



## Judiciary Amendment Bill 2008

Morag Donaldson  
Law and Bills Digest Section

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## Judiciary Amendment Bill 2008

**Date introduced:** 28 May 2008

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** On the day after it receives Royal Assent

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The Bill seeks to amend section 79 of the *Judiciary Act 1903* (Cth) (the Judiciary Act) to provide that a State or Territory law (which limits the recovery of invalidly imposed State or Territory taxes) that would otherwise apply to a suit if it did not involve federal jurisdiction is binding on a court exercising federal jurisdiction in the relevant State or Territory.

### Background

Section 79 of the Judiciary Act currently provides that, 'except as otherwise provided' by the Constitution or Commonwealth laws, the laws of a State or Territory are binding on all courts exercising federal jurisdiction in that State or Territory. The exact terms of section 79 are as follows:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

The Bill seeks to rename that provision as **subsection 79(1)**. It then seeks to insert **proposed subsections 79(2)–(4)**, which deal specifically with limitations on actions brought in a State or Territory court exercising federal jurisdiction to recover taxes raised invalidly under a State or Territory law.

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The Bill ‘assists in restoring the states and territories to the position they were in’ before the decision of the High Court of Australia in *British American Tobacco v Western Australia* (2003) 217 CLR 30 (*BAT v WA*).<sup>1</sup> In short, the High Court found that State laws imposing conditions on the right to sue the State Government did not apply where the State court was exercising federal jurisdiction, because the provisions were inconsistent with Commonwealth law, particularly sections 39 and 64 of the Judiciary Act. The decision in *BAT v WA* is discussed further below.

The proposed amendments to section 79 of the Judiciary Act contained in the Bill make clear that State and Territory laws which apply to the recovery of invalidly imposed State or Territory taxes (including the imposition of conditions on the right to bring an action) are binding where the proceedings are in federal jurisdiction.

#### The decision of the High Court of Australia in *British American Tobacco v Western Australia* (2003) 217 CLR 30

The decision of the High Court in *BAT v WA* concerned a claim made by a tobacco wholesaler against the Government of Western Australia (the Crown) to recover licence fees paid under the *Business Franchise (Tobacco) Act 1975* (WA). The claim was brought under the *Crown Suits Act 1947* (WA) (the WA Act) after the decision of the High Court in *Ha v New South Wales* (1997) 189 CLR 465, where the Court found that fees imposed under a similar law in NSW were excise duties and thus that they had been imposed in contravention of section 90 of the Commonwealth Constitution.<sup>2</sup>

At the time, section 6 of the WA Act stated that no right of action lay against the Crown unless (a) the party proposing to take action gives written notice to the Crown Solicitor advising of certain information within 3 months of the action accruing or ‘as soon as practicable’ (whichever period is longer), and (b) the action is commenced within one year of the action accruing. (The provision has since been repealed.) In this case, it was common ground that the action accrued on 5 August 1997, when judgment was delivered in *Ha v New South Wales*. However, written notice was not given under subsection 6(1) of the WA Act until some 10 months after the relevant payment was made. It was also common ground that the proceedings were in federal jurisdiction, conferred on the Supreme Court of Western Australia by subsection 39(2) of the Judiciary Act. Section 39 is as follows:

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1. Mr Robert McClelland MP, Attorney-General, ‘Second reading speech: Judiciary Amendment Bill 2008’, House of Representatives, *Debates*, 28 May 2008, p. 4; available electronically at <http://www.aph.gov.au/hansard/reps/dailys/dr280508.pdf> (accessed on 2 June 2008). A copy of the High Court decision in *BAT v WA* is available electronically at <http://www.austlii.edu.au/au/cases/cth/HCA/2003/47.html> (accessed on 2 June 2008).
  2. Among other things, section 90 of the Constitution provides for the exclusive power of the Commonwealth over the imposition of excise duties.

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- (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.
- (2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:
  - (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.
  - (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

In *BAT v WA*, the High Court found that a law such as section 39 of the Judiciary Act is an exercise of power under section 78 of the Constitution. The majority (McHugh, Gummow and Hayne JJ, with Callinan J agreeing) held that the conferring of jurisdiction with respect to a matter arising under the Constitution (or involving its interpretation) under section 39(2) of the Judiciary Act involves the conferral of any necessary right to proceed against a State as a party in the matter. Their Honours found that section 39(2) of the Judiciary Act ‘otherwise provided’ for the purposes of that Act, and concluded that the Supreme Court had federal jurisdiction because of section 39(2), supported by section 77(iii) of the Constitution. They also found that section 79 of the Judiciary Act did not make subsection 6(1) of the WA Act applicable in federal jurisdiction. In practical terms, this means that the limitation period and the notice provision in subsection 6(1) of the WA Act were not binding on the Supreme Court exercising federal jurisdiction in the case.

The Court also held that the limitation period in paragraph 6(1)(b) of the WA Act, which applied only to actions against the Crown, was invalid because it was inconsistent with section 64 of the Judiciary Act. Section 64 provides:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

In the event, the High Court allowed the company’s appeal with costs. In doing so, it set aside certain orders made by the Full Court of the Supreme Court of Western Australia (which had given summary judgment in favour of the Crown on the basis that the company had not complied with subsection 6(1) of the *Crown Suits Act 1947* (WA)), and also dismissed the company’s appeal to the Full Court of the Supreme Court with costs.

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It should be noted that the taxes paid by British American Tobacco were in fact found by the High Court to have been *invalidly* imposed by the Western Australian Government. It would seem reasonable that the company should have the right to recover moneys from the Western Australian (or other relevant State) Government. It remains a matter for speculation if that right should be diminished because the company received some benefit from having paid the fee/tax (for example, in the form of revenue from tobacco sales, where the price of the tobacco product paid by the consumer presumably included an amount to cover the cost of the fee paid by the company to the Government), notwithstanding the fact that the fee was invalidly imposed.

### Basis of policy commitment

In a Press Release dated 28 May 2008, the Attorney-General, Mr Robert McClelland MP, stated that the Bill is a clear example ‘of the Rudd Government cooperating closely with the States and Territories to achieve progress for the nation’.<sup>3</sup> Similarly, Mr McClelland said that the Bill ‘is an example of the Rudd Labor government’s commitment to cooperative federalism’, claiming that:

This is a matter that has long languished on the books of the Standing Committee of Attorneys-General for over four years because of the previous government declining to act for political reasons completely unrelated to the substance of the proposed legislation.

While Mr McClelland’s statement is cryptic, it may be that he was referring to the fact that the Howard Coalition Government received substantial campaign funds in 2006–07 from British American Tobacco.<sup>4</sup> Arguably, British American Tobacco (and similar organisations) would have been unhappy if the Howard Government had acted to remedy the effects of the High Court decision in *BAT v WA*.

In introducing the Bill, the Attorney-General also referred to the fact that it implements recommendations of the Standing Committee of Attorneys-General (SCAG) ‘which have as their objective the protection of state and territory revenue’, saying:

It is desirable that there be a special, short limitation period applicable to proceedings to recover invalid state and territory taxes. Otherwise, claims could be made many

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3. Mr Robert McClelland MP, Attorney-General, ‘Rudd Government Removes SCAG Roadblocks’, *News Release*, number 037/2008, 28 May 2008.

4. See Katharine Murphy, ‘Tough Talk on Political Donations’, *The Age*, 17 May 2008, p. 1, where Ms Murphy cites records held by the Australian Electoral Commission that show that British American Tobacco donated \$166 000 to the Coalition in 2006–07.

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years after a tax has been paid, with potentially far-reaching consequences for government budgeting.<sup>5</sup>

Mr McClelland also referred to the fact that all the States and Territories have ‘special limitation periods with respect to the recovery of taxes paid under a mistake of fact or law, including constitutionally invalid taxes’.<sup>6</sup> These limitation periods range from 6 to 12 months from the date of the payment of the tax.<sup>7</sup>

### Position of significant interest groups/press commentary

There has been no press commentary on the Bill. Also, there is no apparent mention of it on any website of any political party, or on the website of companies such as British American Tobacco Australia. Perhaps this is not completely surprising, given the nature of the Bill and the fact it has the support of SCAG.

## Financial implications

According to the Explanatory Memorandum for the Bill, the amendments ‘are not expected to have any significant financial impact’.<sup>8</sup> The Bill may have financial implications for the budgets of State Governments—but to a large extent that is in their own hands, given they bear the ultimate financial responsibility for imposing valid taxes. Also, as mentioned above, the Bill ensures that claims must be made 6–12 months from the date of payment of the invalid tax, which limitation gives the State and Territory Governments some certainty and protection.

## Main provisions

**Item 2 of Schedule 1** seeks to insert **proposed subsections 79(2)–(4)** into the Judiciary Act. These provisions would override the effect of the decision in *BAT v WA*.

**Proposed subsection 79(2)** expressly states that a provision of the Judiciary Act ‘does not prevent’ a State or Territory law (of the sort mentioned in **proposed subsection 79(3)**) from binding the Crown in relation to a suit involving federal jurisdiction that relates to the recovery of ‘an amount paid in connection with’ a tax that was invalidly imposed under State or Territory law.

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5. McClelland, ‘Second reading speech’, op. cit., p. 5.
  6. *ibid.*, p. 4.
  7. *ibid.*
  8. Judiciary Amendment Bill 2008, Explanatory Memorandum, p. 2.

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This provision is intended to overcome the difficulties with the operation of section 79 identified in *BAT v WA*.<sup>9</sup> Particularly it overcomes the fact that if section 79 does not refer to a right to proceed, it may then be inconsistent with subsection 39(2) which implicitly confers a right to proceed. Similarly, any limitation on the right to proceed will not be picked up by section 79 in its current terms.

**Proposed subsection 79(3)** states that the types of State or Territory law that would apply to a suit ‘if it did not involve federal jurisdiction’ include a law that:

- limits the period for bringing the suit to recover the amount
- requires notice to be given, and
- bars the suit on the ground that the person bringing the suit has charged someone else for the amount.

**Proposed subsection 79(4)** provides some examples of an amount ‘paid in connection with a tax’ (being a phrase used in **proposed subsection 79(2)**), including:

- (a) an amount paid as the tax;
- (b) an amount of penalty for failure to pay the tax on time;
- (c) an amount of penalty for failure to pay enough of the tax;
- (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer’s liability to the tax in connection with the taxpayer’s dealings with the customer.

Thus, it is clear that the provisions are intended to cover not only taxes paid but invalidly imposed, but also penalties for the late payment (or non-payment) of those taxes. The provisions also cover the situation where the taxpayer has already recovered the amount from a third party (such as a consumer of the taxpayer’s goods or services).

The proposed amendments are not intended to have retrospective operation. **Item 3 of Schedule 1** states that the amendments ‘apply in relation to the recovery of amounts paid after the commencement of this Schedule’. As mentioned above, the Act (and thus the Schedule) is intended to commence on the day after Royal Assent.

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9. *ibid.*, p. 4.

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## Concluding comments

The decision in *BAT v WA* was handed down on 2 September 2003. The Howard Government made no obvious attempt to counteract the effect of the decision in its third or fourth terms of government. The Bill has now been introduced by the Rudd Government, not only with the support of SCAG, but particularly to implement recommendations by SCAG designed to protect State and Territory revenue. SCAG is a co-operative body of Commonwealth, State and Territory Attorneys-General, whose members are all of Labor Party affiliation at present.

The amendments overcome much of the uncertainty that resounds in the individual judgments of members of the High Court in *BAT v WA*, especially in relation to the operation in federal jurisdiction of State or Territory provisions dealing with limitation requirements and the contemporaneous operation of relevant Commonwealth law, particularly the Judiciary Act. The amendments make clear the types of State or Territory law that will apply to suits heard in State or Territory courts exercising federal jurisdiction, while leaving open the possibility that other State laws may operate in federal jurisdiction as well. This scenario gives certainty, but also allows scope for the operation of State laws which either are not assumed to be relevant (or apply) at the present time or which may come into being in the future.

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