

13175 CAT. NO. 97 2709 4 ISBN 0644 516429

1996-97-98

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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COMMONWEALTH PLACES (MIRROR TAX) BILL 1998

COMMONWEALTH PLACES WINDFALL TAX (COLLECTION)  
BILL 1998

COMMONWEALTH PLACES WINDFALL TAX (IMPOSITION) BILL  
1998

COMMONWEALTH PLACES (CONSEQUENTIAL AMENDMENTS)  
BILL 1998

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EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Treasurer, the Hon Peter Costello, MP)



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# ***General outline and financial impact***

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## **Background**

This package of Bills represents the Government's legislative response to the decision of the High Court in *Allders International Pty Ltd v Commissioner of State Revenue (Victoria)* (1996) 186 CLR 630. In its decision the High Court held invalid the imposition of stamp duty on a lease covering part of a Commonwealth place on the grounds that paragraph 52(i) of the Constitution gives the Commonwealth exclusive power to make laws with respect to Commonwealth places.

The implications of this case are that other State taxes may similarly be held invalid in relation to Commonwealth places. The Government has been advised that as well as stamp duty, payroll tax, financial institutions duty and debits taxes may also be at risk of invalidity. At the request of the States, this package of Bills will:

- provide for mirroring of those four taxes, and of any other State taxes should they be endangered, in relation to Commonwealth places from 6 October 1997; and
- protect those four State revenues collected before 6 October 1997 in respect of Commonwealth places. It will do this by applying a windfall tax on applications for refunds, sought on the basis of constitutional invalidity, of any of the four taxes which were paid prior to 6 October 1997.

## **COMMONWEALTH PLACES (MIRROR TAXES) BILL 1998**

Provides for the imposition of taxes, in relation to Commonwealth places in a State, which mirror the stamp duties, payroll taxes, financial institutions duties and debits taxes of that State. The revenue collected will be returned to the States.

***Date of effect:*** The Bill will apply from date of Royal Assent with effect while arrangements between the Governor-General and the Governor of the State for the exercise or performance of powers, duties or functions under the Bill are in place, requiring payment of amounts which would have become first due for payment on or after 6 October 1997 had the State tax laws been fully complied with before then and had they not been invalid.

***Proposal announced:*** Announced by the Treasurer in a Press Release (No. 109) on 6 October 1997.

**Financial impact:** The measures will protect revenues which would have been collectable by the States from 6 October 1997. The amount of revenue which will be collected and returned to the States is not known.

**Compliance cost impact:** There will be increased compliance costs for those taxpayers who had never before paid these State taxes. There may also be increased administration costs for the States.

## **COMMONWEALTH PLACES WINDFALL TAX (COLLECTION) BILL 1998**

Provides for the determination, collection, and administration of the Commonwealth places windfall tax which applies to claims for refunds of amounts paid under State taxing laws before 6 October 1997.

**Date of effect:** The Bill will apply from 6 October 1997.

**Proposal announced:** Announced by the Treasurer in a Press Release (No. 109) on 6 October 1997.

**Financial impact:** The measures will protect revenues already collected by the States before 6 October 1997. The revenue from the windfall tax depends upon the number of claims and is not known.

**Compliance cost impact:** The proposed windfall tax should not increase compliance costs. However, there may be increased administration costs for the States.

## **COMMONWEALTH PLACES WINDFALL TAX (IMPOSITION) BILL 1998**

Imposes the Commonwealth places windfall tax at a rate of 100%.

**Date of effect:** The Bill will apply from 6 October 1997.

**Proposal announced:** Announced by the Treasurer in a Press Release (No. 109) on 6 October 1997.

**Financial impact:** The measures will protect revenues already collected by the States before 6 October 1997. The revenue from the windfall tax depends upon the number of claims and is not known.

**Compliance cost impact:** The proposed windfall tax should not increase compliance costs. However, there may be increased administration costs for the States.

## COMMONWEALTH PLACES (CONSEQUENTIAL AMENDMENTS) BILL 1998

Makes consequential amendments to *Income Tax Assessment Act 1936*, *Income Tax Assessment Act 1997* and the *Commonwealth Places (Application of Laws) Act 1970* (the 1970 Act). The amendments to the Income Tax Assessment Acts will exempt from income tax refunded State taxes subject to the windfall tax and deny an income tax deduction for the windfall tax. The amendment to the 1970 Act will ensure that the provisions of the State taxing laws which will be mirrored by the *Commonwealth Places (Mirror Tax) Act 1998* will have effect under that Act rather than the 1970 Act.

**Date of effect:** The amendments will apply from the date of Royal Assent.

**Proposal announced:** Not previously announced.

**Financial impact:** No impact on the revenue.

**Compliance cost impact:** The amendments will have no effect on compliance costs.

## RIS SUMMARY

### Regulation Impact on Business

**Scale:** Low impact

- Only taxpayers operating in or in relation to a Commonwealth place within a State will be affected by the mirror tax and windfall tax legislation.
- The Commonwealth and the States will work closely to ensure that the terms of their bilateral agreements relating to revenue collection minimise the compliance costs on taxpayers.





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# *Chapter 1*

## **Commonwealth Places (Mirror Tax) Bill 1998**

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### **Overview**

1.1 The Bill provides the framework for the imposition of taxes to mirror certain state taxes, in Commonwealth places located in those states.

### **Summary of the provisions**

#### **Purpose of the provisions**

1.2 The purpose of the provisions is to ensure that taxes which mirror State taxes such as state stamp duties, payroll taxes, financial institutions duties and debits taxes apply in relation to Commonwealth places in the same State. To the extent to which those State taxes are invalid in terms of paragraph 52(i) of the Constitution, the provisions will ensure that State taxes are applied as Commonwealth mirror taxes in the Commonwealth places located in the relevant state.

#### **Date of effect**

1.3 The Bill will apply the mirrored taxes to require payment of amounts which, under the State taxing laws being mirrored, would have first become due for payment from 6 October 1997. It will calculate those amounts on the basis that all relevant obligations before 6 October 1997 had been complied with; that is, it will not require larger payments of mirror tax from those who had not complied with invalid state taxing laws before that date, compared to those who had done so.

#### **Background to the legislation**

1.4 In *Alders International Pty Ltd v Commissioner of State Revenue* (Victoria) (1996) 186 CLR 630 the High Court held invalid the imposition of stamp duty on a lease covering part of a Commonwealth place on the grounds that section 52(i) of the Constitution gives the Commonwealth exclusive power to make laws with respect to Commonwealth places.

1.5 The implications of this case are that other State taxes may similarly be held invalid in relation to Commonwealth places. The

Government has been advised that at the very least, payroll tax, financial institutions duty and debits taxes may also be at risk of invalidity.

1.6 The Government announced on 6 October 1997 (Treasurer's Press Release No 109) how it would act, with effect from that date, to protect State revenues. It announced that from 6 October 1997 the Commonwealth would apply stamp duty, payroll tax, financial institutions duty and debits tax in relation to Commonwealth places. It announced that taxpayers should continue to make payments to State revenue authorities as if State taxes applied directly, as applicable payments would be credited against Commonwealth mirror taxes. And it announced that any pre-payments under existing State legislation would be credited against mirror tax legislation. This Bill gives effect to that announcement.

1.7 The Government also included in that announcement notice of a Commonwealth windfall tax, applying from 6 October 1997 to refunds of past payments in relation to State taxes where the basis for the refund is the invalidity of the State tax in relation to a Commonwealth place. The Commonwealth Places Windfall Tax (Collection) Bill 1998 and the Commonwealth Places Windfall Tax (Imposition) Bill 1998 give effect to that announcement.

1.8 The practical effect of the windfall tax system is to ensure that the States retain the benefit of any amounts to which the tax applies. For that reason, those amounts must neither be assessed to taxpayers, nor must a deduction be given for windfall tax payments. The necessary amendments to the *Income Tax Assessment Act 1936* for the 1996-97 year of income and to the *Income Tax Assessment Act 1997* for the 1997-98 and later years of income are to be made by the Commonwealth Places (Consequential Amendments) Bill 1998, together with an amendment to the *Commonwealth Places (Application of Laws) Act 1970*.

1.9 In order to protect State revenues the Government has decided to introduce legislation to apply (from 6 October 1997) to Commonwealth places which will "mirror" those of the four taxes – payroll tax, stamp duty, financial institutions duty and debits taxes - which apply in each State, in the Commonwealth places located in that State. Should other taxes prove likely to be affected, they can be added to the mirror tax regime by regulation, effectively from the same date, 6 October 1997. The protection to State revenues provided by these measures requires State Governments to determine the taxes applying to Commonwealth places in their States. It also assumes that Commonwealth places will not be taxed adversely under those laws compared to the taxation of other places in the same State.

1.10 The policy of these measures is that the States will have the practical benefit of the mirror taxes, and will have the administrative burden in relation to them. Consequently, the Bill is drafted on a broadly similar basis to the *Commonwealth Places (Application of Laws) Act 1970*, in that it seeks to apply, as Commonwealth law, as nearly as possible the law of the State in which the Commonwealth place is located.

A simple extension of the *Commonwealth Places (Application of Laws) Act 1970* to taxation was not possible, however, and there are several areas where the mirror tax provisions differ from that model.

## Explanation of the provisions

### *Title, commencement, definitions and scope of the Act*

1.11 The Bill, when enacted, will be called the *Commonwealth Places (Mirror Taxes) Act 1998* [clause 1].

1.12 The Act is to *commence* on the date that it receives the Royal Assent [clause 2]. It will, however, *operate* to an extent before that date in that tax liabilities may be created, in some circumstances, in relation to transactions which occurred before that date. It has effect in relation to Commonwealth places in a State only if an arrangement between the Commonwealth and the State for the exercise and performance of powers, duties and functions under the applied laws by State authorities is in effect [subclause 6(6) and clause 9]. This reflects the policy that the States, who enjoy the benefit of the mirror taxes, must bear any administrative burden that relates to these taxes.

1.13 The Bill includes provisions which give meanings to a number of terms used in the Bill [clause 3]. These definitions include *applied law, authority, Commonwealth place* (which is defined so as not to include the seat of government), *corresponding applied law, corresponding State taxing law, excluded by paragraph 52(i) of the Constitution, in relation to a Commonwealth place, modifications, proceedings, scheduled law, State law* and *State taxing law*. Relevant aspects of these definitions are discussed in the explanation of the substantive provisions to which they are most relevant.

1.14 The Act is made under the Commonwealth's legislative powers in respect of Commonwealth places (Constitution, paragraph 52(i)), the appellate jurisdiction of the High Court (Constitution, section 73), and also under its powers to invest courts of a State with federal jurisdiction (Constitution, paragraph 77(iii)) and powers incidental to those powers (Constitution, paragraph 51(xxxix)) [clause 4]. Because it is made under these powers, and not under the power with respect to taxation (Constitution, paragraph 51(ii)), the task of mirroring the effect of State taxing laws on other places in the same State is made easier.

1.15 The limitation on the Commonwealth's taxing power, precluding its use so as to discriminate between States or parts of States, does not apply to the Bill. The Government is also advised that the constitutional limitations on laws imposing taxation, requiring laws imposing taxation to deal with no other matter, and requiring such laws to deal with one subject of taxation only (Constitution, section 55), do not apply to the Bill. As these principles do not usually restrict State drafting

of State taxing laws, the task of adopting relevant State drafting by reference could have been made more difficult if those principles applied.

1.16 Differences between the taxing laws of different States could have been argued to produce discrimination between States or parts of States; the legislation could have been split between an appropriation Bill and an assessment Bill, requiring selective reference to different parts of State drafting for the two purposes; and the question could have arisen whether mirror taxation is one, or more than one, subject of taxation. Because of the powers under which the Bill is proposed, each of these difficulties is believed to be irrelevant.

1.17 The Bill is intended to bind the Crown, both in relation to the States and in relation to the Commonwealth, and in any other relevant capacity. However, it does not make the Crown liable to prosecution for any offence [*clause 5*].

### *State laws as applied laws*

1.18 The scheme of the Bill is to apply provisions which mirror those of certain State taxing laws in relation to Commonwealth places in the same State. A '*State taxing law*' is defined in the following terms:

- a scheduled law of the State. Schedule 1 of the Bill contains the State taxing laws which each State is proposing to have imposed as applied laws. These are their current laws relating to each of the four taxes – payroll tax, stamp duty, financial institutions duty and debits taxes – mentioned in the Treasurer's announcement of 6 October 1997;
- a State law that imposes tax and is prescribed by regulations. There is flexibility in the legislation to include other State laws at a later date. Such later prescription of other taxing laws would effectively protect State revenues concerned as from 6 October 1997, the date of the government's announcement. That is proposed to be done by means of the Regulations; and
- any other State law of a State, to the extent that it is relevant to the laws scheduled or prescribed. This includes, for example, State Taxation Administration Acts. As these are progressively introduced around the States of Australia they are automatically included as State taxing laws by this definition. Other existing State legislation is automatically included so far as it is relevant to scheduled or prescribed laws. This reflects the broad policy that, so far as possible, the mirror taxes will operate, be applied and interpreted in the same way as the State taxes they mirror; thus it will be State interpretation acts, criminal administration and so on that will be applied as relevant to the mirror taxes.

1.19 To the extent to which a State taxing law is excluded from operation by paragraph 52(i) of the Constitution, *clause 6* will ensure that

the provisions of that law, as in force at any time (before or after the commencement of this Bill as an Act), apply at that time in each Commonwealth place in that State [*subclauses 6(1) and 6(2)*].

1.20 The Bill thus seeks to impose mirror taxes only where State taxing laws are invalid. Correspondingly, the *Allders* decision supports the view that wherever the Bill could validly impose mirror taxes, State taxing laws are invalid.

1.21 This does not mean that only those provisions which directly tax in relation to Commonwealth places are applied. Such taxing provisions have a substantial underpinning of related laws, such as interpretation acts, administration acts, and the like. To the extent that the most direct tax provisions of the State law are excluded by paragraph 52(i) of the Constitution, so are all the relevant provisions which affect the interpretation, application or operation of those provisions; and they too are applied by the Bill as part of the mirror tax system.

1.22 However, the State taxing law will not be applied by the Bill as a mirror tax in relation to Commonwealth places in another State. To do so would create a danger of multiple taxation in relation to Commonwealth places which the Commonwealth is unwilling to allow under the mirror tax system.

1.23 An express saving provision prevents the application of any provision of a State taxing law as part of the mirror tax system where it would not be open to the Parliament to make that provision apply in relation to a Commonwealth place [*subclause 6(3)*]. This expressly supports the normal implication of an intention to sever any part of the Bill, and of the applied law, that would be invalid (for instance, for constitutional reasons, to which section 15A of the *Acts Interpretation Act 1901* would imply an intention to sever).

1.24 Applied laws are subject to the express modifications which may be made in the manner set out at *clause 8* [*subclause 6(4)*].

1.25 Neither the applied provisions, nor any other part of the Bill, have the effect of creating a tribunal, including a court, body or office [*subclause 6(5)*]; this rule is subject to the exception that express modifications may do so. The rule is designed to limit any possibility of invalidly conferring judicial authority on a body that is not exclusively judicial in character.

1.26 It is important to note that a State will not have the benefit of the applied law under *clause 6* unless an arrangement is in operation under *clause 9* in relation to that State [*subclause 6(6)*].

1.27 Where a State taxing law is amended at some time in the future, for example to alter the rate of taxation generally applicable under that State taxing law, the operation of the law as amended will automatically be picked up as an applied law under these provisions. The new rate will

apply in relation to the Commonwealth place, at the same time that it applies generally in the State.

1.28 There may be revisions of a State taxing law so substantial that the Schedule no longer describes it. Regulations may be made to cover this sort of change, as well as to deal with other taxes, in accordance with paragraph (b) of the definition of a State taxing law. This sort of change is separate from the power to make modifications to applied laws – perhaps including laws applied as a result of such regulations – by regulations under *clause 8*.

**'In relation to'**

1.29 This phrase is used in the Bill because paragraph 52(i) of the Constitution affects not only State laws purporting to apply **in** Commonwealth places but also State laws purporting to apply to matters outside those places if they are sufficiently connected with the Commonwealth places to be 'in relation to' them. For instance, a State taxing official may be investigating a breach of a State taxing law, but in respect only of a breach which occurred in the State outside the Commonwealth place. The official can exercise any appropriate access powers in a Commonwealth place, for example, in pursuing documents which may have been removed to the Commonwealth place in order to frustrate that investigation.

***Operative Date of Applied Laws***

1.30 The provisions of a State taxing law which apply as mirror tax in the Commonwealth places in the State are defined as '*applied law*'. The applied laws apply, or are taken to have applied, at any time as the corresponding State law stood at that time, however long ago or however far in the future that time may be [*subclause 6(2)*]. However the retrospective effect is modified by *clause 7*. In essence, mirror tax will apply so that the only amounts which are due under the mirror taxes will be the amounts which would have first fallen due on or after 6 October 1997, had the mirror taxes always applied. These amounts are to be calculated as though all previous obligations had been fully and promptly complied with. So the Commonwealth collects the same mirror tax, regardless of the extent to which a taxpayer had formerly complied with an invalid State tax. Special provisions apply these principles in relation to stamp duty (see paragraphs 34 to 38, below).

1.31 The applied law does not have effect in relation to amounts that would have become due for payment before 6 October 1997 [*subclause 7(1)*]. Therefore, any amounts which have become due for payment before that date are not subject to the applied laws.

1.32 Amounts which first become due from 6 October 1997 may arise from transactions or events which occurred before that date. A tax may be paid in arrears for example. Where an amount of tax first

becomes due for payment from 6 October 1997, it is required to be paid under the mirror tax provisions, that is, the applied law.

1.33 *Clause 7* assumes that in determining amounts payable under the mirror tax all obligations that arose before 6 October 1997 had been fully and promptly complied with. This means, for example, that where a taxpayer did not pay tax under an invalid State taxing law, whether because the taxpayer believed that law to be invalid under paragraph 52(i) of the Constitution or for some other reason, a default assessment cannot be issued in relation to that taxpayer under the mirror tax [*subclause 7(2)*]. It also means that any other obligations that are relevant to an amount payable under the mirror tax had been similarly complied with. For example, related employers may affect one another's liability for payroll tax; the calculation of liability assumes compliance by all relevant people, not just the taxpayer. The use of the words "any relevant person" in *subclause 7(2)* will include situations where persons are jointly and severally liable in certain circumstances.

#### **Operative Date for Stamp Duty: Particular Rules**

1.34 In some circumstances, the general rules for operative date are not given full effect by *subclauses 7(1)* and *7(2)*. These circumstances relate to stamp duty. Where stamp duty applies, it is generally expressed as a duty on instruments, not on transactions. The duty is commonly supported by restrictions limiting the use in evidence of unstamped documents. It is sometimes supported by requirements to create (or be deemed to create) instruments in some circumstances. But there is not necessarily any obligation to submit a document for stamping, and even where there is such an obligation it may not arise until some time after an instrument is made (or required to be made).

1.35 Under the general rule, it could still be contended in some cases that a taxpayer who had made an instrument before 6 October 1997 had no liability that first arose before that date, and so could be fully assessed to duty under the mirror tax. The Bill does not permit this liability to arise.

1.36 An applied law therefore does not have effect in relation to amounts that would have become due for payment as stamp duty on an instrument that was made before 6 October 1997 [*subclause 7(3)*]. This rule is in addition to the general rule, which also applies to stamp duty.

1.37 Under the general rule, it could still be contended in some cases that there was no obligation to lodge a relevant previous instrument made before 6 October 1997, and so that a later instrument was to be assessed on the basis that no previous instrument had been lodged and duty duly assessed and paid. This could be thought to justify assessing an instrument made on or after 6 October 1997 to a greater liability for mirror tax, although there was an earlier instrument made before that date, due stamping of which would have reduced the mirror tax liability of the later instrument. The Bill does not permit this greater liability to arise.

1.38 In determining what amount is or was payable the Bill assumes that all duty in relation to documents that were made before 6 October 1997 had been assessed and paid [*subclause 7(4)*].

### *Modifications of applied laws*

1.39 There may be technical reasons why the operation of *sub clause 6(2)* would not be sufficient to enable the State taxing law (as an '*applied law*') to operate effectively or correctly in Commonwealth places in that State. In that event, *clause 8* provides a framework whereby modifications may be made to applied laws so that the mirror tax will operate appropriately.

1.40 The Bill provides that such custom modifications to the applied laws may be made, as and when required, in one of two ways:

- A State Treasurer may, by notice in writing, make such modifications as are required [*subclause 8(2)*]. The notice is a disallowable instrument for the purposes of the Commonwealth rules relating to the disallowance of such instruments and will require publication in the Commonwealth *Gazette* [*subclause 8(3)*]. Modifications made by this method cannot be made for the purpose of overcoming constitutional problems [*subclause 8(2)*]. Such modifications remain the province only of the Commonwealth.
- The Commonwealth may make such modifications as are required, including modifications directed to ensuring that constitutional requirements are met strictly, by way of regulations made under the Act [*subclause 8(1)*]. Such regulations are disallowable in the ordinary way.

1.41 It is unlikely that any modifications will be made under the regulations as it is the States who administer the State taxing laws and it is they who have the expertise in relation to those laws. However, in the case of the Commonwealth making modifications which conflict with those made by a State, it is the Commonwealth modifications which prevail, reflecting both the possible constitutional importance of some regulations and the status of the mirror taxes as Commonwealth laws [*subclause 8(6)*].

1.42 Whichever method of modification is used, modifications can only be made that are necessary or convenient for the purpose of:

- enabling the effective operation of the applied law as a law of the Commonwealth [*paragraph (a) of subclause 8(4)*]; or
- enabling the applied law to operate so that the combined liability of a taxpayer under both the applied law and the corresponding State taxing law will be as nearly as possible the same as it would have been if the State taxing law applied



without the constitutional impediment *[paragraph (b) of subclause 8(4)]*. This important permitted purpose of modification allows changes to ensure that the mirror tax more closely reflects the intended policy that the application to a taxpayer of mirror tax alone, or the application to the taxpayer of mirror tax in some respects and corresponding State law in other respects, will have no different actual effect overall than the State taxing law which it is applying had the Commonwealth place concerned been any other place in the State. The policy seeks to make it possible to ensure, for example, that a taxpayer located in a Commonwealth place in a State does not pay a different amount of tax overall than a taxpayer located elsewhere in that State or that a taxpayer does not benefit from two tax thresholds.

1.43 The nature of modifications, taking account of the limitations on their purpose, is such that they may properly be expressed to take effect from an earlier date than their gazettal *[paragraph (a) 8(5)]*, and they are expressly authorised to deal with the circumstances in which they apply and with transitional and savings issues *[paragraph(b) of subclause 8(5)]*.

#### *Arrangements with the States*

1.44 The Bill provides for the making of arrangements between the Governor General and the Governor of a State in relation to the exercise or performance of a power, duty or function by an authority of the State *[subclause 9(1)]*. Such arrangements have legal force, as the relevant power, duty or function is to be exercised or performed accordingly *[subclause 9(2)]*. It is therefore necessary that these arrangements be able to be varied or revoked, and they can be *[subclause 9(3)]*. Accordingly, to ensure that such arrangements are public, they and any variation or revocation must be made by instrument in writing, and such an instrument must be published in the Commonwealth *Gazette* *[subclause 9(4)]*.

1.45 One of the matters which may be the subject of such arrangement is the assent by the State to its authorities (eg. State Revenue Offices) to undertake the various duties which are implicit in the applied laws. This assent is an issue because of the constitutional restrictions against the Commonwealth imposing obligations on State authorities without the agreement of the States. Such agreement is practically certain here, because the States receive the whole benefit of the mirror taxes.

1.46 The mirror tax regime only has effect in relation to a State while the State has an arrangement in operation *[subclause 6(6)]*. This is a point of difference between the Bill and the drafting of the *Commonwealth Places (Application of Laws) Act 1970*. That Act is designed to have a significant degree of operation even in the absence of such arrangements, although they are authorised and clearly expected to extend the adequacy of the operation of the Act in a range of possible circumstances. The importance of ensuring that taxpayers are subjected to

consistent burdens effectively administered requires the Bill to take its different approach.

### *Jurisdiction of Courts*

1.47 The Bill invests the courts of a State (within the limits of their jurisdictions) with federal jurisdiction in matters arising under applied laws as arising in relation to Commonwealth places [*subclause 10(1)*].

1.48 The applied laws will be Commonwealth laws. As such, jurisdiction to determine matters arising under the applied laws will be federal jurisdiction and must be conferred by Parliament under paragraph 77(iii) of the Constitution.

1.49 The jurisdiction so conferred is to be exercised in accordance with the applied laws [*subclause 10(2)*]. This means that if a State law provides, for example, that only the Supreme Court has jurisdiction in relation to stamp duty matters then that jurisdiction is the same for applied stamp duties. This will be so, notwithstanding that some stamp duty matters may come within the monetary limits of minor courts.

1.50 It may be necessary for the modifications to invest federal jurisdiction in some respects outside the limits of the courts' jurisdiction under State laws. *Subclause 10(3)* provides the authority. This is additional to the express terms of *subclause 8(4)*, which might otherwise be thought to limit the capacity to make modifications of jurisdiction. Implicitly, the limits of a court's jurisdiction under the mirror tax are altered by the applied law, which includes any modifications; nevertheless *subclauses 10(3)* and *(4)* make it clear that modifications can alter what would otherwise be the limits of a court's jurisdiction in relation to mirror taxes.

1.51 The jurisdiction conferred on State courts is only subject to the restriction that an appeal will only lie to the High Court (in a situation where a State law prohibits any appeal from a court so conferred with jurisdiction) where the High Court grants special leave [*subclauses 10(4)* and *10(5)*]. The lack of any other restriction means that State courts will be able to deal with matters arising under the applied provisions as if they had arisen under the corresponding State laws.

1.52 *Subclause 10(6)* is inserted to ensure that the Bill, when enacted, does not invest State courts with federal jurisdiction in those matters in which the High Court has exclusive jurisdiction under section 38 of the *Judiciary Act 1903*. Those matters include the seeking of a writ of mandamus or prohibition against an officer of the Commonwealth. This example is apposite, since State revenue officers acting pursuant to an applied law could be acting as officers of the Commonwealth.

1.53 *Subclause 10(7)* ensures that appeals to the High Court are not automatic in cases where any ground relied upon in the appeal involves a question as to the operation of section 52 of the Constitution as it affects

the Commonwealth places in relation to which the mirror tax regime applies: that is, Commonwealth places in States and other than the seat of government. This is consistent with the general policy of the Commonwealth in relation to appeals to the High Court on other constitutional matters, and is not peculiar to questions about such Commonwealth places.

***Proceedings under applied laws***

1.54 **Clause 11** ensures that proceedings under applied laws are to be instituted and conducted in the same manner as proceedings under the corresponding State taxing law. This ensures, for example, that where debt recovery proceedings are undertaken against a taxpayer at a Commonwealth place, those proceedings are the same as if the taxpayer were elsewhere in the State.

1.55 Where the debt recovery proceedings are being instituted against a taxpayer who has debts partly in relation to a business in a Commonwealth place and partly in relation to that same business elsewhere in the State, there is no necessity to institute or conduct proceedings according to different rules. This makes it relatively likely that consolidation of separate proceedings will be available, as proceedings will be between the same parties and will not be hindered by conflicting procedural rules.

1.56 Trial on indictment of any offence against any law of the Commonwealth is required to be by jury, under section 80 of the Constitution. This requirement applies to the trial on indictment of any offence under the mirror tax regime. **Subclause 11(2)** expresses this requirement on the face of the Bill, as it could otherwise be overlooked.

1.57 Where proceedings have been commenced under a State taxing law and the court is satisfied that they should have been commenced under an applied law, those proceedings will and must continue as though they had been commenced under the applied law [**clause 12**]. The definition of 'proceedings' in **clause 3** is cast widely to include any stage of judicial proceedings whether civil or criminal. The effect of this rule is that action commenced under an invalid State law does not have to be restarted, nor does an action taken have to be redone, where there is a corresponding mirror tax provision. A corresponding rule may be enacted by the States for the purposes of corresponding State laws. While this does not preclude questions as to whether the law under which action has been commenced is appropriate, it does prevent a range of possible procedural mischiefs, including the application of limitation provisions, that might otherwise arise. The rule will apply to proceedings which include all enforcement and recovery matters for mirror tax purposes.

1.58 **Clause 14** ensures the same outcome on an appeal from a judgement, decree, order or sentence of a State or Territory court in proceedings under a State taxing law. The provision does not apply where the appeal is an appeal to the High Court.

1.59 Taxpayers to whom the mirrored tax legislation applies have the same objection rights as other taxpayers within the State. This Bill does not confer a right to direct an objection to any authority of the Commonwealth. **Clause 13** ensures that proceedings under an applied law are not frustrated because proceedings are taken under a corresponding State taxing law. For example, duplicate proceedings may be instituted by a State taxing authority where they are unsure about the correct jurisdiction. They may also arise because a part of proceedings instituted under a corresponding State taxing law are invalid and so taken to have been instituted under mirror tax. In such cases, **clause 13** ensures that no objection requiring the severance of the proceedings will be allowed. The provision is equally applicable whether the proceedings are civil or criminal in nature, and so applies to cases where a taxpayer is charged with simultaneously committing offences under the mirror tax regime and under a corresponding State taxing law.

1.60 Where the person is convicted under an applied law, then an authority of a State has the same powers and functions in relation to that person as they would have had if the person had committed the offence under the corresponding State taxing law: that is, if the offence had been committed in the State but not in relation to a Commonwealth place. This ensures that the person will be dealt with in the same manner as others convicted of similar offences in the State [**clause 15**].

1.61 Where a cause of action exists under both an applied law and under the corresponding State taxing law, extinguishment of the latter cause of action automatically extinguishes the former [**clause 17**]. This reinforces the policy that so far as possible the mirror tax regime is to be applied in the same way as the corresponding State taxing law, by expressly ensuring that causes of action under the mirror tax will follow the basis of extinguishment that applies to causes of action under such a State law, where the two causes of action have the same basis.

1.62 An issue which may arise in proceedings under either the applied provisions or under the corresponding State taxing law is whether a particular place is a Commonwealth place. **Clause 16** is designed to facilitate proof of interests in land. Although not determinative of the question of whether or not a place has been acquired by the Commonwealth 'for public purposes', (which is a question of law rather than one for formal proof by certificate), such a certificate may nonetheless evidence the fact that the place was 'acquired by the Commonwealth'. To make sure that certificates are effective, documents purporting to be such certificates are taken to be so unless proved otherwise. The certificate is not conclusive; that is, the evidence it provides can be contradicted or disproved by other evidence.

#### ***Validation of actions and instruments***

1.63 **Clause 18** is a provision designed to overcome uncertainty. If an action is purportedly done in relation to a Commonwealth place under a State taxing law which is excluded by paragraph 52(i) of the

Constitution and the State taxing law has a corresponding applied law, then the thing is taken to have been done under the applied law.

1.64 This provision will have many effects. It will validate, for example, the action of a State revenue authority who pursues, as a single debt under State taxing law, a tax debt which relates partly to a business in a Commonwealth place and partly elsewhere in the State. It will also validate the action of a Minister in forgiving a debt in relation to tax owed, or owed partly, in respect of a Commonwealth place. Most obviously, if a taxpayer pays as State tax an amount which was properly due as mirror tax, the amount will be taken to have been paid as mirror tax; so the taxpayer would not be entitled to a refund, and the revenue office would not be required to pursue a separate payment or mirror tax.

1.65 The provision will also assist State revenue authorities and taxpayers who will face continuing uncertainty in identifying some places in their States which are 'Commonwealth places'.

1.66 **Clause 19** provides that any instrument or other writing referring to a State taxing law which is inapplicable by reason of paragraph 52(i) of the Constitution shall be deemed to refer to any corresponding applied law.

1.67 This provision ensures the validity of such documents and writings and negates the need for new documents or other writings to specify the mirror taxes of the State taxing laws, that is State taxing laws operating as applied laws.

#### ***Application of other Commonwealth laws***

1.68 A range of other State laws affect the State taxing laws. These include, for example, Evidence Acts and Acts Interpretation Acts. The Commonwealth has similar laws and when the State laws are mirrored and become Commonwealth laws, there could be a conflict. **Subclause 20(1)** provides generally for Commonwealth laws (other than the applied law) not to apply in relation to the applied law or anything done under the applied law. However, the regulations may prescribe a Commonwealth law to apply (and may do so with retrospective effect, which could prove necessary in some circumstances) [**subclause 20(2)**].

1.69 Where a Commonwealth law applies to a State taxing law or to things done under a State taxing law and there is a corresponding applied law, the Commonwealth law applies to the applied law and to things done under the applied law [**subclause 20(3)**]. For instance, where a Commonwealth law provides for an exemption from a State law, it also provides for an exemption under the corresponding applied law.

1.70 If a Commonwealth law (other than an applied law) refers to a State taxing law which has a corresponding applied law, the reference includes a reference to an applied law. For example, if a Commonwealth

law specifies that an entity is not exempt from a State taxing law, the entity is equally not exempt from the applied law [*subclause 20(4)*].

1.71 A Commonwealth law may be expressed so as to provide exemption from Commonwealth imposed taxes and charges. In that case, *clause 21* ensures that, unless the law expressly provides otherwise, the exemption will not apply in respect of mirror taxes, the taxes imposed by the applied laws.

1.72 An example of the effect of the above provisions is the following. Suppose a Commonwealth law simultaneously provides that there will be no exemption from State taxes and there will be exemption from Commonwealth taxes and charges. Because an applied law is a Commonwealth tax on its face the Commonwealth law in question could be taken to have provided an exemption from the applied law. *Clause 21* ensures that the exemption from Commonwealth taxes and charges does not extend to exemption from any mirror taxes under an applied law.

### *Savings provisions*

1.73 *Clause 22* is a savings provision for situations where a place **ceases** to be a Commonwealth place [*subclause 22(1)*]. It has the effect that, in such circumstances, all rights, privileges, duties and liabilities that were acquired or created while the place was a Commonwealth place continue [*subclause 22(2)*]. Penalties, forfeitures and punishments can be imposed as though the mirror tax had continued to have effect [*subclause 22(3)*], and investigations, legal proceedings or remedies can continue in the same way [*subclause 22(4)*]. This provision is not intended to affect the operation of State law, particularly in relation to the former Commonwealth place [*subclause 22(5)*].

1.74 *Clause 24* is a savings clause which provides for the reverse situation; that is where a place **becomes** a Commonwealth place [*subclause 24(1)*]. It has the effect that, in such circumstances all rights, etc that were acquired or created before the place became a Commonwealth place shall continue [*subclause 24(2)*]. Penalties, forfeitures and punishments can be imposed as though the State tax had continued to have effect [*subclause 24(3)*], and investigations, legal proceedings or remedies can continue in the same way [*subclause 24(4)*]. This provision is not intended to affect the operation of State law, particularly in relation to the now Commonwealth place [*subclause 24(5)*].

### *Money paid or received under an applied law*

1.75 All amounts received under an applied law will have to be credited to the Commonwealth Consolidated Revenue Fund (CRF) (as required by section 81 of the Constitution) [*subclause 23(1)*]. A State taxing law may provide that moneys collected under that law form part of that State's Consolidated Revenue Fund. The Bill will override such requirements in respect of amounts received under applied laws.

1.76 Because the Commonwealth has agreed to protect the State's revenues, amounts received under an applied law and credited to CRF are required to be paid to the State *[subclause 23(2)]*.

1.77 Amounts may be paid under an applied law but refunded at a later time. Such refunds are amounts required to be paid by the Commonwealth. If the Commonwealth is required to pay such an amount under an applied law, *subclause 23(3)* requires that the amount payable is to be subtracted from amounts the Commonwealth is to pay to the States under *subclause 23(2)*. In effect the State is repaid amounts collected under the applied law, net of any refunds paid under an applied law. The calculation specifically excludes amounts that the Commonwealth pays under an applied law **as a taxpayer**.

1.78 *Subclause 23(4)* provides that the CRF is appropriated for the purposes of:

- payments required to be made by the Commonwealth by way of returning revenues raised under applied laws; *[paragraph (a) of subclause 23(4)]* and
- payments by way of refunds of taxes required to be made under applied laws *[paragraph (a) of subclause 23(4)]*.

1.79 *Subclause 23(5)* excludes the operation of the *Financial Management and Accountability Act 1997* for amounts received under an applied law. Payments of tax and of penalties will be received by the States; their own accounting requirements will apply.

### **Regulations**

1.80 *Clause 25* provides for the Regulation making power under the Act. Various matters may be prescribed by regulations. These include:

- Regulations required or permitted by the Act to be prescribed. This includes modifications to applied laws *[subclause 8(1)]*, State laws for the purpose of becoming applied laws *[definition of 'State taxing law' in clause 3]* and Commonwealth laws which are to apply in relation to applied laws *[subclause 20(2)]*; and
- matters necessary and convenient for carrying out or giving effect to the Act *paragraph (b) of subclause 25(1)*.

1.81 New State taxing laws may be identified at a later date and added to the list of laws contained in Schedule 1. Inclusion will give such laws retrospective effect as they will become applied laws as if they had always been listed in the Schedule. Because such retrospectivity is prohibited by subsection 48(2) of the *Acts Interpretation Act 1901*, *subclause 25(2)* is required to permit such regulations to be made. Each of the other regulation-making powers also contemplates that the power

may be exercised in such a way as operate retrospectively in a specified way.



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## *Chapter 2*

# **Commonwealth Places Windfall Tax (Collection) Bill 1998**

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### **Overview**

2.1 The Commonwealth Places Windfall Tax (Collection) Bill 1998 provides the framework for the Commonwealth places windfall tax. The Bill provides for the determination of the liability for windfall tax as well as the collection and administration of the tax.

### **Summary of the provisions**

#### **Purpose of the provisions**

- 2.2 The purpose of the provisions is to:
- establish the title, scope and commencement date of the Act;
  - define terms used in the Bill;
  - establish who is to administer the Bill;
  - determine the amounts which are subject to the windfall tax;
  - establish who is liable for the tax;
  - describe the collection mechanism for the windfall tax;
  - allow a credit for windfall tax deducted;
  - provide for arrangements with the States;
  - provide for payments by the Commonwealth to the States;
  - provide for general regulation making powers.

#### **Date of effect**

2.3 The Bill will apply from 6 October 1997.

## Background to the legislation

2.4 In *Allders International Pty Ltd v Commissioner for State Revenue* (1996) 140 ALR 189 the High Court held invalid the imposition of stamp duty on a lease covering part of a Commonwealth place on the grounds that section 52(i) of the Constitution gives the Commonwealth exclusive power to make laws with respect to Commonwealth places. The decision also cast doubt on other State taxes as they operate in respect of Commonwealth places.

2.5 The Government has been advised that, as well as stamp duty, payroll tax, financial institutions duty, and debits taxes may also be at risk of invalidity. The Commonwealth Places (Mirror Taxes) Bill 1998, when enacted, will protect those four State taxes collected in respect of Commonwealth places from 6 October 1997. The windfall tax aims to protect those four State taxes collected before 6 October 1997 in respect of Commonwealth places.

## Explanation of the provisions

### Title, commencement and scope of the Act

2.6 The Bill, when enacted, will be called the *Commonwealth Places Windfall Tax (Collection) Act 1998* [Clause 1].

2.7 The Act is taken to have commenced on 6 October 1997 [Clause 2].

2.8 The Act will bind the Crown in each of its capacities [Clause 3].

2.9 The Bill includes provisions which give meaning to a number of terms used in the Bill [Clause 4]. For the purposes of the Bill '*State taxing law*' has the same meaning as in the *Commonwealth Places (Mirror Taxes) Act 1998*. The effect of this is that if a State taxing law is applied under that Act in a Commonwealth place the windfall tax will potentially apply to applications for refunds of that tax.

### Administration of the Act

2.10 The Commissioner of Taxation will be responsible for the general administration of the Bill [Clause 5 and the definition of '*Commissioner*' in subclause 4(1)]. The Commissioner may make arrangements with the States about matters in connection with the administration of the Act [Clause 13].

## Determination of the taxable amount

2.11 A taxpayer will be liable for the windfall tax where the person is liable to be repaid a taxable amount by a State [*Clause 7*]. A taxable amount is an amount which meets three conditions:

- a State is liable to repay the amount to a person because a State taxing law is wholly or partly invalid because of paragraph 52(i) of the Constitution [*paragraph 6(1)(a)*];
- the amount is a repayment of an amount paid under the State taxing law before 6 October 1997 [*paragraph 6(1)(b)*]; and
- the amount is claimed by the taxpayer from the State or a court orders the State to pay the amount to the taxpayer [*paragraph 6(1)(c)*].

2.12 Effectively, a taxpayer will be liable for windfall tax whenever that person seeks to claim a refund from a State for one of the four State taxes paid before 6 October 1997.

2.13 The taxable amount to which the windfall tax applies will be reduced to reflect only that amount which was invalid under paragraph 52(i). Amounts which were invalidly collected for other reasons are netted off. This could include mistakenly overpaid amounts [*Subclause 6(2)*].

## Collection of windfall tax

2.14 A State will be required to deduct windfall tax from refunds of one of the four State taxes which it is liable to repay to a taxpayer. A refund cannot be paid until the windfall tax is deducted [*Subclause 8(1)*]. The State is required to notify the taxpayer (in writing) that the deduction has been made [*Subclause 8(2)*].

2.15 The amount deducted must be paid to the Commonwealth [*Subclause 8(3)*]. The liability to make this payment to the Commonwealth creates a liability in the Commonwealth to pay an equal amount to the State [*Clause 12*].

2.16 In order to protect the State from further claims for a refund, when a State makes (or purports to make) a deduction from a taxable amount, the State is discharged from liability to pay or account for the amount to any person other than the Commissioner of Taxation [*Subclause 8(4)*].

## Taxpayer credit for amount deducted

2.17 When a State makes (or purports to make) a deduction from a refund of one of the four State taxes, the taxpayer is entitled to a credit equal to the amount deducted. The credit is a debt due to the taxpayer by

the Commissioner on behalf of the Commonwealth. The Commissioner may apply the credit against any liability the taxpayer has for windfall tax. If a portion of the credit is not so applied the Commissioner must refund that portion [*Clause 9*].

### **Annual report, arrangements with the States and Regulations**

2.18 The Commissioner of Taxation must prepare a report for the Minister, for presentation to Parliament, on the operation of the Act [*Clause 10*].

2.19 Although it is proposed the Commissioner of Taxation will have the general administration of the Act, the Commissioner may enter into arrangements with the States about any matter for the administration of the Act. In particular, the arrangement may relate to the Commissioner's delegation of powers or functions under the Act or regulations. The Commissioner may use section 8 of the *Taxation Administration Act 1953* to delegate some or all of his powers or functions under the Act or regulations to an officer or authority of a State [*Clause 11*].

2.20 The Governor General is authorised to make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for administering the Act [*Subclause 13(1)*].

2.21 The Bill also provides for regulations to prescribe penalties by way of fines not exceeding 10 penalty points for offences against the regulations [*Subclause 13(2)*].

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## Chapter 3

# Commonwealth Places Windfall Tax (Imposition) Bill 1998

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### Overview

3.1 The Commonwealth Places Windfall Tax (Imposition) Bill 1998 imposes the windfall tax at a rate of 100%.

### Summary of the provisions

#### Purpose of the provisions

3.2 The purpose of the Commonwealth Places Windfall Tax (Imposition) Bill 1998 is to impose the windfall tax.

#### Date of effect

3.3 The Bill will apply from the same date as the Commonwealth Places Windfall Tax (Collection) Bill 1998 which is proposed to commence on 6 October 1997 [*clause 2*].

### Explanation of the provisions

3.4 The Bill, when enacted, will be called the *Commonwealth Places Windfall Tax (Imposition) Act 1998* [*clause 1*].

3.5 The Act will bind the Crown in all its capacities [*clause 3*].

3.6 The Commonwealth places windfall tax will be imposed at a rate of 100%. That is, the tax imposed is 100% of the taxable amount as described in the *Commonwealth Places Windfall Tax (Collection) Act 1998* [*clause 4*].



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## Chapter 4

# Commonwealth Places (Consequential Amendments) Bill 1998

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### Overview

4.1 The Commonwealth Places (Consequential Amendments) Bill 1998 sets out consequential amendments to the *Income Tax Assessment Act 1936* (ITAA 1936), the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Commonwealth Places (Application of Laws) Act 1970* (CPAL) as a result of the proposed Commonwealth places windfall tax.

### Summary of the provisions

#### Purpose of the provisions

4.2 The purpose of the Commonwealth Places (Consequential Amendments) Bill 1998 is to make amendments to the Income Tax Assessment Acts as a result of the windfall tax. The Bill also makes amendments to the CPAL.

#### Date of effect

4.3 The proposed amendments will apply from the date of Royal Assent of the Bill [*clause 2*]. The amendments to the ITAA 1936 are to apply to the 1996-97 year of income. The amendments to the ITAA 1997 are to apply for the 1997-98 year of income and all subsequent years. It is necessary to amend both Income Tax Assessment Acts because the ITAA 1997 only applies to the 1997-98 and subsequent years. The ITAA 1936 needs to be amended to cover amounts which may arise for a late balancing company whose balancing date for the 1996-97 year is on or after 6 October 1997 [*clause 4*].

### Explanation of the provisions

4.4 The Bill, when enacted, will be called the *Commonwealth Places (Consequential Amendments) Act 1998* [*clause 1*].

4.5 The Act is to commence on the day it receives the Royal Assent [*clause 2*].

4.6 Schedule 1 of the Bill sets out the amendments to the CPAL and the two Income Tax Assessment Acts [*clause 3*]. The references in this explanatory memorandum to particular items are references to items in that Schedule.

### **Amendments to *Commonwealth Places (Application of Laws) Act 1970***

4.7 Subsection 4(1) of the CPAL states that:

"The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time."

4.8 *Item 1* inserts *new subsection 4(1A)* which provides that subsection 4(1) does not apply to the extent that the provisions of the laws of a State have effect as laws of the Commonwealth, under the *Commonwealth Places (Mirror Taxes) Act 1998* (Mirror Taxes Act). This amendment ensures that any provisions of State taxing laws, as defined for the purposes of the Mirror Taxes Act, which may have applied as Commonwealth laws by virtue of the CPAL will now apply as State taxing laws only by virtue of the Mirror Taxes Act.

### **Amendments to the *Income Tax Assessment Act 1936***

4.9 Section 23 of the ITAA 1936 sets out amounts which are exempt from income tax. Section 23 is to be amended to exempt taxable amounts, within the meaning of the *Commonwealth Places Windfall Tax (Collection) Act 1998*, which are derived by the taxpayer. If a taxpayer is subject to windfall tax on a refund of State taxes, the refund will be exempt from tax to the extent to which the refund is subject to windfall tax [*item 2 - new paragraph 23(kg)*].

4.10 Section 51 of the ITAA 1936 allows a deduction for losses or outgoings incurred in deriving assessable income or in carrying on a business for the purposes of gaining or producing assessable income. The section also sets out specific amounts which are not allowable as a deduction. The section is to be amended to deny a deduction for payments of windfall tax imposed under the *Commonwealth Places Windfall Tax (Imposition) Act 1998* [*item 3 - new subsection 51(11)*].

### **Amendments to the *Income Tax Assessment Act 1997***

4.11 Section 11-10 lists the classes of income which are exempt, no matter who derives the income. Taxable amounts subject to the Commonwealth places windfall tax are to be added to the list [*item 4*]. These amounts will be specifically exempt from income tax. This means that if a taxpayer is subject to windfall tax on a refund of one of the four State taxes, the refund will be exempt from tax to the extent to which the refund is subject to windfall tax [*item 7 - new section 51-49*].



4.12 Section 12-5 of the ITAA 1997 lists the provisions in the ITAA 1997 which contain rules about specific types of deduction. Commonwealth places windfall tax will be added to the list *[item 5]*. The ITAA 1997 is to be amended to deny a deduction for payments of windfall tax imposed under the *Commonwealth Places Windfall Tax (Imposition) Act 1998 [item 6 - new section 26-17]*.



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## Chapter 5

# Regulation Impact Statement (RIS)

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### Commonwealth Places Mirror Tax and Windfall Tax

#### 1. Policy objectives

The Commonwealth Places Mirror Tax is intended to restore to the States the benefit of levying certain taxes in relation to Commonwealth places from 6 October 1997 following the decision in the *Allders* case. In that case the High Court found that the States were precluded by section 52(i) of the Constitution from levying certain taxes with respect to Commonwealth Places within a State because that section gives the Commonwealth exclusive powers to make laws with respect to Commonwealth places.

The Windfall Tax is intended to protect State taxes collected with respect to Commonwealth places before 6 October 1997.

On 6 October 1997 the Treasurer announced that a legislative solution would be developed and that taxpayers should continue to make payments to State revenue authorities as if State taxes were still valid. Such pre-payments would be credited against the liability for Commonwealth mirror taxes.

#### 2. Identification of implementation options

### Background

The Inter-Jurisdictional Taxation Agreement (IJTA), agreed between the Commonwealth and all State and Territory governments in September 1997, committed the Commonwealth to protecting State and Territory government revenues from the implications of the *Allders* decision. Subsequently, all States requested that the Commonwealth specifically apply stamp duty, payroll tax, financial institutions duty and debits tax in and in relation to Commonwealth places.

The intended outcome is that each of the States will collect from 6 October 1997 the same amount (assuming previous compliance) that they would have received as State tax had their laws applied validly in and in relation to Commonwealth places in that State and that revenues already collected by the States before 6 October 1997 in and in relation to Commonwealth places be protected. It is also an essential element of the solution that the Commonwealth's involvement in the ongoing administration of the mirror tax law be kept to a minimum.

The Treasurer instructed officials to consult widely when settling the terms of the legislative response. That process of consultation, together with input from Office of Parliamentary Counsel, has resulted in the development of an approach which involves enacting Commonwealth law to allow State laws to be applied as Commonwealth law, subject to possible modification by Commonwealth regulation and by the States to modify that Commonwealth law by published instrument. A 100% windfall tax will also apply to refunds of State taxes paid before 6 October 1997 and claimed on the basis of the constitutional invalidity of the tax.

### **Commonwealth Mirror Tax Act**

The Act will provide specifically for stamp duty, pay-roll tax, financial institutions duty and debits tax to be applied in and in relation to Commonwealth places as Commonwealth law. (Other State taxes may be added by regulation.) The Commonwealth legislation will mirror the current State legislation in relation to these taxes so that all businesses in the State will be subject to taxes as if none of their business related to a Commonwealth place. The States will continue to collect these taxes with respect to all of the State, but will pay into Commonwealth Consolidated Revenue the proportion of the collections which relates to Commonwealth places. These collections will then be returned immediately to the States under special appropriations. The applied provisions will vary as related State tax law is changed to ensure that the incidence remains identical. Should other taxes become ineffective, they will be able to be added to the mirror tax system by Commonwealth regulation.

State taxes being mirrored may need some modifications so that mirror tax will apply with the correct effect. Modification can be done by Commonwealth regulation or by the relevant State Treasurer publishing the changes in the Commonwealth *Gazette* but will be limited to changes that are necessary or convenient to enable the applied State law to operate effectively, or that are necessary or convenient to ensure that a taxpayer's total liability under the mirror tax and its State counterparts is as nearly as possible what it would be if State taxes could be applied directly. Modifications required by constitutional matters will be undertaken only by the Commonwealth, in regulations.

A taxpayer paying one of these mirror taxes will not necessarily know whether the payment is made under a State law or an applied provision of a Commonwealth law. The taxpayer's total liability should be the same no matter which law applies. An act done under either law will be validated by the other so there will be no gap between their operation. Should one of them be found to be inoperative in a particular case, the other will apply.

The mirror tax legislation will apply only to the extent that the relevant State law cannot be directly applied because of section 52(i) of the Constitution and only to the extent that the taxes became first due for

payment on or after 6 October 1997. Payments made before that date will be subject to the windfall tax legislation if a claim for refund is made.

Precedent for this drafting approach is the *Commonwealth Places (Application of Laws) Act 1970* which deals with all other matters except taxation. The Mirror Tax legislation has been loosely modelled on this Act.

## **Windfall Tax**

The Windfall Tax imposes a 100% impost on refund claims made for taxes paid before 6 October 1997 on the basis that the tax(es) were unconstitutionally applied.

### **3. Assessment of impacts (costs and benefits) of implementation option**

#### **Impact group identification**

The effect of the *Allders* decision is that there are two tax jurisdictions within each State - Commonwealth places within the State and the rest of the State. However, businesses operating within any State should not be greatly affected by this structure – they will continue to pay their liabilities to the State and it will be the State that bears the administrative costs of identifying the correct legislation to apply.

The States will also incur costs in maintaining the legislation and publishing amendments. There will also be an accounting function to be performed which will largely be borne by the States.

The Commonwealth will be responsible for making modifications regarding constitutional matters in relation to the mirror taxes and for accounting for receipts and outlays to and from Consolidated Revenue.

Those impacted by the Windfall Tax legislation will be those taxpayers who paid State taxes in relation to Commonwealth places before 6 October 1997 and who may wish to claim a refund on the grounds that the tax was constitutionally invalid.

## **Assessment of costs**

The Commonwealth's role in the ongoing maintenance of this legislation will be minimal and the costs to the Commonwealth associated with it will be absorbed in existing general administrative funds. Accounting costs to the Commonwealth will also be absorbed.

The States may incur increased systems and staffing costs to deal with allocating tax collections between State and Commonwealth accounts and for accounting to Commonwealth Consolidated Revenue. It is not known how much these additional administrative costs will be. The Commonwealth will not be increasing State appropriations to cover these costs so they must be met from existing State revenues.

The Commonwealth and the States will work closely to ensure that the terms of the bilateral agreements relating to revenue collection minimise the compliance costs on taxpayers, subject to legal and constitutional requirements.

## **Assessment of benefits**

The benefit of this exercise is that the States will be able to collect and retain revenue from taxpayers from whom collection of State taxes is otherwise impossible due to constitutional invalidity. This will ensure that State governments continue to determine the taxes applying in Commonwealth places in their State.

## **Consultation**

The Australian Taxation Office has undertaken extensive consultation with the Treasury, State Revenue Offices and State Treasuries. The Attorney General's Department has also been heavily involved in developing the proposals. Advice has also been obtained from the Australian National Audit Office and the Department of Finance and Administration. Early consultations were undertaken with a number of other Commonwealth departments.

Taxpayers have not been formally consulted but a Press Release announcing the change to the law was released on 6 October 1997.

## **4. Conclusion**

The approach being suggested for the implementation of this policy objective has been developed after extensive consultation between the Commonwealth and the States and is considered to be the only viable implementation option for achieving the Government's policy objectives. It is a combined Mirror Tax/Windfall Tax approach which will protect past receipts by the States and ensure future collections of taxes which mirror State taxes with minimum compliance costs to taxpayers operating in or in relation to Commonwealth places.

