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2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW OFFICERS LEGISLATION AMENDMENT BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

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LAW OFFICERS LEGISLATION AMENDMENT BILL 2008

OUTLINE

This Bill amends the *Long Service Leave (Commonwealth Employees) Act 1976*, and the *Law Officers Act 1964*, to provide holders of the office of the Solicitor-General with an entitlement to long service leave.

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The position of Solicitor-General is currently held by Mr David Bennett AO QC whose second term in office expires on 13 August 2008.

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Historically, section 16A of the *Law Officers Act 1964* set out the entitlement of the Solicitor-General to long service leave (or pro-rata payment in lieu of that leave). To avoid conflict with section 16A, subsection 10(3) of the *Long Service Leave (Commonwealth Employees) Act 1976* (‘the Long Service Leave Act’) expressly excludes the Solicitor-General from the operation of that Act.

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The *Law Officers Amendment Act 1998* amended the *Law Officers Act 1964* to vary the terms and conditions of service for those holding the office of Solicitor-General after 31 December 1997. The purpose was to break the nexus between the terms and conditions of the Solicitor-General and those applying to a Judge, and to make those of the Solicitor-General similar to those of senior members of the Australian Public Service. —The Solicitor-General’s remuneration thereafter was to be determined by the Remuneration Tribunal. Section 16A was amended by the *Law Officers Amendment Act 1998* so that it removed a payment on death or retirement after ten years of service, in lieu of unused long leave, to the holder of the office of Solicitor-General appointed after 31 December 1997. Subsection 10(3) of the Long Service Leave Act, however, was not amended to remove the reference excluding the Solicitor-General from its operation.

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While Solicitors-General appointed after 31 December 1997 receive superannuation and leave entitlements similar to those applying to senior members of the Australian Public Service, the *Law Officers Amendment Act 1998* did not address these proposals in detail and the *Long Service Leave (Commonwealth Employees) Act 1976* was not amended to extend coverage to the Solicitor-General.

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The Bill inserts a new section 7A in the *Law Officers Act* to make it clear that that Act operates subject to the Long Service Leave Act, and amends subsections 10(3) and 10(4) of the Long Service Leave Act, in so far as they refer to the Solicitor-General, to enable permit Solicitors-General to access take long service leave entitlements under the Act.

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~~This Bill responds to the High Court decision in *British American Tobacco v Western Australia* [2003 HCA 47] (BAT case). This case involved proceedings in federal jurisdiction for the recovery of invalid taxes paid under Western Australian law.~~

~~The High Court held that provisions in Western Australian law containing a special notice requirement and limitation period for actions against the Crown in right of Western Australia were not applied by section 79 of the *Judiciary Act 1903* (Judiciary Act).~~

~~Section 79 of the Judiciary Act applies the laws of a State or Territory to proceedings in courts exercising federal jurisdiction in that State or Territory, ‘except as otherwise provided by the Constitution or the laws of the Commonwealth’.~~

~~In the BAT case, the High Court held that a Western Australian special limitation period applicable to actions against the Crown would be inconsistent with section 64 of the Judiciary Act as the limitation period would not apply as between subject and subject. As the law was inconsistent with section 64, it was ‘otherwise provided... by a law of the Commonwealth’ and so was not picked up by section 79 of the Judiciary Act.~~

~~It was also held that the right to proceed and related notice provision conferred by the Western Australian law was not picked up by section 79 of the Judiciary Act as it would have been inconsistent with section 39(2) of the Judiciary Act which implies a right to proceed.~~

~~All of 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. For example, Victoria, New South Wales, Queensland, Tasmania, and Western Australia impose a 12 month limitation period from the date of the payment of the tax. South Australia, the Northern Territory and the Australian Capital Territory impose a 6 month restriction. These limitation periods are different from the general limitation period of 6 years which applies in ordinary proceedings between subject and subject, for example, in contract and tort.~~

~~The Bill seeks to restore assists in restoring the States and Territories to the position it was thought they were in prior to the BAT case. It does so by amending section 79 of the Judiciary Act to ensure provide that nothing in the Judiciary Act prevents State and Territory laws related to the recovery of invalid State and Territory taxes apply from applying, as far as possible, to proceedings in federal jurisdiction. in federal jurisdiction in proceedings for the recovery of a tax (or an amount paid in connection with a tax) invalidly imposed by a law of a State or Territory.~~

~~This implements recommendations of the Standing Committee of Attorneys General which have as their objective the protection of State and Territory revenue.~~

FINANCIAL IMPACT STATEMENT

The amendments are not expected to have any significant financial impact.

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NOTES ON CLAUSES

Clause 1: Short title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. All sections of the Act will commence on the day ~~after~~ on which it receives Royal Assent.

Clause 3: Schedule(s)

3. Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule.

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Schedule 1 – ~~Amendments~~ Limits on actions to recover invalidly raised taxes

Law Officers Act 1964

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Item 1: Section ~~7A~~9

~~3-4.~~ Item 1 inserts new section 7A of the Law Officers Act 1964.

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5. Section 6 of the Law Officers Act 1964 provides that the Governor-General appoints the Solicitor-General and may determine the terms and conditions attached to the office of Solicitor-General. Section 7 provides that the Solicitor-General's remuneration and allowances are determined by the Remuneration Tribunal.

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6. Proposed new section 7A amends section 79 of the Judiciary Act 1903 to make clear that sections 6 and 7 have effect subject to the Long Service Leave (Commonwealth Employees) Act 1976 reflect the insertion by Item 2 of proposed new subsections in section 79 to clarify the relationship between section 79 and the rest of the Judiciary Act.

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Item 2: Section 16AAt the end of section 79

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4-5. Item 2 ~~repeals section 16A of the Law Officers Act~~ adds proposed new subsections (2), (3) and (4) to section 79 of the Judiciary Act. They are intended to restore State and Territories to the position it was thought they were in prior to the decision in the BAT case.

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6. Section 16A was amended by the Law Officers Amendment Act 1998 so that it removed a payment on death or retirement after ten years of service, in lieu of unused long leave, to the holder of the office of Solicitor-General appointed after 31 December 1997. In substance, that amendment was intended to break the nexus between entitlements of Judges and entitlements of the Solicitor-General.

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~~7. The proposed repeal of section 16A makes clear there is no longer any person that Solicitors General are entitled to long service leave after 31 December 1997 to which the whom section 16A applies. It is therefore a spent provision, and should may be repealed.~~

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~~***Long Service Leave (Commonwealth Employees) Act 1976***~~

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~~**Item 3: Subsections 10(3) and (4)**~~

~~Section 10 of the Long Service Leave (Commonwealth Employees) Act 1976 in general terms provides that one of the basic qualifications for long service leave is that the person is, (or was), 'employed in Government Service'. Subsection 10(3) of the Act expressly excludes the Solicitor-General from the meaning of 'employed in Government Service' (subject to considerations listed in subsection 10(4)). It is proposed that the holder of the office of Solicitor-General be provided with an entitlement to long service leave by amending subsections 10(3) and (4) to include service in the office of the Solicitor-General in the meaning of 'employment in Government Service' in subsections 10(3) and 10(4).~~

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~~**Item 4: Subsection 10(4)**~~

~~The proposed amendment of subsection 10(4) removes references to the Solicitor-General from transitional provisions entitling Judges to long service leave in respect of their entitlements under the *Judges Pension Act 1968*.~~

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~~5. The effect of proposed new subsection (2) is that State/Territory laws, which would apply to a suit if it did not involve federal jurisdiction, for the recovery of amounts paid in connection with a purported tax that is found to be invalid will operate in federal jurisdiction. Examples of such laws are set out in proposed new subsection (3).~~

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~~6. Proposed new subsection (2) achieves the requisite effect by providing that other provisions of the Judiciary Act do not prevent the application of section 79 to allow the operation in federal jurisdiction of a law of a State/Territory that would otherwise apply to the recovery of amounts paid as invalid State or Territory taxes or purported taxes.~~

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~~7. Section 79 applies State and Territory laws 'except as otherwise provided by the Constitution or the laws of the Commonwealth'. An example of a law that might 'otherwise provide' is section 64 of the Judiciary Act, which provides that parties who have an action against the Commonwealth or State should as nearly as possible be in the same position as in a suit between two ordinary subjects. The BAT case found that this provision prevented section 79 from applying a Western Australian special limitation period which limited the time in which an action for the recovery of an amount paid as a tax under a law of Western Australia could be commenced.~~

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~~8. Proposed new subsection (2) also overcomes another problem identified in the BAT case, relating to the operation of s 79 of the Judiciary Act. The difficulty was that, if a~~

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~~right to proceed conferred by a State law was not picked up by s 79 of the Judiciary Act because this would be inconsistent with s 39(2) of that Act, which impliedly confers a right to proceed, then a condition on the State right to proceed such as a notice requirement would also not be picked up by s 79.~~

~~9. Proposed new subsection (3) gives examples of the types of State/Territory laws to which proposed new subsection 79(2) may relate. These include laws limiting the time period for bringing a suit, laws requiring notice to be given to the person against whom a suit is brought and anti windfall provisions. The list of examples is not intended to be exhaustive. The laws may be of general application or may be specifically directed at suits relating to the recovery of invalid taxes.~~

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~~10. Proposed new subsection (4) gives examples of amounts paid in connection with a tax. The list of examples is not intended to be exhaustive. These amounts include penalties for failure to pay a tax in time or to pay all the tax that is due, and other amounts that may be paid in relation to a tax.~~

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Item 53: Application

~~11.8. Item 53 adds an application provision that makes clear that the amendment applies to any period during which the person holds office as the Solicitor-General if the person was appointed as Solicitor-General after 31 December 1997, whether before of after the commencement of Schedule 1, prospectively only, that is, in relation to the recovery of amounts paid after the commencement of Schedule 1.~~

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