



REPORT OF THE

STANDING COMMITTEE ON
CONSTITUTIONAL AFFAIRS

IN RELATION TO THE

COMMONWEALTH PLACES (MIRROR TAXES
ADMINISTRATION) BILL 1998

Presented by the Hon Murray Nixon JP, MLC (Chairman)

Report 34

STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

Date first appointed:

21 December 1989

Terms of Reference:

1. The functions of the committee are to inquire into and report on:
 - (a) the constitutional law, customs and usages of Western Australia;
 - (b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories,

and any related matter or issue;
 - (c) a bill to which SO 230 (c) applies but subject to SO 230 (d);
 - (d) any petition.

2. A petition stands referred after presentation. The committee may refer a petition to another standing committee where the subject matter of the petition is within the terms of reference of that standing committee. A standing committee to which a petition is referred shall report to the House as it thinks fit.

Members as at the date of this report:

Hon Murray Nixon JP, MLC (Chairman)
Hon Ray Halligan MLC
Hon Tom Helm MLC

Staff as at the date of this report:

Ms Felicity Beattie, Advisory/Research Officer
Mr David Driscoll, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

ISBN 0 7309 8928 3

Table of Contents

1. Executive Summary 1

2. Recommendations 2

3. Reference and Procedure 3

4. Background to the Bill 3

5. Contents and Purpose of the Bill 4

6. Selected clauses of the *Commonwealth Places
(Mirror Taxes Administration) Bill 1998* 8

Report of the Legislative Council
Constitutional Affairs Committee

in relation to the

COMMONWEALTH PLACES (MIRROR TAXES ADMINISTRATION) BILL 1998

1. Executive Summary

- 1.1 The *Commonwealth Places (Mirror Taxes Administration) Bill 1998* ("the Bill") was referred to the Constitutional Affairs Committee ("the Committee") by the Legislative Council under Standing Order 230 (d).
- 1.2 The purpose of the Bill is to implement essential elements of safety net arrangements agreed between Western Australia and the Commonwealth to ensure the continuation of appropriate taxation arrangements in respect of Commonwealth places in Western Australia.
- 1.3 It is intended that the Bill will make provision for the administration and operation of Western Australian laws which are applied as Commonwealth laws in relation to Commonwealth places under the *Commonwealth Places (Mirror Taxes) Act 1998 (Cth)* in a manner which imposes no additional compliance costs on taxpayers.
- 1.4 In order for the arrangements that have been established by the Commonwealth to become effective, the Western Australian Parliament must enact complementary legislation to allow Western Australia to enter into an arrangement with the Commonwealth to administer and collect the mirror tax revenue. It is that Bill which is the subject of this report.
- 1.5 The Bill provides for:
- an arrangement to be entered into between the State Governor and the Governor General to provide for the administration of the Commonwealth mirror tax laws by State authorities;
 - the empowerment of State authorities to exercise or perform all necessary powers and functions for the Commonwealth when administering the Commonwealth mirror tax laws, including collecting taxes and enforcing compliance;
 - the situation where a place becomes a Commonwealth place or ceases to be a Commonwealth place;

- a general modification of State taxing laws to enable them to operate effectively in conjunction with the Commonwealth mirror tax laws so that a taxpayer does not incur any additional liabilities because tax may be imposed under both a State taxing law and the corresponding Commonwealth mirror tax law; and
- a specific power to modify State taxing laws by regulation in order to achieve the objectives of the Bill.

2. Recommendations

The Committee believes that the Bill is necessary for the application of State taxes in Commonwealth places and for the protection of the State's existing tax base. The Committee believes that the effect of the Bill will be to overcome the current threat to State revenue and recommends that all clauses be passed.

Recommendation: *The Committee recommends that all clauses be passed.*

Report of the Legislative Council
Constitutional Affairs Committee

in relation to the

COMMONWEALTH PLACES (MIRROR TAXES ADMINISTRATION) BILL 1998

3. Reference and Procedure

The *Commonwealth Places (Mirror Taxes Administration) Bill 1998* ("the Bill") was referred to the Constitutional Affairs Committee ("the Committee") by the Legislative Council under Standing Order 230 (d).

4. Background to the Bill

4.1 The purpose of the Bill is to implement essential elements of safety net arrangements agreed between Western Australia and the Commonwealth to ensure the continuation of appropriate taxation arrangements in respect of Commonwealth places in Western Australia.

4.2 The need for this arrangement arose from the High Court's decision in the case of *Allders International Pty Ltd v Commissioner of State Revenue (Victoria)* (1996) 186 CLR 630 ("the *Allder's* case"). In that case the High Court declared that a lease of a shop at Tullamarine Airport was not subject to stamp duty imposed by Victorian stamp duty legislation because of section 52 (i) of the Commonwealth Constitution.

4.3 Section 52 (i) of the Commonwealth Constitution provides that the Federal Parliament has exclusive power to legislate for the peace, order, and good government of the Commonwealth with respect to "all places acquired by the Commonwealth for public purposes." Such places are referred to in this report as "Commonwealth places" and examples in Western Australia include:

- Perth International Airport;
- HMAS Stirling, Garden Island - Navy's major west coast fleet base;
- Campbell Barracks, Swanbourne - Army operational (SAS) base;
- the Reserve Bank Building, 45 St George's Terrace - Office accommodation;
- Law courts - Terrace Road, Perth; and
- Customs House - Lot 10, Richardson Street, Port Hedland.

4.4 In the *Allder's* case, the High Court determined that the effect of section 52 (i) of the Commonwealth Constitution is that any State law, including a taxation law, that can

be characterised as a law with respect to a Commonwealth place is, to that extent, inapplicable in Commonwealth places in the State. The decision effectively weakened the taxation power of the States.

4.5 The case has important ramifications for State revenue as it is possible that other State taxes may also be held invalid in relation to Commonwealth places. In addition to stamp duty on leases of the type considered by the High Court in the *Allders* case, it is highly likely that the imposition of other State taxes such as payroll tax, financial institutions duty and debits taxes on transactions in or in relation to Commonwealth places may also be considered unconstitutional and therefore inapplicable. It is therefore possible that persons carrying on a business in a Commonwealth place will not be liable to the State taxes to which other persons are liable. Further, the decision opens up the possibility of potential tax havens being created at Commonwealth places.

4.6 As a result of this threat to State taxation revenue and in an attempt to resolve the situation, the States jointly approached the Commonwealth to put in place safety net arrangements to protect State revenue. On 6 October 1997 the Federal Treasurer announced how the Federal Government would act, with effect from that date, to give effect to a scheme to restore and secure revenue security for the States. The arrangements outlined by the Federal Treasurer have been effected by a number of Commonwealth Acts, enacted in April 1998, which are discussed at paragraph 5.3.

5. Contents and Purpose of the Bill

5.1 The purpose of the Bill is to implement essential elements of safety net arrangements agreed between Western Australia and the Commonwealth to ensure the continuation of appropriate taxation arrangements in respect of Commonwealth places in Western Australia.

5.2 It is intended that the Bill will make provision for the administration and operation of Western Australian laws which are applied as Commonwealth laws in relation to Commonwealth places under the *Commonwealth Places (Mirror Taxes) Act 1998 (Cth)* in a manner which imposes no additional compliance costs on taxpayers.

5.3 The Commonwealth has enacted a package of Acts which provide for administrative and legal arrangements to allow the State governments to continue to receive revenue from State taxes. The Commonwealth legislation includes the:

- *Commonwealth Places (Mirror Taxes) Act 1998* ("the Commonwealth Act") which applies State laws concerning stamp duty, payroll tax, financial institution duty and debits tax to transactions that are carried out in or on Commonwealth places to the extent that the State can not impose them because of section 52 (i) of the Commonwealth Constitution. The revenue

will be collected by the State Revenue Department, credited to the Commonwealth, and returned to the State in the form of a statutory payment;

- *Commonwealth Places Windfall Tax (Imposition) Act 1998* which imposes a 100% windfall tax on applications for refunds, sought on the basis of constitutional invalidity of the State taxing law, of amounts paid under State taxing laws before 6 October 1997. The aim is that each State 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 State before 6 October 1997 in and in relation to Commonwealth places be protected;
- *Commonwealth Places Windfall Tax (Collection) Act 1998* which provides for the determination, collection and administration of the Commonwealth places windfall tax; and
- *Commonwealth Places (Consequential Amendments) Act 1998* which makes consequential amendments to several Commonwealth Acts as a result of the Commonwealth places windfall tax.

- 5.4 The effect of the Commonwealth Act is that the State taxing laws are applied and operate in Commonwealth places as laws of the Commonwealth. The Commonwealth Act provides that Western Australia will obtain the benefit of the Commonwealth Act only after an arrangement is entered into between the Governor General and the Governor of Western Australia.
- 5.5 In order for the arrangements that have been established by the Commonwealth to become effective, the Western Australian Parliament must enact complementary legislation to allow Western Australia to enter into an arrangement with the Commonwealth to administer and collect the mirror tax revenue. It is that Bill which is the subject of this report.
- 5.6 When an arrangement has been entered into between the Governor General and the Governor of Western Australia, the Commonwealth mirror tax laws are deemed to have always applied in Commonwealth places in Western Australia, but not so as to require payment of any amount due prior to 6 October 1997.
- 5.7 Following the adoption of such an arrangement, Western Australian taxing laws will continue to apply to transactions in or in relation to all Commonwealth places in Western Australia where their operation is not excluded due to section 52 (i) of the Commonwealth Constitution. Where the operation of Western Australia's taxing laws are excluded due to section 52 (i), the corresponding Commonwealth mirror tax laws will apply.

- 5.8 It is proposed that the State Revenue Department will collect the Commonwealth imposed mirror taxes and credit the tax collected to the Commonwealth. In return the Commonwealth will make a statutory payment to the State equivalent to the amount of mirror tax collected. The policy behind these measures is that the States will have the practical benefit of the mirror taxes, but also the administrative burden in relation to them. It is anticipated that there will be minimal additional administrative costs for the State in the context of ongoing arrangements, however it is expected that there will be some initial expenses incurred in putting in place the arrangements both in the design of the legislation and setting up the interaction between the State and the Commonwealth. It is anticipated that those costs will not be significant. They will be absorbed by the State Revenue Department's existing budget.
- 5.9 A major objective of the legislation is to ensure that, from the taxpayer's perspective, the operation of the new arrangements are as 'seamless' as possible. This means that when taxpayers are liable to pay both Commonwealth and State taxes because of involvement in operations both on and off Commonwealth places, the calculation and payment of taxes that applied to each place should not involve the taxpayers in additional cost or effort. Thus the liability of taxpayers who are associated with Commonwealth places is not intended to differ from that which they would have incurred had they not been associated with Commonwealth places. For example, payroll tax in respect of wages paid to employees working at Perth International Airport and employees working at other sites should not have to be broken up and paid separately by the employer to the Commonwealth and to Western Australia.
- 5.10 Further, the Bill is drafted to ensure that taxpayers do not pay more than 100 per cent of the tax that would have been payable before the High Court's decision in the *Allders* case and does not impose any additional tax burden on the people of Western Australia. It merely restores the level of revenue that Western Australia received prior to the High Court's decision.
- 5.11 The Bill provides for:
- an arrangement to be entered into between the State Governor and the Governor General to provide for the administration of the Commonwealth mirror tax laws by State authorities;
 - the empowerment of State authorities to exercise or perform all necessary powers and functions for the Commonwealth when administering the Commonwealth mirror tax laws, including collecting taxes and enforcing compliance;
 - the situation where a place becomes a Commonwealth place or ceases to be a Commonwealth place;

- a general modification of State taxing laws to enable them to operate effectively in conjunction with the Commonwealth mirror tax laws so that a taxpayer does not incur any additional liabilities because tax may be imposed under both a State taxing law and the corresponding Commonwealth mirror tax law; and
- a specific power to modify State taxing laws by regulation in order to achieve the objectives of the Bill.

5.12 The Bill contains 16 clauses in 5 parts:

Part 1 - Preliminary

Part 2 - Administration and operation of State taxing laws as applied laws in relation to Commonwealth places

Part 3 - Proceedings

Part 4 - Validation and saving

Part 5 - Miscellaneous

5.13 Certain selected clauses of the Bill requiring explanation are outlined in this report and the Committee has provided comment and recommendations on each of these clauses.

Recommendation: The Committee recommends that all clauses be passed.

5.14 As part of the review, the Committee placed an advertisement in *The West Australian* newspaper inviting submissions on the Bill. The Committee received no submissions.

5.15 As a further part of the review, the Committee called for evidence from a number of witnesses concerning the operation of the Bill. The witnesses who appeared before the Committee were:

- Mr William Sullivan, Assistant Commissioner (Policy and Legislation), State Revenue Department; and
- Ms Janet Weeden, Senior Assistant Crown Solicitor, Crown Solicitor's Office.

The Committee also invited comment from the Chamber of Commerce and Industry of Western Australia however the invitation was declined.

6. Selected clauses of the *Commonwealth Places (Mirror Taxes Administration) Bill 1998*

6.1 **Clause 2** sets out the commencement provisions. Subclause (2) provides that when an arrangement has been made between the State Governor and the Governor General of the Commonwealth as provided for under section 5, then the modified operation of State taxing laws provided for by section 7 will be deemed to have come into operation on 6 October 1997. The 6 October 1997 date is tied to the date from which the Commonwealth mirror tax liability will apply. Nonetheless, under the operation of the Commonwealth Act the State taxing laws are taken to have always applied in relation to Commonwealth places in Western Australia, but not so as to impose any liability for tax for events that occurred before 6 October 1997.

6.2 **Clause 3** defines certain words and expressions used in the Bill. Key definitions are:

6.2.1 "applied law" means the provisions of a State taxing law that apply in relation to a Commonwealth place in accordance with the Commonwealth Act.

6.2.2 "Commonwealth place" means a place in the State acquired by the Commonwealth for public purposes. The Commonwealth must hold the title to the property before it falls within the definition of "Commonwealth place". Places merely leased by the Commonwealth, regardless of the length of the lease, are not "Commonwealth places". Examples of "Commonwealth places" in Western Australia include:

- Perth International Airport;
- HMAS Stirling, Garden Island - Navy's major west coast fleet base;
- Campbell Barracks, Swanbourne - Army operational (SAS) base;
- the Reserve Bank Building, 45 St George's Terrace - Office accommodation;
- Law courts - Terrace Road, Perth; and
- Customs House - Lot 10, Richardson Street, Port Hedland.

6.2.3 "State authority" is defined as the Governor, a Minister, a member of the Executive Council, a court, a member of a court, a body created by or under a law of the State and an officer or employee of the State or of such a body. This definition is intended to include persons and entities such as the State Revenue Department associated with the administration of applied laws on behalf of the Commonwealth.

6.2.4 "State taxing law" is defined to mean a State law that is a State taxing law within the meaning of the Commonwealth Act. The Commonwealth legislation provides that a State taxing law is:

- a scheduled law of the State. The Western Australian laws scheduled in the Commonwealth Act as State taxing laws are the *Debits Tax Act 1990*, the *Debits Tax Assessment Act 1990*, the *Financial Institutions Duty Act 1983*, the *Pay-roll Tax Act 1971* and the *Stamp Act 1921*;
- any other State law that imposes tax and is prescribed by regulations. Although no such law has been prescribed at the present time, should other State taxes prove likely to be similarly affected by the decision of the High Court in the *Allder's* case, there is flexibility to add those State laws to the mirror tax regime at a later date. This would be done by means of regulations made by the Governor General under the Commonwealth Act. Such later prescription of other taxing laws will give those laws retrospective effect for the purposes of the mirror tax regime and they will become State taxing laws as if they had always been listed in the Schedule. This ensures that the State revenue concerned is protected as from 6 October 1997; and
- any other State law to the extent that it is relevant to the laws scheduled or prescribed. An example is the *Taxation (Reciprocal Powers) Act 1989*. As new laws that are relevant to scheduled or prescribed laws are introduced, they are automatically included as State taxing laws by virtue of this definition. Existing State legislation is automatically included so far as it is relevant to scheduled or prescribed laws.

This reflects the broad policy of the legislation that, so far as possible, the mirror taxes will operate, be applied and interpreted in the same way as the State taxes they mirror. It will therefore be Western Australia's *Interpretation Act 1984* and its criminal administration laws that will be applied as relevant to the mirror taxes.

6.3 **Clause 5(1)** provides for the Governor to enter into an arrangement with the Governor General for the administration of applied laws in relation to Commonwealth places in Western Australia. Until such an arrangement is made, the State taxing laws applied by the Commonwealth Act in relation to Commonwealth places will not have effect. This arrangement therefore acts as a trigger for the operation of the applied laws. Should such an arrangement cease, State taxing laws would no longer have effect as applied laws.

One of the matters which may be the subject of such arrangement is the assent by the State to its authorities such as the State Revenue Department to undertake the various duties which are implicit in the applied laws. Assent is required as a result of the constitutional restrictions against the Commonwealth imposing obligations on State authorities without the agreement of the States.

Clause 5(2) provides for the variation or revocation of such an arrangement, subject to agreement between the Governor and the Governor General.

6.4 **Clause 7** seeks to ensure that where necessary, State taxing laws are modified to ensure their effective operation side by side with the Commonwealth applied laws. In some cases it may not be possible for a State taxing law to operate effectively or correctly in Commonwealth places in the State. In that event, Clause 7 provides a framework whereby modifications may be made to the State taxing law so that the mirror tax regime will operate properly.

Clause 7(1) is aimed primarily at the situation where a taxpayer is subject to both a State taxing law and the corresponding applied law.

Clause 7(1)(a) provides that the State taxing law is to be read and construed with such modifications as are necessary or convenient to enable the effective operation of the State taxing law, together with the corresponding applied law, as a single law applying in the State.

The provision is intended, for example, to alleviate the need for a taxpayer to lodge taxation returns under both the State taxing law and the corresponding applied law.

Clause 7(1)(b) provides that the State taxing law is to be read and construed with such modifications as are necessary or convenient to enable the State taxing law to operate so that a taxpayer has a combined liability under the State taxing law and the corresponding applied law that is as nearly as possible the same as the taxpayer's liability would be under the State taxing law alone if the Commonwealth places in the State were not Commonwealth places.

The provision is intended to ensure that there is as little change as possible in the overall tax liability of a taxpayer who has a liability under a State taxing law and the corresponding applied law.

Clause 7(2) provides that specific modifications to the State taxing laws can be made by regulation. This may occur, for example, where such prescription is considered necessary to make it clearer for taxpayers as to how a State taxing law should be construed when operating in conjunction with the corresponding applied law.

Clause 7(3) provides that any such regulation may take effect from a date earlier than the publication of the regulation in the Gazette, however can not pre-date the commencement of the operation of the section; that is, 6 October 1997. The regulations may deal with the circumstances in which the modifications apply and with matters of a transitional or saving nature.

- 6.5 **Clause 8** provides that where proceedings have been commenced under an applied law and the court is satisfied that they should have been commenced under a State taxing law as the State taxing law is not excluded by section 52 (i) of the Commonwealth Constitution, those proceedings must continue as though they had been commenced under the State taxing law.

The definition of "proceedings" in Clause 3 is cast widely to include any stage of judicial proceedings whether civil or criminal. It includes judicial proceedings such as enforcement, recovery, and tax appeal matters.

The effect of Clause 8 is that action commenced under an applied law in the mistaken belief that the State taxing law was excluded by section 52 (i) of the Commonwealth Constitution does not have to be restarted, nor does an action have to be redone, where there is a corresponding State taxing law. This prevents a range of possible procedural mischiefs, including the application of limitation provisions, that might otherwise arise.

- 6.6 **Clause 9** prevents an objection being made in proceedings under a State taxing law merely on the grounds that proceedings have been commenced or are pending under a corresponding applied law. It ensures that proceedings under a State taxing law are not frustrated because a similar proceeding is also taken under the corresponding applied law. For example, duplicate proceedings may be instituted by a State taxing authority where it is unsure about the correct jurisdiction. They may also arise because a part of proceedings instituted under a State taxing law are held to be invalid by virtue of section 52 (i) of the Commonwealth Constitution and so are taken to have been instituted under the corresponding applied law.

In such cases, Clause 9 ensures that an objection requiring the severance of the proceedings will not be allowed.

It should be noted that this section does not prevent a taxpayer who has liabilities under both a State taxing law and the corresponding Commonwealth applied law from facing "proceedings" under both the State taxing law and the corresponding Commonwealth applied law. For example, duplicate recovery proceedings could be instituted by the Commissioner against a taxpayer who owed tax under both a State taxing law and the corresponding Commonwealth applied law. In such a situation, both the taxpayer and the Commissioner would be faced with the prospect of two sets of legal costs and it is likely that they would each take the steps available to them

under the rules of court to either consolidate the two proceedings or have both matters heard at the same time in order to minimise costs. It should be noted that rather than commencing duplicate recovery proceedings it may be possible for the Commissioner to pursue as a single debt tax payable under a State taxing law and the corresponding Commonwealth applied law, relying on clause 12 of the Bill. Refer to paragraph 6.8.

Where a taxpayer proceeds with an appeal under both a State taxing law and the corresponding Commonwealth applied law and the appeals involve the same legal issues, it is likely that the taxpayer and the Commissioner will agree to proceed with just one of the appeals and to hold the other(s) in abeyance pending the outcome of the test case. Again, rather than pursue separate appeals, it may be possible for the taxpayer and the Commissioner to pursue as a single appeal the issue that is in dispute under both the State taxing law and the corresponding applied law by relying on the provisions of clause 12 of the Bill.

In the case of a prosecution, where an act or omission constitutes an offence under both a State taxing law and the corresponding Commonwealth applied law, it would be possible for the taxpayer to be charged with an offence under both the State taxing law and the corresponding Commonwealth applied law. For example, a taxpayer might provide the Commissioner with a document that contains false information that relates to his liability under both the *Pay-Roll Tax Assessment Act 1971 (WA)* and the corresponding Commonwealth applied law. If a taxpayer was to be charged with two separate offences he would not be able to object to this duplication. It is likely, however, that when determining the appropriate penalty for each offence, the court would take into account the fact that the two offences arose out of the same act or omission.

- 6.7 **Clause 11** is designed to facilitate proof of interests in land where an issue arises in proceedings under a State taxing law as to whether a particular place is a Commonwealth place. 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 ensure that certificates are effective, there is a rebuttable presumption in favour of the conclusiveness of the certificate; that is, documents purporting to be such certificates are taken to be so unless proved otherwise.

- 6.8 **Clause 12** is a provision designed to overcome uncertainty by ensuring that if an action is purportedly done under an applied law and the corresponding State taxing law is not excluded by section 52 (i) of the Commonwealth Constitution, it will be taken to have been done under the State taxing law that corresponds to the applied law.

This provision will, for example, validate the action of the Commissioner of State Revenue who pursues as a single debt under an applied law a tax debt that relates partly to a business in a Commonwealth place, and partly elsewhere in the State. It will ensure that if a taxpayer pays as Commonwealth mirror tax an amount that was properly due as State tax, the amount will be taken to have been paid as State tax so the taxpayer will not be entitled to a refund and the Commissioner of State Revenue will not be required to pursue a separate payment of State tax.

- 6.9 **Clause 13** is a savings provision for situations where a place ceases to be a Commonwealth place, for example where the Commonwealth sells land which it acquired for a public purpose.

Clause 13 has the effect that, in such circumstances, all rights, privileges, duties and liabilities that were acquired or created under an applied law while the place was a Commonwealth place continue. Penalties, forfeitures and punishments can be imposed as though the applied law continued to have effect and investigations, legal proceedings and remedies may be instituted or enforced in the same way.

- 6.10 **Clause 14** is also a saving provision similar to Clause 13, however this clause provides for the reverse situation; that is where a place becomes a Commonwealth place.

Clause 14 has the effect that, in such circumstances, all rights, privileges, duties and liabilities that were acquired or created under a State taxing law before the place became a Commonwealth place continue. Penalties, forfeitures and punishments can be imposed as though the State taxing law continued to have effect and investigations, legal proceedings and remedies may be instituted or enforced in the same way.

Hon Murray Nixon JP, MLC
Chairman

Date:

