Attorney-General

Reference: MC24-001441

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: Scrutiny.Sen@aph.gov.au

Dear Chair

I refer to the request of the Senate Standing Committee for the Scrutiny of Bills in Digest 2 of 2024, dated 7 February 2024, for further information in relation to the Administrative Review Tribunal Bill 2023 (**ART Bill)** and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (**Consequential and Transitional Bill** 1).

I appreciate the time the Committee has taken to consider the Bills, and thank the Committee for the opportunity to address the comments raised in its initial scrutiny. Please see below my response to the questions raised by the Committee. As well as the further information contained in this response, I note the recommendations of the House of Representatives Standing Committee on Social Policy and Legal Affairs, following its inquiry into the ART Bill and the Consequential and Transitional Bill 1. The Government will also consider any recommendations from the Senate Legal and Constitutional Affairs Legislation Committee on the entire legislative package that establishes the Administrative Review Tribunal, following its inquiry into these Bills.

Finally, I have copied relevant ministers into this correspondence, noting responses to comments made by the Committee in the attached include matters outside of my portfolio responsibilities.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
15 / 3 /2024

Encl. Response to the Committee's questions on the Bills
CC *The Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs*
The Hon Clare O'Neil MP, Minister for Home Affairs
The Hon Matt Keogh MP, Minister for Veteran's Affairs
The Hon Stephen Jones MP, Assistant Treasurer

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Response to Senate Standing Committee on the Scrutiny of Bills
Scrutiny Digest 2 of 2024

The Senate Standing Committee on the Scrutiny of Bills (the Committee) has requested my further advice in relation to the Administrative Review Tribunal Bill 2023 (**ART Bill)** and the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (**Consequential and Transitional Bill 1**). The Committee's observations are set out in Scrutiny Digest 2 of 2024.

I note that while the focus of the reform that this legislation gives effect to is on the new Tribunal, the Government is conscious that the Tribunal will exist as a component – albeit an important one – of existing, broader systems of government decision-making. The success of reform to Australia's system of administrative review is inextricably linked to how other components of the system operate, including ensuring appropriate continuity and certainty for established aspects of those systems that the Tribunal will necessarily engage with and support. This consideration has informed which arrangements remain consistent between the current Administrative Appeals Tribunal (AAT) and the Administrative Review Tribunal that will replace it.

Noting that a number of the Committee's comments relate to the replication of existing public interest certificate frameworks, and the procedures for the intelligence and security jurisdictional area (replicated from the AAT's Security Division), I provide the following information as context on the process of policy development for these matters.

The Attorney-General's Department conducted public consultation on the design of a new federal administrative review body, which involved the release of a Public Issues Paper and short survey on 3 April 2023, with submissions open until 12 May 2023. The Issues Paper summarised existing arrangements for the non-disclosure of information under the *Administrative Appeals Tribunal Act 1975* (AAT Act) and specifically invited comment on these issues (pp. 69-71 refers). The Attorney-General's Department did not receive comments or responses from stakeholders that these settings required substantive change. Previous reviews of the AAT, including the Hon Ian Callinan's AC KC *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, did not identify any issues with the operation of these provisions.

As a result, the overall approach adopted to the design of the Intelligence and Security Jurisdictional Area and the public interest certificate regime was to retain existing settings, with harmonisation and drafting improvements where practicable. The AAT Annual Report for 2022-23 noted that there are a small number of applications in the Security Division. In that year, there were 7 applications finalised in the Security Division.[1]

Matters dealt with in the AAT's Security Division, which would be reframed as the Intelligence and Security Jurisdictional Area, are extremely sensitive with serious national security consequences if not handled cautiously. The settings for these matters, as set out in the Bill, carefully balance the imperatives of national security and procedural fairness. The procedures are only activated where necessary – as the relatively small number of matters in Security Division suggests. Similarly, Attorney-General public interest certificates are issued very rarely – generally in the region of 1-4 certificates per year.

[1] Administrative-Appeals-Tribunal-Annual-Report-2022–23.pdf (aat.gov.au), p 19, 60

Administrative Review Tribunal Bill 2023

Procedural fairness – public interest certificates

1.19 In light of the above, the committee requests that the Attorney-General provide a comprehensive justification for the rigid approach adopted for public interest certificates, including:

- **a consideration of whether fairness could appropriately be promoted by an approach which includes granting the Administrative Review Tribunal a more general discretion to consider the cogency of any public interest immunity claims (analogous to the flexibility given to a court when considering a public interest immunity claim and noting that the Administrative Review Tribunal could be required to exercise this discretion through a judicial member);**
- **whether the bill could be amended to require the minister to balance the extent of prejudice to the public interest with the unfairness to the individual prior to issuing a certificate under clause 91 or 92;**
- **whether the bill can be amended to include additional mechanisms to provide for procedural fairness or, at a minimum, ameliorate the denial of procedural fairness;**
- **whether a more detailed explanation can be provided as to what other mechanisms have been considered to address the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case; and**
- **a consideration of the appropriateness of a special advocate scheme in this context.**

Some government decisions, by their nature, involve the government relying on sensitive, and protected, information to inform the decision-making process. Decisions such as whether to grant an individual a security clearance, to revoke a passport, to refuse a visa or to refuse access to documents containing sensitive information inherently involve material obtained from Australian, and potentially other security partners', intelligence agencies. As noted in the 2020 *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Comprehensive Review), '[i]ntelligence agencies, by their nature, require secrecy and confidentiality in order to effectively perform their functions. Secrecy and confidentiality are essential for operational effectiveness and governments' ongoing ability to address security and national interest concerns.'[2]

The Australian Law Reform Commission's 2004 report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* noted that the consequences of disclosing national security information may include:

- identifying to foreign powers and others the capabilities (or limitations) and methodologies of Australia's intelligence agencies and defence arrangements
- undermining international or diplomatic relations
- endangering the ongoing exchange of security information with domestic and international partner agencies
- undermining security and intelligence operations and endangering the lives or wellbeing of officers and informants, and
- confirming the existence of matters which could otherwise only be the subject of speculation.

It is against this backdrop that the ART Bill, and the AAT Act before it, would apply a review framework which balances the right of individuals to a fair hearing, with the imperative to protect

[2] *Comprehensive Review of the Legal Framework of the National Intelligence Community*, para 45.1

sensitive information from disclosure. In setting out procedures for review of these matters, the Bill ensures that individuals can seek review of administrative decisions on the merits, without exposing the Commonwealth to the disclosure risks outlined above.

The approach to public interest certificates in the Tribunal necessarily differs from the approach taken to public interest immunity in the courts because of the difference in role between the Tribunal and the courts. The Tribunal 'stands in the shoes' of the decision-maker, conducting a full *de novo* review of the decision. In order to perform this role, it must have available to it all of the material that was before the original decision-maker. Disclosure protections proceed on this basis.

Where a court considers a public interest immunity claim by parties, the fundamental issue is whether the information ought to be admitted into evidence – thus whether all parties, including the court, may have regard to that information in proceedings. There is no asymmetry in access to the information. This is because judicial review concerns whether or not there has been an error of law, and the rules of evidence apply. It is not a full review of the decision on its merits.

Noting the impact that ministerial certificates have on a party's ability to understand the case against them, the ART Bill provides the Tribunal with the power to disclose information covered by a certificate, where the grounds for that certificate are that the material could form the basis for non-disclosure claim in a judicial proceeding.

It is not appropriate to allow the same discretion where a certificate has been sought on the basis that the disclosure of information would prejudice the security, defence or international relations of the Commonwealth. Responsibility for whether information ought to be disclosed rightly sits with the responsible minister (or, in some cases, the Director-General of Security (clause 159, ART Bill)), who are uniquely placed to understand the sensitivity of the material, and consequences of its disclosure.

Finally, the Tribunal is not able to override a certificate where the basis for the certification is that the material would disclose deliberations or decisions of the Cabinet or of a Committee of the Cabinet. Cabinet confidentiality is a foundational principle for Westminster Cabinet governments. Whether documents are Cabinet materials is largely a question of fact – governed by whether the documents have entered the open access period (20 years for most documents, 30 years for Cabinet notebooks). It is not appropriate for Tribunal members to have discretion to release individual Cabinet materials, where there is a pre-existing government-wide framework for their release.

In summary, in developing the ART Bill, the government has considered what flexibility ought to be provided to Tribunal members to consider the cogency of certificated information, and has determined that this discretion is appropriately applied to claims for general privilege, but not for security, defence or international relations claims, nor for Cabinet matters. The Bill also provides for parties to seek review of decisions on public interest certificates in the FCA (see clause 172, subclauses 94(4) and 189(3)).

The threshold for issuing public interest certificates requires Ministers to be satisfied that restricting access to information is in the public interest. It is not necessary to create more detailed criteria for that consideration due to the context in which ministerial certificates are sought. Tribunal proceedings are generally held in public (clause 69), which government decision-makers are aware of when making their primary decisions. Where a certificate is sought, it is inherent in the request that the information will not be made available to the applicant, and that is a part of the 'public interest' being considered by the Minister in issuing the certificate.

The ART Bill contains a number of measures to ensure that parties have access to an independent and fair review, including where certificated information is included in proceedings. For example,

parties have the right to present their case, including to make submissions and to adduce evidence (paragraphs 55(1)(a) and (c)), and the Tribunal has a general obligation to ensure that the review is accessible (clause 51). The Tribunal controls the scope of the review (clause 53), and may inform itself on any matter that it considers appropriate (clause 52). Using these general powers, it is open to the Tribunal to ask questions to the applicant which may arise from their consideration of certificated materials to inform their decision-making, provided they do not reveal the content or substance of the certificated material.

The Government will not be considering a special advocate scheme in the Tribunal at this time. The Government notes that applicants are entitled to be represented in Tribunal proceedings (clause 66, ART Bill).

Procedural fairness – intelligence and security jurisdiction

1.40 In light of the above, the committee requests the Attorney-General provide a comprehensive justification for the rigid approach adopted for decisions made in the intelligence and security jurisdiction of the Tribunal, including:

- **why it is necessary and appropriate for subclause 136(2) to provide a blanket ban on reasons for intelligence and security decisions from being provided to applicants, and whether consideration has been given to drafting the provision so that the default position required reasons for a decision to be provided with grounds for exceptions for non-disclosure;**
- **a consideration of whether fairness could appropriately be promoted by an approach which includes granting the Administrative Review Tribunal a more general discretion to consider the cogency of the public interest immunity claims for intelligence and security decisions (analogous to the flexibility given to a court when considering a public interest immunity claim and noting the Administrative Review Tribunal could be required to exercise this discretion through a judicial member);**
- **whether the bill can be amended to require the minister to balance the extent of prejudice to the public interest with the unfairness to the individual prior to issuing a certificate under clause 159, 160 or 161;**
- **whether the bill can be amended to include additional mechanisms to provide for procedural fairness or, at a minimum, ameliorate the denial of procedural fairness;**
- **whether a more detailed explanation can be provided as to what other mechanisms have been considered to address the denial of procedural fairness and, if they are considered not appropriate to include in the bill, why this is the case; and**
- **a consideration of the appropriateness of a special advocate scheme in this context.**

Limitations in the ART Bill on the ability of an individual to be able to meet a case put against them is for a legitimate purpose of protecting information that would be against the public interest to disclose. The information protections applied in relevant parts of the ART Bill promote public safety and national security, and ensure a carefully balanced framework for people to seek independent review of such decisions without compromising sensitive information.

The Committee has asked why it is necessary and appropriate for subclause 136(2) of the ART Bill to provide a 'blanket ban' on reasons for intelligence and security decisions from being provided to applicants. Subclause 136(2) exempts decision-makers from the requirement to provide reasons for intelligence and security decisions upon request, but it does not prevent them from doing so.

The reason for the exemption is due to the nature of these decisions. 'Intelligence and security decisions' are defined by clause 4 of the ART Bill as including:

- criminal intelligence assessments
- exempt security record decisions
- foreign acquisitions and takeovers decisions
- preventative detention decisions
- security assessments
- security clearance decisions, or
- security clearance suitability assessments.

These decisions inherently, and exclusively, will relate to and rely on sensitive information which must be protected, including from the applicant. Unlike other government decisions which may draw on information from a range of sources, the information that is used by the decision-maker in making an 'intelligence and security decision' is drawn exclusively from protected information. The decision-maker is unable to write a statement of reasons without referring to sensitive law enforcement or intelligence information, and without disclosing capabilities, sources or the assessments standards used by Australian government agencies. As such, the long-standing policy position has been not to provide reasons for these decisions.

Nevertheless, applicants (except in limited circumstances – see, for example, s 36 of the *Australian Security Intelligence Organisation Act 1979*), must be notified where decisions have been made in relation to them, and given advice as to their review rights in the Tribunal.

This approach strikes the appropriate balance between providing applicants with procedural fairness, and ensuring that a comprehensive review of the matter can be undertaken without the risk of sensitive information being revealed in reasons. It is pertinent to note that in a number of these decisions, whether the applicant poses a security risk is central to the decision under review. In these circumstances, the consequence of requiring information to be disclosed to the review applicant would be that sensitive national security information would be divulged to a person who has been judged by the relevant agency to be a national security risk.

Proceedings in the Intelligence and Security jurisdictional area, or involving public interest certificates under clause 91, must be constituted with the President (who must be a Judge of the Federal Court) or a Deputy President. Members are required to promote the objectives of the Tribunal set out in clause 9 of the ART Bill to be fair and just, and promote public trust and confidence in the Tribunal.

Proceedings in the intelligence and security jurisdictional area follow a specific order of evidence and submissions. Clause 151 of the ART Bill sets outs that unless it determines otherwise, the Tribunal must first hear evidence and submissions by the agency head, followed by relevant bodies, and then the applicant. This ensures that the Tribunal has all relevant information before the applicant presents their evidence and submissions so that the Tribunal is able to invite views on relevant facts before making a decision. Procedural fairness is bolstered for applicants in clause 152 of the ART Bill, by providing the applicant with a further opportunity to adduce further evidence and make further submissions. The Tribunal is also able to invite a person to give evidence at any stage of the proceedings in the intelligence and security jurisdictional area (clause 153, ART Bill). The Tribunal retains a discretion in subclause 161(6) of the ART Bill to make certificated information or documents available to any or all of the parties to the proceeding if the certificate

does not specify the reason set out in paragraph (2)(a), (b) or (c).

The Committee asks whether the Bill can be amended to include additional mechanisms to provide for procedural fairness, or otherwise ameliorate the impact of the provision. The settings for review of decisions in the Intelligence and Security Jurisdictional Area have been carefully calibrated to balance the risks of disclosure of the most sensitive information against the ability of applicants to receive a fair and just review of those decisions on the merits. They are consistent with the outcomes of the public consultation process which informed design of the ART Bill, noting stakeholders did not raise significant concerns about the operation of the Security Division under the AAT Act.

It is noted that the functions of the re-established Administrative Review Council include monitoring the integrity of the Commonwealth administrative review system, and inquiring into and reporting on systemic challenges in administrative law. As such, the Council has a role in assessing procedures and arrangements within the Tribunal, including those within the Intelligence and Security jurisdictional area, to ensure they remain adequate and appropriate. It is anticipated that in undertaking such reviews, from time to time and as required, the Council could monitor and inquire into the processes outlined in Part 6 of the ART Bill, and related matters, as a component of Australia's federal administrative review system.

Broad discretionary power

1.44 In light of the above, the committee requests the Attorney-General's detailed advice as to:

- **the criteria against which the Attorney-General will consider a decision to grant financial or legal assistance; and**
- **whether consideration has been given to including appropriate criteria or considerations in the bill that can guide the exercise of the Attorney-General's broad discretionary power to authorise the provision of legal or financial assistance.**

Subclause 294(7) of the ART Bill provides that the Commonwealth Attorney-General may authorise legal or financial assistance to a person if the Attorney-General considers that refusing the application would involve hardship to the person, and that providing assistance is reasonable in all the circumstances.

Consistent with the approach to the current scheme, applications for legal or financial assistance will be assessed in accordance with the Commonwealth Guidelines for Legal Financial Assistance (the Guidelines) and the accompanying Assessment of Costs. As noted in the Guidelines, which are available on the Attorney-General Department's website <Commonwealth Guidelines for Legal Financial Assistance 2012 | Attorney-General's Department (ag.gov.au)>, assistance in this scheme is generally targeted at helping people meet the sometimes prohibitive costs of disbursements. Disbursements may include fees for the preparation of medico-legal reports, expert opinions, the provision of transcripts and interpreters.

It is appropriate that decision-making considerations are contained in the Guidelines. The criteria set out in the Guidelines allow the decision maker to weigh a range of considerations relevant to a particular applicant's circumstances and the subclause 294(7) elements of hardship and reasonableness. The criteria include consideration of the applicant's financial means to meet the cost of the proceedings, prospects of success in the proceedings, the potential benefit/detriment to the applicant, the availability of legal aid, the availability of funds, and the reasonableness of the grant amount requested. A range of schemes are also administered under the Guidelines, allowing

broad consistency in the assessment and decision making on applications, as well as grantee obligations once a grant is approved.

The Assessment of Costs document is used to determine reasonable costs payable. For example, it sets an hourly rate and daily cap for legal practitioners, and associated disbursements such as administration costs, travel and the cost of expert/medical reports.

Clause 294 creates a scheme that is separate from the legal assistance provided by legal aid, community legal centres and other legal assistance providers through which people have access to a lawyer who can provide advice. A further consideration for the Attorney-General in deciding whether to grant legal or financial assistance will be if a person is receiving, or is eligible to receive, assistance from a legal aid commission.

Given legal or financial assistance under this clause is by application to, and granted by, the Attorney-General, the mechanism is not suited to the delivery of legal or financial assistance to large cohorts of applicants. Instead, this broader support is provided through the National Legal Assistance Partnership. Legal assistance providers funded through the partnership typically prioritise the delivery of advice on reviews of social security and migration decisions.

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)

1.49 The committee requests the Attorney-General's advice as to why it is necessary and appropriate for proposed subsection 798G(2) of the Corporations Act 2001 to allow delegated legislation made under that Act to amend the operation of the Administrative Review Tribunal Act.

Currently, subsection 25(6A) of the AAT Act allows any enactment to make modifications to various provisions in the AAT Act. The ART Bill contains updated drafting which provides (in subclause 5(2)) that legislative instruments may modify the operation of the ART Bill but only where provided for by primary legislation. This enhances scrutiny and transparency by ensuring that non-legislative instruments and other types of enactments cannot modify the effect of the Bill.

Subclause 5(2) reflects the principle that, while Henry VIII style provisions are generally to be avoided, the proximity of decision-making power and rights of review in the same Act or legislative instrument allows individuals to be able to easily ascertain their review rights. It ensures that provisions relating to review rights, including any specific procedural requirements, can be located with the decision-making power rather than across multiple pieces of legislation.

New subsection 798G(2) of the *Corporations Act 2001* would maintain the Australian Security and Investments Commission's (**ASIC**) ability to make a legislative instrument that contains provisions that apply in addition to, instead of or contrary to the ART Act. The provision would not change the scope of the rule making power that already exists in section 798G. Rather, it would provide certainty to ASIC of their ability to make such rules consistently with subclause 5(2) of the ART Bill.

ASIC has made various instruments under current section 798G of the Corporations Act which modify the operation of the AAT Act. The following instruments have been made under section 798G of the Corporations Act and modify the operation of the AAT Act:

- ASIC Market Integrity Rules (Securities Markets) 2017

- ASIC Market Integrity Rules (Capital) 2021
- ASIC Market Integrity Rules (Futures Markets) 2017
- ASIC Market Integrity Rules (IMB Market) 2010

These instruments modify provisions of the AAT Act that would otherwise lead to impractical outcomes. The category of persons who may seek review of an ASIC decision identified as reviewable in the above instruments is narrower in these instruments than the AAT Act and associated notification obligations are similarly modified. Therefore, proposed subsection 798G(2) is needed to ensure these instruments remain effective.

For example, the ASIC Market Integrity Rules (Futures Markets) 2017 restricts the application for review of a decision made under that instrument to Market Participants that are directly affected by the decision. This modifies the approach taken in the AAT Act which is to allow for any persons whose interests are affected by the decision to apply for review.

Procedural fairness

1.55 In light of the above, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to restrict a person's right to apply for legal or financial assistance in relation to the review of a migration or protection decision.

The type of legal or financial assistance provided for in clause 294 has historically been unavailable for reviewable migration decisions and reviewable protection decisions. This approach has not changed. Clause 294 is one of 24 Commonwealth legal financial assistance schemes, such as the schemes under section 30, *Aboriginal and Torres Strait Islander Heritage Protections Act 1984*, and section 46PU, *Australian Human Rights Commission Act 1986*, that are all funded under a single appropriation of approximately $5million per year (further information on legal financial assistance schemes is available on the Attorney-General's Department's website <Commonwealth legal financial assistance | Attorney-General's Department (ag.gov.au)>). This scheme does not have the capacity or available funding to cater for the volume of migration and social security matters before the Tribunal. As explained above in relation to clause 294 of the ART Bill, there are more targeted programs available from other providers, such through the National Legal Assistance Partnership. Legal assistance providers funded through the partnership typically prioritise the delivery of advice on, among other matters, migration and protection decisions.

While migration and protection applicants would not access the specific scheme created by clause 294, they would continue to be eligible for legal assistance. The Government provides funding to legal assistance service providers through a range of measures including the National Legal Assistance Partnership 2020-25 (NLAP). The NLAP delivers Commonwealth legal assistance funding to states and territories through a Federation Funding Agreement. Schedule A15(g) highlights that migration matters (which include protection matters) are a Commonwealth civil law priority.

Discrete funding programs (such as the recently announced $48.9 million funding injection to provide both early intervention and litigation support for permanent protection visa applicants), and other programs such as the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Home Affairs also provide support to legal assistance providers.

Procedural fairness

1.71 The committee therefore requests the Attorney-General's advice as to:

- **for proposed subsection 359A(4A), whether consideration was given to how non-disclosure of information about a class of persons to which the applicant is a member could have a significant impact on an applicant's claim for protection and how their procedural fairness rights are balanced;**
- **for paragraph 359A(4)(d), whether consideration was given to whether applicants may not be aware of information provided in the original written decision being considered adverse to their case, and whether further justification as to the necessity of this paragraph can be provided; and**
- **for paragraph 359A(4)(e), why it is considered to be necessary and appropriate for the regulations to be empowered to prescribe further types of information upon which the Tribunal may base their decision without disclosing that information to the applicant.**

Section 359A of the Migration Act requires the Tribunal to give the applicant an opportunity to comment on information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review. The provision provides a fair and certain process for ensuring that the applicant has had an opportunity to comment on any adverse information. Importantly, section 359A does not prevent the Tribunal member from putting any information to the applicant, if they consider it necessary and conducive to the review process.

Proposed subsection 359A(4A) is intended to put beyond doubt that the Tribunal is not required to put information covered in subsection 359A(4) to the applicant before making its decision in the review. It does not otherwise alter the scope of the provision. The subsection also reflects that the requirements only apply to the substantive decision in the review, that is the decision under section 105 of the ART Bill or section 349 of the Migration Act. Common law procedural fairness applies to other decisions of the Tribunal under the ART Bill, such as dismissals and procedural decisions.

New paragraph 359A(4)(d) has the effect that the Tribunal will not be required to give the applicant any adverse information contained in the notice of primary decision under review. This is because applicants are provided with written statements of decisions under the Migration Act. As the primary document relevant to the decision under review, applicants will already be aware of the contents of the notice, and have the opportunity to respond to any of that information during the review process and particularly at the hearing. It is therefore unnecessary and duplicative to require the information to be put to the applicant again under the section 359A process. Such a requirement would impede the efficiency of Tribunal reviews and contribute to delays and backlogs in reviews of migration and protection decisions.

Proposed paragraph 359A(4)(e) would enable the *Migration Regulations 1994* (the Migration Regulations) to prescribe types of information for the purposes of subsection 359A(4). The types of information and materials relied on can change quickly. Regulations provide greater flexibility than amending legislation, and allow the Government to quickly resolve uncertainty about what information ought to be provided to the applicant. Any amendments to the Migration Regulations for the purposes of paragraph 359A(4)(e) would be subject to parliamentary scrutiny and disallowance to determine whether the amendments are necessary and appropriate.

Parliamentary Scrutiny

1.87 The committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to specifically exclude, through legislative provision, entrusted persons from providing protected documents and information to the Parliament, particularly noting the existing structures in place for the protection of sensitive information such as the ability for ministers to raise public interest immunity claims and for committees to receive evidence on an in-camera basis; and**
- **whether the bill could be amended to remove proposed section 378 of the Migration Act, noting that such a provision should not be enacted except in the rarest and most extraordinary of cases.**

Clause 378 in the Consequential and Transitional Bill 1 would retain the current legislative settings (see current subsection 473GC(5) of the Migration Act), thereby retaining existing restrictions on the production or disclosure of documents or information, to include production or disclosure to a parliament. The purpose of this amendment is to prohibit the use of information or a document in the course of a person performing his/her duties or functions or exercising a power under the Migration Act other than for a purpose of the Migration Act or in the course of performing that duty or function. This amendment prevents such a person from being compelled to produce a document or divulge or communicate to any court, any information to which this section applies. This also includes any House of Parliament or a committee of a House of Parliament, tribunal or authority possessing the power to compel a person to do such things. This section is subject to the *Freedom of Information Act 1982* in that a person is entitled to personal information under that Act.

The Government draws the Committee's attention to the construction of clause 378, which prevents the production or disclosure of documents to a parliament only if the production or disclosure is not necessary for the purposes of carrying into effect the provisions of the ART Act or another enactment conferring powers on the Tribunal. This has the effect that only necessary information would be disclosed to a parliament. For instance, the President of the Tribunal would be able to disclose protection visa review information when such information forms part of a systemic issue in the Tribunal.

This limitation is appropriate for reviewable protection decisions (which proposed section 378 would apply to) to provide protection to the privacy and safety of persons involved in reviews of a reviewable protection decision. The information contained in protection visa reviews contains highly sensitive information about an individual's circumstances, and often those of their families. They routinely involve allegations of other states' activities, the open disclosure of which in the parliament could endanger the applicant or other persons.

Availability of appeal

1.92 The committee therefore requests the Attorney-General's advice as to why it is necessary and appropriate to limit the right to appeal to the Federal Court on a question of law in the context of migration and protection decisions.

Provisions in the Bills relating to appeals to the Federal Court on a question of law are consistent with the current judicial review framework for migration and protection decisions set out in Part 8 of the Migration Act (which would become Part 7 under the proposed amendments). The overall judicial review framework is out of scope of these current reforms, which focus on the operations of the federal administrative review body which needs to work within and as part of existing frameworks for primary decision-making and judicial review. As such, while the framework in the ART Bill for appealing Tribunal decisions does not apply to migration matters, the current

framework for appeal to the Federal Circuit and Family Court of Australia in the Migration Act is preserved.

Procedural fairness

1.97 The committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to restrict a person's access to security clearance standards, and what consideration has been given to allowing access as the default position.

Careful consideration has been given to balancing the public interest in affording an applicant in legal proceedings with procedural fairness, with the public interest in protecting national security.

Vetting methodology and tradecraft is particularly sensitive information. Improper access to this sensitive information would dilute the efficacy of the security clearance process by allowing applicants to understand how they are being assessed, to modify their answers or behaviours to game the system.

Australia has, in the past, had publicly accessible standards for security vetting. The *Australian Security Intelligence Organisation Amendment Act 2023* (the ASIO Amendment Act) was passed to uplift and harden Australia's highest-level of security clearances in response to the unprecedented threat from espionage and foreign interference and drive shared initiatives and investments across critical national security capabilities.

Those amendments put in place a new, classified standard for Australia's highest level of security clearance. The standard is security classified and only available to qualified practitioners conducting highest-level security vetting, psychological security assessments or insider threat management activities in authorised vetting agencies or sponsoring entities.

The standard details how security vetting is conducted for Australia's highest-level of security clearance. This 'how to' guide to obtaining a security clearance, which grants access to Australia's most sensitive information and capabilities, would be highly valuable to foreign intelligence services and others who may seek to engage in espionage and foreign interference activities against Australia.

To minimise the risk of foreign intelligence services and others from gaining access to the standard and undermining the security clearance process, it is necessary to restrict access to the standard. Further, it is not only improper access that would cause harm, intentional or unintentional disclosures would also cause harm.

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)

1.102 The committee requests the Attorney-General's advice as to why it is necessary and appropriate for proposed subsections 115B(12) and 216(2) of the bill to empower legislative instruments to amend the operation of the Administrative Review Tribunal Act.

The Government acknowledges that Henry VIII clauses have a significant impact on parliamentary scrutiny. However, there are some circumstances where Henry VIII clauses may be appropriate, for example, where minor or technical changes are required to keep legislation up to date due to changes in other legislation or international agreements, or complex transitional arrangements that may require modifications not anticipated when the primary Bill is introduced.

Timeframes for applying for review of veterans' decisions are usually either the same as, or longer than, other jurisdictions in a reflection of the unique characteristics of benefits available to veterans. Subclauses 115B(12) and 216(2) reflect and retain an existing ability within veterans' legislation to determine appeal periods for certain types of claims via legislative instrument. The existing instruments contain more beneficial timeframes for appeals for veterans, noting the specific personal circumstances that this cohort may be affected by, such as injury. These amendments are necessary to align the provisions with subclause 5(2) of the ART Bill that allows legislative instruments to modify the operation of the ART Bill only if explicitly provided in the parent Act. For information about the policy intent of subclause 5(2) of the ART Bill, please see the response to the Committee's question at 1.49 of this response.

For example, amendments to section 115B of the *Veterans' Entitlements Act 1986* (VEA) allows the Veterans' Vocational Rehabilitation Scheme Instrument (VVRS Instrument) to modify the timeframes for application to the Tribunal. This amendment replicates presently existing power which the instrument incorporates in relation to the operation of the AAT Act, as currently provided by provision 5.3.3 of the VVRS Instrument.

Similarly, proposed new subsection 216(2) will also replicate those powers which now exist in respect of the AAT Act in relation to certain veterans' entitlements by enabling regulations made under the VEA to modify the timeframes for application to the Tribunal. The Veterans' Entitlements (Rehabilitation Allowance) Regulations is an example of an instrument made pursuant to section 216 of the VEA which currently confers jurisdiction upon the AAT and modifies timeframes for applications to the AAT.

These amendments would ensure that review timeframes under veterans' entitlements and military compensation continue to be more beneficial for veterans than those which may be set for application to broader Tribunal matters, and for the relevant timeframes to be contained in legislative instruments alongside provisions that provide for the decision to be made and for applications to be made for review of the decision.

Retrospectivity

1.111 In light of the above, the committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to restrict the operation of subsection 12(2) of the Legislation Act 2003 and what steps, if any, will be taken to avoid any disadvantage to an individual and ensure procedural fairness for affected persons;**
- **why it is necessary and appropriate for rules to be made under subitems 51(2) and (3) that may modify provisions, or provide for the application of provisions, of the Act or the Administrative Review Tribunal Act; and**
- **whether the power to make transitional rules which may modify provisions of Acts or the operation of Acts can be restricted to a period of time after the Act has come into force.**

Subitems 51(2) and (3) of Schedule 16 to Consequential and Transitional Bill 1 enable the Minister to make rules of a transitional nature. This includes rules of a transitional nature that modify provisions, or provide for the application of provisions, of the ART Bill or Consequential and Transitional Bill 1. This is necessary to provide the Minister with the discretion and flexibility to deal with transitional matters or circumstances that are not dealt with in the Consequential and Transitional Bill 1. The transitional provisions in Schedule 16 will apply in relation to a very large number of applications and proceedings. It may not be possible to anticipate the full range of circumstances which the transitional provisions will need to accommodate.

During the transition from the AAT to the new Tribunal, it may become clear that there are particular matters for which transitional arrangements are required, that have not been dealt with in Consequential and Transitional Bill 1. In that case, it may be necessary to make rules clarifying how particular provisions of the ART Bill and Consequential and Transitional Bill 1 will apply during the transition from the AAT to the new Tribunal. This may require modifying provisions, or providing for the application of provisions, of the ART Bill or the Consequential and Transitional Bill 1.

In addition, if it becomes clear during the transition that the transitional arrangements in Consequential and Transitional Bill 1 give rise to unintended or undesirable outcomes, the Minister can remedy this via transitional rules. This may involve making rules that modify, or provide for the application, of provisions in Consequential and Transitional Bill 1. This will ensure the transition to the ART is smooth and causes as little disruption to parties as possible.

The Government considers that it is necessary to enable the Minister to make transitional rules of this kind that have a retrospective application. It is conceivable that it would be necessary to make transitional rules that relate to, or affect, rights or liabilities that existed before commencement date. For example, if it becomes clear that there is a gap in how Consequential and Transitional Bill 1 deals with the transition of particular procedural obligations or rights that applied before the commencement time, it may be necessary to make transitional rules that preserve or otherwise transition those rights and obligations.

Although the rules may have retrospective application and subsection 51(4) operates despite subsection 12(2) of the *Legislation Act 2003*, this is subject to the safeguards provided in subsection 50(1). Subsection 50(1) has the effect that the rules would not be able to retrospectively criminalise conduct or retrospectively apply a penalty.

The Government considers it is not appropriate to prescribe a time limit for the exercise of the transitional rule-making power, as it is difficult to anticipate the full range of circumstances which transitional provisions need to accommodate, or the timeframes in which matters that have been

transferred from the AAT to the new Tribunal will be dealt with. However, the scope of this rule-making power is confined to matters of a transitional nature relating to the enactment of the legislation that establishes the Tribunal. Rules made under item 51 are subject to disallowance by the Parliament, which provides appropriate oversight.

The Hon Amanda Rishworth MP

Minister for Social Services

Ref: MC24-002377

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
scrutiny.sen@aph.gov.au

Dear Senator ~~Smith~~ Dean

I write in relation to the Senate Scrutiny of Bills Committee's 28 February 2024 request for information concerning the retrospective elements of the Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Bill 2024 (the Bill).

The Bill

The Bill proposes to amend the *Social Security Act 1991* (SS Act) and the *Veterans' Entitlements Act 1986* (VE Act) to provide a clear legal foundation for the classification of military invalidity pensions affected by the Full Federal Court decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (*Douglas*) within the social security and veterans' entitlements means test.

The amendments in the Bill will ensure the income provided by these military invalidity payments continues to be assessed in line with the intent of policy and legislation before *Douglas*, in cases where a veteran receiving the payments also seeks an income support payment under either of the Acts. In addition, the Bill validates past mean test assessments of the invalidity payments, which may be invalid in light of *Douglas*.

It has become apparent the findings in *Douglas* mean the historical treatment of the affected military invalidity payments under the two Acts can no longer be applied. As detailed in the Explanatory Memorandum to the Bill, the affected payments were previously treated as "asset-test exempt income streams" that are also "defined benefit income streams", and were accordingly assessed for income support purposes under section 1099A of the SS Act and section 46V of the VE Act.

Part 1 of Schedule 1 to the Bill proposes to insert new provisions into each Act to create a new category of "military invalidity pension income streams" that will include the affected invalidity payments. The new category will operate prospectively from commencement of the Bill. The treatment of this category within the means test is designed to produce the same assessment of income as the historical assessments of the affected invalidity payments. It also ensures the invalidity payments continue to be treated as exempt from the assets test.

Validation provisions

The *Douglas* findings make the legal basis for the historical treatment of the affected payments unclear. Despite this, the historical means test assessments reflect the intended policy outcomes and are consistent with outcomes for other veterans within the income support system.

To address this, the Bill contains validation provisions to preserve the validity of the working out, or purported working out, of assessable income from the affected payments, and any other thing done or purportedly done in relation to the working out, in respect of days prior to commencement of the Bill. The validation provisions are intended to provide a clear legal basis for the previous assessment of income from the affected payments.

The proposed validation provisions, at items 37 and 39 in Part 2 of Schedule 1 to the Bill, are intended to have retrospective operation.

Effect of retrospective operation

It is highly unlikely that any veteran and/or their partner would be detrimentally affected by the operation of the validation provisions. This is because the validation provisions deem the historical treatment of the affected payments in the means test to be valid and effective, and to have always been valid and effective.

These provisions do not operate retrospectively to change anything that occurred in the past, including the income assessments for the affected invalidity payments performed by Services Australia or the Department of Veterans' Affairs, and the rates of income support veterans and/or their partners received on the basis of these assessments. The provisions cannot result in any debts arising for past periods.

The validation provisions will have the same effect in the event that a person's assessable income from the affected invalidity payments is worked out after the Bill commences, but for periods prior to the commencement of the Bill. This will ensure the person's assessed income will be the same as if it had been worked out at that past time and in line with the operation of relevant legislation as it then applied.

These arrangements are intended to ensure veterans and/or their partners continue receiving a level of income support that is consistent with the intent of legislation and policy before the unexpected findings of the *Douglas* decision.

The validation provisions do not remove people's rights of review or appeal in cases where decisions may have been invalid for other reasons.

I trust this information assists the Committee's consideration of the retrospective elements in the Bill. The Explanatory Memorandum to the Bill could be updated to include further explanation of the retrospectivity aspect, if this would be of assistance.

Thank you again for writing.

Yours sincerely

Amanda Rishworth MP

19/3/2024

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS24-000238

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: scrutiny.sen@aph.gov.au.

Dear Senator

I am writing in response to the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Digest 1 of 2024 regarding the Treasury laws Amendment (Better Targeted Superannuation Concession and Other Measures) Bill 2023.

I have attached detailed responses to the Committee's enquiries about Schedules 7 and 8 of the Bill. I trust that the information attached provides further context about the drafting of the Bills and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

Attachment A

Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 (the Bill)

Schedule 7
As set out in the Committee's *Scrutiny Digest No. 1 of 2024*, the Committee has requested advice as to:

- what would constitute 'exceptional circumstances' permitting regulations made under proposed section 911F to amend the operation of the Corporations Act 2001, and whether any examples of such exceptional circumstances could be provided;

- whether there is any guidance or relevant matters to be considered in exercising this power; and

- whether proposed section 911F can be amended to include an express requirement that the regulations may only prescribe financial products, services, or classes of such as, being exempt from the professional investor exemption in exceptional circumstances.

The professional investor exemption allows a foreign financial services provider to provide financial services to professional investors without needing to hold an Australian Financial Services Licence (AFS licence), subject to the requirements in paragraph 911A(2)(eo) being met. The reduced regulatory burden recognises that sophisticated Australian investors are well resourced to protect their own interests. However, the requirement to hold an AFS licence is a key mechanism to support the integrity of Australian financial markets and protect consumers of financial services and products. To balance the desire to reduce regulatory burden on Australian professional investors while also managing any risks that could arise in relation to providing the professional investor exemption, section 911F enables regulations to provide that the exemption does not apply in certain circumstances. The regulations may disapply the professional investor exemption to a particular kind of financial service, a particular kind of financial service in relation to a particular kind of financial product, a particular kind of financial product, or a particular kind of investor.

Paragraph 5.79 of the Explanatory Memorandum for this Bill states that regulations are only intended to be made in exceptional circumstances where the application of the professional investor exemption would pose a risk to investors, the regulatory regime, or the market. Further, paragraph 5.81 of the Explanatory Memorandum explains that the regulation-making power is intended to provide the Government with the ability to ensure the effective operation of the professional investor exemption and to respond to emerging risks and changes in global financial markets. Taken together, it is clear that the power is intended to be exercised in exceptional circumstances to ensure there are appropriate protections for investors (including retail investors), the regulatory regime (which encompasses the AFS licence regime), or Australia's financial markets.

Australia's financial markets are constantly evolving, including in response to global events. The government must be able to respond promptly to deal with any emerging risks. As the regulation making power is intended to enable prompt response if such exceptional circumstances arise, identifying specific examples or inserting an express requirement in the legislation may constrain the use of the power in a manner that is contrary to the clear legislative intent. The decision as to whether the professional investor exemption should be disapplied due to exceptional circumstances is an appropriate matter for the government of the day. Any such regulation would be subject to Parliamentary scrutiny as the regulations are subject to disallowance.

Schedule 8
As set out in the Committee's *Scrutiny Digest No. 1 of 2024*, the Committee has requested advice as to:

- why it is necessary and appropriate for instruments made under proposed subsections 12(1A), 18(1B) and 18(6) to be exempt from disallowance; and

- why it is necessary and appropriate for instruments made under proposed subsection 11B(1) to be notifiable instruments which are exempt from the full range of parliamentary scrutiny.

As noted at paragraph 6.57 of the Explanatory Memorandum, sections 9 and 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that an instrument that is a direction by a Minister to any person or body is not subject to disallowance or sunsetting. As recognised by that Regulation, where legislation confers power on a Minister to issue directions to a body, it is consistent with the principle of ministerial responsibility that this direction, which may require consideration of the national interest, is not subject to uncertainty by being subject to disallowance or sunsetting.

In the case of the instruments made under proposed subsections 12(1A), 18(1B) and 18(6), and 11B(1), these exemptions are appropriate because the directions are designed to ensure that the Minister's intended outcomes are complied with and appropriate outcomes in relation to the designated payment system are achieved. Given the potential serious circumstances in which this power may be exercised, noting any designation or direction must be in the national interest, it is intended that there is executive control over the instrument.

AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Bills
Parliament House, Canberra ACT 2600
02 6277 3050 | scrutiny.sen@aph.gov.au
www.aph.gov.au/senate_scrutiny

20 March 2024

Dr Jim Chalmers
Treasurer
Parliament House
CANBERRA ACT 2600
via email

Dear Treasurer,

I am writing on behalf of the Senate Standing Committee for the Scrutiny of Bills in relation to the committee's consideration of the Treasury Laws Amendment (Foreign Investment) Bill 2024.

The committee is required under its standing orders to consider, amongst other matters, whether legislative provisions unduly trespass on personal rights and liberties. Where a provision seeks to apply amendments made by a bill retrospectively, the committee must consider whether this retrospective application will trespass on the rights and liberties of any person. If so, the committee will consider any justification for the retrospective application to determine whether it trespasses on rights and liberties *unduly*.

On 11 March 2024, the committee received email correspondence from Mr Eu-Jin Teo, a senior academic at the University of Melbourne, drawing the committee's attention to material that discusses the interest of persons who may be detrimentally affected by the retrospective application of amendments in the bill. A copy of this correspondence is attached.

The paper attached to Mr Teo's correspondence makes an argument concerning the validity of certain state and territory schemes relating to the purchase of residential property by foreign nationals and suggests potential grounds of recovery for individuals if such schemes are invalid.

Mr Teo's correspondence also drew the attention of the committee to an announcement made by New South Wales (NSW) Revenue, noted in a media release dated 29 May 2023 and available at: https://www.revenue.nsw.gov.au/news-media-releases/surcharge-purchaser-duty-and-surcharge-land-tax-international-tax-treaties-update.

Before considering Mr Teo's correspondence, the committee seeks your response, noting that if Mr Teo's arguments are to be accepted it appears that it may identify persons that may be detrimentally affected by the retrospective application of the amendments proposed by the bill.

The committee also seeks your advice on how the retrospective application of the amendments provided by the bill will impact those captured by the announcement of NSW Revenue referred to above.

The committee would also welcome any additional advice you could provide as to the justification for the retrospective application of the amendments in the event any individuals would be detrimentally affected.

In order to facilitate the committee's further consideration of Mr Teo's correspondence at its next meeting, scheduled for Wednesday, 27 March 2024, the committee requests a response by Monday, 25 March 2024.

Thank you for your assistance in relation to this matter.

If you have any questions please do not hesitate to contact the committee secretary, Shaun Hayden, on 02 6277 3050.

Regards,

Senator Dean Smith
Chair

From:
To: Scrutiny, Committee (SEN)
Subject: Treasury Laws Amendment (Foreign Investment) Bill 2024
Date: Monday, 11 March 2024 3:53:10 AM
Attachments: Prize Certificates Best Tax Research Paper.pdf
Is Fiscal Fortress Australia a Legal Sandcastle The Emperors and Empress New Taxes on Aliens.pdf

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Dear Senators
I trust that this finds you well.
I am a senior academic at The University of Melbourne.
I write to you in relation to the Treasury Laws Amendment (Foreign Investment) Bill 2024 ('the Bill'), in your capacity as members of the Senate Standing Committee for the Scrutiny of Bills ('the Committee').
On 28 February, the Committee requested the Treasurer's detailed advice as to:

1. whether any persons are likely to be detrimentally affected by the retrospective application of the Bill and, if so, to what extent their interests are likely to be affected; and
2. why it is considered necessary and appropriate for the amendment proposed by the Bill to operate retrospectively.

In my capacity as a senior academic at The University of Melbourne, I am pleased to be able to independently assist the Committee in relation to these questions.
The attached paper (which was awarded the Prize for the Best Tax Research Paper at this year's Australasian Tax Teachers Association Conference, and which is publicly available at https://drive.google.com/drive/folders/1edeEsLBDwi0SdrYO5eGf64IzdcjoZEUB, from the 'Papers' link at https://www.atta.network/2024-melbourne) sets out the issues that the Bill is attempting to address, and discusses the interests of the persons who are likely to be detrimentally affected.
In addition, concerns regarding the potential unconstitutionality of the Bill may be found here: 'Fair(ness) Go(ne)'? Foreigner Surcharge Taxes and Tax Non-Discrimination - Austaxpolicy: The Tax and Transfer Policy Blog (on the entry dated 15 February, toward the bottom of the page).
If the Bill is, in fact, effective, it would put Australia in breach of its obligations to its partners under the affected tax treaties.
I am at your disposal in relation to any questions that you might have.
Regards
Eu-Jin
Attach
--

Eu-Jin Teo

Senior Lecturer

The University of Melbourne

Victoria 3010

Australia

IS FISCAL 'FORTRESS AUSTRALIA' A LEGAL SANDCASTLE? THE EMPERORS' (AND EMPRESS') NEW TAXES ON ALIENS

Eu-Jin Teo*

[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. Interestingly, nationals of polities with agreements that have no applicable non-discrimination clauses (such as the United States, the United Kingdom, Canada and China) or those of countries with no relevant tax treaty, might, pursuant to Australian constitutional law, 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 with likely 'intergovernmental immunity' considerations.]

* Barrister and Solicitor of the High Court of Australia and the Supreme Court of Victoria; Chartered Tax Adviser; Senior Lecturer, The University of Melbourne; Principal Examiner, Law Institute of Victoria, Administrative Law Accredited Specialisation Scheme. The author gratefully acknowledges the input of Phillip Hamilton and Stephanie Forgie in the finalisation of this paper. The usual disclaimer applies.

CONTENTS

'The Emperor has no clothes'.

I INTRODUCTION

In 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 inconsistency 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 nationals of countries with no such treaties or clauses is then considered in Part VI, following a consideration of likely 'intergovernmental immunity' arguments in Part V. Part VII then points out some potential consequences under Australian domestic law, that could arise from a likely tax-and-treaty incompatibility. Part VIII concludes with the observation that Australian domestic law likely precludes a potential legislative 'fix' to the problems that have been identified.

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 regime.[1] Receiving Royal Assent on 29 June 2015,[2] 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).

Pursuant to s 28A at present, with limited exceptions,[3] 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

1 For a discussion of these regimes, see, eg, Bernie Walrut, 'Tax Files: New Surcharge Duty on Foreign Acquisitions' (2018) 40(1) *Bulletin* 43.
2 Victoria, *Government Gazette* (No S 182, 29 June 2015) 1.
3 *Duties Act 2000* (Vic) s 69AJ.

(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 7 per cent,[4] and a 2 per cent land tax absentee surcharge;[5]

- New South Wales now having an 8 per cent transfer duty surcharge[6] and a 4 per cent land tax surcharge;[7]

- South Australia now having a foreign acquirer additional duty of 7 per cent;[8]

- 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;[9]

- Western Australia now having a foreign citizen transfer duty surcharge of 7 per cent;[10] and

- Tasmania now having an 8 per cent duty surcharge on foreign-investor purchasers of residential property,[11] and a 3 per cent surcharge on foreign-investor purchasers of primary production land,[12] as well as a 2 per cent land tax surcharge.[13]

4 *Duties Act 2001* (Qld) ss 234, 235.
5 *Land Tax Act 2010* (Qld) s 32 and sch 3, pt 2.
6 *Duties Act 1997* (NSW) s 104U.
7 *Land Tax Act 1956* (NSW) s 5A.
8 *Stamp Duties Act 1923* (SA) pt 3, div 9.
9 *Land Tax Act 2004* (ACT) pt 2A.
10 *Duties Act 2008* (WA) s 205O.
11 *Duties Act 2001* (Tas) s 30C.
12 *Duties Act 2001* (Tas) s 30C.
13 *Land Tax Rating Act 2000* (Tas) s 6A.

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.[14]

There are over 40 such treaties at present, 12 of which contain tax non-discrimination clauses[15] (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*)[16] which are, thus, incorporated into Australian domestic law.[17] 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*,[18] Australia was the only OECD country to not include a non-discrimination clause in its double taxation treaties,[19] 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*,[20] was not incorporated into Australian domestic law.[21]

14 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.

15 *Addy* (n 14) 625–6.

16 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.

17 *Resource Capital* (n 14) 304–5; *Addy* (n 14) 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.

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

19 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.

20 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.[22]

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*[23] expressly states that, for the purposes of its tax non-discrimination clause,[24]

> 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.[25]

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

- New Zealand;[26]
- Finland;[27]
- Germany;[28]
- Japan;[29]

21 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*').
22 (n 18) art 25(1).
23 Signed 31 March 2008, [2008] ATS 18 (entered into force 12 November 2008).
24 In ibid art 23A.
25 Ibid art 2(3).
26 *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.
27 *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.
28 *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.
29 *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Protocol,*

- Norway;[30]
- India;[31] and
- Switzerland.[32]

Unlike the clause in Australia's agreements with the countries listed above, the tax non-discrimination clause in the remaining relevant agreements with Chile,[33] Türkiye[34] and Israel[35] does not, like that of the *United Kingdom Convention*, expressly encompass 'political subdivisions or local authorities' or 'taxes of every kind and description'.[36]

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

and Exchange of Notes, signed 31 January 2008, [2008] ATS 21 (entered into force 3 December 2008) art 26.

30 *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.

31 *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.

32 *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.

33 *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*').

34 *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*').

35 *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).

36 Ibid arts 2, 24; *Chilean Convention* (n 33) arts 2, 24; *Turkish Convention* (n 34) arts 2, 24.

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*,[37] 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).[38]

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 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.[39]

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

37 (n 14).
38 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.
39 (n 14) 630.

resident visa status),[40] whereas the residency reference in the treaties is to *residence for income taxation purposes*[41] … which is more transitory in nature.[42] 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.[43] With respect, it is submitted that it is difficult to see how this does not contravene the text, context and purpose[44] of the non-discrimination clauses,[45] particularly in light of the High Court of Australia's approach in *Addy*.[46]

40 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.

41 *Addy* (n 14) 630.

42 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.

43 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/>.

44 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 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.

45 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).

46 For a discussion of *Addy*, see, eg, Melita Parker, '"Backpacker Tax" Offends Australia–UK Double Taxation Treaty' [2022] (3) *Bar News* 18.

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) (subject to intergovernmental immunity considerations to be discussed below, likely enacted pursuant to the Australian Commonwealth Parliament's powers to legislate with respect to taxation[47] or to external affairs,[48] or both)[49] gives the provisions of

47 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] HCA 30, [69] ('*Vanderstock*'):

> 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).

48 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 Molloy 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.

49 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, 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). 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'.

international tax treaties that are mentioned in the section, the force of Australian Commonwealth law.[50]

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.[51]

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',[52] and a similar approach has been held to apply in relation to the territories.[53]

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'[54] 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 these clauses confer a legal right, privilege or entitlement (to non-discrimination) which the taxes in question purport to take away or

50 *Resource Capital* (n 14) 304–5; *Addy* (n 14) 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.

51 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*').

52 *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*').

53 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) 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.

54 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.

diminish,[55] by targeting putative taxpayers based on their non-Australian nationality, regardless of their Australian income tax residency status.[56]

V IS ANY RELEVANT INTERGOVERNMENTAL IMMUNITY ENGAGED?

Would, as was alluded to in *Commonwealth v Tasmania*,[57] any intergovernmental immunity be offended by the Australian Commonwealth legislatively prohibiting certain state actions in order to ostensibly comply with its treaty obligations; in this case, as just discussed, prohibiting the states from imposing harsher taxes on treaty-protected foreign nationals? As has been canvassed at length by Taylor[58] and others,[59] the issue of 'intergovernmental immunity' in federal systems gives rise to constraints on the ability of one level of government to legislatively bind another. In Australia, such constraints are said to be consonant with (and indeed, required for) the efficacy of the Australian federal system,[60] which is founded upon the constitutional concept of the Commonwealth and the states as constituent entities of the federal

55 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; *Western Australia v Commonwealth* (1995) 183 CLR 373, 438, 451–2 ('*Native Title Act Case*'). 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; 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.

56 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.

57 (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

58 Greg Taylor, '*Commonwealth v Western Australia* and the Operation in Federal Systems of the Presumption that Statutes Do Not Apply to the Crown' (2000) 24(1) *Melbourne University Law Review* 77.

59 See generally P Hogg, P Monahan and W Wright, *Liability of the Crown* (Carswell, 4th ed, 2011); Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018) ch 4; Ann Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006). Cf Jenna Bednar, 'Federalism Theory: The Boundary Problem, Robustness and Dynamics' in John Kinkaid (ed), *A Research Agenda for Federalism Studies* (Edward Elgar, 2019) 27, 29–30.

60 See, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 81–3 ('*Melbourne Corporation*').

compact, each having a continuing independent existence that is reflected in a central government and separately organised state governments.[61]

Specifically, cases such as *Melbourne Corporation v Commonwealth*[62] (along with *Victoria v Commonwealth*[63] and others)[64] support the proposition that, by laws of general application, one level of government may legislate to bind another in a way that does not inhibit or impair the latter's continued existence or capacity to function. Relevantly and conversely, therefore, the Australian Commonwealth's legislative power may not be used to discriminate against state governments,[65] or to place special burdens or disabilities upon the latter,[66] although here, with the Australian Commonwealth enacting into Australian domestic law, and thus binding the states to, the non-discrimination clauses in the tax treaties that it has entered into, it is difficult to see how these prohibitions are offended, as the Commonwealth is bound by the same tax non-discrimination requirement[67] and, accordingly, is not requiring of the states anything 'special', that it is not already requiring of itself.[68]

Importantly, in *Austin v Commonwealth*,[69] a majority of the High Court of Australia observed that the notion of 'discrimination' by Commonwealth law against a state is only an illustration of a law which impairs the capacity of the state to function in accordance with the Australian constitutional conception of the Commonwealth and states as constituent entities of a federal structure, and therefore 'discrimination' of itself is insufficient in order to attract invalidity.[70] Rather, the focus

61 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 218; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231; *Street v Queensland Bar Association* (1989) 168 CLR 461, 513.
62 (n 60).
63 (1996) 187 CLR 416 ('*Industrial Relations Act Case*').
64 See, eg, *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372; *Austin v Commonwealth* (2003) 215 CLR 185.
65 See, eg, *Tasmanian Dams Case* (n 57) 128.
66 Ibid.
67 See *International Tax Agreements Act 1953* (Cth) ss 4, 4AA.
68 Cf Thomas Dixon, 'The Doctrine of Implied Intergovernmental Immunities: A Recrudescence?' (2019) 9(3) *Workplace Review* 103; Vince Morabito, 'Commonwealth Taxes, State Governments and the Doctrine of Intergovernmental Immunity' (1997) 26(4) *Australian Tax Review* 182; Nicolee Dixon, 'Limiting the Doctrine of Intergovernmental Immunity' (1993) 9 *Queensland University of Technology Law Journal* 1.
69 (n 64).
70 Ibid 217, 246–9.

must be on the 'essential question' of interference with, or impairment of, state functions.[71] In this regard, a state is protected against the impairment of its capacity to function as a constituent element in the federal constitutional system, rather than against interference with, or impairment of, any particular function which the state may choose to undertake.[72]

As Mason J noted in the *Tasmanian Dams Case*:

> To fall foul of the prohibition, in so far as it relates to the capacity of a State to govern, it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[73]

Relevantly, the High Court of Australia has held that Commonwealth legislation prohibiting the use of state Crown land pending a decision on the listing of that land under an international convention, did not invalidly discriminate against the state, because the convention necessarily fell to be discharged with respect to particular properties.[74] The Court has also declined to apply the intergovernmental immunity principle to Commonwealth legislation imposing a tax on state government payrolls;[75] legislation controlling the conditions of employment of state school teachers;[76] or imposing a tax on fringe benefits provided by the states to state government ministers, members of Parliament and judges.[77] Notably, it has been held that the Australian Commonwealth Parliament may, in the exercise of its external affairs power, legislate so as to require a state to act in accordance with a principle of conduct endorsed by the international community,[78] or in conformity with an international obligation assumed by the

71 Ibid 249, 301.
72 See, eg, *Melbourne Corporation* (n 60) 82–3.
73 (n 57) 139.
74 *Richardson v Forestry Commission* (1988) 164 CLR 261.
75 *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*').
76 *Re Lee; Ex parte Harper* (1986) 160 CLR 430.
77 *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 ('*Second Fringe Benefits Tax Case*'). Cf *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 292, 305.
78 See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

Commonwealth[79] (which, presumably, would include relevant non-discrimination obligations in tax treaties that have been entered into?)[80]

It is worth noting, in this regard, that, whilst the average value of the relevant transactions is high,[81] on the latest estimates available, only around one per cent of sales of Australian dwellings involve non-Australian citizen, non-permanent resident purchasers.[82] Perhaps by way of contrast, in *Fortescue Metals Group Ltd v Commonwealth*,[83] the High Court of Australia rejected the argument that a federal economic rent tax on the above-normal profits made by mining companies from the extraction of iron ore violated an intergovernmental immunity, said to be engaged because the tax, ostensibly, interfered with the states' management of mineral resources under their control, possibly because a reduction in a state's royalty rate would increase its liability to the tax.[84] The plaintiff's arguments were rejected, on the basis that the laws were not aimed at the states or their entities, and did not impose any special burden or disability on the exercise of powers which curtailed the states' ability to function as governments.[85] However, it should be recalled, in this regard, that a Commonwealth legislative scheme that, in substance, effectively prevented the states from continuing to levy taxes on income, was also not precluded by any intergovernmental immunity.[86] It is, also, perhaps telling that, by way of contrast, duties of

79 See, eg, *Tasmanian Dams Case* (n 57); *Industrial Relations Act Case* (n 63).

80 Cf Lang (n 50) 221–2.

81 See, eg, Nassim Khadem, 'Higher Interest Rates and Property Prices not Deterring Migrants, Retirees, and First Home Buyers Drawing on "The Bank of Mum and Dad"', *Australian Broadcasting Corporation News* (Web Page, 26 July 2023) <https://www.abc.net.au/news/2023-07-25/migrants-retirees-first-home-buyers-interest-rates-house-prices/102639598>.

82 Ibid.

83 (2013) 250 CLR 548.

84 Ibid 607–8.

85 Ibid 563, 611, 614, 636–7. See, eg, Amelia Simpson, 'Discrimination and Fiscal Federalism' (2014) 25(2) *Public Law Review* 93; Martin Clark, 'Royalties, Discrimination and Federalism' (2013) 28(10) *Australian Environment Review* 794; Andrew Lynch, 'The Mining Tax, Discrimination and Federalism' (2014) 38 *Australian Bar Review* 183.

86 *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Second Uniform Tax Case*'). See generally Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27(3) *Melbourne University Law Review* 864; Julianne Jaques, 'Tax Reform: The Why, the When and the What' (2022) 51(1) *Australian Tax Review* 5; Dale Pinto and Michelle Evans, 'Returning Income Taxation Revenue to the States: Back to the Future' (2018) 33(2) *Australian Tax Forum: A Journal of Taxation Policy, Law and Reform* 379; Cheng Han Kea, 'Preservation of the Australian Federal System by the High Court: A Critique' (2009) 16(2) *Murdoch University Electronic Journal of Law* 72; Mirko Bagaric and James McConvill, 'The *Australian Constitution*: A Century of Irrelevance' (2002) 21(2) *University of Tasmania Law Review* 89.

excise were a major revenue source of the colonies that became the Australian states,[87] and that a broad conception of the meaning of this duty, at present,[88] ostensibly prohibits many longstanding state taxes which had historically been regarded as unproblematic even following the s 90 *Australian Constitution* prohibition, upon federation, on state excise duties.[89]

VI 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 on 21 February this 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.[90]

What is surprising, perhaps, 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 of South Africa, New Zealand, Finland and Germany.

87 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 3 April 1891, 678 (William Burgess); Chief Justice Robert French, 'Tax and the Constitution' (D G Hill Memorial Lecture, Canberra, 14 March 2012) 11.

88 See *Vanderstock* (n 47).

89 See, eg, Adrian Chek et al, '*Vanderstock* and the Future of Federal–State Tax Powers' (2023) 58(6) *Taxation in Australia* 320; Anthony Gray, 'High Court Holds State Consumption Taxes Constitutionally Invalid' on Tax and Transfer Policy Institute, *Austaxpolicy* (15 November 2023) <https://www.austaxpolicy.com/high-court-holds-state-consumption-taxes-constitutionally-invalid/>.

90 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>.

> The position in Victoria has not changed and the SRO will continue to apply the Victorian provisions to all foreign purchasers and absentee owners[,][91]

especially considering that the relevant New South Wales provisions are not materially different from those in Victoria.[92] 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.'[93]

What then, of the position of nationals from countries with no relevant tax treaty or no relevant tax non-discrimination clause (for instance, the United States, the United Kingdom, Canada and China)? Are they, due to the absence of applicable treaty protection, still subject to the taxes in question?[94]

It has been observed that, while only 'that part of the State law which is inconsistent with the Commonwealth law is invalid',[95] 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.'[96] 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.[97]

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

91 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>.
92 See, eg, *Duties Act 1997* (NSW) s 104J; *Duties Act 2000* (Vic) s 3.
93 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 51) 105; *Metwally* (n 53) 468, 478.
94 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).
95 *Laws of Australia* (n 93) [19.5.340].
96 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*').
97 LexisNexis, *Halsbury's Laws of Australia* (at 20 July 2016) 90 Constitutional Law '5 Inconsistency of Commonwealth and State Laws' [90-2040].

those countries without a relevant tax treaty non-discrimination clause?[98] 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 remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.[99]

Relevant however, is the caution from *Clubb v Edwards*,[100] 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.[101]

In this regard, the relevant second reading speeches[102] and explanatory memoranda[103] reveal a policy intention to relevantly tax *foreigners generally*, as a market-intervention (some might say,

98 An issue overlooked in *Gallo* (n 21; the tribunal there, in reality, lacked the jurisdiction to hear the matter in fact raised: see *Burns v Corbett* (2018) 265 CLR 304; *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1).

99 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.

100 (2019) 267 CLR 171 ('*Clubb*').

101 Ibid 321. Cases such as *Bell Group* (n 96) 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'.

102 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).

103 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.

'interference')[104] measure (aimed at increasing the cost associated with such persons taking a stake in property), to thus favour 'non-foreigners' in this regard.[105] It would thus seem that judicial 'reading down' or 'partial disapplication' of the provisions in question to somehow interpretively 'carve out' nationals of countries with applicable treaty protection, could be somewhat problematic.[106]

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*,[107] 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'.[108]

VII AFTERMATH …

At least two consequences would seem to follow from the conclusion in the analysis above, namely, that existing Australian sub-national,

104 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.

105 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 Interpretation Act 2021* (SA) s 16(2); *Interpretation Act 1984* (WA) s 19(2); *Legislation Act 2001* (ACT) s 142. 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.

106 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.

107 (1910) 11 CLR 689.

108 *Clubb* (n 100) 315 (citations omitted).

foreigner-specific property taxes would 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.[109] As the Australian position on the recovery of unconstitutional taxes remains unsettled,[110] 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,[111] a taxpayer will have to establish the existence of one or more private law grounds of recovery on the basis of 'unjust factors'[112] such as:

- compulsion[113] (of the grounds potentially available, the most difficult to make out, legally and factually);[114]

109 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.

110 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').

111 Cf *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] 1 AC 70.

112 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.

113 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*').

- a payment exacted under 'colour of office';[115] or

- a payment made as a result of a mistake of law[116] (for instance, as to the validity or applicability of the purported tax).[117]

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[,][118]

noting however, that the constitutional propriety of provisions of this kind is not beyond doubt.[119]

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.

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

115 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.

116 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.

117 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.

118 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.

119 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 110).

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.[120]

This, therefore, begs the question as to whether the exception mentioned in the section,[121] would still be available if the relevant Act, or rather, enactment, is inoperative by reason of the *Constitution*,[122] as the preceding analysis has suggested.

VIII CONCLUSION: WHERE TO FROM HERE?

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, they prevail over state and territory taxes to the extent that these taxes may be inconsistent with the protections that are afforded under such clauses.

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

121 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.

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

While at least one Australian jurisdiction has recognised the imperative to, accordingly, discontinue the collection of relevant taxes from nationals who are protected by the clauses in question, all jurisdictions are yet to (perhaps for political reasons) amend their legislation to put the collection of tax from non-protected nationals beyond the constitutional doubt 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.[123]

Ultimately, as was the case with the *RMS Titanic*, it may well be that an 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 of such buyers hailing from either China, Hong Kong, India, Vietnam, Singapore or Taiwan.[124] 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,[125] 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-

123 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 119); *Air Canada* (n 113).

124 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>.

125 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.

> 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[,][126]

which relevantly encompasses the 'right to own property alone as well as in association with others',[127] in addition to the 'right to housing'.[128]

In the High Court of Australia case of *Maloney v The Queen*,[129] 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.[130]

In that case, provisions of the relevant legislation allowed declarations of 'restricted areas' to be made, with the result that persons in such areas 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,[131] 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.[132]

In *Western Australia v Ward*,[133] 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

126 Emphasis added.
127 *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).
128 Ibid art 5(e)(iii).
129 (2013) 252 CLR 168 ('*Maloney*').
130 Ibid 191.
131 *Liquor Act 1992* (Qld) ss 168B, 173G, 173H.
132 *Liquor Regulation 2002* (Qld) regs 37A, 37B, sch 1R, s 1.
133 (n 125).

> 'the practical operation and effect' of the impugned legislation and is 'concerned not merely with matters of form but with matters of substance'.[134]

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,[135] 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 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.[136] If so, then, alas, no amount of state or territory legislative redrafting might be able to preserve the taxes at issue.

134 Ibid 103 (citations omitted). See also *Athwal v Queensland* [2023] QCA 156, [25].

135 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 129) 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)

136 Compare *Maloney* (n 129) 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.

THE HON JIM CHALMERS MP
TREASURER

Ref: MC24-005174

Tuesday, 26 March 2024

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

scrutiny.sen@aph.gov.au

Dear Chair

Thank you for your correspondence of 20 March 2024 concerning the *Treasury Laws Amendment (Foreign Investment) Bill 2024*. Please see our responses addressing the Committee's requests below.

Retrospective application of the Bill

The Committee asked whether certain persons would be detrimentally impacted by the retrospective application of the Bill. The Bill seeks to maintain the status quo. Its retrospective application is essential to put beyond doubt the Commonwealth Government's intention that certain Commonwealth, state and territory fees remain payable. Clarifying this position retrospectively resolves any ambiguity in the law and provides taxpayers with certainty about Parliament's intention.

While some foreign resident taxpayers may feel that they are detrimentally affected by the retrospective application of the legislation, so far as those taxpayers, having paid certain fees and taxes, were hoping for or anticipating a refund due to the ambiguity in the law, that anticipated outcome was not certain, was not consistent with the intention of either the Commonwealth Parliament or the Parliaments of the state and territories, and if paid, would result in foreign investors receiving windfall gains as investment decisions would have been made on the basis of the fees and taxes being paid.

Providing the certainty given by the Bill for taxpayers is important, in particular with respect of Commonwealth foreign investment fees, as it ensures that applications made and approved under the foreign investment regime remain valid and can continue to be relied on by taxpayers. Therefore, any taxpayers, having paid the aforementioned fees, should not be detrimentally affected by the retrospective application of the legislation.

Impacts on persons captured by the announcement of NSW Revenue

The Committee requested a response on how the retrospective application of the amendment would impact those captured by NSW Revenue's announcement. The Government is aware of the announcement by NSW Revenue, that it considered that the NSW surcharge provisions are inconsistent with various international tax treaties in certain situations. The purpose of the amendment to be made by the Bill is to clarify the interaction between Australia's tax treaties and certain Commonwealth, state and territory laws by removing any potential ambiguity in the operation of the law, ensuring the abovementioned fees can prevail so as to maintain the status quo, as intended by the Commonwealth.

The Commonwealth consulted the states in the development of the Bill and continues to engage with the states in respect of the interaction between Commonwealth and state laws. How the operation of a state tax law to certain persons is ultimately impacted by the *Treasury Laws Amendment (Foreign Investment) Bill 2024* will be a matter for each of the state governments and Parliaments. The Australian Government is committed to facilitating the passage of the amendments as soon as possible to provide certainty for taxpayers and state governments and to ensure the foreign investment framework operates as intended.

Further justification of the retrospective application of the amendments

Providing this certainty for taxpayers, both prospectively and retrospectively, that the abovementioned fees remain payable and foreign investment applications can continue to be relied upon, is essential to strengthen the integrity of Australia's foreign investment rules, consistent with the Government's agenda to boost Australia's housing supply as outlined in the explanatory memorandum to the Bill.

Thank you again for your letter. I trust this information is of assistance to the Committee.

Yours sincerely

The Hon Jim Chalmers MP