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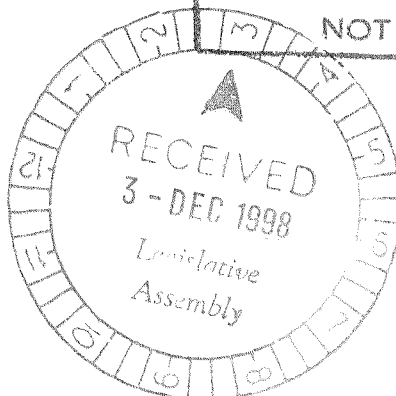
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EXPLANATORY MEMORANDUM

COMMONWEALTH PLACES (MIRROR TAXES ADMINISTRATION) BILL 1998

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COMMONWEALTH PLACES (MIRROR TAXES ADMINISTRATION) BILL 1998

EXPLANATORY MEMORANDUM

The purpose of this 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 the State.

The Federal Treasurer announced details of these arrangements in a press release on 6 October 1997.

The need for these arrangements arose from the High Court's decision in the case of *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630.

In that case, the Court decided 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.

That section of the Constitution provides that the Federal Parliament has exclusive powers to make laws 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 memorandum as "Commonwealth places".

The Court determined that the effect of section 52(i) 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 has important ramifications for State revenue as, in addition to stamp duty on leases of the type considered by the High Court in the *Allders* case, it is possible that other taxes imposed by States might similarly be inapplicable to the extent that the taxes affect persons, property or things done at Commonwealth places.

The Court's decision also opens up the possibility of potential tax havens being created at Commonwealth places.

At the request of the States, in April 1998 the Commonwealth enacted a package of legislation including:

- Commonwealth "mirror tax" legislation to apply, in relation to each State, the State's taxing laws to Commonwealth places in the State; and
- windfall tax legislation to tax refunds of State taxes paid prior to 6 October 1997 where the refund is sought after that date on the basis of the constitutional invalidity of the State taxing law.

The Commonwealth Places (Mirror Taxes) Act 1998 (referred to in this memorandum as "the Commonwealth Act"), applies State laws concerning stamp duties, pay-roll tax, financial institutions duty and debits tax to Commonwealth places in the State, to the extent to which the State taxing laws cannot apply because of section 52(i).

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 terms of the Commonwealth mirror tax laws are identical to the terms of the corresponding State taxing laws.

However, section 8 of the Commonwealth Act enables modification of the Commonwealth mirror tax laws to provide for any adjustments that may be required where a taxpayer has a liability under both a State taxing law and the corresponding Commonwealth mirror tax law.

Western Australia will obtain the benefit of the Commonwealth Act only after an arrangement is entered into, as referred to in section 9 of the Commonwealth Act, between the Governor General and the Governor of the State.

When such an arrangement has been entered into, the Commonwealth mirror tax laws are deemed, by section 6 of the Commonwealth Act, to have always applied in Commonwealth places in Western Australia, but not so as to require payment of any amount due for payment prior to 6 October 1997.

Following the adoption of such an arrangement, State taxing laws will continue to apply in and in relation to all Commonwealth places in the State where their operation is not excluded due to section 52(i).

Where the operation of the State law is excluded because of section 52(i), the corresponding Commonwealth mirror tax laws will apply.

It is intended that from a taxpayer's perspective, the operation of these new arrangements is to be as "seamless" as possible.

That is, the liability of taxpayers who are associated with Commonwealth places and compliance costs faced by them, are not intended to differ from that which they would have incurred had they not been associated with Commonwealth places, and were not subject to the Commonwealth mirror tax laws.

It is proposed that the State Revenue Department will collect the Commonwealth imposed mirror taxes and credit the taxes collected to the Commonwealth, which will then return an equivalent amount to the State in the form of a statutory payment provided for under the Commonwealth Act.

This Bill complements the provisions of the Commonwealth Act and seeks to put in place the necessary legislative support for the proposed administrative arrangements to ensure that the mirror taxes imposed by the Commonwealth in respect of Commonwealth places in Western Australia can be administered in the seamless manner intended.

At a broad level, the Bill provides for:

- an arrangement to be entered into by the State Governor with the Governor General to provide for the administration of the Commonwealth mirror tax laws by State authorities;
- empowerment of State authorities to exercise or perform all necessary powers and functions for the Commonwealth when administering the Commonwealth mirror tax laws;
- the situation where a place becomes a Commonwealth place or ceases to be a Commonwealth place;
- other validation and saving provisions; and
- a general modification of State taxing laws to enable them to operate effectively in conjunction with the Commonwealth mirror tax laws and to provide for any adjustments that may be required where a taxpayer has a liability under both a State taxing law and the corresponding Commonwealth mirror tax law.

Also included is a specific power to modify State taxing laws by regulation in order to achieve these objectives.

The issues this Bill seeks to address also confront all other States.

Legislation of a similar nature to this Bill has already been enacted by New South Wales and it is expected that all other States will shortly do likewise.

Outlined below is an examination of the contents of the Bill on a clause by clause basis.

Part 1 - Preliminary

This Part contains the title of the Act, the relevant commencement provisions, definitions of terms used within the Bill and a provision binding the Crown.

Clause 1: Short title and citation.

Clause 2: This clause sets out the commencement provisions.

Subclause (1) provides that subject to subclause (2), the proposed Act will come into operation on the day on which it receives the Royal Assent.

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 the proposed section 5, then the modified operation of State taxing laws provided for by the proposed section 7 will be deemed to have come into operation on 6 October 1997.

The 6 October 1997 date is tied to the date the Commonwealth mirror tax liability will apply from. Nonetheless, as made clear in the note to clause 2, under the operation of the Commonwealth Places (Mirror Taxes) Act 1998 (Commonwealth) the State taxing laws are taken to have always applied in relation to Commonwealth places in this State, but not so as to impose any liability for tax for things that happened before 6 October 1997.

Clause 3: This clause defines certain words and expressions used in the proposed Act.

Subclause (1) provides definitions of a number of terms including:

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

"Commonwealth place" means a place in the State acquired by the Commonwealth for public purposes. Examples of such places include airports, defence bases, and office blocks purchased by the Commonwealth to accommodate employees of Commonwealth Government Departments.

"excluded by section 52(i) of the Commonwealth Constitution" means inapplicable by reason only of the operation of section 52 of the Commonwealth Constitution in relation to Commonwealth places.

In this regard, that Constitution states "the Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to -

- (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; ..."

"proceedings" means any proceedings, whether civil or criminal and whether original or appellate and would include an appeal to the Supreme Court arising from the Commissioner of State Revenue's disallowance of a taxpayer's objection.

"State authority" is defined to include those persons and entities outlined in paragraphs (a) to (e).

It is envisaged that these persons and entities will be undertaking tasks associated with the administration of applied laws on behalf of the Commonwealth.

"State taxing law" means 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. In relation to Western Australia, the following laws of Western Australia are scheduled laws:

- (a) Debits Tax Act 1990;
 - (b) Debits Tax Assessment Act 1990;
 - (c) Financial Institutions Duty Act 1983;
 - (d) Pay-roll Tax Act 1971;
 - (e) Pay-roll Tax Assessment Act 1971; and
 - (f) Stamp Act 1921.
- A State law that imposes tax and is prescribed by regulations. At this point, no such law has been prescribed nor is envisaged to be prescribed.
 - Any other State law of the State to the extent that it is relevant to the laws scheduled or prescribed.

This includes, for example, the Taxation (Reciprocal Powers) Act 1989 and the Interpretation Act 1984.

As noted in the explanatory memorandum tabled at the time of the introduction of the Commonwealth legislation, "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."

Subclause (2) clarifies that the note after the proposed section 2 does not form part of the Act.

Clause 4: This clause clarifies that this Act binds the Crown in the right of the State of Western Australia and, subject to the limitations on the legislative power of the State, in all its other capacities.

Part 2 - Administration and Operation of State Taxing Laws as Applied Laws in Relation to Commonwealth Places

This Part provides both a mechanism for setting up the administrative arrangements between Commonwealth and State authorities, as well as putting in place a mechanism to facilitate the operation of State taxing laws in conjunction with the Commonwealth mirror tax legislation.

Clause 5: This clause provides for the State to enter into an arrangement with the Commonwealth for the administration of the applied laws, in relation to Commonwealth places in Western Australia.

Subclause (1) provides for a formal arrangement to be made between the State Governor and the Commonwealth Governor-General in relation to the exercise by a State authority of a power, duty or function under an applied law.

This provision corresponds to section 9 of the Commonwealth Act. Until such an arrangement is made, the State taxing laws applied by the Commonwealth Act in relation to Commonwealth places will not have effect. In essence, therefore, this arrangement serves as a trigger for the operation of the applied laws and should such an arrangement cease, State taxing laws would no longer remain in force.

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

Notably, the Commonwealth Act equivalent of this section provides that any such arrangement, or variation or revocation thereof, is required to be published in the Commonwealth Gazette. Given the existence of this requirement, it was not considered necessary to provide for similar gazettal in the equivalent State publication.

Clause 6: This clause provides for a State authority to exercise or perform any power, duty or function that the Commonwealth Act requires or authorises it to exercise or perform despite any State law.

The principal State authority that will exercise or perform powers, duties and functions under the applied laws will be the Commissioner of State Revenue and officers in the State Revenue Department.

Clause 7: This clause seeks to ensure that where necessary, State taxing laws are modified to ensure their effective operation side by side with the Commonwealth applied laws.

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

Paragraph (a) provides that the State taxing law is to be read and construed with any modifications necessary or convenient for the purpose of enabling the effective operation of the State taxing law in conjunction with the corresponding applied law.

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

Paragraph (b) provides that the State taxing law is to be read and construed with any modifications necessary or convenient for the purpose of enabling 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.

This provision is intended to ensure that the taxpayer who has a liability under a State taxing law and the corresponding applied law pays no more and no less tax overall than he would have paid had he only been subject to the State taxing law.

This provision complements section 4(b) of the Commonwealth Act which has a provision designed to achieve the same effect.

Subclause (2) provides a supplementary power to the operation of subclause (1) such that specific modifications to the State taxing laws can be made by regulation, for example where such prescription may be 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.

Subclause (3) provides that any such regulation made under subclause (2) may take effect from a date earlier than the gazettal of the regulation. However, such effect cannot pre-date the commencement of the operation of the proposed section 7 (6 October 1997). Furthermore, such regulations may also deal with the circumstances in which the modifications apply, and with matters of a transitional or saving nature.

Part 3 - Proceedings

This Part outlines how court proceedings under State taxing laws are to be conducted where a question arises as to a party's connection with a Commonwealth place.

Clause 8: This clause requires proceedings commenced in a court under an applied law to be continued as if commenced under the corresponding State taxing law if the court is satisfied that the State taxing law is not excluded by section 52(i) of the Commonwealth Constitution.

This means that a proceeding does not have to be restarted or any steps taken in the proceedings redone when the proceeding has been commenced under an applied law in the mistaken belief that the State taxing law was excluded by section 52(i) of the Commonwealth Constitution. This clause is similar to section 12 of the Commonwealth Act.

Clause 9: This clause prevents an objection being made in proceedings under a State taxing law merely on the ground that proceedings have been commenced or are pending under a corresponding applied law.

It ensures that a proceeding under a State taxing law is not frustrated because a similar proceeding is also taken under the corresponding applied law (for example, if duplicate proceedings are instituted because the State taxing authority is unsure of the correct jurisdiction). This clause is similar to section 13 of the Commonwealth Act.

Clause 10: This clause provides that a court can deal with an appeal from a judgement, decree, order or sentence of a court in proceedings under an applied law as though it was commenced under the corresponding State taxing law, where the court is satisfied that the State taxing law is not excluded by section 52(i) of the Commonwealth Constitution. This clause is similar to section 14 of the Commonwealth Act.

Clause 11: This clause is similar to section 16 of the Commonwealth Act and is designed to facilitate proof of the Commonwealth's interest in land.

It is intended to be used in circumstances in which any question arises in proceedings under a State taxing law as to whether a 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), the use of the certificate may nonetheless evidence the fact that the place was "acquired by the Commonwealth".

To make sure that such 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.

Part 4 - Validation and saving

This Part includes a number of provisions to validate certain actions for the purposes of State taxing laws where those actions were initially taken purportedly under an applied law and to also effect certain savings where a place ceases to be a Commonwealth place or becomes a Commonwealth place.

Clause 12: This clause is similar to section 18 of the Commonwealth Act and is designed to ensure 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.

The 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 which 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.

Clause 13: This clause is a saving provision to cover circumstances in which a place ceases to be a Commonwealth place. For example, where the Commonwealth sells land which it acquired for a public purpose. It 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 can be imposed as if the applied law continued to have effect and investigations, legal proceedings and remedies may be instituted or enforced as if the applied law had not ceased to have effect.

Clause 14: This clause is also a saving provision similar to clause 13, however, this clause covers circumstances in which a place becomes a Commonwealth place.

It has the effect that, in such circumstances, all rights, privileges, duties and liabilities that were acquired or created under a State taxing law while the place was not a Commonwealth place continue.

Penalties can be imposed as if the State taxing law had continued to have effect and investigations, legal proceedings and remedies may be instituted or enforced as if the State taxing law had not ceased to have effect.

Clauses 13 and 14 are similar to sections 22 and 24 of the Commonwealth Act.

Part 5 - Miscellaneous

This Part provides for instruments which have a connection with a Commonwealth place and also provides for the making of regulations.

Clause 15: This clause provides for references to an applied law in an instrument or other writing to be read as a reference to the corresponding State taxing law if the State taxing law is not excluded by section 52(i) of the Commonwealth Constitution.

This ensures the validity of such documents and negates the need for new documents to specify the State taxing laws.

Clause 16: This clause provides for the making by the Governor of regulations necessary or convenient to give effect to the purposes of this Act.