



# Legislation Note

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## COMMONWEALTH PLACES (MIRROR TAXES ADMINISTRATION) BILL 1999

### BACKGROUND

The Commonwealth Places (Mirror Taxes Administration) Bill was introduced into the Queensland Parliament on 25 May 1999. The Queensland Bill is part of a national scheme and largely reflects the Federal Parliament's Commonwealth Places (Mirror Tax) legislation. The scheme is in response to the High Court's interpretation of s 52(i) of the Commonwealth Constitution in *Allders* case.

### SECTION 52 & CASES

Section 52(i) of the Commonwealth Constitution provides that the Commonwealth Parliament has exclusive power to make laws with respect to all places acquired by the Commonwealth for public purposes.

A number of cases have examined s 52(i) and the notion of exclusive power over Commonwealth places. The starting point is the High Court decision in *Worthing v Rowell*<sup>1</sup>. In that case a majority of the Court held that s 52(i) gave the Commonwealth Parliament an exclusive general power to legislate with respect to acquired places, so that the States could not legislate to regulate conduct in that place.

This was taken even further in the case of *R v Phillips*<sup>2</sup> where a majority of the Court held that upon acquisition by the Commonwealth of a place for public purposes, the effect of s 52(i) is to terminate the application of State laws, as from the date of acquisition.

The effect of these two decisions has been described as giving Commonwealth places, a special status, where only Commonwealth

legislation may apply, such that the conduct and activities of the Commonwealth and of private persons in those places cannot be regulated by State legislation.<sup>3</sup>

### LEGISLATIVE RESPONSE TO S 52 CASES

The assumption held by both Commonwealth and State governments before these High Court decisions appears to have been that State laws were not affected by s 52(i) if they did not purport to apply specifically to Commonwealth places.<sup>4</sup> The Commonwealth Parliament responded to these decisions with the *Commonwealth Places (Application of Laws) Act* 1970. The object of this legislation was to restore the position as far as possible to the position that was assumed to exist before the *Worthing* and *Phillips* cases.<sup>5</sup>

However, that legislation in s 4(5) contains an exception for State laws imposing taxation. That is, the Commonwealth Places (Application of Laws) Act does not extend State tax law to Commonwealth places.

### ALLDERS INTERNATIONAL V COMMISSIONER OF STATE REVENUE

*Allders International*<sup>6</sup> was the holder of a lease for a duty free shop at Melbourne's Tullamarine Airport. Tullamarine Airport was constructed on land acquired for a public purpose by the Commonwealth, and was therefore a "Commonwealth place" within the s 52(i) meaning. *Allders* was appealing a decision of the federal court which upheld the Victorian State Revenue Commissioner's decision to levy stamp duty on the lease.<sup>7</sup>

The High Court refused to reopen Worthing's case. A majority of the Court held that s 52(i) is a plenary power which gives the Commonwealth Parliament exclusive power to legislate with respect to Commonwealth places. They found that whilst the Victorian stamp duty legislation was a law with respect to instruments, for the purposes of s 52(i) it was nonetheless a law with respect to a Commonwealth place, and therefore invalid in this context.

### **COMMONWEALTH PLACES (MIRROR TAXES) ACT 1998 (CTH) AND COGNATE ACTS**

The Commonwealth Places (Mirror Taxes) Bill 1998 (Cth) and cognate Bills<sup>8</sup> were introduced into the Commonwealth Parliament's House of Representatives on 5 March 1998. As Mr Kelvin Thomson pointed out during the second reading debate, it was a "*legislation package not about taxes on mirrors as some may imagine, but in fact it seeks to deal with the issues raised in the 1996 High Court decision in Allders International...*"

The legislation package was requested by the States so that their revenue base would not be threatened by the High Court's finding. That is, it followed from the reasoning in *Allders* that other state taxes such as payroll tax, financial institutions duty and debits taxes, levied on Commonwealth places may also be invalid.<sup>9</sup> The constitutional invalidity of the taxes would have led to compulsory refunding of all taxes previously collected from Commonwealth places.<sup>10</sup>

Under the package of legislation, state taxing laws<sup>11</sup> are applied to Commonwealth places as Commonwealth law.<sup>12</sup> That is, the relevant state taxing law is endowed with the character of a Commonwealth law as it applies in a Commonwealth place within that state.<sup>13</sup> The system has also been described as the Commonwealth imposing mirror or identical taxes, on Commonwealth places, to those that would prevail if the Commonwealth places were not owned by the Commonwealth.<sup>14</sup>

The idea is to ensure that Commonwealth places within a state are not immune to state taxing laws of general application.<sup>15</sup> The revenue from these "mirror taxes" will be passed on to the relevant states.<sup>16</sup>

The package of legislation follows from the Interjurisdictional Taxation Agreement settled between the Commonwealth, States and Territories in 1997.<sup>17</sup>

The windfall tax aspect of the package is designed to deal with the fact that if a tax is unconstitutionally imposed then it must be refunded to the relevant taxpayers. The problem with refunds of this type was described as two-fold.<sup>18</sup> Firstly, the costs of making refunds of such a magnitude would impact on state governments' ability to provide services such as health and education. Secondly, the refunds would go to a taxpayer business which would ordinarily have already passed on the cost of the tax to its consumers, and as such the refund would be a windfall to those businesses.

Accordingly the Commonwealth imposed a 100% windfall tax on all such refunds. The process for achieving this was somewhat convoluted. The state deducted the windfall tax at the rate of 100% from the refund before it is paid. The refund notice notified the taxpayer that the windfall had been deducted, and then the refund tax was remitted to the Commonwealth. The State's liability to make a payment to the Commonwealth, triggered the Commonwealth's liability to pay an equal amount to the State.<sup>19</sup> A similar windfall tax model was implemented to overcome the High Court's 1997 decision that tobacco franchise fees were in fact excise duties and therefore constitutionally invalid.<sup>20</sup>

### **THE QUEENSLAND BILL**

The Commonwealth Places (Mirror Taxes Administration) Bill 1999 implements:

*"essential elements of safety net arrangements agreed between Queensland and the Commonwealth to ensure the continuation of appropriate taxation arrangements for Commonwealth Places in the State."*<sup>21</sup>

The Bill covers largely similar territory to the Commonwealth Places (Mirror Taxes) Act and has been prepared in substantially similar form by all States. It is designed to deal with the small technical issues essential to the smooth running of the mirror tax arrangement.

Particularly, the Bill provides amongst other things, for the authorisation for State authorities to perform functions and exercise powers on behalf of the Commonwealth in administering the applied laws (**Clause 5**). It validates certain actions purportedly taken under an applied law where that action should have been taken under a State taxing law (**Clause 10**). It provides for the operation of State taxing laws where a place stops being a Commonwealth place (**Clause 11**). The Bill confirms that the Governor may enter into arrangements with the Governor-General for the applied laws to have effect in Queensland (**Clause 4**); and makes an amendment to the *Land Tax Act 1915* (Qld) by increasing the rebate available to taxpayers (**Clause 15-17**).

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<sup>1</sup> (1970) 123 CLR 89.

<sup>2</sup> (1970) 125 CLR 93.

<sup>3</sup> Peter Hanks, *Constitutional Law in Australia*, 2<sup>nd</sup> edition, Butterworths, Sydney, 1996, p 255.

<sup>4</sup> Mr Thomas Hughes, 'Commonwealth Places (Application of Laws) Bill 1970', *House of Representatives Parliamentary Debates*, Canberra, 27 October 1970, p 2801.

<sup>5</sup> Hughes, p 2801.

<sup>6</sup> *Allders International Pty Ltd v Commissioner of State Revenue of Victoria* (1996) 140 ALR 189.

<sup>7</sup> *Allders International Pty Ltd v Commissioner of State Revenue of Victoria* (1995) 129 ALR 678.

<sup>8</sup> Commonwealth Places Windfall Tax (Collection) Bill 1998; Commonwealth Places Windfall Tax (Imposition) Bill 1998; Commonwealth Places (Consequential Amendments) Bill 1998.

<sup>9</sup> Mr Kelvin Thomson, 'Commonwealth Places (Mirror Taxes) Bill 1998', *House of Representatives Parliamentary Debates*, 12 March 1998, Canberra, p 1233.

<sup>10</sup> Mr Kelvin Thomson, p 1233.

<sup>11</sup> The scheduled Queensland taxing laws are the *Debts Tax Act 1990*; *Pay-roll Tax Act 1971*; *Stamp Act 1894*. Other state taxing law can be added by regulation.

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<sup>12</sup> See *Commonwealth Places (Mirror Taxes) Act 1998* (Cth), s 3 & s 6.

<sup>13</sup> 'Australia: Commonwealth Places (Mirror Taxes) Act 1998', *Parliamentarian*, 79(3), July 1998, 262.

<sup>14</sup> Mr Kelvin Thomson, p 1233.

<sup>15</sup> 'Australia: Commonwealth Places (Mirror Taxes) Act 1998', *Parliamentarian*, 79(3), July 1998, 262.

<sup>16</sup> *Commonwealth Places (Mirror Taxes) Act 1998* (Cth), s 23.

<sup>17</sup> 'Australia: Commonwealth Places (Mirror Taxes) Act 1998', *Parliamentarian*, 79(3), July 1998, 262.

<sup>18</sup> Mr Kelvin Thomson, p 1234.

<sup>19</sup> *Commonwealth Places Windfall Tax (Collection) Act 1998* (Cth), s 12.

<sup>20</sup> *Ngo Ngo Ha v New South Wales* (1997) 146 ALR 355.

<sup>21</sup> Hon David Hamill, 'Commonwealth Places (Mirror Taxes Administration) Bill 1999' *Queensland Parliamentary Debates*, 25 May 1999, Daily Hansard, p 1823.

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### *Helen Gregorcuk*

#### **Research Publications and Resources Section**

#### **<sup>a</sup> Queensland Parliamentary Library, 1999**

**PARLIAMENT HOUSE  
GEORGE & ALICE STS  
BRISBANE 4000 QLD  
AUSTRALIA  
Fax (+617) 3210 0172  
Tel. (+617) 3406 7199**

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