both retroactive and retrospective laws also typically have a "prospective" operation which changes the law for the future.

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[17] *Metwally* (1984) 158 CLR 447 at 469 (Murphy J), 479 (Deane J).

[18] *Metwally* (1984) 158 CLR 447 at 469 (Murphy J), 480 (Deane J).

[19] *Native Title Act Case* (1995) 183 CLR 373 at 456 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (**joint judgment**)).

[20] *Native Title Act Case* (1995) 183 CLR 373 at 451, 454-455 (joint judgment). See also ***Doyle*** *v Queensland* (2016) 249 FCR 519 at [50]-[51], [57] (the Court).

[21] *Native Title Act Case* (1995) 183 CLR 373 at 451 (joint judgment). See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 242-243 (Stephen J, Menzies and Gibbs JJ agreeing); ***Re Macks****; Ex parte Saint* (2000) 204 CLR 158 at [31] (Gleeson CJ), [81]-[82] (Gaudron J), [110] (McHugh J), [208] (Gummow J), [353]-[355] (Hayne and Callinan JJ).

[22] ***Stephens*** *v The Queen* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman and Gleeson JJ), noting that such laws may be described as "the only 'true' retrospective laws".

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

28. Consistently with *Metwally* and the *Native Title Act Case*, a past s 109 inconsistency can be overcome by a Commonwealth law that is retroactive, retrospective *or* prospective, because any of these will validly clear the way for the State to legislate to give new legal consequences to past events. That is consistent with this Court's recognition that the legislature can overcome past constitutional invalidity that arises other than from a want of legislative power or an irremediable contravention of a constitutional prohibition.[24]

C.2 The Commonwealth Amendment Act "cleared the way"

29. The Commonwealth Amendment Act inserted s 5(3) into the ITA Act, which removed any inconsistency between s 5(1) of the ITA Act and the impugned provisions of the Land Tax Act. Whether the Commonwealth Amendment Act did so retroactively or retrospectively, it is not in dispute that it at least also had a valid prospective operation from its date of commencement. That was sufficient to "clear the way" for the State to legislate in the manner that it did. To explain this submission, it is necessary to address the proper construction of the Commonwealth Amendment Act and its validity.

30. ***Proper construction:*** The relevant effect of s 5(3) (read with s 5(1)) of the ITA Act is that the New Zealand Convention only has legal force "subject to anything inconsistent with the provision contained in a law … of a State … that imposes a tax other than Australian tax, unless expressly provided otherwise in that law". The Land Tax Act is a law of a State that imposes a tax other than "Australian tax"[25] and does not "provide[] otherwise". As such, s 5(3) operates such that Art 24(1) of the New Zealand Convention is *not* given legal force by s 5(1) to the extent that the New Zealand Convention is inconsistent with the Land Tax Act.

31. Ordinarily, it would be presumed that s 5(3) was intended to take effect from the date of its commencement.[26] However, cl 2 of Sch 1 of the Commonwealth Amendment Act expressly provides that s 5(3) applies in relation to taxes payable "on or after 1 January 2018" and tax periods that end "on or after 1 January 2018". The plaintiff submits that cl 2 of Sch 1 purports to give s 5(3) a "retroactive" effect (PS [10]), so that it operates as if it had commenced on 1 January 2018. There may be some doubt about whether s 5(3)

[24] *Mutual Pools* (1994) 179 CLR 155 at 167 (Mason CJ), 175 (Brennan J), 183 (Deane and Gaudron JJ).
[25] Land tax is not income tax or fringe benefits tax: see n 33 above.
[26] *Stephens* (2022) 273 CLR 635 at [31] (Keane, Gordon, Edelman and Gleeson JJ).

is given retroactive (or merely retrospective) effect by cl 2 of Sch 1.[27] But, either way, that does not bear on the ultimate conclusion, for two reasons.

32. *First*, if cl 2 of Sch 1 is construed **retroactively**, either:

(1) applying the *Metwally* principle — the Commonwealth Amendment Act would be ineffective on its own to reverse the past operation of s 109 on the prior State law, but the Act would still be valid and effective to clear the way for the State Parliament to legislate (see [34] below); or

(2) even if *Metwally* is overruled *and* even if (as the plaintiff contends) cl 2 of Sch 1 is invalid by reason of s 51(xxxi) of the Constitution — that clause would be severable, and the remaining prospective operation of the Commonwealth Amendment Act would be valid and effective to clear the way for the State Parliament to legislate (see [35]-[38] below).

33. *Second*, and alternatively, if cl 2 of Sch 1 is construed **retrospectively**, the *Metwally* principle would not be engaged, as there would be no Commonwealth law purporting to, on its own, undo the past invalidating effect of s 109 on an inconsistent State law. But the Commonwealth Amendment Act would still clear the way (see [39] below).

34. ***Validity if cl 2 of Sch 1 is construed retroactively:*** If cl 2 of Sch 1 is construed retroactively, the *Metwally* principle would apply such that cl 2 of Sch 1 would be ineffective to reverse the past operation of s 109 on the impugned provisions of the Land Tax Act, but nonetheless would be valid and effective to clear the way for the State Parliament to legislate. As has been explained, the amendment considered in *Metwally* was retroactive. Although it was ineffective to reverse the past operation of s 109 on the State law,[28] that did not render the amendment invalid.[29] As Deane J put it, the Commonwealth can amend its laws to remove an inconsistency retrospectively,[30] and a new State law enacted *after* that amendment will be measured for s 109 purposes against "subsisting" (ie present) Commonwealth law.[31]

[27] Clause 2 of Sch 1 does not deem s 5(3) to have been the law from a prior date, as in *Metwally*. See also Commonwealth Amendment Act, s 2(1); Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) at 35-36 [3.9]-[3.12].

[28] *Metwally* (1984) 158 CLR 447 at 479 (Deane J); see also 469 (Murphy J).

[29] Contra *Doyle* (2016) 249 FCR 519 at [28] (the Court), though this observation does not, with respect, accurately reflect the majority decision in *Metwally*.

[30] *Metwally* (1984) 158 CLR 447 at 479 (Deane J).

[31] *Metwally* (1984) 158 CLR 447 at 480 (Deane J); see also 469 (Murphy J).

35. Further, even if *Metwally* is overruled *and* even if (as the plaintiff contends) cl 2 of Sch 1 is invalid in its retroactive application to State taxes by reason of s 51(xxxi),[32] cl 2 of Sch 1 would be severable and the Commonwealth Amendment Act would remain valid in its prospective operation (PS [24]).[33] The prospective validity of the Commonwealth Act would, in turn, be sufficient to clear the way for the State Parliament to legislate.

36. The plaintiff does not mount any challenge to the prospective validity of the Commonwealth Amendment Act (PS [24], [34]). To the extent that the plaintiff's position is based on the assumption that the Commonwealth law at issue in the *Native Title Act Case* was (and needed to be) retroactive to clear the way for a State Parliament to legislate (PS [33]), that assumption is misconceived. In the *Native Title Act Case*, the joint reasons proceeded on the very same premise as in *Metwally.* Namely, that the Commonwealth Parliament cannot alone "retrospectively undo" the operation of s 109: it can modify its own laws but, for the purposes of the operation of s 109 on a State law, such modification will apply "only for the future".[34] Their Honours then observed that ss 7 and 19 of the Native Title Act achieved such a modification. Those provisions *prospectively* removed any inconsistency between the Racial Discrimination Act and (relevantly) a State law enacted in the future purporting to extinguish native title.[35] Having done so, any State law enacted thereafter could operate "from that time onwards" to extinguish native title in relation to past acts, unaffected by any invalidating inconsistency.[36]

37. It is true that s 19 of the Native Title Act contemplated the validation of "past acts" attributable to a State. But it is necessary to "differentiate between the variety of ways in which legislation may operate in respect of events which have occurred before its enactment", as "it is not every alteration of past rights which makes a statute retrospective and the forms of retrospectivity are diverse".[37] Critically, the Native Title Act did not purport to alter the law in force in the period between the enactment of the Racial

[32] Of course, if *Metwally* is overruled and cl 2 of Sch 1 is *not* invalid by reason of s 51(xxxi) (see Part D below), s 5(3) would be sufficient on its own to remedy the past invalidating effect of s 109. In that case, the provisions of the State Amendment Act would never be engaged.

[33] See *Acts Interpretation Act 1901* (Cth), s 15A; *Spence v Queensland* (2019) 268 CLR 355 at [87] (Kiefel CJ, Bell, Gageler and Keane JJ). See also ***Clubb*** *v Edwards* (2019) 267 CLR 171 at [415]-[425] (Edelman J).

[34] *Native Title Act Case* (1995) 183 CLR 373 at 451, 455 (joint judgment).

[35] *Native Title Act Case* (1995) 183 CLR 373 at 455 (joint judgment).

[36] Provided it did so consistently with the requirements of the Native Title Act, which introduced a statutory code for native title: *Native Title Act Case* (1995) 183 CLR 373 at 453 (joint judgment).

[37] *Doyle* (2016) 249 FCR 519 at [47]-[48] (the Court).

Discrimination Act in 1975 and the enactment of the Native Title Act in 1993.[38] It was not a law with "retroactive" effect. It simply removed any invalidating inconsistency between the Racial Discrimination Act and any State law that might be "*enacted in the future*" to give new legal consequences to acts undertaken in that period.[39]

38. In much the same way, if the retroactive application of the Commonwealth Amendment Act to State taxes is invalid because of s 51(xxxi) but severable, s 5(3) would not alter the law in force in the period between 2010 (when s 5(1) of the ITA Act gave effect to the New Zealand Convention) and 2024 (when s 5(3) of the ITA Act was enacted). The Commonwealth Amendment Act would simply remove any invalidating inconsistency between s 5(1) and any State law that might be *enacted in the future*.

39. ***Validity if cl 2 of Sch 1 is construed retrospectively:*** Alternatively, if cl 2 of Sch 1 is construed retrospectively,[40] the *Metwally* principle would not be engaged, as there would be no Commonwealth law purporting to undo the past invalidating effect of s 109 on the impugned provisions of the Land Tax Act. In that case, there could be little doubt that the Commonwealth Amendment Act would be effective to clear the way for the State Parliament to legislate.[41] As such, regardless of whether cl 2 of Sch 1 is construed retroactively or retrospectively, the ultimate conclusion is the same: namely, that the Act will have cleared the way for the State Parliament to legislate.

C.3 The State Amendment Act gave new legal consequences to past acts or events

40. In circumstances where the Commonwealth Parliament removed (whether prospectively, retrospectively or retroactively) any invalidating inconsistency between the ITA Act and the Land Tax Act, the State was free to enact a law giving new legal consequences to past acts or events. That is what the State Amendment Act does.

41. ***Proper construction:*** The State Amendment Act inserted s 106A into the Land Tax Act. The relevant effect of s 106A is that if LTS was purportedly imposed on a person between 1 January 2018 and 8 April 2024, and the purported imposition was invalid because of s 109 of the Constitution, new land tax is imposed.[42] The new land tax is imposed on the

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[38] *Native Title Act Case* (1995) 183 CLR 373 at 455 (joint judgment). See also *Doyle* (2016) 249 FCR 519 at [50] (the Court).

[39] *Native Title Act Case* (1995) 183 CLR 373 at 455 (joint judgment) (emphasis in original).

[40] Or if the Commonwealth Amendment Act is held invalid in its retroactive application to State taxes, but cl 2 of Sch 1 is "read down" so as to give it a retrospective operation only: SCB 15 [28(b)], [31(b)].

[41] *Native Title Act Case* (1995) 183 CLR 373 at 451, 455 (joint judgment).

[42] Land Tax Act, s 106A(1)-(2).

same person, and in the same amount, as if LTS had been validly imposed.[43] Further, liability for the new tax is "taken to have arisen, and to have always arisen, at the same time as liability for the purported land tax would have arisen if the purported land tax had been validly imposed".[44]

42. Contrary to PS [11] and [34], the State Amendment Act, properly construed, is not retroactive. It operates for the future only.[45] It is true that the Act "looks backwards", in the sense that it "imposes new results in respect of a past event".[46] That is, in cases where LTS has been purportedly but invalidly imposed (the "past event"), s 106A imposes new land tax and defines a person's liability for the new tax by reference to the past ineffective tax. There is nothing novel in that approach. The State Amendment Act is very similar to the law which gave effect to past court orders made without jurisdiction in *R v Humby; Ex parte Rooney*.[47] Laws of that kind might be understood to be retrospective, but they are not retroactive.[48] They accept the past invalidity and do not purport to deem the law in the past to have been other than it was.

43. ***Validity:*** Because the Commonwealth Amendment Act is valid at least prospectively, and regardless of whether the Commonwealth Amendment Act is also retrospective or retroactive, the State Amendment Act is valid. More specifically, the State Amendment Act is not made invalid or inoperative by force of s 109 of the Constitution, and it does not contravene the *Metwally* principle.

44. *Section 109:* Section 109 has an important temporal dimension. Its application requires an assessment of whether there is an inconsistency between a Commonwealth law and State law at a particular *point in time*. That is why if a State law is inoperative by reason of s 109, and the inconsistency is removed by amendment of the Commonwealth law, the State law will revive for the future.[49] In respect of a retrospective State law, like the State Amendment Act, the validity of the State law falls to be determined by reference to the

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43 Land Tax Act, s 106A(4)-(5).
44 Land Tax Act, s 106A(3). See also s 106A(6)-(7); Administration Act, s 135A.
45 State Amendment Act, s 2(1); Victoria, *Government Gazette*, No S 670 (3 December 2024).
46 *Stephens* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman and Gleeson JJ).
47 (1973) 129 CLR 231 at 243 (Stephen J, Menzies and Gibbs JJ agreeing). See also *Re Macks* (2000) 204 CLR 158 at [15], [25] (Gleeson CJ), [81] (Gaudron J), [111] (McHugh J), [210]-[211] (Gummow J), [354]-[355] (Hayne and Callinan JJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [36]-[37], [53] (French CJ, Crennan and Kiefel JJ), [90], [96]-[97] (Gummow, Hayne and Bell JJ).
48 *Stephens* (2022) 273 CLR 635 at [29] (Keane, Gordon, Edelman and Gleeson JJ).
49 *Metwally* (1984) 158 CLR 447 at 456 (Gibbs CJ), 461-462 (Mason J), 473-474 (Brennan J), 477 (Deane J), 484-485 (Dawson J); *Native Title Act Case* (1995) 183 CLR 373 at 465 (joint judgment).

time it is "in fact on the statute book".[50] At all times since the State Amendment Act has been on the statute book, s 5(3) of the ITA Act has also been in force. As such, at all relevant times, s 5(3) has effectively disapplied s 5(1) of the ITA Act to the extent of any inconsistency with the State Amendment Act. There has therefore never been a "present inconsistency" between the ITA Act and the State Amendment Act that would cause s 109 to apply.[51]

45. *The Metwally principle:* The State Amendment Act also does not contravene the *Metwally* principle. As explained above, the concern to which that principle is addressed is to avoid any attempt to retroactively overcome the invalidating effect of s 109 by a legislative declaration that the truth — the historical fact of a past inconsistency — is other than what it was. The State Amendment Act does not create such a fiction. To the contrary, the Act assumes that there *was* past inconsistency, and then attaches new legal consequences to that historical fact. As noted above, the competence of a State Parliament with plenary legislative power to enact such a law is well established.

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C.4 This issue is dispositive

46. The potential application of s 51(xxxi) of the Constitution does not arise in this proceeding unless *Metwally* is re-opened and overruled. Not only does the plaintiff not contend for the Court to take that step, but doing so would also be contrary to the longstanding prudential approach of this Court only to decide constitutional questions if necessary "to do justice in the given case and to determine the rights of the parties".[52] That approach is entirely orthodox (cf PS [26]), and should be applied here.

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47. In particular, if the above submissions on the combined operation of the Commonwealth and State Amendment Acts are accepted, a declaration to that effect would be sufficient conclusively to "determine the rights of the parties", because it would confirm the plaintiff's liability to the State for the amounts paid as LTS in respect of the 2018 to 2024 land tax years: SCB 49-50 [39].[53] That liability would either have been imposed as originally intended by the impugned provisions of the Land Tax Act or re-imposed as a

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50 *Metwally* (1984) 158 CLR 447 at 480 (Deane J).

51 *Metwally* (1984) 158 CLR 447 at 480 (Deane J)

52 *Knight v Victoria* (2017) 261 CLR 306 at [32]-[33] (the Court); ***ICM Agriculture*** *Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [141] (Hayne, Kiefel and Bell JJ). See also *Tajjour v New South Wales* (2014) 254 CLR 508 at [174] (Gageler J); *Clubb* (2019) 267 CLR 171 at [32]-[36] (Kiefel CJ, Bell and Keane JJ), [144]-[146] (Gageler J), [329]-[330] (Gordon J), [443] (Edelman J); *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216 at [22] (the Court).

53 The plaintiff does not seek any relief in this proceeding in respect of the 2016 or 2017 land tax years (SCB 55-56 [56]).

new tax, albeit with retrospective effect, by the State Amendment Act. The issues of the correctness of *Metwally* and the application of s 51(xxxi) therefore do not arise.

D. THE COMMONWEALTH AMENDMENT ACT IN ISOLATION

48. In the alternative, if the Court considers it necessary to reach this issue and if *Metwally* is overruled, Victoria submits that the Commonwealth Amendment Act is effective *on its own* to retroactively avoid the past invalidating effect of s 109. Section 51(xxxi) of the Constitution is not be engaged.

49. The premise of Part D of these submissions is that s 5(3) of the Commonwealth Amendment Act is given *retroactive* effect by cl 2 of Sch 1. Otherwise, the opportunity
10 to reconsider *Metwally* would not arise.

D.1 Effect of the Commonwealth Amendment Act if *Metwally* is overruled

50. As explained above, the relevant effect of the Commonwealth Amendment Act is to disapply s 5(1) of the ITA Act to the extent of any inconsistency between that law and certain taxation laws. By reason of cl 2 of Sch 1, that disapplication applies to taxes payable "on or after 1 January 2018" and in relation to tax periods that end "on or after 1 January 2018". If *Metwally* is overruled, and the Act is construed as having a retroactive operation, it was effective to remove any inconsistency in the period before its commencement with the consequence that s 109 is not engaged and the State law has a valid operation in that period. As Dawson J explained (in dissent) in *Metwally*:[54]

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> Retrospective repeal cannot change the operation of s 109, but it may change the situation from one upon which s 109 previously operated to one upon which it has ceased to have an operation. ... [I]t is in the nature of a retrospective law that it changes things in the past and if in so doing it removes a past inconsistency then it removes the circumstance upon which s 109 operated and so denies its present application.

D.2 Section 51(xxxi) of the Constitution is not engaged

51. Even if *Metwally* is overruled and the Commonwealth Amendment Act is construed as having a retroactive operation, s 51(xxxi) is not engaged for three reasons. *First*, the Commonwealth Amendment Act is properly characterised as a law with respect to the application (and disapplication) of international tax agreements in respect of certain
30 persons — it is not a law "with respect to" the plaintiff's claims in restitution (see [51]-[54] below). *Second*, in any event, the plaintiff's claims have not been "acquired" in

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[54] *Metwally* (1984) 158 CLR 447 at 485. See also 460-461 (Mason J).

the relevant sense because they were always inherently defeasible (see [55] below). *Third*, the plaintiff's claims are not "property" in the relevant sense because they have no value (see [56]-[62] below).

52. ***The Commonwealth Amendment Act is not a law with respect to the plaintiff's claims*:** The starting premise of the plaintiff's submissions on s 51(xxxi) is that a Commonwealth law that has a consequential effect on a chose in action is a law "with respect to" that chose in action (PS [12], [18]). That premise is misconceived and should be rejected. The Commonwealth Amendment Act is properly characterised as a law with respect to the application (and disapplication) of international tax agreements. Any consequential effect

10 that the Act may have on choses in action is incidental and remote, and does not attract the operation of s 51(xxxi).[55] This is supported by each of the following matters.

53. *The legal and practical operation of the Act:* The Commonwealth Amendment Act must be characterised having regard to its legal and practical operation.[56] As explained, the Act operates to amend the extent to which s 5(1) of the ITA Act gives legal force to Art 24 of the New Zealand Convention. Article 24 concerns the taxation laws to which nationals of "a Contracting State" may be subjected to in "the other Contracting State". Section 5(1) of the ITA Act gave domestic force to Art 24, but only to the extent provided for in that section. Indeed, it is an important corollary of Australia's dualist legal system that the extent to which taxation laws would be *disapplied* in respect of certain persons by s 5(1)

20 has always been a matter for the Commonwealth Parliament.[57] By inserting s 5(3) into the ITA Act, the Commonwealth Amendment Act amended the extent to which Art 24 was given legal force in Australia, and so amended the scope of the *disapplication* of State taxation laws.[58] This may have had a consequential effect on persons who had previously enjoyed a particular "privilege" or "status" by reason of s 5(1) and Art 24. But that is not sufficient to attract the operation of s 51(xxxi).

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[55] See *Mutual Pools* (1994) 179 CLR 155 at 174-175 (Mason CJ), 181 (Brennan J), 191 (Deane and Gaudron JJ); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at [100]-[101] (Gleeson CJ and Kirby J), [345]-[357] (McHugh J), [501] (Gummow J), [519] (Hayne J); *Commonwealth v* ***Yunupingu*** [2025] HCA 6 at [17] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [127] (Gordon J), [373] (Steward J).

[56] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *New South Wales v Commonwealth (WorkChoices Case)* (2006) 229 CLR 1 at [197] (Gleeson CJ, Gummow, Hayne, Heydon and Callinan JJ).

[57] See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at [20] (Kiefel CJ, Keane, Gordon and Steward JJ).

[58] *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613 at [16] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

54. *The subject-matter of taxation:* Relatedly, the Commonwealth Amendment Act's concern with taxation "presupposes the absence of the kind of quid pro quo involved in the 'just terms' prescribed by s 51(xxxi)".[59] Landowners liable to pay tax under the Land Tax Act had no reasonable expectation of any quid pro quo that the Commonwealth Amendment Act possibly could have defeated, which counts against its characterisation as a law with respect to the acquisition of property.[60] The Act also validly enables a "genuine adjustment"[61] of obligations as part of that scheme of taxation[62] by "correct[ing] a defect" and "overcome[ing] [] unintended consequences" in the working of the ITA Act in order to "bring about the position that was thought [] to have existed" and "preserve the
10 integrity"[63] of the taxation system.[64]

55. *The Act does not unilaterally affect choses in action:* Finally, the Commonwealth Amendment Act, *on its own*, has no relevant effect on choses in action. It does not, by its own terms, authorise or effect any extinguishment of the plaintiff's claims, nor lead to any concomitant benefit being acquired by the State. The Commonwealth law merely has the consequence that the impugned provisions of the Land Tax Act are re-enlivened. Any substantive effect on the plaintiff's claims that follows is contingent on those *State* taxation provisions, which are not subject to a "just terms" requirement. Taking these matters together, the Commonwealth Amendment Act is properly characterised as a law with respect to the application (and disapplication) of international tax agreements, not a
20 law with respect to the plaintiff's claims.

56. ***The plaintiff's claims have not been "acquired" for the purposes of s 51(xxxi):*** Even if the Commonwealth Amendment Act is properly characterised as a law with respect to the plaintiff's claims, it does not relevantly "acquire" those claims. Insofar as s 5(1) of the ITA Act gave protection from double taxation, which gave rise to the s 109 inconsistency that the plaintiff relies upon to ground his claims, such protection relevantly arose from the Commonwealth executive entering the New Zealand Convention pursuant to an

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[59] *Mutual Pools* (1994) 179 CLR 155 at 171 (Mason CJ). For the same reason, it has been held that s 51(ii) is not subject to s 51(xxxi): *Mutual Pools* (1994) 179 CLR 155 at 170 (Mason CJ), 178 (Brennan J), 187 (Deane and Gaudron JJ); *Yunupingu* [2025] HCA 6 at [189] (Gordon J).

[60] Cf ***Georgiadis*** *v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306, 308 (Mason CJ, Deane and Gaudron JJ).

[61] *Mutual Pools* (1994) 179 CLR 155 at 172 (Mason CJ), 191 (Deane and Gaudron JJ).

[62] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-237 (Mason CJ, Deane and Gaudron JJ).

[63] *Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ).

[64] See Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) at 35 [3.9].

exercise of an intrinsically discretionary power conferred by s 61 of the Constitution,[65] which in turn gave content to Parliament's power under s 51(xxix) to implement that treaty. That the force given to the international agreements by s 5(1) is qualified by that provision being "[s]ubject to" the ITA Act emphasises the contingent nature of the plaintiff's claims. It follows that those claims, founded on exercises of power susceptible to alteration or extinguishment,[66] are inherently defeasible and no "acquisition" arises.[67] Moreover, at most, the effect of the Commonwealth Amendment Act is only to alter the substantive law applicable to an element of the plaintiff's cause of action. It adversely affected that cause of action, such that it cannot be maintained, but that does not mean 10 that it acquired the cause of action within the meaning of s 51(xxxi).[68]

57. ***The plaintiff's claims are not "property" for the purposes of s 51(xxxi):*** Even if the Commonwealth Amendment Act had some acquisitive effect on the plaintiff's claims, those claims are not "property" for the purposes of s 51(xxxi).[69] Only "valuable" rights and interests are property protected by s 51(xxxi),[70] because only valuable rights can sensibly demand "just terms" compensation.[71] A chose in action in the form of a claim has value only because it carries a prospect of success and recovery. It follows that a claim with no real prospect of success has no value and is not property for the purpose of s 51(xxxi). Looked at another way, such claims cannot attract the just terms guarantee in s 51(xxxi). The plaintiff's claims are of this character because: *First*, the plaintiff's 20 claims, all made outside of the exclusive statutory objection procedure in Part 10 of the Administration Act, cannot be maintained; and *Second*, the plaintiff's claims in respect of any tax paid before 20 February 2023 (**pre-2023 claims**) are barred by s 20A of the

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[65] *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 476 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[66] Either by the executive or the legislature: the withdrawal or alteration by the executive of the scope of Australia's commitment to a treaty may affect the scope of the legislature's power under s 51(xxix).

[67] *Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ), 268 (McHugh); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [196] (Gummow J). Cf *Yunupingu* [2025] HCA 6 at [81] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [145]-[171] (Gordon J), [278]-[321] (Edelman J).

[68] *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ). In this respect, it is of a substantively different character from a law which bars or extinguishes a subsisting cause of action: Cf *Georgiadis* (1994) 179 CLR 297; *Commonwealth v **Mewett*** (1997) 191 CLR 471. See also fn 47 above.

[69] *Mutual Pools* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ); *ICM Agriculture* (2009) 240 CLR 140 at [82] (French CJ, Gummow and Crennan JJ); *Georgiadis* (1994) 179 CLR 297 at 305-306 (Mason CJ, Deane and Gaudron JJ); *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [42] (French CJ), [118] (Gummow J), [169] (Hayne and Bell JJ), [278] (Crennan J).

[70] *Yunupingu* [2025] HCA 6 at [50] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J).

[71] *Mutual Pools* (1994) 179 CLR 155 at 196 (Dawson and Toohey JJ).

Limitation of Actions Act 1958 (Vic) (**Limitations Act**), which could not be extended or postponed.

58. *Part 10 of the Administration Act:* Section 96(2), which is contained in Part 10, provides that "no court or administrative review body … has jurisdiction or power to consider any question concerning an assessment … except as provided by this Part." Part 10 is an *exclusive* procedure by which a taxpayer may dispute an assessment.[72] It "bar[s]" or "preclude[s]" a person from bringing a claim in restitution outside of that process.[73] Such a procedure is familiar in tax legislation, and validly does "no more than limit the remedy, while leaving practically effective redress open to the plaintiff".[74]

10 59. By reason of s 96(2), no court has jurisdiction or power to consider any question concerning the assessments of the plaintiff's LTS liability except under Part 10. Yet, contrary to s 96(2), the plaintiff's restitutionary claims in the Federal Court *do* concern those assessments, and *have* been brought outside of the Part 10 procedure (SCB 52-55 [50]-[53]). The plaintiff's claims are essentially that the Commissioner committed errors when assessing his land tax liability, because the Commissioner ought to have imposed tax in amounts equivalent to the general rate specified in Part 1 of Sch 1, rather than at the surcharge rate specified in Part 4 of Sch 1. If that was an error going to jurisdiction, the assessments were still "made in fact" and so were amenable to objection under Part 10.[75] Contrary to PS [16], the suggestion that *any* assessment made outside of jurisdiction
20 is not an assessment at all, and therefore not subject to Part 10, is not supported by authority,[76] is contrary to the express provisions of the Act that provide that a person is

[72] Part 4 of the Administration Act provides an alternate procedure for obtaining a refund of tax, but that procedure is not available to a taxpayer who, like the plaintiff, claims to be entitled to a refund by reason of the invalidity of a provision of a taxation law: s 18(3).

[73] See *Commissioner of State Revenue (Vic) v* ***ACN 005 057 349*** *Pty Ltd* (2017) 261 CLR 509 at [22], [70]-[74] (Bell and Gordon JJ), in respect of the former s 90AA of the *Land Tax Act 1958* (Vic) (which is the equivalent to Part 4 of the Administration Act). See also *North West Melbourne Recycling Pty Ltd v Commissioner of State Revenue (Vic)* (2017) 106 ATR 891 at [8]-[10] (Croft J).

[74] *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 103 (Fullager J); see also 100 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ).

[75] *ACN 005 057 349* (2017) 261 CLR 509 at [74] (Bell and Gordon JJ); *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at [2] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

[76] The plaintiff cites *Federal Commissioner of Taxation v* ***Futuris*** *Corporation Ltd* (2008) 237 CLR 146 at [25] (Gummow, Hayne, Heydon and Crennan JJ), where their Honours said conscious maladministration of the assessment process "may be said also not to produce an 'assessment' *to which s 175 applies*" (emphasis added). That section provided that the validity of an assessment was not affected by non-compliance with the provisions of the Act. The Court did *not* conclude that an assessment affected by jurisdictional error generally was not an "assessment" at all for the purpose of the statutory objection process in Part IVC of that Act.

liable to pay the assessed amount while an objection is pending,[77] and is nonsensical, because it would remove the availability of the Part 10 pathway for taxpayers who receive invalid assessments. Accordingly, the plaintiff's claims in the Federal Court cannot be maintained and have no value.[78]

60. *Section 20A of the Limitation Act:* A claim that is definitively statute barred has no real prospect of success and so is not "property" for the purposes of s 51(xxxi). That can occur where the claim has been extinguished or where, as here, a limitation period definitively bars the commencement of a proceeding and is incapable of extension.[79] That is the effect of s 20A of the Limitation Act upon the plaintiff's pre-2023 claims. Section 20A(2)
10 provides that "[d]espite anything to the contrary in any other Act", proceedings for the recovery of money paid under an invalid tax "must" be commenced "within 12 months after the date of payment". Section 20A(4) provides that no order can be made "under this or any other Act" enabling or permitting a proceeding to which s 20A(2) applies from being commenced after the expiration of the 12 month period.

61. Contrary to PS [17], no different result follows from s 27 of the Limitation Act. Section 27, which applies generally to postpone the running of a limitation period for an action for fraud or mistake, until the fraud or mistake could have been discovered, does not apply to claims covered by s 20A. To the extent they deal with the same subject matter, s 20A(2) must prevail over s 27 as the more recently enacted and specific
20 provision dealing exclusively with payment of an invalid tax.[80] Were it otherwise, the entire operation of s 20A would be subsumed within the general postponement provided in s 27, rendering s 20A otiose,[81] and conflicting with the express intention of Parliament that the limitation period in s 20A "cannot be extended".[82]

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77 Administration Act, s 104.

78 *Haskins v The Commonwealth* (2011) 244 CLR 22 at [64]-[68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)

79 *Mewett* (1997) 191 CLR 471 at 535 (Gummow and Kirby JJ, Brennan J agreeing). It was implicit in Gummow and Kirby JJ's reasoning that a statute-barred but subsisting cause of action was still "valuable" because it had not yet been pleaded in a defence and could be subject to an extension of time.

80 Section 20A was inserted by the *Limitation of Actions (Recovery of Imposts) Act 1961* (Vic), was replaced by s 4 of the *Limitation of Actions (Amendment) Act 1993* (Vic), and amended by the *Limitation of Actions (Amendment) Act 2004* (Vic). See generally Explanatory Memorandum, Limitation of Actions (Amendment) Bill 2004 at 1-2. Section 27 has been in the Act since it was originally enacted in 1958.

81 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).

82 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 October 1993, 1207 (Mr Stockdale, Treasurer). The contrary observations of Bell and Gordon JJ in *ACN 005 057 349* (2017) 261 CLR 509 at [75] were obiter, and in any event did not directly consider the interaction between ss 20A and 27 of the Limitation Act.

62. Once it is understood that s 20A(2) is incapable of extension or postponement, it is readily distinguishable from the statute-barred claims considered in *Commonwealth v Mewett.* There, the relevant limitation periods operated to extinguish the claim, subject to a right of the plaintiff to apply for an extension of time which would "revive" those claims, requiring evidence of when the applicant became aware of their injuries, and an exercise of the court's discretion that it was just and reasonable to extend time.[83] That *prospect* of a successful revival was sufficient to preserve the claims' status as property because, until the court's discretion was exercised and the application determined, it was "not possible to say with certainty" that the action had been extinguished.[84] In contrast, the plaintiff's
10 pre-2023 claims are barred by the operation of s 20A itself: no exercise of discretion or factual inquiry is required or permitted.

63. *Part 10 and s 20A apply in federal jurisdiction:* Both s 20A of the Limitation Act and s 96(2) of the Administration Act conclusively removed, by operation of law, the plaintiff's prospects of obtaining any relief in restitution. Not being provisions that destroy or extinguish an underlying cause of action itself, they operate to regulate the exercise of jurisdiction, and so are picked up and applied as Commonwealth laws in federal jurisdiction by s 79 of the *Judiciary Act*.[85] The suggestion at PS [15] that the State was purporting to deny the jurisdiction of the Federal Court is misplaced.

E. RELIEF

20 64. For these reasons, the questions should be answered as follows: (1) "Yes"; (2) and (3) "Unnecessary to answer"; (4) "No"; (5) "None"; and (6) "The plaintiff".

65. In any event, if, contrary to Victoria's submissions, the Court otherwise would be inclined to grant the plaintiff declaratory relief, it should decline to do so in this case. That is because the usual discretionary considerations attending the grant of equitable remedies also apply to declarations in public law cases.[86] The consequence is that, as a matter of

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83 *Mewett* (1997) 191 CLR 471 at 508 (Dawson J).

84 *Mewett* (1997) 191 CLR 471 at 517 (Toohey J), 533 (McHugh J); see also 509 (Dawson J), 530 (Gaudron J).

85 Sections 79(2)-(4) were inserted in response to *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 to resolve any inconsistency between a State limitation provision and s 64 of the Judiciary Act: Explanatory Memorandum, Judiciary Amendment Bill 2008 (Cth) at 3-4 [5]-[11]. See also *Rizeq v Western Australia* (2017) 262 CLR 1 at [201]-[202] (Edelman J).

86 *Futuris* (2008) 237 CLR 146 at [48] (Gummow, Hayne, Heydon and Crennan JJ), citing *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [58] (Gaudron J).

discretion, relief under ss 75 and 76 of the Constitution "may be (and often will be) withheld" where there is another, statutory remedy available.[87]

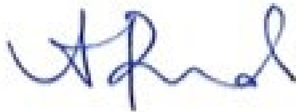
66. As explained above, the plaintiff's claims essentially involve a challenge to the correctness of assessments of his LTS liability made by the Commissioner. However, the plaintiff has never sought to invoke the procedure for objecting to assessments in Part 10 of the Administration Act: see [58]-[59] above. Instead, he has brought two overlapping, collateral proceedings: a representative proceeding in the Federal Court seeking declaratory and restitutionary relief (SCB 52-55 [50]-[53]); and, without discontinuing the first proceeding, this proceeding in the High Court's original jurisdiction seeking
10 declaratory relief in substantially the same form (SCB 6-21).

67. Such tactics should not be encouraged. In circumstances where the statutory procedure under Part 10 is available and has not been invoked, this Court should, at its discretion, decline to grant the plaintiff any relief.

PART VI: ESTIMATE OF TIME

68. It is estimated that Victoria will require approximately 1.25 hours for oral submissions.

Dated: 24 March 2025



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[87] *Futuris* (2008) 237 CLR 146 at [10] (Gummow, Hayne, Heydon and Crennan JJ). See also *Redland City Council v Kozik* (2024) 98 ALJR 544 at [151] (Gordon, Edelman and Steward JJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

FRANCIS STOTT
Plaintiff

and

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THE COMMONWEALTH OF AUSTRALIA
First Defendant

THE STATE OF VICTORIA
Second Defendant

ANNEXURE TO THE SECOND DEFENDANT'S SUBMISSIONS

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Pursuant to paragraph 4 of *Practice Direction No 1 of 2024*, the Second Defendant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provisions	Reason for providing version	Applicable date(s)
Constitutional provisions					
1.	Commonwealth *Constitution*	Current	Sections 51(ii), 51(xxix), 51(xxxi), 109, 75, 76	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.	*Income Tax Assessment Act 1936* (Cth)	Current C2025C00014	Part IVC	For illustrative purposes.	All relevant times.
4.	*International Tax Agreements Act 1953* (Cth)	Current C2024C00814	Sections 3, 3AAA, 5	Version includes s 5(3).	From 8 April 2024.
5.	*Judiciary Act 1903* (Cth)	Current C2024C00864	Section 79	In force at all relevant times.	All relevant times.

No	Description	Version	Provisions	Reason for providing version	Applicable date(s)
6.	*Land Tax Act 1958* (Vic)	Last before repeal 131	Section 90AA	For illustrative purposes.	All relevant times.
7.	*Land Tax Act 2005* (Vic)	Current 081	Sections 3, 7, 8, 35, 36, 104B, s 106A, Sch 1	Version includes s 106A.	From 4 November 2024 onwards.
8.	*Limitation of Actions Act 1958* (Vic)	Current 110	Sections 20A, 27	In force at all relevant times.	All relevant times.
9.	*Limitation of Actions (Recovery of Imposts) Act 1961* (Vic)	As enacted 6845/1964	Section 2	For illustrative purposes.	All relevant times.
10.	*Limitation of Actions (Amendment) Act 1993* (Vic)	As enacted 102/1993	Section 4	For illustrative purposes.	All relevant times.
11.	*Limitation of Actions (Amendment) Act 2004* (Vic)	As enacted 8/2004	Section 3	For illustrative purposes.	All relevant times.
12.	*Native Title Act 1993* (Cth)	Current C2024C00224	Sections 7, 15, 16, 19	For illustrative purposes.	All relevant times.
13.	*Racial Discrimination Act 1975* (Cth)	Current C2022C00366	Section 6A	For illustrative purposes.	All relevant times.
14.	*State Taxation Further Amendment Act 2024* (Vic)	As enacted 50/2024	Sections 2, 42, 54	Inserted s 106A into the Land Tax Act and s 135A into the Administration Act.	All relevant times.
15.	*Taxation Administration Act 1997* (Vic)	Current 088	Sections 18, 96, 104, 135A	No material difference, save for insertion of s 135A.	All relevant times.
16.	*Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)	Current C2024A00018	Sections 2, 3, Sch 1	Inserted s 5(3) into ITA Act.	From 8 April 2024.