ARE ANTIPODEAN TAXES ON 'INTERLOPERS' CONSTITUTIONALLY UNSAFE? THE EMPERORS' NEW PROPERTY SURCHARGES (ON ALIENS SUCH AS HONG KONGERS)

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[The enactment of populist taxes (of varying constitutional validity) that are targeted at aliens, is a contemporary phenomenon in a number of countries. This paper discusses the additional taxation that many Australian jurisdictions have sought to impose on foreign ownership of property, against the backdrop of some of Australia's international tax obligations. Such foreigner-specific taxes would appear to be incompatible with expansive non-discrimination clauses contained in a number of international tax agreements to which Australia is a party, clauses which also have the force of Australian federal law. Interestingly, people from countries with agreements that have no applicable non-discrimination clauses (such as the United States, the United Kingdom, Canada and China) or those from polities with no relevant tax treaty — for instance, Hong Kong — might (pursuant to Australian constitutional law, notwithstanding the Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth) and related subsequent legislation), also be able to rely on the aforesaid incompatibility for relevant relief. The ramifications of such incompatibility in terms of the potential for non-compliance with Australian domestic human rights legislation, and for potential private law actions for money had and received, will also be canvassed, along*

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with the issues that are raised by the Amendment Act*, such as its compatibility with applicable supremacy clauses, questionable retrospectivity and likely acquisition of property on other than just terms.]*

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'The Emperor has no clothes'.[1]

I INTRODUCTION

Populist, alien-specific property-related taxes of varying constitutional validity have been enacted in a number of countries.[2] In

1 Cf Kelvin Low, 'The Emperor's New Art: Cryptomania, Art and Property' (2022) 86 *Conveyancer and Property Lawyer* 378.

recent times, almost all Australian mainland jurisdictions have legislated to impose additional taxes on foreigners in relation to their ownership of Australian property. The levying of such taxes on non-citizen, non-permanent residents sits uncomfortably with the reality of relevantly expansive non-discrimination clauses contained in a number of international tax agreements to which Australia is a party.

This paper discusses the compatibility of these taxes with the relevant tax non-discrimination clauses set out in a number of such agreements, and considers the potential consequences of incompatibility in this regard. Using the (Australian) State of Victoria as an example, Part II outlines the additional taxes that have been legislated with respect to foreign ownership. Part III then juxtaposes these non-citizen, non-permanent resident-specific imposts against the non-discrimination clauses found in various tax treaties that Australia is a party to, with the consequences for taxpayers of incompatibility between these taxes and the relevant clauses discussed in Part IV. As the treaties with the clauses in question have the force of law under Australian domestic law, the interesting position in relation to persons from polities with no such treaties or clauses is then considered in Part V. Part VI subsequently points out some potential consequences under Australian domestic law, that could arise from a likely tax-and-treaty incompatibility. Part VII then observes that Australian domestic law likely precludes a potential legislative 'fix' to the problems that have been identified, including that purportedly enacted by way of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) and related legislation, which are separately considered in Part VIII.

II FOREIGNERS' ADDITIONAL TAX

As part of its 2015 package of Budget measures, the State of Victoria was the first Australian jurisdiction to enact a foreigners' additional tax

[2] See, eg, the taxes discussed in Andrew Hayashi and Richard Hynes, 'Protectionist Property Taxes' (2021) 106 *Iowa Law Review* 1091 and *Li v British Columbia* [2022] 1 WWR 443 ('*Li*').

regime.[3] Receiving Royal Assent on 29 June 2015,[4] the *State Taxation Acts Amendment Act 2015* (Vic) introduced a 'foreign purchaser additional duty' by way of s 28A to the *Duties Act 2000* (Vic), and an 'absentee owner surcharge' by way of pt 4 of sch 1 to the *Land Tax Act 2005* (Vic).[5]

Pursuant to s 28A[6] at present, with limited exceptions,[7] a foreign purchaser additional duty of 8 per cent is payable by non-citizens who are not Australian permanent residents, on the acquisition of Victorian residential property, *in addition to the transfer duty that ordinarily would be payable* under the *Duties Act 2000* (Vic).

Part 4 of sch 1 to the *Land Tax Act 2005* (Vic) sets out a rate of land tax for Victorian land held by an 'absentee owner', that is in excess of the rate that would be applicable to a non-'absentee owner'. Section 3(1) of the legislation provides that, in so far as natural persons are concerned, an 'absentee owner' means a non-citizen, non-permanent resident of Australia

> (a) who does not ordinarily reside in Australia; and
>
> (b) who —
>
> (i) was absent from Australia on 31 December in the year immediately preceding the tax year; or
>
> (ii) in the 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[.]

With the exception of the Northern Territory, other Australian jurisdictions followed with similar regimes, with:

- Queensland now having a foreign acquirer additional duty of 8 per cent,[8] and a 3 per cent land tax absentee surcharge;[9]

3 For a discussion of these regimes, see, eg, Bernie Walrut, 'Tax Files: New Surcharge Duty on Foreign Acquisitions' (2018) 40(1) *Bulletin* 43; Edward Ti, 'Politics and Policy: Chinese Money and its Impact on the Regulation of Residential Property in the West' (2019) 83(4) *Conveyancer and Property Lawyer* 371.
4 Victoria, *Government Gazette* (No S 182, 29 June 2015) 1.
5 Read together with ss 7, 8, 35 and 104B.
6 Read together with *Duties Act 2000* (Vic) ss 7, 10, 11, 12 and 18A.
7 See, eg, ibid s 69AJ.
8 See *Duties Act 2001* (Qld) ss 8 to 10, 16, 17, 231, 244 and 245.
9 *Land Tax Act 2010* (Qld) ss 6, 8, 32, 34, 77 and sch 3, pt 2.

- New South Wales now having an 8 per cent transfer duty surcharge[10] and a 4 per cent land tax surcharge;[11]

- South Australia now having a foreign acquirer additional duty of 7 per cent;[12]

- the Australian Capital Territory now applying a 0.75 per cent land tax surcharge to the unimproved value of foreign-owned residential property in the Territory;[13]

- Western Australia now having a foreign citizen transfer duty surcharge of 7 per cent;[14] and

- Tasmania now having an 8 per cent duty surcharge on foreign-investor purchasers of residential property,[15] and a 1.5 per cent surcharge on foreign-investor purchasers of primary production land,[16] as well as a 2 per cent land tax surcharge.[17]

The compatibility with international tax treaties of such (additional) taxes on non-Australian citizens will now be examined.

III INTERNATIONAL TAX TREATIES AND TAX NON-DISCRIMINATION

The provisions of international tax treaties entered into by Australia that are mentioned in s 5(1) of the *International Tax Agreements Act 1953* (Cth) have, pursuant to the section, the force of Australian Commonwealth law.[18] The section provides that:

10 *Duties Act 1997* (NSW) ss 8, 11, 12, 13 and 104L to 104U.
11 *Land Tax Act 1956* (NSW) ss 3AL, 5A to 5D and sch 13.
12 *Stamp Duties Act 1923* (SA) ss 4, 16 to 18, 72, 100 and 102AB.
13 *Land Tax Act 2004* (ACT) ss 9, 14, 17 and 17E.
14 *Duties Act 2008* (WA) ss 11, 15, 19, 20, 205G to 205K, 205M and 205O.
15 *Duties Act 2001* (Tas) ss 6, 7, 9, 10, 11 and 30C to 30I.
16 Ibid s 30E(2).
17 *Land Tax Act 2000* (Tas) ss 10, 16C, 16J, 20 and sch 1.
18 See, eg, *Resource Capital Fund IV LP v Federal Commissioner of Taxation* (2018) 355 ALR 273, 304–5 ('*Resource Capital*'); *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613, 626 ('*Addy*'). Compare the international instrument considered in *Tajjour v New South Wales* (2014) 254 CLR 508, and the more limited United Kingdom equivalent provision by way of ss 2 and 6 of the *Taxation (International and Other Provisions) Act 2010* (UK) (cf the discussion

> Subject 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.[19]

There are over 40 such agreements at present, 13 of which contain tax non-discrimination clauses[20] (clauses based on that in the Organisation for Economic Co-operation and Development's ('the OECD's') *Model Tax Convention on Income and on Capital*)[21] which are, thus, incorporated into Australian domestic law.[22] Prior to the 2003 *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*,[23] Australia was the only OECD country to not include a non-discrimination clause in its double taxation treaties,[24] noting that the non-discrimination clause in the 1982 *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*,[25] was not incorporated into Australian domestic law.[26]

in Richard Vann and David Oliver, 'The New Australia–UK Tax Treaty' (2004) 3 *British Tax Review* 194, 195–6; Norman Hanna, 'Interpreting Tax Treaties in the "Real World"' (2023) 38(3) *Australian Tax Forum: A Journal of Taxation Policy, Law and Reform* 409, 422–3), but contrast s 12 of the *Native Title Act 1993* (Cth) as discussed by the High Court of Australia in *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*').

19 Compare the approach taken by the *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7(1).

20 *Addy* (n 18) 625–6.

21 Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Publishing, 2019) M-64–M-67, which relevantly provides that:

> Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or 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 provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

22 *Resource Capital* (n 18) 304–5; *Addy* (n 18) 626. Compare *R v Inland Revenue Commissioners; Ex parte Commerzbank AG* [1991] STC 271; *Boake Allen Ltd v Revenue and Customs Commissioners* [2007] 1 WLR 1386.

23 Signed 21 August 2003, [2003] ATS 22 (entered into force 17 December 2003) ('*United Kingdom Convention*').

24 Review of Business Taxation, *A Tax System Redesigned: More Certain, Equitable and Durable* (1999) 678; Explanatory Memorandum, International Tax Agreements Amendment Bill 2003 (Cth) 73.

25 Signed 6 August 1982, [1983] ATS 16 (entered into force 31 October 1983).

By way of example, the tax non-discrimination clause in the *United Kingdom Convention* relevantly provides that:

> Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or 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.[27]

Unlike the *United Kingdom Convention*, the *Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*[28] expressly states that, for the purposes of its tax non-discrimination clause,[29]

> the taxes to which the Agreement shall apply are taxes of every kind and description imposed on behalf of the Contracting States, or their political subdivisions or local authorities.[30]

Expansive non-discrimination clauses along similar lines to that in the *South African Agreement* may also be found[31] in Australia's international tax agreements with:

- New Zealand;[32]
- Finland;[33]

26 Explanatory Memorandum, International Tax Agreements Amendment Bill 2003 (Cth) 73. See also *Gallo v Chief Commissioner of State Revenue (NSW)* [2023] NSWCATAD 311, [21] ('*Gallo*'); John Taylor, 'Much Ado about Non-Discrimination in Negotiating and Drafting of the 1982 *Australia–US Taxation Treaty*' in Peter Harris and Dominic de Cogan (eds), *Studies in the History of Tax Law* (Hart Publishing, 2021) vol 10, 253.

27 (n 23) art 25(1).

28 Signed 31 March 2008, [2008] ATS 18 (entered into force 12 November 2008).

29 In ibid art 23A.

30 Ibid art 2(3).

31 For a discussion of the policy rationale for such clauses see, eg, John Avery Jones et al, 'Article 24(5) of the *Organisation for Economic Cooperation and Development (OECD) Model* in Relation to Intra-Group Transfers of Assets and Profits and Losses' [2011] 5 *British Tax Review* 535, 548–9; John Avery Jones et al, 'Art 24(5) of the *OECD Model* in Relation to Intra-Group Transfers of Assets and Profits and Losses' (2011) 3(2) *World Tax Journal* 179, 190–1; but compare Richard Krever, Kerrie Sadiq and Na Li, 'Australia Treaty Override: Restricting Nondiscrimination Articles' (2024) 113(13) *Tax Notes International* 1839, 1840 (which is at odds with, for instance, Explanatory Memorandum, International Tax Agreements Amendment Bill 2016 (Cth) 187).

32 *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*, signed 26 June 2009, [2010] ATS 10 (entered into force 19 March 2010) art 24.

- Germany;[34]
- Japan;[35]
- Norway;[36]
- India;[37] and
- Switzerland.[38]

Unlike the clause in Australia's agreements with the countries listed above, the tax non-discrimination clause in the remaining relevant agreements with Chile,[39] Türkiye,[40] Iceland[41] and Israel[42] does not, like that of the *United Kingdom Convention*, expressly encompass 'political subdivisions or local authorities' or 'taxes of every kind and description'.[43]

33 *Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion, and Protocol*, signed 20 November 2006, [2007] ATS 36 (entered into force 10 November 2007) arts 2, 23.

34 *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with Respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance*, signed 12 November 2015, [2016] ATS 23 (entered into force 7 December 2016) art 24 ('*German Agreement*').

35 *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Protocol, and Exchange of Notes*, signed 31 January 2008, [2008] ATS 21 (entered into force 3 December 2008) art 26.

36 *Convention between Australia and the Kingdom of Norway for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion*, signed 8 August 2006, [2007] ATS 32 (entered into force 12 September 2007) arts 2, 24.

37 *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 16 December 2011, [2013] ATS 22 (entered into force 2 April 2013) art 24A.

38 *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol*, signed 30 July 2013, [2014] ATS 33 (entered into force 14 October 2014) art 23.

39 *Convention between Australia and the Republic of Chile for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion, and Protocol*, signed 10 March 2010, [2013] ATS 7 (entered into force 8 February 2013) ('*Chilean Convention*').

40 *Convention between the Government of Australia and the Government of the Republic of Turkey for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion*, signed 28 April 2010, [2013] ATS 19 (entered into force 5 June 2013) ('*Turkish Convention*').

41 *Convention between Australia and Iceland for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance and its Protocol*, signed 12 October 2022, [2023] ATS 10 (entered into force 6 November 2023) ('*Icelandic Convention*').

42 *Convention between the Government of Australia and the Government of the State of Israel for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance*, signed 28 March 2019, [2019] ATS 20 (entered into force 6 December 2019).

43 Ibid arts 2, 24; *Chilean Convention* (n 39) arts 2, 24; *Turkish Convention* (n 40) arts 2, 24; *Icelandic Convention* (n 41) arts 2, 22.

IV DO AUSTRALIA'S SUB-NATIONAL, FOREIGNER-SPECIFIC PROPERTY TAXES COMPORT WITH ITS TAX TREATIES?

Having outlined the nature of Australia's foreign national-specific sub-national taxes, and in light of the presence of non-discrimination clauses in a number of Australia's international tax agreements, the question could well be asked: are these additional taxes consistent with the expansive non-discrimination clause that may be found in the various agreements? If not, what then are the consequences for the nationals of one of the eight countries with a relevant agreement?

In the 2021 case of *Addy v Federal Commissioner of Taxation*,[44] the High Court of Australia considered the position of a United Kingdom national who was a resident of Australia for income tax purposes but who nevertheless was subjected to a greater income tax burden than would otherwise have been borne by Australian tax residents, due to her status as the holder of an Australian 'working holiday visa' (a visa category the members of which were expressly singled out in legislation for harsher tax treatment).[45]

The Court observed, in relation to the *United Kingdom Convention*'s tax non-discrimination clause, that:

> Article 25(1), as a matter of ordinary language, requires a comparison between a national of the United Kingdom and an Australian national who is, otherwise than with respect to nationality, 'in the same circumstances, in particular with respect to residence'. In the present case, Ms Addy was, for the purposes of Art 25(1), a resident of Australia for Australian tax purposes.
>
> …
>
> Article 25(1), as well as Art 25(5), make explicit that foreign residency is a permissible basis for imposing other or more burdensome tax requirements on foreign nationals — accordingly, if Ms Addy were a non-resident 'working holiday maker', Art 25(1) would offer no relief. But this is of no assistance in the present case: it is precisely because of the Commissioner's initial

44 (n 18).

45 See *Income Tax Rates Act 1986* (Cth) sch 7, pt III, cl 1, table item 1; Explanatory Memorandum, Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (Cth) 3–4.

> acceptance of Ms Addy's status as an Australian resident for tax purposes that Ms Addy's objection to her assessment was chosen by the parties as a 'test case' to determine the effect of Art 25(1). With respect to tax residency during the relevant period, at least, there is no doubt that Ms Addy was 'in the same circumstances' as an Australian national who was also a tax resident.[46]

Herein lies the potential issue with the sub-national, foreigner-specific property-related taxes previously outlined: the residency reference in these taxes centres on *immigration residence* (ie permanent resident visa status),[47] whereas the residency reference in the treaties is to *residence for income taxation purposes*[48] … which is more transitory in nature.[49] So, a non-Australian national who does not hold an Australian permanent residence visa but who, nevertheless, is a resident of Australia for income tax purposes (as was the case in *Addy*) could be subject to the foreigner-specific sub-national property taxes mentioned above, but an Australian citizen would never be, regardless of his or her Australian income tax residency status.[50] With respect, it is submitted that it is difficult to see how this does not contravene the text, context and purpose[51] of the non-discrimination clauses,[52] particularly in light of the High Court of Australia's approach in *Addy*.[53]

46 (n 18) 630.

47 See, eg, *Monisse v Chief Commissioner of State Revenue (NSW)* [2023] NSWCATAD 27; *Mohammed v Chief Commissioner of State Revenue (NSW)* [2023] NSWCATAD 38; *Aparekka v Chief Commissioner of State Revenue (NSW)* [2022] NSWCATAD 333; *Picone v Chief Commissioner of State Revenue (NSW)* [2022] NSWCATAD 382.

48 *Addy* (n 18) 630.

49 See generally, for instance, Nolan Sharkey, 'Coming to Australia: Cross Border and Australian Income Tax Complexities, with a Focus on Dual Residence and DTAs and Those from China, Singapore and Hong Kong' (Pt 2) (2015) 42(11) *Brief* 41; Pippa Rogerson, 'Habitual Residence: The New Domicile?' (2000) 49(1) *International and Comparative Law Quarterly* 86; Ann-Maree Herbst, 'Business Migration to Australia' (1995) 65(6) *Australian Accountant* 22. Cf *Mackinnon v Federal Commissioner of Taxation* (2020) 111 ATR 708; *Harding v Federal Commissioner of Taxation* (2019) 269 FCR 311.

50 Eu-Jin Teo, '"Fair(ness) Go(ne)"? Foreigner Surcharge Taxes and Tax Non-Discrimination' on Tax and Transfer Policy Institute, *Austaxpolicy* (5 October 2023) <https://www.austaxpolicy.com/fairness-gone-foreigner-surchage-taxes-and-tax-non-discrimination/> ('Surcharge Taxes'); Peter Scott, 'Current Issues in the Application of the Non-discrimination Article in Australia's Tax Treaties' (Discussion Paper, Westminster Tax Discussion Group, 8 February 2024) 21–2.

51 On the importance of text, context and purpose in matters of interpretation, see, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362. For a general discussion, see Michael Kirby, 'The Never-Ending Challenge of Drafting and Interpreting Statutes: A Meditation on the Career of John Finemore QC' (2012) 36 *Melbourne University Law Review* 140; Robert Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2 *University of New England Law Journal* 5; Chief Justice James Spigelman, 'The Poet's Rich Resource: Issues in Statutory Interpretation' (2001) 21 *Australian Bar Review* 224; Mark Burton, 'The Rhetoric of Taxation Interpretation and the Definition of "Taxpayer" for the

What then for the taxpayer, one might ask? It will be remembered, from the earlier discussion, that s 5(1) of the *International Tax Agreements Act 1953* (Cth) (likely enacted pursuant to the Australian Commonwealth Parliament's powers to legislate with respect to taxation[54] or to external affairs,[55] or both)[56] gives the provisions of

Purposes of Part IVA' (2005) 15 *Revenue Law Journal* 4, and for a recent application of this approach in a taxation context, see, eg, *Federal Commissioner of Taxation v Carter* (2022) 274 CLR 304.

52 On treaty-clause interpretation, see, eg, *McDermott Industries (Aust) Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 134, 143; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 252–3; *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 349, 356; *Federal Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597, 604–5; *Bywater Investments Ltd v Federal Commissioner of Taxation* (2016) 260 CLR 169, 227–8; *Task Technology Pty Ltd v Federal Commissioner of Taxation* (2014) 224 FCR 355, 358; *Tech Mahindra Ltd v Federal Commissioner of Taxation* (2015) 101 ATR 755, 768–71; *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6, 19; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

53 For a discussion of *Addy*, see, eg, Melita Parker, '"Backpacker Tax" Offends Australia–UK Double Taxation Treaty' [2022] (3) *Bar News* 18; Swapna Verma, 'Brave to Reform Australia's Backpacker Tax? An Examination of its Challenges in Australia's Residence-based Taxation System' (Conference Paper, Australasian Tax Teachers Association Conference, 18 January 2024).

54 On the scope of this power, see, eg, *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, but cf Kiefel CJ, Gageler and Gleeson JJ in *Vanderstock v Victoria* (2023) 414 ALR 161, 182:

> The power conferred on the Commonwealth Parliament by s 51(ii) to make laws with respect to taxation has also been recognised to be subject to an inherent limitation. The limitation is inherent in the nature of the power as a power with respect to Commonwealth taxation: it 'has never been, and, consistently with the federal character of the Constitution could not be, construed as a power over the whole subject of taxation throughout Australia, whatever parliament or other authority imposed taxation'. The significance of that inherent limitation, as Professor Leslie Zines pointed out, appears on occasion to have been overlooked in dicta which have assumed unfettered capacity on the part of the Commonwealth Parliament to enact laws which would operate through s 109 to invalidate State laws (citations omitted).

55 On the scope of this power, see, eg, *New South Wales v Commonwealth* (1975) 135 CLR 337, 360, 449–50, 471 ('*Seas and Submerged Lands Case*'); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 530–1, 550–2, 602–3, 654–5, 695–6 ('*War Crimes Act Case*'); *Horta v Commonwealth* (1994) 181 CLR 183, 193–5; *Commonwealth v Ling* (1993) 118 ALR 309, 341. For a general discussion, see Peter McDermott, 'External Affairs and Treaties: The Founding Fathers' Perspective' (1990) 16(1) *University of Queensland Law Journal* 123; Zaccary Mencshelyi, Stephen Puttick and Murray Wesson, 'The Executive and the External Affairs Power: Does the Executive's Prerogative Power to Vary Treaty Obligations Qualify Parliamentary Supremacy?' (2018) 43(2) *University of Western Australia Law Review* 286; Daniel Vujcich, 'As Easy as XYZ: Changing the World through Corporate Law and the External Affairs Power' (2007) 35(5) *Australian Business Law Review* 338; Andrew Byrnes, 'The Implementation of Treaties in Australia after the *Tasmanian Dams* Case: The External Affairs Power and the Influence of Federalism' (1985) 8(2) *Boston College International and Comparative Law Review* 275; Ronald Sackville, 'Techniques of Constitutional Interpretation: Five Recent Cases' (2008) 10(2) *Constitutional Law and Policy Review* 22.

56 On the need for merely one head of power to be found, see, eg, *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 150,

international tax treaties that are mentioned in the section, the force of Australian Commonwealth law.[57]

Relevant, then, is s 109 of the *Australian Constitution*, which stipulates that:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[58]

In this regard, the High Court of Australia has held, unanimously, that a state law is inconsistent with a Commonwealth law if the state law would 'impair or detract from the operation of a law of the Commonwealth Parliament',[59] and a similar approach has been held to apply in relation to the territories.[60]

154 ('*Engineers' Case*'); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 184 ('*Bank Nationalisation Case*'). In giving domestic legal effect to relevant tax non-discrimination international undertakings, the law potentially is also one for the protection of aliens, and hence valid under the aliens power (like in *Cunliffe v Commonwealth* (1994) 182 CLR 272; compare, in a different context, Exodus 20:10 and Deuteronomy 5:14). It, conceivably, is also supported by the international trade and commerce power, given the power's broad scope (as to which, see, eg, *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 546–7; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 11, 19–20; *Leeth v Commonwealth* (1992) 174 CLR 455, 469, 483; *Crowe v Commonwealth* (1935) 54 CLR 69, 96; *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 598; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 78; *Australian Steamships Ltd v Malcolm* (1915) 19 CLR 298, 355; *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188, 198; but compare *James v Commonwealth* [1936] AC 578). As Xaver Ditz et al, 'Non-Discrimination' (Conference Presentation, Congress of the International Fiscal Association, 25 October 2023) 17 point out: 'Encourag[ing] mutual flow of trade … ought to be the attitude of all reasonable governments towards foreign nationals carrying on business within their borders'. See also Sunita Jogarajan and Tania Voon, 'The Intersection of Treaties on Tax and Trade: A Case Study of Australia and India' in Irma Valderrama et al (eds), *Redefining Global Governance* (Springer, 2024) (forthcoming).

57 *Resource Capital* (n 18) 304–5; *Addy* (n 18) 626. On the validity of statutory 'choice of law' provisions generally, see, eg, *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, 156–7; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]* (1992) 177 CLR 248, 263–5; *Gould v Brown* (1998) 193 CLR 346, 485–7; *R v Holmes* (1988) 93 FLR 405, 407. Cf Scott Lang, 'Potential Grounds for Challenging the Validity or Application of Taxes' (2018) 47 *Australian Tax Review* 211, 224.

58 Compare covering cl 5 of the *Australian Constitution*, discussed in *Federated Saw Mill, Timber Yard and General Woodworkers Employees' Association of Australasia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, 530, 535; *A-G (Qld); Ex rel Goldsbrough, Mort & Co Ltd v A-G (Cth)* (1915) 20 CLR 148, 172; *Butler v A-G (Vic)* (1961) 106 CLR 268, 278; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92–3; *Momcilovic v The Queen* (2011) 245 CLR 1, 101, 132, 232 ('*Momcilovic*').

59 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), citing Dixon J in *Victoria v Commonwealth* (1937) 58 CLR 618, 630 ('*The Kakariki Case*').

60 See, eg, *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395, 418–20; *Federal Capital Commission v Laristan Building & Investment Co Pty Ltd* (1929)

It is submitted that it is difficult to see how the foreigner-specific state and territory taxes previously outlined do not relevantly 'impair or detract from the operation of'[61] the relevant tax non-discrimination clauses that have been given the force of Commonwealth law by virtue of s 5(1) of the *International Tax Agreements Act 1953* (Cth). This is because — leaving aside, for now, the effect, if any, of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) — these clauses confer a legal right, privilege or entitlement (to non-discrimination) which the taxes in question purport to take away or diminish,[62] by targeting putative taxpayers based on their non-Australian nationality,[63] regardless of their Australian income tax residency status.[64]

42 CLR 582, 588; *Stock Motor Ploughs Ltd v Forsythe* (1932) 48 CLR 128, 136; *University of Wollongong v Metwally* (1984) 158 CLR 447, 464 ('*Metwally*'); *A-G (NT) v Hand* (1989) 25 FCR 345, 366–7; *Webster v McIntosh* (1981) 49 FLR 317, 320–2. Compare *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28, discussed in Anne Twomey, 'Inconsistency between Commonwealth and Territory Laws' (2014) 42(3) *Federal Law Review* 421.

61 Cf *Dickson v The Queen* (2010) 241 CLR 491, 502; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 524; *Loo v DPP (Vic)* (2005) 12 VR 665, 688; *Local Government Association of Queensland (Inc) v Queensland* [2003] 2 Qd R 354, 373.

62 Compare *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478; *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151, 160, 161–2; *Wallis v Downard-Pickford (North Qld) Pty Ltd* (1994) 179 CLR 388, 396–7; *Native Title Act Case* (n 18) 438, 451–2. Cf Andrea Beatty and Gabor Papdi, 'Constitutional Issues Raised by South Australia's Proposed Major Bank Levy' (2017) 16(7) *Financial Services Newsletter* 125; Gary Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38(3) *Federal Law Review* 445 ('Manufacturing and Avoiding'); Allan Murray-Jones, 'The Tests for Inconsistency under Section 109 of the *Constitution*' (1979) 10(1) *Federal Law Review* 25; Gary Rumble, 'The Nature of Inconsistency under Section 109 of the *Constitution*' (1980) 11(1) *Federal Law Review* 40 ('Nature of Inconsistency').

63 The disenfranchised tend to be treated unequally, as Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 46 observes ('Lacking [the right to vote], whole classes of people may find themselves ignored by the political process'). Cf Janek Ratnatunga, 'Lawyers, Accountants and Real Estate Agents: Finally Subject to Money Laundering Laws?', *CEO Blog* (Blog Post, 23 July 2024) <https://ontarget.cma australia.edu.au/lawyers-accountants-and-real-estate-agents-finally-subject-to-money-laundering-laws/>: 'The … concern of some state governments was that the prices of real estate are rising astronomically as foreign buyers with deep pockets are outbidding local (voting) families who may vent their frustration at the polling booths'.

64 See, eg, Alexander Rust, 'Non-Discrimination' in Ekkehart Reimer and Alexander Rust (eds), *Klaus Vogel on Double Taxation Conventions* (Wolters Kluwer, 5th ed, 2022) vol 1, 1881, 1907; Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital 2017 (Commentary)* (OECD Publishing, 2019) C(24)-1–C(24)-4.

V WHAT THEN, OF NATIONALS FROM COUNTRIES WITHOUT A RELEVANT NON-DISCRIMINATION CLAUSE?

In light of the discussion that has preceded, it is perhaps unsurprising that the New South Wales revenue authority issued the following statement in February last year:

> It has been determined that NSW surcharge provisions are inconsistent with international tax treaties entered into by the Federal Government with [certain nations]. These international tax treaties are related to taxation and other matters and have been given the force of federal law.[65]

What is surprising, perhaps,[66] is the statement by the Victorian revenue authority that followed not long after, that

> [t]he SRO is aware of the announcement made by Revenue NSW in February 2023 regarding the imposition of the NSW foreign owner surcharge and surcharge purchaser duty for residents [sic] of South Africa, New Zealand, Finland and Germany.
>
> The position in Victoria has not changed and the SRO will continue to apply the Victorian provisions to all foreign purchasers and absentee owners[,][67]

especially considering that the relevant New South Wales provisions are not materially different from those in Victoria.[68] Noteworthy also is the reminder by the author of *The Laws of Australia*, that '[t]he provisions of s 109 are unqualified and self-executing. Their operation is automatic and does not require a judicial order.'[69]

65 New South Wales Government, 'Surcharge Purchaser Duty and Surcharge Land Tax — International Tax Treaties', *Revenue* (Web Page, 21 February 2023) <https://www.revenue.nsw.gov.au/news-media-releases/international-tax-treaties>. See further New South Wales Government, 'Surcharge Purchaser Duty and Surcharge Land Tax — International Tax Treaties Update', *Revenue* (Web Page, 29 May 2023) <https://www.revenue.nsw.gov.au/news-media-releases/surcharge-purchaser-duty-and-surcharge-land-tax-international-tax-treaties-update>.

66 See, eg, Matthew Cridland, 'Discriminating against Foreign Investors? NSW, Victoria beg to Differ', *The Australian Financial Review* (Sydney), 30 March 2023, 15.

67 State Revenue Office Victoria, 'Taxes on Foreign Property Investors', *News* (Web Page, 15 March 2023) <https://www.sro.vic.gov.au/news/taxes-foreign-property-investors>.

68 See, eg, *Duties Act 1997* (NSW) s 104J; *Duties Act 2000* (Vic) s 3.

69 Thomson Reuters, *The Laws of Australia* (at 1 October 2021) 19 Government '2 Framework for Federal Distribution of Legislative Power' [19.5.230] ('*Laws of Australia*'). See, eg, *Momcilovic* (n 58) 105; *Metwally* (n 60) 468, 478.

What then, of the position of people from places with no relevant tax treaty or no relevant tax non-discrimination clause (for instance, the United States, the United Kingdom, China and Hong Kong)? Are they, due to the absence of applicable treaty protection, still subject to the taxes in question?[70]

It has been observed that, while only 'that part of the State law which is inconsistent with the Commonwealth law is invalid',[71] a court will, nevertheless, 'declare the whole law invalid where severance of the inconsistent provisions from the remainder of the law would produce a law which the State Parliament never intended to enact.'[72] As the author of *Halsbury's Laws of Australia* puts it:

> If a law of a State is inconsistent with a law of the Commonwealth, the State law is rendered invalid to the extent of the inconsistency. Only those parts of a law of the State which are inconsistent with a law of the Commonwealth are invalid. However, the separation of the inconsistent parts of a State law cannot be made where division is only possible at the cost of producing provisions that the State Parliament never intended to enact.[73]

Could the problematic Australian sub-national, foreigner-specific property taxes already referred to, therefore, validly be 'read down' or 'partially disapplied' so as to be taken to encompass only nationals of those countries without a relevant tax treaty non-discrimination clause?[74] For instance, s 6(1) of the *Interpretation of Legislation Act 1984* (Vic) provides that:

> Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the

70 Compare the lack of recognition of this issue in Steven Paterson, 'Land Tax and Foreign Surcharge Developments' (Conference Paper, State Taxes Convention, 20 July 2023) and John Kehoe, 'Property Taxes on Foreign Buyers may be Illegal', *The Australian Financial Review* (Sydney), 18 January 2024, 12.

71 *Laws of Australia* (n 69) [19.5.340].

72 Ibid. See, eg, *Wenn v A-G (Vic)* (1948) 77 CLR 84, 122; *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 526–8 ('*Bell Group*').

73 LexisNexis, *Halsbury's Laws of Australia* (at 20 July 2016) 90 Constitutional Law '5 Inconsistency of Commonwealth and State Laws' [90-2040].

74 An issue overlooked in *Gallo* (n 26; despite *Burns v Corbett* (2018) 265 CLR 304 and *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, the tribunal there, in reality, did not lack the jurisdiction to hear the matter in fact raised: see *McCardle v Legal Services Board (Vic)* [2021] VCAT 743).

> remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.[75]

Relevant however, is the caution from *Clubb v Edwards*,[76] that partial disapplication of this nature cannot legitimately occur in instances where a policy or scheme would be contradicted or altered:

> The technique of partial disapplication cannot be used if it would alter a statute's general policy or scheme or the specific policy or purpose of the relevant provision. To do so would cross the line between adjudication and legislation. One way in which the general policy or scheme of a statute or a provision could be altered is where the partial disapplication would lead to a result that contradicts or alters any policy of the statute.[77]

In this regard, the relevant second reading speeches[78] and explanatory memoranda[79] reveal a policy intention to relevantly tax *foreigners generally*, as a market-intervention (some might say, 'interference')[80] measure (aimed at increasing the cost associated with such persons taking a stake in property),[81] to thus favour 'non-foreigners' in this regard.[82] It would thus seem that judicial 'reading down' or 'partial

75 See also *Interpretation Act 1987* (NSW) s 31; *Acts Interpretation Act 1954* (Qld) s 29; *Acts Interpretation Act 1931* (Tas) s 3; *Legislation Interpretation Act 2021* (SA) s 15; *Interpretation Act 1984* (WA) s 7; *Legislation Act 2001* (ACT) s 120.

76 (2019) 267 CLR 171 ('*Clubb*').

77 Ibid 321. Cases such as *Bell Group* (n 72) 527 and *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 317 have also observed that provisions like the partial disapplication power do 'not speak to the situation where the issue is not one of the absence of State legislative power, but is one of the extent of inconsistency, by operation of s 109 of the *Constitution*, of a State law made in exercise of concurrent power'.

78 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2015, 1444 (Timothy Pallas); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 12 April 2018, 1338–9 (Andrew Barr); New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2016, 3 (Gladys Berejiklian); Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 June 2018, 3301–2 (David Templeman); South Australia, *Parliamentary Debates*, Legislative Council, 28 November 2017, 8558–60 (Kyam Maher).

79 See, eg, Explanatory Memorandum, State Taxation Acts Amendment Bill 2015 (Vic) 6, 11; Explanatory Statement, Land Tax Amendment Bill 2018 (ACT) 3–5; Explanatory Note, State Revenue Legislation Amendment (Budget Measures) Bill 2016 (NSW) 1; Explanatory Notes, Revenue Legislation Amendment Bill 2017 (Qld) 1–3.

80 Cf Matthew Cranston and Larry Schlesinger, 'Foreign Property Buyer Demand Falls, Prompting Warning from Harry Triguboff', *The Australian Financial Review* (Sydney), 11 January 2018, 28; Richard Eccleston et al, *Pathways to State Property Tax Reform: Inquiry into Pathways to Housing Tax Reform* (Australian Housing and Urban Research Institute Limited Final Report No 291, November 2017) 23.

81 Na Li, Kerrie Sadiq and Richard Krever, 'Can Australia's Double Tax Treaties Invalidate State Real Estate Taxes?' (2024) 113(1) *Tax Notes International* 47, 47; Krever, Sadiq and Li (n 31) 1839.

82 On the use of extrinsic materials, see, eg, *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1987* (NSW) s 34(2); *Acts Interpretation Act 1954* (Qld) s 14B(3); *Acts Interpretation Act 1931* (Tas) s 8B(3); *Legislation*

disapplication' of the provisions in question to somehow interpretively 'carve out' nationals of countries with applicable treaty protection, could be somewhat problematic.[83]

Relevant to the potential unavailability of severance or reading down in these circumstances, would further appear to be the somewhat analogous approach adopted in the case of the *Owners of SS Kalibia v Wilson*,[84] in relation to which Edelman J pointed out that

> the expression 'coasting trade' could not be read down to mean only inter-State coasting trade because Parliament had intended to use the term to mean all trade between different Australian ports. As the expression could not be read down, the Court considered whether severance was possible. A majority of the Court held that it was not possible to sever the intra-State elements of the provisions from their inter-State elements because the provisions used the 'indivisible' and 'collective expression' of 'coasting trade', which necessarily encompassed inter-State and intra-State trade. Griffith CJ said that to sever the statute 'would be in effect making a new law'. Barton J considered that severance would cause the law to be 'substantially or radically different'. O'Connor J said that the Court would 'take upon itself the power of making a new law'. And Isaacs J said that to sever in such circumstances 'would therefore be exceeding our functions as interpreters of the law'.[85]

In place of 'coasting trade' here, may be substituted the term 'foreigner'; for instance, Victoria, the vanguard of foreigner surcharge taxes, has candidly confirmed that it was always the intention that 'citizens of all foreign countries [b]e placed in the same position under Victorian law'.[86]

Interpretation Act 2021 (SA) s 16(2); *Interpretation Act 1984* (WA) s 19(2); *Legislation Act 2001* (ACT) s 142; *Harvey v Minister for Primary Industry and Resources* (2024) 98 ALJR 168. The use of extrinsic material in statutory interpretation is discussed in detail in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 105–18. Cf Matthew Cridland, 'As a Housing Shortage Looms, is it Time to Stop Plucking Foreigners?', *The Australian Financial Review* (Sydney), 1 November 2019, 12.

83 For a general discussion of 'reading down', see, eg, David Hume, 'The Rule of Law in Reading Down: Good Law for the "Bad Man"' (2014) 37(3) *Melbourne University Law Review* 620. Compare Li, Sadiq and Krever (n 81) 50.

84 (1910) 11 CLR 689.

85 *Clubb* (n 76) 315 (citations omitted). Compare the approach adopted by Li, Sadiq and Krever (n 81) 50.

86 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2024, 26 (Timothy Pallas).

VI AFTERMATH …

At least two consequences would seem to follow from the conclusion in the analysis above, namely, that existing Australian sub-national, foreigner-specific property taxes would (but-for the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), to be considered below in Part VIII) appear to be constitutionally suspect.

A *Potential Actions for Money Had and Received*

The availability of restitution from public authorities (for instance, in relation to invalid monetary exactions) is an intractable issue which has been the subject of much debate.[87] As the Australian position on the recovery of unconstitutional taxes remains unsettled,[88] a detailed exegesis on the issue in this context will be beyond the scope of this particular paper. Suffice to say, however, that as there at present would appear to be no comprehensive restitutionary right based solely on the invalid nature of a tax,[89] a taxpayer will have to establish the existence of

87 Amongst some of the better material, see, eg, Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar, 2020); Peter Butler, 'Restitution of Overpaid Taxes, Windfall Gains, and Unjust Enrichment: *Commissioner of State Revenue v Royal Insurance Australia Ltd*' (1995) 18(2) *University of Queensland Law Journal* 318; Clifford Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 *Texas Law Review* 777; Peter Birks, 'Restitution from the Executive: A Tercentenary Footnote to the *Bill of Rights*' in Paul Finn (ed), *Essays on Restitution* (1990) 164; Graham Virgo, 'The Law of Taxation is not an Island: Overpaid Taxes and the Law of Restitution' [1993] *British Tax Review* 442; Ronald Collins, 'Restitution from Government Officials' (1984) 29 *McGill Law Journal* 407; Dennis Klimchuk, 'The Structure and Content of the Right to Restitution for Unjust Enrichment' (2007) 57(3) *University of Toronto Law Journal* 661; Mark Byrne, 'Restitution and Unjust Enrichment: Theory and Practice' (1995) 3(3) *Current Commercial Law* 114; Gareth Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia' (1988) 1(1) *Journal of Contract Law* 8; Struan Scott, 'The Law of Restitution and the Principle of Unjust Enrichment: An Introduction to their Significance for the Law' [1996] *New Zealand Law Journal* 99.

88 See, eg, Eu-Jin Teo, 'Will Drivers Who Paid Victoria's Electric Vehicle Tax be Able to Get their Money Back?' on The Conversation Media Group Ltd, *The Conversation* (25 October 2023) <https://theconversation.com/will-drivers-who-paid-victorias-electric-vehicle-tax-be-able-to-get-their-money-back-216021> ('Money Back').

89 *Redland City Council v Kozik* (2024) 98 ALJR 544. Cf *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] 1 AC 70, discussed, for instance, in Greg Weeks, 'The Public Law of Restitution' (2014) 38 *Melbourne University Law Review* 198.

one or more private law grounds of recovery on the basis of 'unjust factors'[90] such as:

- compulsion[91] (of the grounds potentially available, the most difficult to make out, legally and factually);[92]
- a payment exacted under 'colour of office';[93] or
- a payment made as a result of a mistake of law[94] (for instance, as to the validity or applicability of the purported tax).[95]

Relevant in this regard, though, is legislation such as s 20A(2) of the *Limitation of Actions Act 1958* (Vic), which provides that

> [d]espite anything to the contrary in any other Act, if money paid by way of tax or purported tax is recoverable because of the invalidity of an Act or provision of an Act, a proceeding for the recovery of that money must (whether the payment was made voluntarily or under compulsion) be commenced within 12 months after the date of payment[,][96]

noting however, that the constitutional propriety of provisions of this kind is not beyond doubt.[97]

90 See, eg, Derek Wong, 'The High Court and the *Woolwich* Principle: Adoption or Another Bullet that Cannot be Bitten?' (2011) 85 *Australian Law Journal* 597, 599; Keith Mason, John Carter and Greg Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2nd ed, 2008) 777.

91 See, eg, *Mason v New South Wales* (1959) 102 CLR 108; *Air India v Commonwealth* [1977] 1 NSWLR 449; *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 ('*Air Canada*').

92 See, eg, Margaret Brock, 'Restitution of Invalid Taxes: Principles and Policies' (2000) 5(1) *Deakin Law Review* 127, 129–30.

93 See, eg, *Sargood Brothers v Commonwealth* (1910) 11 CLR 258; *Bell Brothers Pty Ltd v Serpentine-Jarrahdale Shire* (1969) 121 CLR 137. See generally William Cornish, '"Colour of Office": Restitutionary Redress Against Public Authority' (1987) 14 *Journal of Malaysian and Comparative Law* 41; Peter Birks, 'Restitution from Public Authorities' (1980) 33 *Current Legal Problems* 19.

94 Cf *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51; *Barclays Bank Ltd v Simms* [1980] QB 677.

95 See generally United Kingdom Law Commission, *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Report No 227, 1994) 37–8; John McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: *Ignoratia Juris* in the Supreme Court of Canada' (1983) 17 *University of British Columbia Law Review* 233.

96 See also *Recovery of Imposts Act 1963* (NSW) s 2(1); *Limitation of Actions Act 1974* (Qld) s 10A(1); *Limitation Act 1974* (Tas) s 25D; *Limitation of Actions Act 1936* (SA) s 38(2); *Limitation Act 2005* (WA) s 28(1); *Limitation Act 1985* (ACT) s 21A. Compare *Esben Finance Ltd v Wong* [2022] 1 SLR 136.

97 See, eg, *Anthill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 103 ('*Anthill Ranger*'); Enid Campbell, 'Unconstitutionality and Its Consequences' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 90, 119–20; Teo, 'Money Back' (n 88).

B *Potential Non-Conformity with Domestic Human Rights Legislation*

Apart from the potential financial risk to the revenue that has just been identified, relevant revenue officials might also be in the ignominious position of not being in compliance with their government's own human rights legislation.

As the Treasurer of Victoria noted in a statement before Parliament when introducing the state's foreigner-specific tax regime:

> To the extent that the bill differentiates between taxpayers' liability on the basis of a person's nationality, it limits a person's right to recognition and equality [before the law.]
>
> …
>
> The bill establishes the legislative framework for the imposition of surcharges. By providing a legislative framework under the bill, the limitation is consistent with section 75 of the Equal Opportunity Act 2010, which provides that a person may discriminate if the discrimination is necessary to comply with an act [sic] or enactment.[98]

This, therefore, begs the question as to whether the exception mentioned in the section,[99] would still be available if the relevant Act, or rather, enactment, is inoperative by reason of the *Constitution*,[100] as the preceding analysis has suggested (with the effect, if any, of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), to be considered in Part VIII, below).

98 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2015, 1442–3 (Timothy Pallas).

99 See also *Anti-Discrimination Act 1977* (NSW) s 54; *Anti-Discrimination Act 1991* (Qld) s 106; *Anti-Discrimination Act 1998* (Tas) s 24; *Equal Opportunity Act 1984* (WA) s 66ZS; *Discrimination Act 1991* (ACT) s 30. For a discussion of exemption provisions, see, eg, Beth Gaze, 'Discrimination, Temporary Exemptions and Compliance with the Law' (2015) 23(1) *Australian Journal of Administrative Law* 10; Simon Rice, 'Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law' (2011) 10(2) *Canberra Law Review* 97; Miranda Stewart, 'Equal Opportunity, Except for You … and You … and You' (1995) 20(4) *Alternative Law Journal* 196.

100 Compare *Viskauskas v Niland* (1983) 153 CLR 280.

VII IS THE PROBLEM 'FIXABLE'?

This paper has identified potential incompatibilities vis-à-vis the foreigner-specific property taxes enacted in many Australian jurisdictions, and the expansive non-discrimination clauses in various international tax treaties entered into by the Australian government. The stipulations of these clauses have been given the force of Australian Commonwealth law and, as such, under the *Australian Constitution*, they prima facie prevail over state and territory taxes to the extent that these taxes may be inconsistent with the protections that are afforded under such clauses.

While at least one Australian jurisdiction did recognise the desirability of suspending the collection of relevant taxes from nationals who are protected by the clauses in question, no jurisdiction has (perhaps putting all their eggs in the basket of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth)?)[101] amended its legislation to place the collection of tax from non-protected nationals beyond the constitutional risk that has been identified in this paper. While the issue of *ongoing* collection from persons in this latter category could likely be addressed with the stroke of a drafter's pen (by expressly providing in the state or territory legislation for the 'carving out' of protected nationals), whether such amendments could validly be made *retrospective*, so as to potentially stymie some private law claims that might otherwise arise (ie ones from non-protected nationals), is another matter entirely and attended with some uncertainty.[102]

Ultimately, as was the case with the *RMS Titanic*, it may well be that any 11th-hour course correction in this (legislative) regard might, unfortunately, prove to be insufficient. Recent figures reveal that non-Australian citizen, non-permanent resident purchasers of Australian property (ie those who are subject to additional taxes) would likely predominantly be of Asian or South Asian origin, with over 70 per cent

101 See, eg, New South Wales Government, 'International Tax Treaties', *Revenue NSW* (Web Page) <https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/foreign-buyers-and-land-owners/international-tax-treaties>.

102 Compare the circumstances, and discussion, in *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155; *Amax Potash Ltd v Saskatchewan* (1976) 71 DLR (3d) 1; *Anthill Ranger* (n 97); *Air Canada* (n 91).

of such buyers hailing from either China, Hong Kong, India, Vietnam, Singapore or Taiwan.[103] This, potentially, is problematic, considering s 10 of the *Racial Discrimination Act 1975* (Cth), which focuses not on discriminatory *acts* but upon the *operation* of legislation,[104] and provides that:

> (1) If, by *reason* of, or of a provision of, a law of the Commonwealth or of a *State or Territory*, persons of a particular race, colour or *national or ethnic origin* do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or *enjoy a right to a more limited extent* than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right *includes* a reference to a right of a kind referred to in Article 5 of the Convention[,][105]

which relevantly encompasses the 'right to own property alone as well as in association with others',[106] in addition to the 'right to housing'.[107]

In the High Court of Australia case of *Maloney v The Queen*,[108] it was observed, in relation to the facially neutral legislation at issue there, that

> the impugned provisions had the effect that indigenous persons who were the Palm Island community, … could not enjoy a right of ownership of property, namely alcohol, to the same extent as non-indigenous people outside that community. The impugned provisions effected an operational discrimination notwithstanding the race-neutral language of s 168B of the *Liquor Act* [*1992* (Qld)], under which the appellant was charged.[109]

In that case, provisions of the relevant legislation allowed declarations of 'restricted areas' to be made, with the result that persons in such areas

103 Nassim Khadem, 'Rising House Prices Fuelled by "Bank of Mum and Dad", Retirees and Migrants', *Australian Broadcasting Corporation News: The Business* (Web Page, 25 July 2023) <https://www.abc.net.au/news/programs/the-business/2023-07-25/rising-house-prices-fuelled-by-bank-of-mum-and/102647342>. See also Ti (n 3) 375.

104 See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, 97, 99; *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 198–9, 216–19, 231–2; *Western Australia v Ward* (2002) 213 CLR 1, 103.

105 Emphasis added.

106 *International Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(v).

107 Ibid art 5(e)(iii).

108 (2013) 252 CLR 168 ('*Maloney*').

109 Ibid 191.

would have their rights to the possession of alcohol restricted to an extent greater than the usual legal limit in the rest of the state,[110] a state whose inhabitants, on average, were predominantly non-Aboriginal. Palm Island, a community comprised almost entirely (but not solely) of Indigenous people, was declared to be a restricted area.[111]

In *Western Australia v Ward*,[112] a majority of the High Court of Australia further noted that:

> In determining whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a right; it does not require that the relevant law, or an act authorised by that law, be 'aimed at' [property that can be held only by a certain race], nor does it require that the law, in terms, makes a distinction based on race. Section 10(1) is directed at 'the practical operation and effect' of the impugned legislation and is 'concerned not merely with matters of form but with matters of substance'.[113]

Put simply, here, those of, just like in *Addy*, a particular immigration status (namely, non-citizen, non-permanent residents) are expressly singled out for harsher tax treatment if they acquire an Australian dwelling, and over 70 per cent of people in this immigration category who acquire Australian residential property apparently are of Asian or South Asian origin. On the current jurisprudence relating to s 10 of the *Racial Discrimination Act 1975* (Cth) therefore,[114] there would seem to be a real risk that those of such origin could presently be regarded as enjoying a right to acquire Australian residential property to a more

110 *Liquor Act 1992* (Qld) ss 168B, 173G, 173H.
111 *Liquor Regulation 2002* (Qld) regs 37A, 37B, sch 1R, s 1.
112 (n 104).
113 Ibid 103 (citations omitted). See also *Athwal v Queensland* [2023] QCA 156, [25].
114 Discussed in, for instance, Alice Taylor, 'Anti-Discrimination Law as the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*' (2021) 42(2) *Adelaide Law Review* 405; Kent Blore and Nikita Nibbs, 'A Theory of the Right to Property under the *Human Rights Act 2019* (Qld)' (2022) 30 *Australian Property Law Journal* 1; David Jackson and Caspar Conde, 'Statutory Interpretation in the First Quarter of the Twenty-first Century' (2014) 38 *Australian Bar Review* 168; Julie Carroll, Thomas McClintock and Tim Stephens, '"*Maloney v The Queen*" [2013] HCA 28' (2014) 32 *Australian Yearbook of International Law* 220; Richard Bartlett, 'The High Court Decision: Racism and the Western Australian Government' (1995) 3(73) *Aboriginal Law Bulletin* 8. As was observed in *Maloney* (n 108) 200,

> s 10(1) does not use the word 'discriminatory' or any cognate expression, yet the language of discrimination is used throughout the authorities in which s 10(1) has been considered. That use of language follows from the sub-section's focus on the *enjoyment* of rights by some but not by others or to a more limited extent by others but it must always be kept at the forefront of consideration that it is the statutory text which is controlling. Questions about the *enjoyment* of rights do not necessarily require consideration of the concepts that are often associated with 'discrimination'. (Emphasis in original)

limited extent than those who are not of such origin, since, presumably, the makeup of those *who do not have* the immigration status of non-citizen, non-permanent resident (ie those who are subject to 'normal' or 'regular' tax treatment on the acquisition of Australian residential property) is *not* 70 per cent Asian or South Asian.[115] If so, then, alas, no amount of state or territory legislative redrafting might be able to preserve the taxes at issue.[116]

VIII WHAT THE GOVERNMENT IN FACT DID: THE EMPERORS' NEW FIG LEAF?

Perhaps as a reaction to widespread publicity regarding some of the issues that have been canvassed in the preceding discussion,[117] the Commonwealth Parliament enacted the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) ('the Act').

Recall that s 5(1) of the *International Tax Agreements Act 1953* (Cth) provides that:

> Subject 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.

Purporting to introduce a new subsection (s 5(3)) to s 5 of the *International Tax Agreements Act 1953* (Cth), sch 1 of the Act provides that:

> The operation of a provision of an agreement provided for by subsection (1) [of section 5 of the *International Tax Agreements Act 1953* (Cth)] is subject to

115 Compare *Maloney* (n 108) 243:

> The overwhelming majority of persons resident on Palm Island are Aboriginal persons. The purpose and practical operation and effect of the liquor restrictions are to target the Aboriginal community of Palm Island and limit the right of its members to possess alcohol. To the extent that the possession of alcohol by adult members of the Australian community is a right recognised by s 10(1), the enjoyment of the right by Aboriginal persons on Palm Island is limited in comparison with the enjoyment of the right by persons elsewhere in Queensland, the vast majority of whom are non-Aboriginal.

116 Neither would the measure contained in sch 1 of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth).

117 See, eg, The University of Melbourne, 'State and Territory Foreigner Property Tax Laws Unconstitutional, Urgent Redrafts Needed' (Media Release, 1 September 2023); Kehoe (n 70). Compare Lang (n 57) 224.

> 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 [ie a tax other than income tax, fringe benefits tax or the compulsory government healthcare levy[118]], unless expressly provided otherwise in that law.

Does this measure, which received Royal Assent on 8 April 2024[119] but which is asserted to be retrospective in its operation from 1 January 2018, adequately resolve the issues that have been raised in what has preceded in this paper?

Two observations should be made at the outset. The first, potentially less obvious one, is that cases such as *Kartinyeri v Commonwealth*[120] indicate that the very same heads of legislative power (touched on in Part IV) that would likely support the Australian Commonwealth Parliament giving domestic legal force to Australia's international tax treaty non-discrimination commitments could, equally and perhaps somewhat surprisingly (to the uninitiated), also apparently support a legislative 'walking back' or qualification of these very same commitments,[121] which is what the Act endeavours to do. In this regard, Brennan J's remark in *Gerhardy v Brown*,[122] that 'it is beyond the limits of the power conferred by s 51(xxix) of the Constitution for the Commonwealth Parliament to enact a law that operates, or that permits a State law to operate, in a manner inconsistent to any substantial extent with the operation which international law intends the [relevant] Convention provisions to have',[123] would appear to be at odds with the general position that the external affairs power is not limited to enactments that are consistent with the requirements of international

118 See the definition of 'Australian tax' in s 3 of the *International Tax Agreements Act 1953* (Cth).
119 Commonwealth, *Government Gazette* (No C2024G00239, 12 April 2024) 1.
120 (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*'). See also *Georgiadis v Australian & Overseas Telecommunications Corp* (1994) 179 CLR 297, 326–7 ('*Georgiadis*').
121 For a critique of this approach see, eg, Justice Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14(4) *Public Law Review* 234; Jeffrey Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (2000) 24 *Melbourne University Law Review* 677; Arthur Glass, 'Interpretation/Application/Decisionmaking' (2000) 25(1) *Australian Journal of Legal Philosophy* 97; Anne Twomey, 'Constitutional Alteration and the High Court: The Jurisprudence of Justice Callinan' (2008) 27(1) *University of Queensland Law Journal* 47; Michael Wait, 'Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57.
122 (1985) 159 CLR 70.
123 Ibid 119.

law[124] (for example, laws that are consistent with treaties).[125] As was observed in *Lamb v Brisbane City Council*,[126] 'the character of a law as a law with respect to any given head of constitutional power is to be determined by the substance of the rights and duties which are created or repealed by the challenged law and other laws in association with which that law operates.'[127]

The second, possibly more obvious threshold point, is that the Act does not, and cannot (and does not purport to) address the potential risk arising under s 10 of the *Racial Discrimination Act 1975* (Cth) that has been identified in Part VII.

As will be seen in the discussion that follows, the Act raises its own issues in relation to the compatibility of its terms with s 109 of the *Australian Constitution*, (impermissible) retrospectivity and potential acquisition of property on other than just terms.[128] The legislation, overall, is somewhat of a curiosity: the government was well aware, for instance, at the time of entry into the relevant treaties, that sub-national taxes were within their ambit.[129]

124 See, eg, *Horta v Commonwealth* (1994) 181 CLR 183, 195, criticised in Kristen Walker, 'Case Note: *Horta v Commonwealth*' (1994) 19 *Melbourne University Law Review* 1114.

125 See, eg, *Victoria v Commonwealth* (1996) 187 CLR 416, 487 ('*Industrial Relations Act Case*'); but compare *Commonwealth v Tasmania* (1983) 158 CLR 1, 131–2, 172, 232–4, 268 ('*Dam's Case*'); *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 75; *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 141.

126 [2007] 2 Qd R 538.

127 Ibid 546.

128 Issues not alluded to in Kerrie Sadiq and Na Li, 'The Influence of Domestic Tax Reviews on Australia's Network of International Tax Treaties' (2024) 22(2) *eJournal of Tax Research* 257, 264; Krever, Sadiq and Li (n 31) 1840; and not all of which appear to be fully appreciated in *Stott v Commonwealth* (High Court of Australia, M60/2024, commenced 18 July 2024); *A-G (Qld) v G Global 120E T2 Pty Ltd* (High Court of Australia, B34/2024, commenced 5 July 2024); *A-G (Qld) v Global 180Q Pty Ltd* (High Court of Australia, B35/2024, commenced 5 July 2024); *A-G (Qld) v G Global 180Q Pty Ltd* (High Court of Australia, B36/2024, commenced 5 July 2024).

129 See, eg, Explanatory Memorandum, International Tax Agreements Amendment Bill 2016 (Cth) 187, and the other material mentioned by Scott (n 50) 7–8, who observes (at 27) that 'the non-discrimination article in the relevant eight treaties was clearly understood and intended by the parties to capture taxes beyond the convention taxes'. Compare Krever, Sadiq and Li (n 31) 1840.

A *The* Treasury Laws Amendment (Foreign Investment) Act 2024 *(Cth): Going (Boldly?) Where no Commonwealth Legislation has Gone Before*

Recall that s 109 of the *Australian Constitution* stipulates that:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The Act, however, provides that:

> The operation of a provision of an agreement provided for by subsection (1) [of section 5 of the *International Tax Agreements Act 1953* (Cth)] 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 [ie a tax other than income tax, fringe benefits tax or the compulsory government healthcare levy], unless expressly provided otherwise in that law.

As is evident, the terms of the Act are, on their face, potentially incompatible with the wording of s 109 of the *Australian Constitution*. By expressly providing for a specific Commonwealth-state law inconsistency resolution rule that is contrary to that provided for in s 109, is the Act, as a result, constitutionally suspect?[130] For instance, in *R v Credit Tribunal; Ex parte General Motors Acceptance Corp (Australia)*,[131] Mason J (as his Honour then was) endorsed, *obiter*, the view

> that the Commonwealth Parliament has no power to enact a law which is inconsistent with s 109 of the Constitution and that where a s 109 inconsistency arises a law denying the existence of that inconsistency is invalid.[132]

Rumble,[133] however, opines (in abstract) that an inconsistency under s 109 can be avoided in the first place by a clause in relevant

130 See, eg, Teo, 'Surcharge Taxes' (n 50).
131 (1977) 137 CLR 545 ('*GMAC Case*'), discussed in, for example, Stephen White and Milton Latta, 'Product Liability Claims under the *CCA*: Conflict between Commonwealth and State Laws' (2015) 26(2) *Australian Product Liability Reporter* 23; Vince Morabito and Henriette Strain, 'The Section 109 "Cover the Field" Test of Inconsistency: An Undesirable Legal Fiction' (1993) 12 *University of Tasmania Law Review* 182. See, to similar effect, *Metwally* (n 60) 454–6 (Gibbs CJ), 474–5 (Brennan J).
132 *GMAC Case* (n 131) 562.
133 'Nature of Inconsistency' (n 62); 'Manufacturing and Avoiding' (n 62).

Commonwealth legislation that expressly permits the concurrent operation of what otherwise might be inconsistent state legislation,[134] arguing:

> To say that a State law is directly inconsistent with a Commonwealth law merely means that the State law attempted to interfere with the Commonwealth law's rights, powers and obligations in a way in which the Commonwealth did not *intend* to allow[,][135]

an approach apparently not shared by Hanks,[136] but broadly consonant with the views that have been expressed by similarly prominent commentators such as Lindell.[137]

With respect, and on balance, it would appear that the Rumble–Lindell view, whilst yet to be legally tested, seems to have much to commend it. For instance, cases such as *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[138] demonstrate that whether an inconsistency exists vis-à-vis state and Commonwealth law is, ultimately, a question of statutory construction: on their respective terms, properly understood, are both laws capable of operating concurrently?[139]

Importantly, as was observed in *University of Wollongong v Metwally*:[140]

> Section 109 can be divided into two parts: the condition which governs its operation ('When a law of a State is inconsistent with a law of the Commonwealth'), and the operative provision ('the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'). Section 109

134 Rumble, 'Nature of Inconsistency' (n 62) 77; Rumble, 'Manufacturing and Avoiding' (n 62) 457–60.
135 Rumble, 'Nature of Inconsistency' (n 62) 77 (emphasis in original).
136 Peter Hanks, '"Inconsistent" Commonwealth and State Laws: Centralizing Government Power in the Australian Federation' (1986) 16(2) *Federal Law Review* 107.
137 Geoffrey Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8 *Constitutional Law and Policy Review* 25. Cf Geoffrey Lindell and Sir Anthony Mason, 'The Resolution of Inconsistent State and Territory Legislation' (2010) 38(3) *Federal Law Review* 391.
138 (1980) 142 CLR 237 ('*Wardley*'). See also *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47, 50; *Council of the Municipality of Botany v Federal Airports Corp* (1992) 175 CLR 453 ('*Third Runway Case*').
139 For a discussion of *Wardley* (n 138) see, eg, Justice John Ludeke, 'Is It Time to Revisit *Whybrow's Case*?' (1993) 67 *Australian Law Journal* 756; Hanks (n 136); Stephen Donaghue, 'Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133.
140 (n 60).

> operates upon a law of a State that is inconsistent with a law of the Commonwealth.
>
> …
>
> When inconsistency between a Commonwealth law and a State law is removed by an amendment of the Commonwealth law, the condition which governs the operation of s 109 is no longer satisfied.[141]

The wording of the Act, as noted above, modifies s 5 of the *International Tax Agreements Act 1953* (Cth) so as to avoid the 'collision' between state and Commonwealth law that has been canvassed in Part IV. This it does, in a somewhat novel way, by expressly making the stipulations of the latter give way to those of the former (where the two literally would potentially clash), thus sidestepping any inconsistency that might otherwise exist, by permitting — *through the terms of the Commonwealth law itself* — the state law to take precedence under these circumstances. Section 5, as amended, now thus appears to 'avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed.'[142] To echo Lee's[143] words (albeit uttered in a different context), this 'is not an attempt at an unconstitutional amendment of s 109. Neither is it an attempt to elevate a Commonwealth law above the Constitution.'[144]

B *Impermissible Retrospectivity?*

Whilst it might appear from the above discussion that the Act's potential incompatibility with the wording of s 109 of the *Australian Constitution* is a red herring, the Act's stated retrospective operation might, however, offend what the High Court of Australia has referred to as 'the *Metwally* principle',[145] which is said to have arisen from the case of *University of Wollongong v Metwally*.[146]

141 Ibid 472–4.
142 *GMAC Case* (n 131) 563–4.
143 H P Lee, 'Retrospective Amendment of Federal Laws and the Inconsistency Doctrine in Australia' (1985) 15 *Federal Law Review* 335.
144 Ibid 342.
145 See, eg, *Spence v Queensland* (2019) 268 CLR 355, 518. Cf Rumble, 'Manufacturing and Avoiding' (n 62) 459.
146 (n 60).

Metwally was preceded by the earlier High Court case of *Viskauskas v Niland*,[147] where the Court found that the *Racial Discrimination Act 1975* (Cth) appeared to constitute an exclusive code on the subject of racial discrimination throughout Australia, thereby rendering provisions of state legislation that also dealt with racial discrimination inoperative under s 109 for inconsistency with this national code (even though both were, on their literal terms, capable of operating concurrently).[148]

The *Racial Discrimination Act 1975* (Cth) was then amended (in 1983)[149] to provide that:

> This Act is not intended, *and shall be deemed never to have been intended*, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention [namely, the *International Convention for the Elimination of All Forms of Racial Discrimination*[150]] and is capable of operating concurrently with this Act.[151]

The issue confronting the High Court in *Metwally* was: what was the legal effect, if any, of this later amendment to the Commonwealth Act, on the prior conclusion that a state law on racial discrimination was inoperative under s 109 of the *Australian Constitution* due to the inconsistency that had earlier been found between the state law and the Commonwealth Act?

By majority, the Court held that, in so far as the Commonwealth Act, through its 1983 amendment, purported now to have had, since its inception, an intention always to operate alongside concurrent state law (an intention that was not, objectively, present in the terms of the Commonwealth Act prior to its amendment), the belated expression of this intention was not effective to ameliorate any s 109 inconsistency

147 (n 100).
148 For a critique of this case, see, eg, Saku Akmeemana and Teya Dusseldorp, 'Race Discrimination: Where to from Here?' (1995) 20 *Alternative Law Journal* 207; Nicola Nygh, 'Implications of Recent High Court Decisions for State Laws Dealing with Aborigines and Aboriginal Land: *Gerhardy v Brown* and *Mabo v Queensland*' (1990) 1 *Public Law Review* 329; Geoffrey Kennett, 'Individual Rights, the High Court and the *Constitution*' (1994) 19 *Melbourne University Law Review* 581.
149 By way of s 3 of the *Racial Discrimination Amendment Act 1983* (Cth).
150 (n 106).
151 Emphasis added.

that was present prior to the intention being expressed.[152] As Deane J observed:

> A Parliament may legislate that, for the purposes of the law which it controls … facts or … laws are to be deemed and treated as having been different to what they were. It cannot, however, objectively expunge the past or 'alter the facts of history'. If the fact was that its Emperor wore no clothes, it is powerless either to reverse that fact outside the fields in which it is master or objectively to convert into falsehood the truth which a small child saw.[153]

Put simply, Parliament could not, retrospectively, negate an inconsistency that had already arisen under s 109 of the *Constitution*. Whilst this '*Metwally* principle' has drawn some criticism from commentators[154] (for not paying, for instance, due regard to the fundamentals of statutory interpretation),[155] the difference between the *Metwally* majority and minority may be explicable in terms of their Honours' disagreement over the proper role of s 109.[156] For example, Mason J (as his Honour then was) saw the object of the section as being 'to establish the supremacy of Commonwealth law where there is a conflict between a Commonwealth and a State law',[157] with the section not amounting to 'a source of individual rights and immunities'[158] (a point also emphasised by another one of the dissenting Justices, Dawson J).[159]

In contrast, the majority regarded s 109 as serving a broader purpose, being critical not only in adjusting relations between the Commonwealth legislature and the state legislatures, but also of great importance for the ordinary citizen.[160] In the words of Deane J:

152 For a critique of this approach, see, eg, Paul Schoff, 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *Public Law Review* 253; Michael Detmold, 'Australian Law Areas: Status of Laws and Jurisdictions' (2001) 12(3) *Public Law Review* 185; Belinda Wells, 'Aliens: The Outsiders in the *Constitution*' (1996) 19 *University of Queensland Law Journal* 45; Martin Flynn, 'One Strike and You're Out!' (1997) 22 *Alternative Law Journal* 72.

153 *Metwally* (n 60) 478 (citations omitted).

154 See, eg, Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 583–5; Lee (n 143); Hanks (n 136); Rumble, 'Manufacturing and Avoiding' (n 62).

155 Cf Rumble, 'Manufacturing and Avoiding' (n 62) 459–60; Hanks (n 136) 125; Lee (n 143) 342–3.

156 Hanks (n 136) 128; Lee (n 143) 340–1.

157 *Metwally* (n 60) 462–3.

158 Ibid. Compare George Williams, 'Civil Liberties and the *Constitution*: A Question of Interpretation' (1994) 5(2) *Public Law Review* 82; Kennett (n 148).

159 *Metwally* (n 60) 486.

160 Ibid 457–8. Cf Harley Wright, 'Sovereignty of the People: New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165.

> the Australian Federation was and is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority.[161]

Returning to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), it will be recalled that the Act received Royal Assent on 8 April 2024, yet purports to apply in relation to taxes payable on or after, or to taxes payable in relation to tax periods on or after, 1 January 2018: ie the Act is retrospective in its operation and, thus, potentially vulnerable under the *Metwally* principle. In this regard, the approximately six-year period of retrospectivity that has been chosen is also somewhat curious, as the first of the taxes at issue was introduced in 2015.[162] Whilst six years broadly reflects the relevant time period under which most civil wrongs are required to be actioned pursuant to limitation of actions legislation,[163] it should be remembered that, as discussed in Part VIA, the applicable limitation period for the recovery of invalid taxes is 12 months[164] … unless, of course, the government itself lacks confidence in the constitutional validity of the provisions setting out this truncated time period (due to the issues flagged in Part VIA in this regard)?[165]

Two further points should be noted for the sake of completeness. First, *Metwally* is silent in relation to territory law, since, as mentioned in Part IV, s 109 (on its terms) is inapplicable to the territories.[166] Second, the legislation in *Metwally* seemed to have a severable prospective and retrospective operation, the former thereof apparently valid.[167] Could the same conclusion be drawn regarding the *Treasury*

161 *Metwally* (n 60) 476–7.
162 See *Duties Act 2000* (Vic) s 28A and *Land Tax Act 2005* (Vic) sch 1, pt 4.
163 For a discussion of which, see generally Gino Dal Pont, *Law of Limitation* (LexisNexis Butterworths, 2nd ed, 2020).
164 Pursuant to *Limitation of Actions Act 1958* (Vic) s 20A(2); *Recovery of Imposts Act 1963* (NSW) s 2(1); *Limitation of Actions Act 1974* (Qld) s 10A(1); *Limitation Act 1974* (Tas) s 25D; *Limitation of Actions Act 1936* (SA) s 38(2); *Limitation Act 2005* (WA) s 28(1); *Limitation Act 1985* (ACT) s 21A.
165 See, eg, *Anthill Ranger* (n 97) 103; Campbell (n 97) 119–20; Brock (n 92) 141–5; Teo, 'Money Back' (n 88).
166 *Northern Territory v GPAO* (1999) 196 CLR 553, 580, 636. Cf Twomey (n 60) 422; Lindell and Mason (n 137) 407–8.
167 *Metwally* (n 60) 456, 461, 469, 483. Cf Hanks (n 136) 125; Twomey (n 60) 432.

Laws Amendment (Foreign Investment) Act 2024 (Cth)? The *Metwally* legislation relevantly provided that:

> This Act is not intended, *and* shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that … is capable of operating concurrently with this Act.[168]

The *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) however, simply provides that it applies in relation to

> (a) taxes (other than Australian tax [ie a tax other than income tax, fringe benefits tax or the compulsory government healthcare levy]) 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.

From the principles relating to severance discussed in Part V, it appears therefore that the risk that the Act does not have a severable,[169] (valid) prospective operation, is one that cannot simply be dismissed.

C *Genuine Taxation or Acquisition of Property on Other than Just Terms?*

Interestingly, if the Act does, in fact, have a valid retrospective operation (for instance, as alluded to above, potentially in relation to the territories),[170] it would, conversely, run the risk of effecting an acquisition of property on other than just terms, contrary to s 51(31) of the *Australian Constitution*.[171]

168 Emphasis added.

169 For an exegesis of the relevant principles see, eg, *Clubb* (n 76) 313–21; Hume (n 83).

170 Provided that the Act's intended operation in relation to the territories is sufficiently independent of its intended operation in relation to the states so as to admit of severance: compare the statutory schemes considered in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629; *Re Macks; Ex parte Saint* (2000) 204 CLR 158; and *Bell Group Ltd v Westpac Banking Corp* (2000) 104 FCR 305.

171 For a general discussion of this provision see, eg, Justice Pamela Tate, 'Developments in the Constitutional Protection of Property Rights' (Seminar Paper, Administrative Law Intensive, 25 February 2010); Simon Evans, 'Property and the Drafting of the *Australian Constitution*' (2001) 29 *Federal Law Review* 121; Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s 51(xxxi) of the *Constitution*' (2005) 27 *Sydney Law Review* 639; with a different approach to the provision considered in Lael Weis and Rosalind Dixon, 'Rethinking "On Just Terms": *Commonwealth v Yunupingu*' (2024) 46(3) *Sydney Law Review* (forthcoming). On the potential application of this provision to the territories, see, eg, *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Newcrest Mining (WA) Ltd v*

For instance, in *Georgiadis v Australian & Overseas Telecommunications Corp*,[172] the High Court of Australia considered the position of a person whose vested right to sue his employer for negligence was effectively barred by newly introduced Commonwealth legislation, without compensation.[173] It was acknowledged that the plaintiff's general law chose in action had, in essence, effectively been acquired on other than just terms, with the majority holding that an acquisition for the purposes of s 51(31) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a benefit to an entity other than the (now) disenfranchised claim holder.[174]

As Mason CJ and Deane and Gaudron JJ observed

> 'acquisition' directs attention to whether something is or will be received. If there is a receipt, there is no reason why it should correspond precisely with what was taken. That is particularly so with 'innominate and anomalous interests'.[175]

In *Georgiadis*, the concomitant release of the employer from liability for damages following the extinguishment of the plaintiff's vested cause of action was the benefit that was relevantly received (by the employer).[176]

Returning to the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth), all except for one of the eight relevant non-discrimination clauses,[177] whose effect the Act now essentially seeks to reverse, pre-date the introduction, from 2015 onward, of the state and territory taxes ostensibly otherwise contrary to the clauses (ie the taxes in question, highlighted in Part III, have been invalid from their inception). By retrospectively purporting to validate these apparently invalid taxes, the Act thus effectively attempts to extinguish any accrued choses in action that would exist for the recovery by taxpayers of such amounts, and accordingly seeks to permit the states and the Australian

Commonwealth (1997) 190 CLR 513. Compare *Teori Tau v Commonwealth* (1969) 119 CLR 564.

172 (n 120).

173 See s 44 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth).

174 Cf James McLachlan, 'Constitutional Validity of Orders for Divestiture of Property under the *Trade Practices Act*' (1990) 1 *Public Law Review* 120.

175 *Georgiadis* (n 120) 304–5.

176 Cf Brock (n 92) 151; Tate (n 171) 14.

177 Namely, art 24 of the *German Agreement* (n 34).

Capital Territory to retain money that they might otherwise have no legal right to.[178]

Whilst well established is the recognition that choses in action (such as the rights to sue for restitution discussed in Part VIA)[179] amount to property for the purposes of s 51(31),[180] no less well accepted is the notion that acquisitions of property as part of a genuine adjustment of competing rights,[181] or that involve genuine taxation,[182] fall outside the purview of the section.[183] While the High Court of Australia in *Australian Tape Manufacturers Association Ltd v Commonwealth*[184] has held that there is little likelihood that there will be any relevantly impermissible acquisition of property where obligations to pay are imposed as genuine taxation provisions,[185] the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) does not impose any such obligations,[186] instead providing, retrospectively, for a 'tie-breaker' rule favouring state and territory taxation provisions over the provisions of international taxation agreements that have been given the force of Commonwealth law.[187]

178 Unlike in *Inger v Queensland* (Federal Court of Australia, QUD716/2024, commenced 20 November 2024), recovery proceedings had already been commenced in *Sinclair v Victoria* (Federal Court of Australia, VID134/2024, commenced 20 February 2024) ('*Sinclair*') when the Act was passed. Compare the relief sought in *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)* (Supreme Court of Queensland, BS2855/22, commenced 11 March 2022).

179 See, eg, Brock (n 92) 151.

180 See, eg, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Werrin v Commonwealth* (1938) 59 CLR 150. On choses in action as property generally, see, eg, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 574; *Colonial Bank v Whinney* (1886) 11 App Cas 426, 440; *Colonial Bank v Whinney* (1885) 30 Ch D 261, 283; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 915; *Torkington v Magee* [1902] 2 KB 427, 430; *Loxton v Moir* (1914) 18 CLR 360, 379. For a discussion of the authorities, see generally Howard Elphinstone 'What is a Chose in Action?' (1893) 9 *Law Quarterly Review* 311.

181 See, eg, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 175 ('*Mutual Pools*').

182 See, eg, ibid 171, 175, 187, 197–8.

183 For a discussion of these exceptions, see, eg, Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)' (2000) 11 *Public Law Review* 183.

184 (1993) 176 CLR 510 ('*Blank Tapes Case*').

185 See, eg, Vince Morabito and Stephen Barkoczy, 'What is a Tax? The Erosion of the Latham Definition' (1996) 6 *Revenue Law Journal* 43; David O'Brien, 'The One that Almost Got Away: The Constitutional Guarantee of Just Terms' (1994) 5 *Public Law Review* 7 for a discussion of this exception.

186 As to what the imposition of taxation involves, see, eg, *Mutual Pools* (n 181); *Blank Tapes Case* (n 184); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.

187 Explanatory Memorandum, Treasury Laws Amendment (Foreign Investment) Bill 2024 (Cth) 34–6.

Could the Act therefore, then, amount to a genuine adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity?[188] For instance, in *Mutual Pools & Staff Pty Ltd v Commonwealth*,[189] s 51(31) was held not to apply to 'laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest.'[190] However, there is a risk that the Act might not be regarded as a law of this kind, unlike, say, in *Nintendo Co Ltd v Centronics Systems Pty Ltd*[191] (balancing the interests of circuit layout users against those of the designers and first makers of such layouts)[192] and *Airservices Australia v Canadian Airlines International Ltd*[193] (statutory liens on third-party property).[194] Somewhat telling is that no such 'genuine adjustment' argument was even raised, much less considered, in *Georgiadis*,[195] which, as noted above, involved a straight-out extinguishment of the plaintiff's existing claim (concomitantly also releasing a likely defendant from potential liability; in essence, what the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) seeks to achieve through its retrospectivity)[196] … perhaps a recognition, even if

188 An exception discussed in, eg, Brock (n 92) 152; Tate (n 171) 18–9; Pat Brazil, 'Constitutional Protection of Resource Rights under Commonwealth Laws' (1996) 15 *Australian Mining and Petroleum Law Bulletin* 149.

189 (n 181).

190 Ibid 189–90. Cf *Blank Tapes Case* (n 184) 510.

191 (1994) 181 CLR 134.

192 Critiqued in, eg, Clive Turner, 'Sale of Imported Video Game Machines Held to Infringe the *Circuit Layouts Act 1989* (Cth): *Nintendo* in the High Court' (1994) 15 *Queensland Lawyer* 41; Geraldine Chin, 'Technological Change and the *Australian Constitution*' (2000) 24(3) *Melbourne University Law Review* 609.

193 (1999) 202 CLR 133.

194 For a discussion of this case, see, eg, Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351; Patrick Lane, 'Recent Trends in Constitutional Law' (2002) 76(3) *Australian Law Journal* 154.

195 Critiqued in Kevin Purse, 'Common Law and Workers' Compensation in Australia' (2000) 13 *Australian Journal of Labour Law* 260; Kristen Walker, 'Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights' (1995) 25 *University of Western Australia Law Review* 238.

196 As previously noted, recovery proceedings in *Sinclair* (n 178) had been commenced before the Act was passed. For a discussion of the somewhat different scenario in *Nicholas v The Queen* (1998) 193 CLR 173, regarding newly introduced legislation that did not involve choses in action but which nevertheless had an impact on identifiable litigants already before the court, see, eg, Douglas Drummond, 'Judicial Independence and the *Constitution*' (2005) 7(4) *Constitutional Law and Policy Review* 81; Peter Gerangelos, 'The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases' (2002) 30 *Federal Law Review* 1; Peter Gerangelos, 'The Separation of Powers and Legislative Interference in Pending Cases' (2008) 30(1) *Sydney Law Review* 61; Sir Anthony Mason, 'Comment on Peter Gerangelos "Legislative Intervention in Pending Cases"' (2008) 30(1) *Sydney Law Review* 95. Compare *Palmer v*

sub silentio, that the 'genuine' adjustment argument is, to borrow the expression of the High Court of Australia from cases such as *Trade Practices Commission v Tooth & Co Ltd*,[197] possibly 'incongruous'[198] in a situation of this kind? If this was the case, then whether the Act, on its terms, would have a valid (namely, severable, non-property acquiring) prospective operation only, would be an open question[199] … albeit one on which the validity of, for instance, the *State Taxation Further Amendment Act 2024* (Vic), would also turn.

D *The* State Taxation Further Amendment Act 2024 *(Vic)*

In an attempt to 'piggyback' on the Commonwealth Act just discussed above (and to avail itself of the 'out' contemplated by Murphy[200] and Deane JJ[201] in *Metwally*, regarding the validity of *joint* Commonwealth–state legislative action in potentially overcoming a historical s 109 inconsistency),[202] Victoria on 3 December 2024[203] enacted the *State Taxation Further Amendment Act 2024* (Vic).

Sections 32 and 42 of this legislation purport to, in effect, impose relevant foreigner surcharges in Victoria retrospectively, where these surcharges had been invalidated by s 109 of the *Constitution*. Separately but relatedly, s 54 essentially purports to retrospectively validate tax assessments previously issued in relation to the previous surcharges.

The retrospective nature of the taxes and assessments involved, when coupled with the time periods allowed for the lodgement of tax

Western Australia (2021) 274 CLR 286 and *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, discussed in Anthony Gray, 'Legislative Amendment Directed towards a Particular Individual, Company and Dispute: The Separation of Powers and Other Constitutional Issues' (2021) 32 *Public Law Review* 112 (bearing in mind, however, the principle of statutory interpretation that Parliament will not be taken to intend the retrospective application of legislation to pending cases in the absence of express words or a necessary implication to that effect: see, eg, *Re Joseph Suche & Co Ltd* (1875) 1 Ch D 48, 50; *Hutchinson v Jauncey* [1950] 1 KB 574, 579; *Continental Liqueurs Pty Ltd v G F Heublein & Bros Inc* (1960) 103 CLR 422, 427; *Zainal v Malaysia* [1966] AC 734, 742; *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 495, 524–5; *Lodhi v The Queen* (2006) 199 FLR 303, 310–14).

197 (1979) 142 CLR 397.

198 Ibid 408. Compare *Burton v Honan* (1952) 86 CLR 169; *Re DPP (Cth); Ex parte Lawler* (1994) 179 CLR 270, discussed in Tate (n 171) 19.

199 Along the same lines as the discussion accompanying nn 167–169.

200 *Metwally* (n 60) 469.

201 Ibid 480.

202 An approach criticised in Lee (n 143) 342–3.

203 Victoria, *Government Gazette* (No S 670, 3 December 2024) 1.

objections under Victorian law,[204] give rise to the spectre of an incontestable tax being contemplated.[205] The Victorian Parliament's Scrutiny of Acts and Regulations Committee has flagged that these provisions could, potentially, also essentially effect the imposition of criminal culpability retrospectively,[206] contrary to s 27 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[207] Ultimately, the legislation is predicated on the (presumed) valid operation of the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth),[208] the constitutionally contestable nature of which has been pointed out previously.

IX CONCLUSION

In days gone by, the Raubritter were said to have targeted travellers passing through their lands by levying illegal tolls on these 'strangers within their gates'.[209] In the present day, alien-specific property-related taxes of varying constitutional validity have been enacted in a number of jurisdictions.[210] Relevantly, almost all Australian mainland states and territories have legislated to impose additional taxes on foreigners in relation to their ownership of Australian property. As has been discussed, the levying of such taxes on non-citizen, non-permanent residents sits uncomfortably with the reality of relevantly expansive non-discrimination clauses contained in a number of international tax agreements to which Australia is a party.

204 *Taxation Administration Act 1997* (Vic) ss 96(2), 99, 100.

205 Compare *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 378–9; *Deputy Federal Commissioner of Taxation v Hankin* (1959) 100 CLR 566, 576; *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32, 40 (discussed in, for instance, William Gummow, 'The Law of Contracts, Trusts and Corporations as Criteria of Tax Liability' (Annual Tax Lecture, The University of Melbourne, 12 September 2013); Morabito and Barkoczy (n 185)).

206 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 15 of 2024, November 2024) 15.

207 For a discussion of which see, eg, Mark Aronson, 'Judicial Review and the *Charter*' (2018) 25(1) *Australian Journal of Administrative Law* 52.

208 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2024, 26 (Timothy Pallas).

209 See, eg, Hillay Zmora, *State and Nobility in Early Modern Germany: The Knightly Feud in Franconia, 1440–1567* (Cambridge University Press, 2003) 3.

210 See, eg, Hayashi and Hynes (n 2) and *Li* (n 2).

The Australian Parliament has, as a result, attempted to address this conundrum by sailing into uncharted waters with legislation that purports to belatedly give these taxes primacy over the operation of such clauses,[211] even though the latter have the force of Commonwealth law. Whilst, as pointed out above, this ostensible collision with s 109 is essentially a red herring, there nevertheless remains the real risk that even if the legislation navigates through the minefield of (impermissible) retrospectivity, it might yet founder upon the reef that is its attempted acquisition of property on other than just terms. This is to say nothing of the pall that the broad shadow of s 10 of the *Racial Discrimination Act 1975* (Cth) may cast over the particular incidence of the taxes that the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) endeavours otherwise to validate.

[211] Compare the novel s 109-related legislation considered in Rumble, 'Manufacturing and Avoiding' (n 62) 449.