IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M88 of 2016 and No M89 of 2016

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
AND
ACN 005 057 349 PTY LTD
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Issues

2. The Respondent's primary claim at trial, and on appeal, was for mandamus[1]. The broad issue raised by the mandamus claim is whether the Appellant came under legally enforceable duties to exercise his power under s 19 of the *Land Tax Act* 1958 (Vic) (**Act**)[2] to issue amended assessments eliminating any liability to pay land tax on a duplicated landholding, and to give effect to those amended assessments by returning all payments that had been made with respect to the duplicated landholding under the superseded assessments.

3. The express purpose of the power s 19 confers is to ensure the completeness and accuracy of assessments, whether that results in an increase or decrease in tax payable. That power is expressly exercisable at any time.

4. The main issues presented by the case are set out below.

5. *Powers coupled with duties:* It is not in contest that powers cast in permissive terms like those in s 19 can impose a duty[3]. The purpose for which the power is to be exercised may reveal circumstances that will impose a legal duty to exercise the power[4]. Here, the circumstances were that the Appellant: (a) detected and then volunteered that he had made the "*duplication error*"[5]; (b) knew that the assessments for the 1990-2012 tax years were inaccurate by reason of the "*duplication error*"[6]; and (c) knew that he had wrongly received sums that were not payable for land tax[7]. The issue is whether the circumstances were such that the Appellant's powers to issue and give effect to amended assessments were coupled with a legally enforceable duty to exercise those powers.

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1 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 (**Appeal Reasons**) [121] **[AB424]**.
2 Appeal Reasons [45] **[AB389]**, [51] **[AB391]**, [60] **[AB394]**. The Act was repealed by s 116 of the *Land Tax Act* 2005 (Vic).
3 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 (***Finance Facilities***); *Commissioner of State Revenue (Vic) v Royal Insurance Limited* (1994) 182 CLR 51 (***Royal Insurance***).
4 As the Court of Appeal noted at [126] **[AB426]**.
5 Appeal Reasons [4(2)] **[AB371]**, [11] **[AB375]**, [121] **[AB424]**, [158] **[AB439]**.
6 Appeal Reasons [4(3)] **[AB371]**, [33] **[AB383]**, [140] **[AB432]**, [155]-[158] **[AB437]**-**[AB440]**.
7 Appeal Reasons [4](3)] **[AB371]**, [156] **[AB438]**.

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6. *The effect of amended assessments:* The Appellant does not appear to dispute that the amended assessments sought by the Respondent would, upon their issuance, replace the previous assessments so as to authoritatively declare a new set of rights and obligations with respect to each relevant tax year. More specifically, the amended assessments sought by the Respondent would declare that the amount of land tax payable with respect to the duplicated property in each year was $0, in substitution for the previously and erroneously assessed amounts. This is the form taken by the amended assessments that the Appellant issued to 65 Albany Road Pty Ltd with respect to each of the years ended 2006 to 2011[8]. Further, by declaring the correct tax liability, the amended assessments would establish that any additional amount held by the Appellant was being retained without legal authority[9].

7. *The scope of s 19:* The Appellant apparently contends that s 19 does not confer any power to issue an amended assessment that reduces the tax liability of the taxpayer and/or that neither the Appellant nor the taxpayer in question has any right or power to enforce an amended assessment issued by the Appellant that reduces the taxpayer's liability. If these contentions were correct, it would mean that no amended assessment can reduce a taxpayer's liability, or that it would be a dead letter that has no enforceable legal consequences or other significance under the Act. That cannot be correct.

8. There is also an issue whether the power conferred by s 19 carries with it an incidental power to give effect to the amended assessment by returning any excess payments that do not constitute tax under the amended assessment. If this power is not necessarily incidental to the power to issue the amended assessments, the Respondent contends that it is conferred by s 4 of the Act[10].

9. Consistently with what Brennan J held in *Royal Insurance*[11], the Respondent says that an implied statutory obligation to repay will arise from the amended assessments. There is also a question whether the Respondent has a common law right to recover monies which, under the amended assessments, the Appellant has no authority to retain.

10. *Limitation Issues:* There is an issue as to whether any limitation period, in particular s 90AA of the Act, operates to bar the Respondent's claims.

11. The mandamus case asserts rights of action that first arose in 2012 when the Appellant recognised that he had made the "*duplication error*" and knew that he had wrongly collected amounts that were not in fact payable for land tax[12]. The Respondent sought an order compelling the Appellant to exercise his power under s 19 by issuing amended land tax assessments for the relevant years, and an order directing the Appellant to give effect to those amended assessments by refunding the excess amounts[13]. The only relevant limitation period in respect of those claims is the period of six years stipulated

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8 See, e.g., the Notice of Reassessment for the year ended 2006 at WHN-15 **[AB128]**.

9 This Court held in *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39 (***Hoffnung***) at 54 that "*When an alteration or addition is made the assessment henceforth exists as altered or added to, and not as previously existing plus independent alteration or addition.*" See also *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 (***Gas Ban***) at [45]: "*The notice of assessment thereby replaces the initial assessment ...*".

10 (1994) 182 CLR 51, 87.

11 At 87, in respect of retrospective amendments by which the Comptroller ceased to be entitled to retain payments on account of tax.

12 Appeal Reasons [51] **[AB391]**.

13 Appeal Reasons [159] **[AB440]**; Amended originating motion (S CI No 2013 1395) **[AB4]**.

in s 5(1)(d) of the *Limitations of Action Act* 1958 (Vic) (**Limitations Act**)[14]. The proceedings were commenced within about 12 months of the cause of action arising[15].

12. The Respondent disputes that s 90AA has any application. This is because a proceeding that seeks to enforce statutory duties to make and give effect to amended assessments does not fall within s 90AA[16]. The Respondent's claim for repayment of excess sums depends on the issuance of amendment assessments in discharge of the Appellant's legal duties[17] (i.e., the Appellant must return sums that the amended assessments declare not to be tax). The issue is whether a proceeding of that kind falls within s 90AA.

13. *Restitution:* As an alternative to the mandamus claims, the Respondent claimed that the payments in respect of the duplicated landholding were made under a mistake, and the Respondent has a common law right in restitution to reclaim them[18]. There is no dispute in respect of (a) the Appellant's error[19]; (b) the Respondent's mistaken belief[20]; or (c) the Respondent's inability to discover the mistake with reasonable diligence prior to Appellant's admission in 2012[21]. The issue is whether the restitution claim is barred by s 90AA, or whether there is no relevant time bar because s 90AA has no application, or because any limitation period was postponed by s 27 of the Limitations Act[22].

14. As to the Appellant's Submissions, they raise a series of false issues. First, there is no issue as to whether s 19 creates "*free-standing refund and appropriation powers*"[23], whatever that means. There is no room for any notion of economic equivalence. By enforcing the Appellant's duties to issue and give effect to amended assessments that eliminate any tax liability for the duplicated landholdings, the Appellant is not "*requir[ing] a refund by other means*"[24]. That is because the amended assessments will create a new set of legal rights and obligations. The amended assessments will declare that no tax is payable in respect of the duplicated landholding and remove the Appellant's authority to retain the excess payments. The amounts that are sought to be recovered will not be tax at that point[25].

15. Secondly, the Appellant's reliance on the circumstances in which a tax debt arises under Federal legislation is misplaced[26]. The Act is to be construed by reference to its own

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14 Appeal Reasons [214] **[AB463]**. Brennan J took a similar view in *Royal Insurance*, at 91-92.

15 The proceedings were commenced on 21 March 2013: Amended Originating Motion **[AB3]**.

16 Section 90AA is entitled "*Refund of tax*" and refers to a "*refund or recovery of tax paid ...*". The provision operates "*on the basis of an existing assessment*" and "*rests upon the foundation of the "taxable value" remaining unaltered*": see *Trustees, Executors and Agency Co Ltd v Commissioner of Land Tax* (1915) 20 CLR 21 (***Trustees***) at 40.

17 An amended assessment "*operates ab initio as to the amount of the debt payable*", and is "*conclusive that the amount it shows at a given moment was the true amount as at the taxable date, because that amount is taken for all purposes to be the true value of the land at that date*": *Trustees* at 41.

18 Amended statement of claim (S CI No 2013 1396) **[AB22]**.

19 Appeal Reasons [4(2)] **[AB371]** [10]-[11] **[AB374]**-**[AB375]**, [28]-[31] **[AB381]**-**[AB383]**, [33] **[AB383]**, [48] **[AB390]**, [140] **[AB432]**, [155]-[159] **[AB437]**-**[AB440]**; Appellant's Submissions at para 12.

20 Appeal Reasons [4(13)] **[AB373]**, [46]-[48] **[AB389]**-**[AB390]**, 186]-[189] **[AB453]**-**[AB189]**, [195] **[AB456]**; Appellant's Submissions at para 8, fn 10.

21 Appeal Reasons [13] **[AB376]**, [233] **[AB469]**, [238] **[AB472]**; Appellant's Submissions at para 12.

22 Appeal Reasons [120(5)-(7)] **[AB424]**.

23 Appellant's Submissions at para 2(1).

24 Appellant's Submissions at para 2(1).

25 See eg *Trustees* at 41; *Hoffnung* at 54; *Gas Ban* at [45]. See also *Commissioner of Taxation (New South Wales) v Opit* (1938) 59 CLR 770 at 785.

26 Appellant's Submissions eg at paras 2(2), 24-27 (and footnotes 29, 31-38) and para 53.

language and scheme[27] (in circumstances where the Appellant does not have the benefit of s 20[28]), and not by reference to the different language and scheme of the Federal income tax legislation. There are many salient differences between them[29].

Part III: Judiciary Act 1903 (Cth), s 78B

16. The Respondent considers that no notice is required to be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Facts

17. The Appellant's Submissions mischaracterise a number of critical facts.

18. As to paragraph 7 of the Appellant's Submissions, the Appellant did not produce assessments for 1990 to 2002 at trial[30] and accordingly, could not rely upon the conclusive evidence provision (s 20)[31]. Tables summarising the amounts assessed by the Appellant, but not copies or reprints of the assessments[32], were in evidence[33].

19. As to paragraph 8 of the Appellant's Submissions, the Appellant does not dispute[34], that the Respondent paid the amounts demanded by the Appellant in the belief that they were based upon an accurate identification and valuation of the landholdings of the Respondent[35], when in fact they were not[36].

20. As to paragraph 9, the Appellant informed the Respondent's advisers of the "duplication error" in an email dated 23 March 2012 which stated[37]:

> *"The property at 65 Albany Rd has been determined to be a duplicate property. This is because the valuation applied to 2 Ottawa Rd encompasses both Lot 1 Lodge Plan 27424 and lot 1 Title Plan 598039 ...*
> *Therefore the assessments have been amended by the deletion of 65 Albany Rd. Fully settled re-assessments for 2008 to 2011 will issue shortly.*
> *As a result a refund is to be issued."*

21. The evidence established that the Appellant had made the same "*duplication error*" in the 1990 – 2007 tax years[38], which the Appellant knew[39]. The nature of the duplication error made in the assessments is explained by the Court of Appeal at [29]-[30][40] as

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27 The language of provisions comparable to ss 19 and 90AA in a similar scheme have, however, been the subject of relevant consideration by this Court in *Trustees* at 35-37, 39-44.

28 Appeal Reasons [61] **[AB394]**, [196] **[AB457]**.

29 As the Court of Appeal pointed out at [196] and [197] **[AB457]**.

30 The Appellant produced no notices of assessment (cf Appellant's Submissions at fn 8). The Respondent tendered notices of assessment for the 2002 to 2007 land tax years: Affidavit of Kim Francis Davis sworn 6 June 2013 paras 14 and 16 **[AB160]**, KD-4 **[AB187]-[AB190]** and KD-5 **[AB191]-[AB205]**.

31 Appeal Reasons [61] **[AB394]**, [196] **[AB457]**.

32 Cf Appellant's Submissions at para 7.

33 See Affidavit of Sarah Faith Cockburn sworn 29 August 2013 at para 8 **[AB213]**; Affidavit of Wayne Houlyon Ngo sworn 31 May 2013 (Ngo) paras 16-18 **[AB41]-[AB42]**.

34 Appellant's Submissions at para 8, fn 10.

35 Appeal Reasons [4(13)] **[AB373]**, [46]-[48] **[AB389]-[AB390]**, 186]-[189] **[AB453]-[AB189]**, [195] **[AB456]**; Appellant's Submissions at para 8, fn 10.

36 Appeal Reasons [4(2)] **[AB371]**, [10]-[11] **[AB374]-[AB375]**, [28]-[31] **[AB381]-[AB383]**, [33] **[AB383]**, [48] **[AB390]**, [140] **[AB432]**, [155]-[159] **[AB437]-[AB440]**; Appellant's Submissions at para 12.

37 Appeal Reasons [11] **[AB375]**; Exhibit WHN-3 **[AB75]**.

38 Trial Reasons [18]-[19] **[AB252-253]**, Ngo [33], [34] **[AB45]-[AB46]**.

39 Appeal Reasons [4(3)] **[AB371]**, [33] **[AB383]**, [140] **[AB432]**, [155]-[158] **[AB437]-[AB440]**.

40 **[AB381]-[AB382]**.

follows: in each tax year, it was a mistake for the Appellant to issue a separate assessment for the parcel of land known as '65 Albany Road' because that landholding had already been included in the valuation of the landholding attributed to '2 Ottawa Road'. An assessment of the landholding for '2 Ottawa Road' alone would have reflected the true land tax liability for the Appellant (for both landholdings) for each year. Instead of taking this course, the Appellant adopted a site value for 65 Albany Road that was a little less than the site value for 2 Ottawa Road, reflecting the proportionately smaller size of the allotment at 65 Albany Road[41].

22. Until the Appellant expressly admitted his error in 2012, the Respondent was unaware of it[42]. The error was not apparent on the face of the Appellant's demands[43], and not discoverable with reasonable diligence by the Respondent[44].

23. The Appellant issued reassessments for the 2006-2011 tax years under the *Taxation Administration Act* 2007 (Vic) (**TAA**)[45]. Each re-assessment recorded that the total land tax payable for the duplicated landholding was reduced to nil[46]. The Appellant made those reassessments and gave effect to them by repaying the sums paid under the superseded assessments for the duplicated landholding[47]. He did all this without requiring the taxpayer to commence any proceeding of the kind referred to in s 90AA.

24. The Respondent commenced the proceedings on 21 March 2013[48]. By letter dated 15 August 2013, the Appellant decided to exercise the power conferred on him by s 19 of the Act and purported to do so by advising that he would not issue amended assessments[49]. That was despite knowing that he had made the same "duplication error" each year from 1990[50] (a finding not challenged by the Appellant in these appeals[51]). The reasons the Appellant gave for exercising the power under s 19 in this way were as follows:

> *"The primary reason for the Commissioner's decision is that, whether or not each of the assessments were now amended as requested, and even putting to one side the fact that no objection was lodged in accordance with section 24A, your client would not be entitled to the consequential relief sought; that is, pursuant to section 90AA ... your client would still not be entitled to the refund it seeks*[52]."

Part V: Statutes and regulations

25. In addition to the statutory provisions annexed to the Applicant's submissions, these submissions annex sections 3 (part), 4, 6, 8, 94 of the Act.

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41 Appeal Reasons [19] **[AB378]** and [232] **[AB469]**.
42 Appeal Reasons [13] **[AB376]**, [233] **[AB469]**, [238] **[AB472]**.
43 No contrary finding was made by the trial judge, cf Appellant's Submissions at para 12. See also Appeal Reasons [238] **[AB472]**.
44 Appeal Reasons [233] **[AB469]**, [238] **[AB472]**.
45 The TAA applied only in respect of the tax years ending 2006 and following: ss 6 and 51 of the *Land Tax Act* 2005 (Vic).
46 See, eg, the 2006 and 2007 notices of re-assessment: WHN-15 **[AB127]-[AB137]**.
47 See Ngo at para 10 **[AB40]** and para 45 **[AB49]**.
48 Amended originating motion **[AB3]**; Writ **[AB13]**.
49 Exhibit SFC-1 **[AB210]**; Appeal Reasons [49] **[AB390-391]**.
50 Appeal Reasons [4(3)] **[AB371]**, [33] **[AB383]**, [140] **[AB432]**, [155]-[158] **[AB437]-[AB440]**.
51 Appellant's Submissions at para 12.
52 Exhibit SFC-1 **[AB210]**; Appeal Reasons [49] **[AB390-391]**.

Part VI: Argument

26. The Respondent's primary claim[53] was for relief in the nature of mandamus, to compel the Appellant to exercise his power under s 19 to issue amended assessments and to give effect to them[54]. The Court of Appeal unanimously decided, having regard to the nature and scope of the power under s 19 and all of the circumstances of the case[55], that mandamus should issue[56].

The operation of s 19 – the power to amend to ensure accuracy

27. The Court of Appeal considered that it was important to examine, first, the scope and operation of the power under s 19 to amend assessments to ensure their completeness and accuracy[57]. This was so for several reasons. First, the issues in the case had arisen against a background where the Appellant had volunteered (and expressly admitted[58]) that he had issued inaccurate assessments for the 2008 to 2011 land tax years; and where he knew that the same error had occurred in each of the 1990 to 2002 land tax years (and that the assessments for those years were inaccurate)[59]. Secondly, as the Court of Appeal pointed out[60], an approach of starting with the statutory regime for objections and appeals as if s 19 did not form part of the Act posed a risk of error. The Appellant falls into that very error because his submissions are built upon the proposition that the Act has three interrelated components – assessment, objection and refund provisions – and excludes any reference to the power of the Appellant to amend at any time to ensure completeness and accuracy in his assessments[61].

28. Section 19 is a unique provision which served an important function in the Act that applied to the 1990-2005 years. Its critical features included the following:

    (a) The express purpose of the power conferred by s 19 is to "ensure" the completeness and accuracy of assessments.

    (b) The power is expressly exercisable at any time (and as "*often and as radically*" as necessary to make an assessment "*complete and accurate*"[62]).

    (c) The power to amend an assessment conferred by s 19 necessarily carries with it the power to give effect to the amended assessment[63]; so too does the Appellant's power of general administration under s 4 of the Act.

    (d) As the Appellant acknowledges[64], s 19 is part of Part III of the Act (entitled 'Returns by Taxpayers Valuations and Assessments'). It does not form part of the objection, appeal and refund mechanisms of the Act, each of which proceeds on the basis of an existing assessment. There is no reason to suppose the power to

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53 Appeal Reasons [121] **[AB424]**.
54 Amended originating motion (S CI No 2013 1395) **[AB4]**.
55 See Appeal Reasons [143] **[AB433]**.
56 Appeal Reasons [162] **[AB441]**, [244] **[AB473]**.
57 Appeal Reasons [121] **[AB424]**.
58 Appeal Reasons [4(2)] **[AB371]**, [10]-[11] **[AB374]-[AB375]**, [30] **[AB382]**, [121] **[AB424]**, [158] **[AB439]**, [186] **[AB453]**.
59 Appeal Reasons [4(3)] **[AB371]**, [33] **[AB383]**, [140] **[AB432]**, [155]-[158] **[AB437]-[AB440]**.
60 at [121] **[AB424]**.
61 Appellant's Submissions at paras 13-16.
62 *Trustees* at 39. See also 43-44.
63 Appeal Reasons [141] **[AB432-433]**.
64 Appellant's Submissions at paras 13-16.

amend an assessment at any time to ensure completeness and accuracy is constrained by those provisions[65].

(e) Section 19 is an important adjunct to s 17, which confers the Appellant's primary assessment-making power. Section 17 requires the Appellant to assess "*the taxable value of the land*" and the "*land tax payable thereon*", while s 19 provides the power by which the Appellant can continue to ensure the accuracy and completeness of assessments once made[66]. Both provisions confer powers that are directed to the same objective; namely, the accurate identification of the assessable value of land owned by a taxpayer, and the accurate assessment of the tax payable thereon. Conversely, the regimes for objections and appeals in ss 24A, 25, 29 and 38, and "*refunds of tax*" in ss 90AA, 90A, 90B[67] do not deal with the power to assess or re-assess.

29. The Court of Appeal applied orthodox principles of statutory interpretation to construe s 19[68], having regard to the words and express purpose of the provision, and the primary object and purpose of the Act, to accurately assess and levy a tax upon the actual unimproved value of a taxpayer's actual taxable landholdings. The Court of Appeal did not commence with any "*a priori conclusion as to purpose*" or engage in any "*elevation*" of "*statements of a priori purpose concerning the collection of 'the correct amount of tax'*"[69]. It commenced with the language of the provision, in the context of the surrounding provisions and the Act, and not by reference to a "*sole objective*" of "*collect[ing] 'the correct amount of tax'*."[70].

30. The Appellant contends that the power conferred by s 19 is *"primarily concerned"* with a "*power to increase assessments or impose 'fresh' liabilities"*, apparently because the provision goes on to refer to the taxpayer's right to object to an increase in liability[71]. The Appellant does not go so far as to say that s 19 only authorises or empowers an amendment that will increase the liability of the taxpayer, because that is not what the provision says. Indeed, the Appellant appears to acknowledge[72] that the power might be exercised to reduce an assessment, but his later arguments[73] tend to assume that the only purpose of s 19 is to increase assessments. The proposition that s 19 only confers a power to increase assessments is wrong. The first part of s 19 makes it clear, by the express purpose for which the power is conferred and by referring to "*alterations or additions*", that the power can be exercised to "*either by way of increase or diminution*"[74]. There is no suggestion in the provision that completeness or accuracy is only to be ensured when it favours the Revenue.

31. The operation of a relevantly identical provision was explained by Isaacs J in *R v Deputy Federal Commissioner of Taxation (SA); Ex parte Hooper*[75]:

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65 As this Court held in *Trustees* at 35-37, 39-40, 43-44.
66 See also *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168 (***Richard Walter***), 201.
67 See the Appellant's Submissions at paras 15-16.
68 Appeal Reasons [122] **[AB424]-[AB425]**.
69 Cf Appellant's Submissions at paras 31, 32, 35.
70 Cf Appellant's Submissions at para 31.
71 Appellant's Submissions at para 32. Cf *Hoffmung* at 53, 61, 64; *Trustees* at 35, 39-40, 43-44.
72 Appellant's Submissions at para 33.
73 Appellant's Submissions at para 43.
74 *Trustees*, 35.
75 (1926) 37 CLR 368, 374.

> *"... Obviously an "alteration" may be for or against a taxpayer. If against him the proviso to subs (1) requires it to be "notified" to him, that is simply an "alteration or addition," and that shall, unless made by consent, be "subject to objection." If in his favour there is no statutory requirement to notify, because no objection is provided for. That is only natural and common sense. But in that case a refund may take place, and naturally will, except where otherwise provided. ... If any amendment increases the liability that is separately open to objection and appeal. If an amendment decreases liability there is nothing in itself to object to, and it does not affect the reduced assessment."*

10 32. There is no basis for the Appellant's confined construction, which ignores the express language of the provision. As Starke J relevantly observed in *Hoffnung*[76], in respect of a power conferred in similar terms:

> *"The Commissioner has ... the very fullest powers of amendment in order to protect the revenue or to do justice, and the various amendments already mentioned illustrate the extent to which this power has been exercised."*

33. In *Trustees*, this Court was called upon to construe and apply a predecessor provision to s 19 which was expressed in substantially identical terms. Isaacs J considered a scenario involving "*the discovery of a gross error of valuation against the taxpayer, which could only be corrected by amending the assessment*"[77]. His Honour observed
20 that the power to amend could be exercised at any time, and was not confined by the refund and adjustment provisions of the Act, or to amendments only in the Revenue's favour[78]. The amended assessment would be "*conclusive that the amount it shows ... was the true amount as at the taxable date*". The taxpayer was entitled to a "*refundment of the excess*" without reference to the refund provisions or their time limits[79].

34. The Appellant relies upon, but misinterprets, the latter parts of s 19. After conferring the power of amendment and expressly stating its purpose, s 19 moves on to address an additional matter that will arise in the case where an amended assessment has the effect of imposing a fresh or increased liability. The language that is used in this part of the provision assumes that there can be alterations or additions which will not have such an
30 effect. It provides a taxpayer affected by an increased liability under an amended assessment with the assurance that the addition will be subject to objection in the same manner and to the same extent as the original assessment. There is an obvious reason why the reference to objections is limited to cases where the amended assessment increases a taxpayer's liabilities, in that no taxpayer would object to a reduction in its liability. There is a qualification in the last few words, in that the right to object to the changes made by the amended assessment does not include any right to contend that the validity of an assessment is affected by reason only that any of the provisions have not been complied with[80]. None of these additional features detracts from the amplitude of the power to amend to ensure accuracy or completeness in assessments, whether an
40 amended assessment decreases or increases the taxpayer's liability.

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76 At 64.

77 At 40.

78 The refund provision considered by the High Court was in the same form as the predecessor to s 90AA. The Appellant's submissions refer to the predecessor provision and s 90AA in the same terms; that is, as providing for "*refunds ... upon application made within three years*": at paras 16 and 17.

79 *Trustees*, per Griffith CJ at 35.

80 See eg *R v Deputy Federal Commissioner of Taxation (SA); Ex parte Hooper* (1926) 37 CLR 368, 374.

35. The Appellant's arguments misunderstand the operation of s 19 in another respect. The effect of an amended assessment is to alter any liability arising under the original assessment (in the present case, to remove any liability for tax attributable to the "*duplicated landholding*"[81]), and no further step is required to be taken by the taxpayer to give effect to a reduction in liability[82]. Thus, an amended assessment will completely displace the original assessment. Here, the amended assessment sought by the Respondent will declare in respect of each relevant tax year that, in respect of the previously and erroneously assessed amounts, the amount of land tax payable with respect to the duplicated property is $0. This is the form taken by the amended assessments that the Commissioner in fact issued to 65 Albany Road with respect to each of the years 2006-2011.[83] Upon amended assessments issuing in that form, the Appellant would cease to have any statutory authority to retain the payments that had previously been made in respect of the duplicated landholding. Consequently as soon as the Appellant comes under a legally enforceable duty to issue such assessments, the previous payments are incapable of being characterised as sums payable for land tax, or as payments of tax or purported tax.

36. The Appellant contends[84] that if the power in s 19 is exercised to reduce the amount of any assessment, the amended assessment cannot be given effect to unless the conditions prescribed by s 90AA, including as to time, are complied with. This submission is repugnant to the language found in s 19 and s 90AA.

37. In the first place, it would unnecessarily and unjustifiably confine the scope of the Appellant's power under s 19, which is exercisable, as the provision expressly provides, "*from time to time*" (that is, at any time)[85]. It would not give effect to, or further, the express purpose for which the power is conferred.

38. It also impermissibly imposes, in respect of this taxpayer and potentially others, "*a tax ... upon the subject without leaving open to him some judicial process by which he may show that in truth he was not taxable or taxable in the sum assessed*"[86].

39. Moreover, ss 19 and 90AA are directed to different issues and subject matters. Section 19 authorises the making of amended assessments that will displace the original assessment under which payments will have been made, and declare a new set of rights and obligations under statute binding both the Appellant and the taxpayer. A necessary concomitant of this power is that the Appellant must have the power, and in certain circumstances both the power and the duty, to give effect to an amended assessment. In contrast, s 90AA is concerned with proceedings for the refund or recovery of tax that has been paid under or pursuant to an assessment that remains on foot. The language of s 90AA is quite inconsistent with any contention that it can apply to prevent an amended assessment being made at any time, or that it can prevent an amended assessment being enforced by a taxpayer whose tax liability has been eliminated by the amended assessment.

40. This analysis is supported by this Court's reasoning in *Trustees*[87]. The Court rejected an argument that the predecessor provision of s 19 was limited by the refund and

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81 *Gas Ban* at [45]-[46]; *Hoffnung* at 53, *Trustee* at 35, 43.
82 Cf Appellant's Submissions at paras 33, 34.
83 See, e.g., the Notice of Reassessment for the year ended 2006 at WHN-15 [**AB128**].
84 Appellant's Submissions at para 33.
85 Cf Appellant's Submissions at para 43.
86 See e.g., *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32, 40.
87 (1915) 20 CLR 21 at 33, 35, 37, 40, 41 and 43.

adjustment provisions then found in ss 59 and 60[88]. The refund and adjustment provisions were found to be predicated on a footing that the payments in question had been made pursuant to an existing assessment that remained in place. Consequently, they did not limit or restrict the Commissioner's power to amend assessments where necessary to ensure their completeness and accuracy. Further, the High Court held that by exercise of that power, the taxpayer would become entitled to a "*refundment of the excess*" to which the refund provision would have no application.

41. The application of these principles may be assisted by providing a concrete example. If an amended assessment issued that declared that no tax was payable by 65 Albany Road with respect to the duplicated property in, say, the 2002 tax year, but the Appellant had previously received and continued to hold a substantial payment under the superseded original assessment for that year, the Appellant would cease to have any statutory or other lawful authority to retain the payment[89]. In those circumstances, the taxpayer would have had no opportunity to lodge an application within three years of the original payment as contemplated by s 90AA(2) if that provision did apply, and nor would there be any scope for a further enquiry by the Appellant as to whether he should make a finding of overpayment as contemplated by s 90AA(6)(b). Once the amended assessment issued, the amount in question could not be described as "*tax paid under, or purportedly paid under, this Act*" because the original assessment that extracted the payment would have been replaced by an amended assessment that declares that the amount in question is no longer "*payable for tax*"[90].

42. In the circumstances of this case, where the duplicate assessments were effectively incontestable as a result of the Appellant's undiscoverable error, and the Appellant knew that the assessments required amendment for accuracy, the Court of Appeal correctly held that mandamus should issue to compel the Appellant to exercise his power to issue amended assessments for the 1990-2002 tax years. A grant of mandamus in these circumstances is entirely consistent with the observations of Brennan J in *Richard Walter*[91] that "*the courts, if not the Commissioner, can diminish the difficulty of concurrent assessments by ensuring that there is no double recovery of tax*". To similar effect, Dawson J said: "*That is not, of course, to suggest that the courts would be powerless to prevent their processes being abused to obtain double recovery by enforcement of alternative assessment.*[92]" There is nothing in s 19 or its surrounding provisions which could be said to authorise, or entrench, a known double recovery of tax. The Appellant's knowledge of double recovery requires him to "*make good by a subsequent compensating adjustment*"[93].

The power to give effect to an amendment

43. The Appellant contends that s 19 does not permit him to make a payment that gives effect to an amended assessment. The submission appears to be founded on the premise that such a payment could only be made under a separate, express statutory power[94]."

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88 of the Land Tax Assessment Act 1910-1912.
89 *Royal Insurance* per Mason J at 64; and Brennan J at 87 and 89.
90 Compare ss 6, 8, 39 and 57 of the Act.
91 (1995) 183 CLR 168, 201-202.
92 At 214.
93 See *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 (**Futuris**), [58].
94 Appellant's Submissions at para 33.

44. That submission is contrary to authority. A valid alteration to an original assessment is conclusive as to the taxable value of land and the land tax payable[95]. Once an amended assessment is made, the liability in the amended assessment replaces any liability that was imposed by the original assessment[96]. It makes little sense to say that the Appellant can disregard the rights and obligations declared by an amended assessment because the Act contains no express power to give effect to an assessment that reduces the taxpayer's liability to tax. In the absence of an express power to repay, it is "*not open to serious doubt that central revenue departments have a similar discretionary power to make refunds of tax payments which were not legally due*[97]." The position is even stronger when it is suggested that the Appellant has no power to give effect to an amended assessment by returning payments that he has no right to retain.

45. The likely reason why the Act does not contain a separate express power authorising the Appellant to give effect to an amended assessment that reduces or eliminates a tax liability is that Parliament assumed that the Appellant would act with integrity, or, as Isaacs J put it in *Agricultural Service Engineers Ltd (in liq) v Taxes, Commissioner for South Australia*, he would "*take a high position in this matter and not claim for the Crown more than he sees the Crown is entitled to*"[98]. Moreover, on the authorities, it is plain beyond argument that the necessary power is implicit in s 19, or arises from the Appellant's general power of administration of the Act in s 4. It is well established that the grant of a power under statute includes, as a concomitant of the power, "*every power and every control the denial of which would render the grant itself effective*"[99].

46. Further or alternatively, the general administration power in s 4 permits the Appellant to give effect to acts authorised by the Act and to ensure that excess payments are not retained. The Appellant is "*invested with very large powers in carrying out his administration*", including the amendment power. His administrative power extends to enforcing assessments that are "*right*" and altering and correcting those that are "*wrong*", and giving effect to his decisions, including those that bind the Treasury[100].

47. The Appellant was empowered to do everything necessary and convenient for the achievement of the purpose of s 19, which included the power to give effect to the amended assessment by refunding an overpayment[101]. This was, as the Court of Appeal noted[102], what the Appellant had done in respect of the 2006 and 2007 land tax years when he issued amended assessments and paid refunds to the Respondent.

48. In circumstances where the Appellant had a duty to issue amended assessments excluding the duplicate landholding[103], the making of those assessments would remove any lawful authority by which the Appellant could retain the amounts that he knew to

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95 *Trustees*, 35; see also 41.

96 *Gas Ban*, [45]-[46].

97 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 153.

98 (1926) 38 CLR 289, 294; cited by the Court of Appeal at [137] and [138] **[AB431]-[AB432]**.

99 *D'Emden v Pedder* (1904) 1 CLR 91 at 110; see also *Re Sterling; Ex parte Esanda Ltd* (1980) 44 FLR 125 at 130; *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524 at 528; *Australian Securities Commission v Bell* (1991) 32 FCR 517; *Johns v Connor* (1992) 35 FCR 1 at 10; *Australian Securities and Investments Commission v Oliver Banovec (No 2)* (2007) 214 FLR 33 at 43; *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* (2008) 166 FCR 108, 127–8.

100 *W & A McArthur Ltd v Federal Commissioner of Taxation* (1930) 45 CLR 1, 9-10.

101 As the Court of Appeal correctly concluded at [141] **[AB432]-[AB433]**.

102 Appeal Reasons [142] **[AB433]**.

103 Appeal Reasons [140] **[AB432]**, [162] **[AB441]**.

have been wrongfully demanded[104]. The Appellant's power to give effect to the amended assessments was, in these circumstances, coupled with a duty to do so[105].

The duty to amend

49. It is trite that there may be circumstances in which a power must be exercised[106]. The Appellant does not challenge the correctness of *Royal Insurance*, which establishes particular circumstances in which a power is coupled with a duty[107]. The present case involves the same principles, and the way in which the High Court applied those principles in *Royal Insurance* is instructive[108]. The circumstances reflect those contemplated by this Court in *Richardson v FCT*[109]:

> *"The nominee's liability arose only upon a false state of facts. No doubt when and if the Commissioner arrived at the clear conclusion that to ensure the completeness and accuracy of the nominee's assessments the exclusion of the income he returned was requisite, it became his duty to exercise his power under s 37."*

50. In *Finance Facilities*[110], Windeyer J observed that the particular context of the words and circumstances may make the expression "*may*" not only an empowering word but also "*indicate circumstances in which the power is to be exercised – so that in those events the 'may' becomes a 'must'*"[111]. In those circumstances, the power becomes a duty which is enforceable in the event of non-performance[112].

51. The circumstances in the present case, in the context of overpayments arising from the Appellant's duplication error, called for the exercise of the Appellant's power. As Mason CJ indicated in *Royal Insurance* at 64, in the absence of clear words, no discretion should be implied in the circumstances of an "*overpaid tax*". There was no error in the Court's approach[113].

52. This is not a case in which a taxpayer identified an error and sought to dispute a liability; or where there might some uncertainty as to the existence of the asserted error and its cause. This is a case where the existence of the Appellant's error was unarguable, it was caused by the Appellant, it was known by the Appellant, and it was not discoverable and was otherwise incontestable by the Respondent. The undisputed double recovery by the Appellant in respect of the "*duplicate landholding*", his delay in revealing the error, and the fact that it was not discoverable by the Respondent until so

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104 Appeal Reasons [195]-[197] **[AB456]-[AB458]**.

105 Appeal Reasons [143] **[AB433]**.

106 *Royal Insurance* at 66, 88, 89, 99 and 102; *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174; [2014] HCA 13 at [68] ; see also *Samad v District Court of New South Wales* (2002) 209 CLR 140 at [32]; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [116]; *Finance Facilities* at 134-135; *Baiada Poultry Pty Ltd v R* (2012) 246 CLR 92 at [25]-[26]; *Leach v R* (2007) 230 CLR 1 at [38].

107 See *Julius v Lord Bishop of Oxford* (1880) 5 AC 214 (***Julius***), 222-3.

108 *Royal Insurance* at 88-89, 92, 99, 101 and 102; Appeal Reasons [143] **[AB433]**.

109 (1932) 48 CLR 192, at 207 (Dixon J).

110 At 134-135; referred to by the Court of Appeal at [126]-[139] **[AB426]-[AB432]**.

111 *Finance Facilities* at 135. Windeyer J referred to the following passage in *Macdougall v Paterson* (1851) 11 CB 755 at 766: "*The word "may" is merely used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise*". The Appellant accepts that "*a power may be ... coupled with a duty in the circumstances of a particular case, even if the power is not invariably coupled with a duty to exercise the power*": Appellant's Submissions at para 41.

112 *Royal Insurance* at 65-66 per Mason CJ, at 88-89 per Brennan J and per Dawson J at 100, 102.

113 Cf Appellant's Submissions at paras 29-30, 40-42.

revealed[114] are circumstances which indicate that the Appellant's power to amend *must* be exercised to give effect to the purposes of s 19 and the Act[115].

The decision not to amend

53. Well after the mandamus proceeding was commenced by the Respondent, the Appellant made a decision to exercise his power under s 19 by refusing to issue amended assessments[116]. The following facts are not in dispute:

(a) The Appellant knew that amendment of the assessments for the 1990-2002 land tax years was necessary to ensure accurate assessments of land tax[117].

(b) The decision not to amend the 1990-2002 land tax assessments was taken after the Appellant had issued amended assessments in respect of the 2006-2011 years that reduced the tax liability in respect of the duplicated property to nil, and repaid the excess payments. The Treasurer had also granted *ex gratia* relief for the 2003-2005 tax years in response to a request, referring to the "*unique circumstances*" of the case"[118].

(c) The Appellant's decision not to amend was deliberate. It was taken in light of the knowledge of the duplication error and of the express admission made by the Appellant that the duplication error had been committed with respect to the 2008-2011 land tax years[119].

(d) The reason the Appellant gave for the refusal to amend was that, even if amended assessments issued, s 90AA would preclude the Respondent instituting proceedings to recover the excess amount; that is, he refused to amend because he considered that the Respondent would not be entitled to any consequential relief from the Court, regardless of the rights and liabilities declared in the amended assessments[120].

(e) Having become aware of the duplication error meant that, at the time of his refusal, the Appellant was knew that the assessments did "*not reflect any rational assessment of the taxpayer's liability to tax*"[121].

54. The Appellant's power under s 19 was not confined by s 90AA for the reasons given in paragraphs 36 to 41 above and for the reasons that follow:

(a) Where the Appellant had not only the power but a duty to issue amended assessments and make payments that gave effect to the amended assessments, neither the making of the payments nor the taxpayer's right to enforce the amended assessments depended upon a right of the taxpayer to claim a refund of tax.

(b) When the Appellant performed his duty to amend the assessments, a substantial part of the monies held by the Appellant would no longer be the subject of any

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114 See paragraphs 5 and 19 to 22 above.
115 Appeal Reasons [139]-[143] **[AB432]-[AB433]**.
116 Exhibit SFC-1 **[AB210]**; Appeal Reasons [49] **[AB390-391]**.
117 Appeal Reasons [157] **[AB438]-[AB439]**.
118 Appeal Reasons [155] **[AB437]-[AB438]**. Exhibit WHN-19 **[AB152]**.
119 Appeal Reasons [155] **[AB437]-[AB438]**.
120 Appeal Reasons [49] **[AB390]**.
121 Appeal Reasons [156] **[AB438]**.

assessment[122], and those monies would be held without authority. Having no authority to retain those monies, the Appellant would be duty bound to give effect to the assessments by returning those monies to the Respondent.

(c) If, and to the extent, the Respondent needed to exercise statutory or common law rights by bringing proceedings to recover monies held without any statutory authority, those rights arose from the amended assessments and/or from the fact that the Appellant was duty bound to issue and give effect to amended assessments. The taxpayer's statutory and/or common law rights to enforce an amended assessment or recover monies held without authority are not excluded by the Act[123].

(d) Section 90AA applies only to claims for a refund of "*tax*". It assumes that the assessment of tax under which tax was paid, or purportedly paid, under the Act remains on foot. The amended assessments will declare that the Appellant has no lawful authority to retain the overpayments. In those circumstances, there is no need for any proceedings of the kind to which s 90AA might apply. Moreover, the excess payments that the Respondent seeks to recover, consequent on the amended assessments, will not be: (a) "*duty ... upon land*" for its unimproved value within the meaning of s 6 of the Act; or (b) "*tax*" as defined in s 3 of the Act[124].

55. The Appellant's refusal to perform his duty to amend the assessment was based on legally irrelevant and erroneous considerations and amounted to a jurisdictional error: his reliance on s 90AA misunderstood the nature of the decision that he was required to make; did not reflect any rational assessment of the Respondent's liability to tax " (to adopt the language of the Nettle and Mandie JJA and Hargrave AJA in *Gas Ban*[125]); and was, in all of the circumstances, arbitrary, capricious and irrational[126].

56. The decision not to issue amended assessments was also infected by jurisdictional error because he had the power of his own motion to amend assessments and to make the consequential payments, and that relief was not dependent on any further step being taken by the taxpayer. The Court of Appeal held (and the finding is not challenged by the Appellant) that the deliberate decision of the Appellant not to amend the 1990-2002 assessments, taken in the light of knowledge of the duplication error and of the express admission, meant that at the time of his refusal "*he was aware that the assessments did not reflect any rational assessment of the taxpayer's liability to tax*"[127].

57. The Appellant's decision was also an error amenable to judicial review. It was affected by the legal error described above and took into account the extraneous consideration of s 90AA[128]. In circumstances where: (a) the purpose of the power conferred by s 19 was to ensure the correctness of assessments; and (b) the Appellant knew that it was

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122 *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63 at 95.

123 Indeed, the existence of s 20A assumes the existence a taxpayer's right at common law to sue for restitution where an amount has been paid to the Appellant by mistake.

124 Cf Appellant's Submissions at paras 50, 52.

125 *Gas Ban* at [49], see also [60]. *Plaintiff S297-2013 v Minister for Immigration and Border Protection* [2015] HCA 3 at [19]-[21]. See *R v Tower Hamlets LBC; Ex parte Chetnik Developments Pty Ltd* [1988] 1 AC 858, 877.

126 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd (No 2)* (1944) 69 CLR 407, 432. See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [53].

127 Appeal Reasons [156] **[AB438]**.

128 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

necessary to amend the assessments to ensure their correctness; there was only one way in which the power could be exercised and should now be exercised. As Mason CJ observed in similar circumstances in *Royal Insurance*, the Act should not be construed as conferring a discretion to retain amounts that the Appellant knows do not reflect the Applicant's land tax liability[129].

58. Even if the Appellant's decision could stand, a fresh decision can be made: there is nothing in the language of s 19 to suggest that the power to alter or add to an assessment cannot be exercised more than once[130], and the Appellant is not *functus*.

59. Finally and in any event, since the Appellant was, in the circumstances, under duties to issue amended assessments and give effect to them without the Respondent taking any further step, the Respondent was entitled to the relief sought in the mandamus proceeding[131].

Liability to repay

60. The Court of Appeal was correct to conclude that the proceeding for mandamus did not require the Respondent to look beyond the statutory obligations that the Appellant owed to issue amended assessments and to give effect to those amended assessments by repaying the excess amounts. Moreover, the mandamus claim was not dependent on any further step being taken by the Respondent[132] and it did not require the Respondent to establish an antecedent liability at common law in restitution[133].

61. The identification of an antecedent or "*aliunde*" duty in *Royal Insurance* was a reference to the observations of Lord Selbourne in *Julius v Lord Bishop of Oxford*, who considered that the duty to make a repayment is in general to be "*solved*" from the context, from the *particular provisions* or from the general scope and object of the enactment conferring the relevant power.

62. In *Royal Insurance*, Mason CJ observed that a taxing Act confers no authority to retain any monies otherwise than in payment of duties and charges imposed by or pursuant to the Act. More specifically, his Honour said that the grant of a positive discretionary power to make a refund once an overpayment of duty has been found to have taken place cannot be treated as a source of authority in the Commissioner to retain the overpayment[134], and that there will be circumstances in which the only proper exercise of power by the Commissioner is to refund the overpayment. Mason CJ went on to conclude that, far from the Commissioner having a defence such as change of position, the taxpayer had a good claim under the general law to recover the monies under the law of restitution. More generally, Mason CJ concluded by saying that "*there can be no objection to the grant of relief by mandamus directed to a statutory officer requiring that officer to pay money if there be a public legal duty to so act*"[135].

63. Brennan J considered that there must be an *aliunde* liability to effect a refund before the Commissioner will come under a duty to make a refund, but it is important to understand that was the product of a restricted appropriation provision in s 166D of the

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129 *Royal Insurance* at 64 per Mason J, 87-88 per Brennan J and 99 per Dawson J. See also *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285, 312; *Julius* at 222 - 223.

130 *Trustees* at 33-34.

131 Appeal Reasons [162] **[AB441]**.

132 Appeal Reasons [157] **[AB439]**.

133 Appeal Reasons [214] **[AB463]**.

134 *Royal Insurance* 64.

135 *Royal Insurance* per Mason CJ at 81.

Act that the High Court was considering. Brennan J said that it was arguable prior to the commencement of s 166D that the Commissioner was empowered in the exercise of her discretion to refund an overpaid amount *ex gratia* where there was no legal liability to refund. That situation was confined, however, by the enactment of s 166D which limited refunds to cases where the refund was in discharge of an antecedent liability of the Commissioner. However, the most relevant passage in his judgment is directed to the case of tax payments that the Commissioner retained despite retrospective legislation that disentitled the Commissioner to retain the payments, Brennan J concluded that the Commissioner's liability to refund the amount in that case was a statutory liability under the Act[136]. This scenario closely approximates the case where the Commissioner comes under a legal obligation to issue amended assessments that will eliminate the duplicated tax liability and deprive the Appellant of any lawful authority to retain the excess payments.

64. Dawson J considered that the *aliunde* liability to repay could be found in the statutory provisions which established the overpayment.

65. In the present case, the Appellant's liability arises via his duty to issue amended assessments correcting assessments that he knew were erroneous because of the "*duplicated landholding*", declaring that the Appellant had no lawful authority to retain the excess payments. At that point and in those circumstances, the Appellant would come under a liability that was enforceable at law, to give effect to the amended assessments by repaying the excess sums to the Respondent. The liability to make those payments in those circumstances is confirmed and supported by the general duty of administration in s 4 of the Act. This analysis aligns with the High Court's reasoning in *Royal Insurance*. The Court of Appeal correctly held that it was unnecessary to identify a source of duty outside the scope of the Act[137].

66. In any event, even if there were no statutory obligation to effect the repayments, the Court of Appeal correctly concluded that the Respondent's common law claim to recover excess payments after the issue of the amended assessments was not excluded by the Act or statute barred.

The mandamus claim was commenced in time

67. The Respondent sought mandamus to compel the Appellant to exercise his duties under s 19 in circumstances where the Appellant first constructively refused to do so[138], and then subsequently made a decision to refuse to do so on grounds that were legally and jurisdictionally erroneous[139]. The mandamus claim is not statute barred because:

    (a) The Appellant's duty to issue and give effect to amended assessments that eliminated his duplication error arose when he discovered and revealed that error, which was no earlier than 28 March 2012;

    (b) The Respondent's right to seek mandamus arose upon the Appellant's failure or refusal to exercise his duty under s 19, which occurred either shortly prior to, or after, the commencement of these proceedings.

Accordingly, no limitation issue arises.

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136 *Royal Insurance*, per Brennan J at 89.
137 Appeal Reasons [183] **[AB452]-[AB453]**.
138 *FCT v Multiflex Pty Ltd* (2011) 197 FCR 580, [42].
139 *Commissioner of Taxes v Tourism Holdings Ltd* (2002) 171 FLR 166, 173.

68. The Court of Appeal correctly concluded that the only relevant limitation period was the six year period specified in s 5(1)(d) of the Limitations Act which applies to "*actions to recover any sum recoverable by virtue of an enactment*". The mandamus proceeding was commenced well within the period of six years from the date upon which the relevant statutory duties arose.

69. Neither s 90AA of the Act nor s 20A of the Limitations Act applies to a proceeding to compel the performance of statutory duties to issue and give effect to amended assessments. However, even if s 90AA did apply, it did not purport to exclude s 20A of the Limitations Act (except as stated in subsection (3), which in any event harmonises with s 20A(1)(b) and which has no relevant application in this case)[140].

70. The Appellant's Submissions assert that the Court of Appeal concluded that s 90AA was impliedly repealed by ss 5(1)(d) or 20A(1) of the Limitations Act. This misstates the Court of Appeal's reasoning at [218] where the Court explained why, in its view, it was wrong to conclude that s 20A had been excluded by s 90AA. In that context, the Court of Appeal said that s 20A(1) is the later and more specific statutory provision (which is clearly correct because it specifically applies to payments that are attributable to tax and that are made under a mistake). It then observed that s 20A "*impliedly repeals s 90AA or restricts its scope of operation in certain limited circumstances*..."[141].

71. The qualification or restriction that s 20A applies is that s 20A(1)(b) expressly adopts the longer limitation period in s 90AA as the limitation period that is to operate under and subject to the provisions of the Limitations Act. One purpose and effect of this provision is to ensure that s 27 applies to, and alleviates, the limitation period in s 90AA as adopted and applied by s 20A. Thus, when s 27 commences by referring to the case of any action for which a period of limitation is prescribed "*by this Act*", that expression captures the limitation period that is referred to in s 90AA and which is adopted in s 20A(1)(b) as a period of limitation prescribed by the Limitations Act. There is no other reason for the inclusion of s 20A(1)(b) in the Limitations Act – on the Appellant's case, it would never have work to do.

72. Accordingly, if s 90AA otherwise applied (which is denied), s 27 extended the limitation period from three years as provided for by s 90AA of the Act and 20A(1)(b) of the Limitations Act until the mistake under which the Respondent was operating was discovered or reasonably discoverable. It is common ground that the payments were made by the Respondent operating under a relevant mistake and that the operative mistake was not discoverable by the Respondent until it was revealed by the Appellant.

73. Both the mandamus and the restitution proceedings were commenced on 21 March 2013, within twelve months of the discovery of the mistake, and therefore within any applicable limitations period.

Conscious maladministration

74. The Court of Appeal did not use the expression "*conscious maladministration*" to impugn the *bona fides* of the Appellant, but rather to draw attention to the (unchallenged) facts it listed at paragraphs [156]-[157][142]. Those facts included the finding that at the time of the Appellant's refusal to issue amended assessments, on 15 August 2013, he was aware that the assessments did not reflect any rational

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140 Cf Appellant's Submissions at para 55.
141 Under the heading "Implied repeal" at para 55.
142 **[AB438]-[AB439]**.

assessment of the taxpayer's liability to tax, he knew that an amendment of the assessments was necessary to ensure accurate assessments of the land tax, and he had the power of his own motion both to amend the assessments and to make the consequential payments (none of which depended on any further step being taken by the taxpayer)[143]. In those circumstances, the Court of Appeal considered that reliance on the limitation provisions was not to the point, and that the Appellant's refusal to amend was without good reason or justification.

75. This analysis comes close to the analysis undertaken by this Court in *Futuris*[144], where the Court recognised (at least implicitly) that "*double counting*" with any knowledge or belief that there has been a failure in compliance with the provisions of the *Income Tax Assessment Act* 1936 (Cth) would constitute a failure of due administration. In that case, it was decided that the Commissioner had not issued an assessment that he knew to be wrong, nor had he sought, by issuing the assessment, to impose a tax liability twice in respect of the same amount – because it could be assumed "*that all could be made good by a subsequent compensation adjustment*"[145]. For the reasons identified by the Court of Appeal[146], the Appellant's refusal to issue amended assessments and to give effect to them of his own motion was, in substance, no different to the failure of due administration contemplated in *Futuris*.

76. None of the Respondent's submissions in the mandamus case rest, or need to rest, on the Court of Appeal's findings concerning conscious maladministration[147]. However, the conclusion that the Appellant owed enforceable legal obligations to issue amended assessments and to repay the excess amounts is supported by the factual findings that underpin the conclusion as to conscious maladministration.

77. It appears that the Court of Appeal embarked on its discussion of *Futuris*, and made its findings concerning conscious maladministration, because of a misapprehension based on the concluding words of s 19[148]. In fact, those words are no barrier to the Respondent's mandamus claims because the claims do not involve any challenge to the validity of an extant notice of assessment. The point of the mandamus claim is that if the Appellant was under a duty to issue amended assessments eliminating the tax attributable to the duplicated landholding, the issuance of those assessments would displace the original assessments and set out a new charter of rights and obligations. Under that charter, the Appellant would have no lawful authority to retain the excess payments that had been made pursuant to the superseded assessment.

Compound interest

78. The Court of Appeal awarded simple interest on each overpayment from the date of overpayment[149], and compound interest from 15 August 2013 (being the date of the Appellant's decision to exercise his power under s 19 by refusing to issue amended assessments)[150]. An award of simple interest pursuant to s 58 of the *Supreme Court Act* 1986 (Vic) was appropriate in circumstances where the Appellant wrongly calculated

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143 Appeal Reasons [157] **[AB439]**, [209] **[AB462]-[463]**.
144 at [58]-[59].
145 *Futuris*, [58]; see also [108].
146 Appeal Reasons [156]-[157] **[AB438]-[AB439]**.
147 Appeal Reasons [150]-[159] **[AB436]-[AB441]**.
148 See Appeal Reasons [150]-[155] **[AB436]-[AB437]**.
149 Appeal Reasons [245] **[AB474]**.
150 Appeal Reasons [241] **[AB473]**.

the Respondent's liability and erroneously claimed and then retained the overpayments from the date on which they were paid by the Respondent[151].

79. Compound interest was not awarded pursuant to statute and was not inconsistent with any statutory provision[152]. It represented compensation for the foreseeably caused loss of use of money that was wrongfully withheld by the Appellant, assessed by reference to the unchallenged evidence of the Respondent. The Appellant had, but was not entitled to, the funds demanded from the Respondent[153]. From at least the date of the Appellant's refusal to amend the assessments, the Respondent's loss of use of money was accordingly within the reasonable contemplation of the parties[154]. The Respondent's loss through the loss of use of money was the subject of unchallenged evidence and established as a matter of fact[155]. In the premises, there was a proper award of compound interest from the date on which the Appellant failed to exercise his duty in accordance with law[156].

80. The Respondent's claim was analogous to one for money had and received and not comparable to a taxpayer successfully pursuing an objection in circumstances where the taxpayer's entitlement was necessarily the subject of dispute, and the period of time in which the taxpayer might be held out of funds was expressly limited by the Act[157].

The restitution claim

81. The Respondent made an entirely separate claim in restitution that assumed that the Appellant was not under a duty to issue amended assessments under s 19 of the Act. The claim had a limited role in the appeals[158]. One reason why that is so is that the question in the mandamus context was whether there was a common law right to recover excess payments that the amended assessments would declare not to be tax, and to be wrongfully retained. The existence of an *aliunde* liability on the part of the Commissioner to effect a repayment was only considered by the Court of Appeal in case it needed to be established before the mandamus relief could be granted[159].

82. The separate restitution claim is maintainable by the Respondent. The Respondent made the overpayments in respect of the "duplicated landholding" under an operative mistake (established by unchallenged findings of fact)[160], and the Appellant was, and continues to be, unjustly enriched at the expense of the Respondent[161].

83. The Respondent was entitled to challenge the correctness of the assessments in these proceedings[162] because s 20 does not apply[163], and the Respondent has established that the overpayments demanded by the Appellant and paid by the Respondent:

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151 Cf Appellant's Submissions at para 62.
152 Cf Appellant's Submissions at para 63.
153 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 605, 609, 629, 653.
154 *Hungerfords v Walker* (1989) 171 CLR 125, 148; *Wallersteiner v Moir (No 2)* [1975] 2 WLR 389, 393.
155 Affidavit of Kim Francis Davis sworn 10 October 2013 **[AB237]-[AB239]**.
156 Appeal Reasons [241] **[AB473]**.
157 Cf Appellant's Submissions at para 63.
158 Appeal Reasons [242] **[AB473]**.
159 Appeal Reasons [4(12) **[AB373]**], [183] **[AB452]**, [200] **[AB458]**, [205] **[AB460]-[461]**. The alternative ground was the existence of an antecedent liability to effect restitution.
160 Appeal Reasons [31] **[AB383]**, [189] **[AB455]**, [190] **[AB455]**.
161 Appeal Reasons [192] **[AB455]**, [193] **[AB456]**, [195] **[AB456]-[AB457]**.
162 *Richard Walter* , 220; *FJ Bloemen Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 360, 376.
163 Appeal Reasons [61] **[AB394]**, [196] **[AB457]**.

(a) were not based upon a proper assessment of the taxable value of the land owned by the Respondent within the meaning of s 17 of the Act[164];

(b) were not "tax" (as defined in s 3(1), being the charge levied and collected upon the total unimproved value of land pursuant to ss 6 and 8 of the Act);

(c) were not sums payable for land tax within the meaning of s 39 of the Act[165]; and

(d) did not reflect any liability owed by the Respondent under the Act.

For these reasons, the overpayments did not discharge any legal obligation[166].

84. Section 90AA does not apply because the overpayments were not *"tax paid under, or purportedly paid under"* the Act. The mistake was in substance no different from that in *Royal Insurance*, and as the High Court held in respect of relevantly identical language, it is not possible to read the words *"tax paid under, or purportedly paid under this Act"* as denoting *"under a mistaken belief as to authority"*[167].

85. If that is wrong and s 90AA is capable of applying, the overlap between s 90AA and s 20A must be resolved. Either s 20A governs as the later more specific provision, or the provisions are not inconsistent and the two statutes can be accommodated by construing them harmoniously. On the latter approach, s 20A(1)(b) imports and adopts the longer period in s 90AA[168] but subjects it to s 27. As explained above, s 27 of the Limitations Act, postpones the commencement of the limitations period until the operative mistake was discovered or discoverable by the Respondent, which the Appellant accepts was no earlier than 23 March 2012[169].

86. The Respondent is entitled to restitution in the form of compound interest for the loss of use of the overpayments[170].

Part VIII: Estimate

87. The Respondent estimates it will require a total of 3 hours for presentation of its oral argument in the appeals.

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164 Appeal Reasons [189] **[AB455]**.
165 Appeal Reasons [197] **[AB457]-[458]**.
166 Cf Appellant's Submissions at paras 56-59.
167 *Royal Insurance*, 80.
168 Appeal Reasons [218] **[AB464]-[AB465]**.
169 Appeal Reasons [232] **[AB469]**, [238] **[AB472]**.
170 *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561.

(f) a trust established by a will, but only during the period ending on the later of—

(i) the 3rd anniversary of the testator's death or the further period approved by the Commissioner under sub-section (6); or

(ii) if, at the testator's death, all the potential beneficiaries are minors—the 18th birthday of the first beneficiary to turn 18;

(g) a trust, for any tax year in relation to which it is a superannuation trust;

S. 3(1) def. of "fixed trust" inserted by No. 85/2005 s. 18(1)(a).

"**fixed trust**" means a trust that is not an excluded trust, a discretionary trust or a trust to which a unit trust scheme relates;

S. 3(1) def. of "joint owners" inserted by No. 41/1998 s. 4(1).

"**joint owners**" means persons—

(a) who own land jointly or in common, whether as partners or otherwise; or

(b) who are deemed by this Act to be joint owners;

"**land**" includes all land and tenements and all interests therein;

S. 3(1) def. of "land used for industrial purposes" inserted by No. 6929 s. 2.

"**land used for industrial purposes**" means land upon which is erected a factory or workshop which is primarily used for industrial purposes and includes any land which is used in conjunction with and for purposes ancillary to the industrial purposes for which such factory or workshop is being used, but does not include any land upon which is erected a factory or workshop which is primarily being used—

"**supplementary valuation**" means a valuation which is made under section 13DF of the **Valuation of Land Act 1960** and is supplementary to the last general valuation returned to the municipal council before 1 January in the year immediately preceding the tax year;

S. 3(1) def. of "supplementary valuation" inserted by No. 30/2002 s. 16(1)(a).

"**supported residential service**" has the same meaning as in the **Health Services Act 1988**;

S. 3(1) def. of "supported residential service" inserted by No. 36/2005 s. 24(3)(a).

"**tax**" or "**taxation**" means the duty upon land, and includes any super tax or any additional charge in respect thereof to be assessed, collected, or enforced under this Act;

"**tax year**" means a year for which tax is being assessed;

S. 3(1) def. of "tax year" inserted by No. 30/2002 s. 16(1)(a).

"**taxable value**" means—

(a) in respect of any land or lands of an owner for which a duty of land tax is charged, levied and collected under section 6, the total unimproved value of the land;

(b) in respect of any transmission easement or transmission easements held by a transmission easement holder for which a duty of land tax is charged, levied and collected under Part IIB, the total value of the transmission easement or transmission easements;

S. 3(1) def. of "taxable value" inserted by No. 6827 s. 2(c), substituted by No. 7773 s. 2(a)(ii), amended by Nos 8621 s. 3, 9190 s. 2(1)(a), substituted by No. 3/2004 s. 4(2)(a).

PART I—ADMINISTRATION

4. Administration of Act and regulations

Nos 3713 s. 4, 3701 s. 6.

The Commissioner has the general administration of this Act and the regulations.

S. 4 amended by Nos 7773 s. 2(b), 8474 s. 10, 9126 s. 3(1), 9455 s. 2, 9733 s. 12, 9766 s. 5, 10058 s. 2, 37/1987 s. 10(1). 65/1987 ss 53, 57(b), 8/1988 s. 4(1), 40/1997 s. 138(Sch. 2 items 10.3, 10.4), 46/1998 s. 7(Sch. 1), 103/1998 s. 9, substituted by No. 71/2004 s. 31.

* * * * *

S. 4A inserted by No. 23/1986 s. 7, repealed by No. 40/1997 s. 138(Sch. 2 item 10.5).

5. Prohibition on certain disclosures of information

S. 5 repealed by No. 7773 s. 2(c), new s. 5 inserted by No. 9648 s. 2, amended by No. 101/1995 s. 27, repealed by No. 40/1997 s. 138(Sch. 2 item 10.5), new s. 5 inserted by No. 71/2004 s. 32.

(1) A person who is or was engaged in the administration or execution of this Act must not disclose any information obtained under or in relation to the administration or execution of this Act, except as permitted by this Part or section 15(4).

Penalty: 100 penalty units.

PART II—NATURE OF TAXATION

6. Rate of land tax

No. 3713 s. 6. S. 6 amended by Nos 7315 s. 3(Sch. 1 Pt B), 7773 s. 2(d), 9071 s. 2(1), 65/1987 s. 57(c).

Subject to this Act there shall in the case of each owner of land be charged levied and collected by the Commissioner and paid for the use of Her Majesty in aid of the Consolidated Fund for each and every year a duty of land tax upon land for every dollar of the unimproved value thereof in accordance with the provisions of the Second Schedule.

6A. Owner of home unit deemed to be owner of land for purposes of this Act

S. 6A inserted by No. 8527 s. 4(1).

(1) In this section unless inconsistent with the context or subject-matter—

"**home unit**" means a building or part of a building which—

(a) is designed for use as a self-contained unit for living purposes; and

(b) is situated on land owned—

(i) by two or more persons as tenants in common, each of whom is the registered proprietor under the **Transfer of Land Act 1958** of one or more undivided shares in the whole of the land and is lawfully entitled, by virtue of an agreement entered into between him or his predecessor in title and all other owners of undivided shares in the land or their predecessors in title, to the exclusive right to occupy a specified building or part of a building on the land; or

* * * * *

S. 7B inserted by No. 9071 s. 4, repealed by No. 9190 s. 2(1)(b).

No. 3713 s. 8.

8. Land tax, on what land to be assessed

S. 8(1) amended by Nos 6827 s. 4(1), 8527 s. 6(1)(a)(b), 9842 s. 6(a), 74/1991 ss 6(a), 7(1).

(1) Subject to sub-section (2) tax on land shall in the case of each owner thereof be assessed charged levied and collected by the Commissioner for each year on the total unimproved value of all land of which he is the owner at midnight on the thirty-first day of December immediately preceding the year for which such tax is assessed charged levied and collected.

S. 8(2) inserted by No. 8527 s. 6(1)(c), amended by Nos 9071 s. 5, 74/1991 ss 7(1), 8(1), 10/2001 s. 5(1)(a).

(2) Tax on land referred to in section 9(1)(c) that is subject to tax because of section 9(2) and tax on land owned by a charitable institution that is not exempt from tax under section 9(1)(d) (whether because of section 9(2AAA) or otherwise) shall be separately assessed charged levied and collected by the Commissioner from the owner thereof for each year on the unimproved value of each parcel of land of which he is the owner at midnight on the 31st day of December immediately preceding the year for which such taxation is assessed charged levied and collected as if it were the only land owned by the owner.

S. 8(2A) inserted by No. 74/1991 s. 8(2).

(2A) Sub-section (2) does not apply in respect of land referred to in section 9(1)(c) vested in a public statutory authority[2].

S. 8(3) inserted by No. 8527 s. 6(1)(c).

(3) Where portion of a parcel of land (not being a portion of a building) is occupied separately from, or is obviously adapted to being occupied separately from other land in the parcel such portion shall for the purposes of sub-section (2) be regarded as a separate parcel of land.

* * * * *

S. 15(3) inserted by No. 6929 s. 5(b), amended by No. 9078 s. 2(b), substituted by No. 8/1988 s. 4(2), repealed by No. 41/1998 s. 6.

S. 15(4) inserted by No. 6929 s. 5(b), substituted by No. 71/2004 s. 35(2).

(4) Any information contained in a return made to the Commissioner under sub-section (1) or any particulars referred to in sub-section (2) may be disclosed to the Valuer-General.

S. 15(5) inserted by No. 3/2004 s. 7(2).

(5) In sub-section (2A) **"acquired"**, in relation to a transmission easement, includes a transmission easement granted to, reserved in favour of, created by statute in favour of, or vested by statute in, the transmission easement holder.

Heading preceding s. 16 substituted by No. 7773 s. 3(b).

Assessments

S. 16 substituted by No. 7773 s. 3(b).

16. As to use of valuations by Commissioner

For the purpose of the assessment and levy of taxation the Commissioner may use—

(a) valuations made by a rating authority within the meaning of the **Valuation of Land Act 1960**;

S. 16(b) amended by No. 42/1996 s. 18(b)(i).

(b) valuations made by the Valuer-General or a valuer nominated by the Valuer-General;

* * * * *

S. 16(c) repealed by No. 42/1996 s. 18(b)(ii).

17. Assessments to be made by Commissioner

S. 17 substituted by No. 7773 s. 3(b).

The Commissioner shall from the returns and from any other information in his possession or from one of those sources and whether any return has been furnished or not cause an assessment to be made of the taxable value of the land owned by any taxpayer and of the land tax payable thereon.

18. Default assessments

S. 18 substituted by No. 7773 s. 3(b).

If—

(a) a taxpayer makes default in furnishing a return;

(b) the Commissioner is not satisfied with the return made by any taxpayer; or

(c) the Commissioner has reason to believe that any person (though he may not have furnished a return) is a taxpayer—

the Commissioner may make an assessment of the amount which, in his judgment, is the taxable value of the land owned by the taxpayer and of the land tax payable thereon, and the land tax so assessed shall be the land tax payable by that taxpayer unless the assessment is varied in accordance with the provisions of this Act.

19. Amended assessments

S. 19 amended by No. 7466 s. 4(a), substituted by No. 7773 s. 3(b).

The Commissioner may from time to time amend an assessment by making such alterations or additions to it as he thinks necessary to ensure its completeness and accuracy, and shall notify to the taxpayer affected every alteration or addition which has the effect of imposing any fresh liability or increasing any existing liability and

unless made with the consent of the taxpayer every such alteration or addition shall be subject to objection in the same manner and to the same extent as the original assessment but the validity of an assessment shall not be affected by reason only that any of the provisions of this Act have not been complied with.

Heading preceding s. 20 repealed by No. 7773 s. 3(b).

* * * * *

S. 20 amended by No. 7194 s. 5, substituted by No. 7773 s. 3(b).

20. Evidentiary provisions

(1) The production of an assessment or of a document under the hand of the Commissioner purporting to be a copy of an assessment shall—

(a) be conclusive evidence of the due making of the assessment; and

S. 20(1)(b) amended by No. 9455 s. 6.

(b) be conclusive evidence that the amount and all the particulars of the assessment are correct, except in proceedings on review or appeal against the assessment, when it shall be prima facie evidence only.

(2) The production of any document under the hand of the Commissioner purporting to be an extract from any return or assessment shall in relation to any matter other than a matter referred to in sub-section (1) be prima facie evidence of the matter therein set forth.