HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

BRITISH AMERICAN TOBACCO AUSTRALIA LTD APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA & ANOR
RESPONDENTS

British American Tobacco Australia Ltd v Western Australia
[2003] HCA 47
2 September 2003
P62/2002

ORDER

1. *The proceedings be amended to name the appellant as British American Tobacco Australia Ltd.*

2. *Appeal allowed with costs.*

3. *Set aside orders 2, 3 and 4 made by the Full Court of the Supreme Court of Western Australia on 13 February 2001 and, in place thereof, order that the appeal to the Full Court be dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation:

N C Hutley SC with N Perram for the appellant (instructed by Clayton Utz)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell for the respondents (instructed by Crown Solicitor for the State of Western Australia)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with A R Beech and G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

B M Selway QC, Solicitor-General for the State of South Australia with J C Cox intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk intervening on behalf of the Attorneys-General for the State of New South Wales and Victoria (instructed by Crown Solicitor for the State of New South Wales and Victorian Government Solicitor)

CATCHWORDS

British American Tobacco Australia Ltd v Western Australia

Constitutional law (Cth) – Exclusive powers of Commonwealth Parliament – Duties of excise – State law imposing tobacco wholesalers' and retailers' licence fee in contravention of s 90, Constitution – Claim against State for money had and received to the use of taxpayer – Federal jurisdiction – Whether action arises under the Constitution or involves its interpretation – Constitution, s 76(i).

Constitutional law (Cth) – Exclusive powers of Commonwealth Parliament – Duties of excise – State law imposing tobacco wholesalers' and retailers' licence fee in contravention of s 90, Constitution – Claim against State for money had and received to the use of taxpayer – Right to proceed against State – State laws imposing conditions on right of action against State – Whether State laws apply of their own force – Whether State laws apply pursuant to s 64 or s 79, *Judiciary Act* 1903 (Cth) – *Crown Suits Act* 1947 (WA), ss 5, 6 – *Limitation Act* 1935 (WA), s 47A.

Constitution, covering cl 5, ss 75, 76, 77(iii), 78, 90.
Judiciary Act 1903 (Cth), ss 39(2), 64, 79.
Business Franchise (Tobacco) Act 1975 (WA), s 6(1).
Crown Suits Act 1947 (WA), ss 5, 6.
Limitation Act 1935 (WA), s 47A.

1 GLEESON CJ. The appellant, formerly named Rothmans of Pall Mall (Australia) Ltd, commenced an action in the Supreme Court of Western Australia, claiming a declaration that licence fees imposed by State legislation regulating the sale by wholesale of tobacco were duties of excise within the meaning of s 90 of the Constitution. The appellant also sought an order that the State of Western Australia repay an amount which was particularised as $6,957,528.30. The contention that the licence fees were duties of excise, and that it was beyond the legislative power of the Parliament of Western Australia to impose them, is clearly correct, in the light of the decision of this Court in *Ha v New South Wales*[1]. However, the tax was passed on to consumers; and the question of the State's obligation, if any, to repay the licence fees became one of legal and political dispute. The decision in *Ha* was given in August 1997. Over the succeeding months, there were negotiations between the appellant and the government. On 15 April 1998, the appellant gave notice, said to be under s 6 of the *Crown Suits Act* 1947 (WA) ("the Crown Suits Act"), that it proposed to commence action, and, on the same day, commenced the present proceedings.

2 Section 5 of the Crown Suits Act provides that, subject to the Act, the Crown (which is defined to mean the Crown in right of the Government of Western Australia) may sue and be sued in any court in the same manner as a subject. In such proceedings, the Crown is to be identified as "the State of Western Australia". Section 6 provides, so far as presently relevant, that no right of action lies against the Crown unless the party proposing to take action gives, as soon as practicable or within three months after the cause of action accrues (whichever period is the longer), written notice containing certain information. The appellant's cause of action had accrued by August 1997. The Full Court of the Supreme Court of Western Australia held that the appellant "must have been well and truly in a position to give the required notice by 13 February 1998". Hence, since notice was not given until April 1998, there was no compliance with s 6. On that ground, the Full Court (Malcolm CJ, Wallwork J, Stein AJ) entered summary judgment for the respondents. Against that decision, insofar as it relates to the first respondent, the appellant appeals. (The claim against the second respondent, the Commissioner of State Taxation, is not pursued).

3 The issue in the appeal is whether, as was assumed in argument before the Full Court, and in the Full Court's reasons, ss 5 and 6 of the Crown Suits Act were relevant to the proceedings. What appears to have been overlooked, in making the assumption just mentioned, is that the proceedings were in federal jurisdiction. In consequence, ss 5 and 6 did not directly apply. The question is whether they were picked up, and rendered applicable, by federal law. That question was not addressed in the Full Court.

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1 (1997) 189 CLR 465.

4 In the Full Court, there was also a question of the application, to a claim against the second respondent, the Commissioner of State Taxation, of s 47A of the *Limitation Act* 1935 (WA). Although the claim against the Commissioner is not pursued, in one possible contingency, s 47A could still be relevant. However, it is convenient to put it to one side for the moment.

5 The claim for repayment of the licence fees is a claim for moneys payable by the first respondent to the appellant for moneys had and received by the first respondent to the use of the appellant. It is based upon the principles stated by this Court in *Mason v New South Wales*[2] and *David Securities Pty Ltd v Commonwealth Bank of Australia*[3]. The fees were paid pursuant to an unlawful exaction under colour of legislative authority. The unlawfulness of the exaction, and the invalidity of the legislation pursuant to which the exaction was made, are central to the appellant's claim. We are not presently concerned with whether there are any defences to the claim; the appellant is merely seeking to have the summary judgment set aside, and to continue with its action. The allegation of legislative invalidity is based upon s 90 of the Constitution, which confers exclusive power to impose duties of excise upon the Commonwealth Parliament, and upon the (now unanswerable) contention that the licence fees were duties of excise. The matter is, therefore, one arising under the Constitution, within the meaning of s 76(i) of the Constitution, and the Parliament was empowered to confer original jurisdiction on this Court in such a matter. By virtue of s 77(iii) of the Constitution, the Parliament may make laws investing any court of a State with federal jurisdiction. One such law is s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), which provides that the several Courts of the States shall, within the limits of their jurisdiction, 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. That was the jurisdiction that was enlivened when the proceedings were commenced in the Supreme Court of Western Australia.

6 The legal foundation of the appellant's claim consists in a combination of the common law principles considered in *Mason* and *David Securities*, and the distribution of legislative powers amongst the polities of the Commonwealth made by the Constitution and, in particular, s 90. By reason of s 90, the purported imposition of a duty of excise by the Parliament of Western Australia was unconstitutional and invalid. This action is brought by a taxpayer which was subjected to such an unconstitutional imposition, and which claims, according to common law principles, to be entitled to recover money unlawfully exacted under colour of authority. The jurisdiction to which the first respondent is

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2 (1959) 102 CLR 108.

3 (1992) 175 CLR 353.

amenable is that conferred by s 39(2) of the Judiciary Act, which, in turn, has its source in ss 76(i) and 77(iii) of the Constitution.

7 Why, then, does the appellant need to rely upon s 5 of the Crown Suits Act, and how, in turn, does the first respondent become entitled to rely upon s 6? We are not presently concerned with some limitation of actions arising under a Western Australian law of general application. We are dealing with specific State legislation defining the circumstances under which the Crown in right of the Government of Western Australia may be sued, under the title of the State of Western Australia. The operation of such legislation in State matters to which it applies directly has a long history, and is well understood. It has its background in a collection of rules, the combined effect of which is described compendiously as Crown immunity from suit. But we are here dealing with a particular kind of claim. The Constitution provides that the Parliament of Western Australia has no power to impose taxes of a certain kind: duties of excise. The common law of Australia is to the effect that, at least in certain circumstances, when a public authority purports to impose, and collects, a tax which is beyond its power, a taxpayer may sue to recover the tax. A law of the Commonwealth Parliament provides that, in a matter arising under the Constitution, which includes a claim by a taxpayer to recover money exacted by a State under colour of an unconstitutional tax, the Supreme Court of Western Australia is invested with federal jurisdiction. Why is a taxpayer, bringing such a claim in federal jurisdiction, in want of assistance from s 5, or at risk of non-compliance with the conditions imposed by s 6, of the State Act?

8 It was submitted on behalf of the first respondent that s 6 of the Crown Suits Act imposes the requirement of notice as a condition of the existence of any right of action against the State. So much may be accepted in relation to a case to which the Act applies, such as an action in State jurisdiction by a citizen against the Western Australian government. Sections 5 and 6 work together. Section 5 provides that, subject to the Act, (in this case, subject to s 6), the Crown in right of the Government of Western Australia may be sued. Section 6 provides that no right of action lies unless certain conditions are fulfilled. The predecessor to the present legislation was said to have been "intended to define all the claims and demands that can be made against the Crown in Western Australia".[4] However, once it is accepted that the claim is made in federal jurisdiction, and that the Crown Suits Act does not apply directly, then it becomes necessary to consider whether federal law, in its operation in relation to a claim that a State has exacted an unconstitutional tax, and should repay the amount collected, picks up and applies a State law which is intended to define all the claims and demands that can be made against the government, and which imposes a condition that, unless fulfilled, means that no right of action lies under any circumstances.

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4 *The Crown v Dalgety & Co Ltd* (1944) 69 CLR 18 at 49 per Williams J.

9 The contention of the first respondent is that s 79 of the Judiciary Act picks up ss 5 and 6 of the Crown Suits Act, and applies them in federal jurisdiction. That contention depends upon the proposition that neither the Constitution nor any law of the Commonwealth provides otherwise. Much of the argument in this Court turned upon an assumption that the primary source of any potential contrary provision was s 64 of the Judiciary Act. The assumption led to much debate about the meaning, and even the validity, of s 64, and to an application for leave to re-open *The Commonwealth v Evans Deakin Industries Ltd*[5]. However, as I see the case, there is an anterior question.

10 The first respondent accepted that, in the case of the Commonwealth, s 75(iii) of the Constitution denies any operation of common law doctrines of Crown immunity from suit, and that such denial is carried forward when, under s 77, the Parliament makes laws with respect to matters mentioned in s 75, as, for example, in s 39(2) of the Judiciary Act. It is necessary to consider why this is so.

11 The first respondent's submission was supported by reference to the reasons of Gummow and Kirby JJ, with which Brennan CJ agreed, in *The Commonwealth v Mewett*[6]. The principles of Crown immunity from suit, well understood by the framers of the Constitution, and addressed by s 78, reflected the concepts that the courts of justice were those of the Sovereign, that the Sovereign could not be impleaded in his or her own courts[7], and, in relation to claims in tort, that "the King can do no wrong".[8] As was pointed out in *Mewett*[9], those concepts are impossible to relate to certain aspects of the constitutional arrangements established for the Australian Federation. They have relevance to many kinds of claim made by citizens against Commonwealth or State governments; hence the need for s 78, and for State legislation such as the Crown Suits Act. One class of justiciable controversy described in *Mewett* as "not encompassed by the common law as it developed in England" was said to be "litigation by which an individual or corporation seeks redress for tortious injury to private or individual rights by government action in administration of a law which the plaintiff asserts was not authorised by the Constitution but upon which the defendant relies for justification of the alleged tortious conduct". That was a

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5 (1986) 161 CLR 254.

6 (1997) 191 CLR 471 at 491, 542-552.

7 *The Crown v Dalgety & Co Ltd* (1944) 69 CLR 18.

8 *Feather v The Queen* (1865) 6 B & S 257 at 295-296 [122 ER 1191 at 1205].

9 (1997) 191 CLR 471 at 547-548 per Gummow and Kirby JJ.

reference to the nature of the proceedings in that case. The nature of the present proceedings provides an even clearer example. The Constitution denies to the States the power to impose duties of excise. A claim is made that a State, contrary to s 90, purported to impose duties of excise, and that the common law entitles a taxpayer to recover the amount that was the subject of such an unconstitutional exaction. Such a claim is justiciable in federal jurisdiction. As was said in *Mewett*[10]:

> "To deny such a claim on the footing that, in the absence of enabling legislation, the Crown can do no wrong and cannot be sued in its own court would be to cut across the principle in *Marbury v Madison*. It would mean that the operation of the Constitution itself was crippled by doctrines devised in other circumstances and for a different system of government."

12 The Constitution, in s 71, vests the judicial power of the Commonwealth, not in the Sovereign, but in this Court, and in such other federal courts as the Parliament creates, and in such other courts (including State courts) as it invests with federal jurisdiction. The Supreme Court of Western Australia was invested with federal jurisdiction in relation to the present matter. The idea that the Crown in right of the Government of Western Australia can do no wrong, and cannot be sued in its own court, is incongruous in the context of a claim that the State of Western Australia has purported to impose a tax in a manner contrary to the Constitution's division of legislative powers, and that the judicial power of the Commonwealth should be exercised, in application of the Constitution and the common law of Australia, to compel repayment of the money unlawfully exacted.

13 The first respondent contends that there is a vital difference between *Mewett* and the present case: s 75(iii) of the Constitution operated of its own force to confer jurisdiction in *Mewett*; the present case falls within s 76(i), which merely empowers the Parliament to make laws conferring jurisdiction. It is said that, unlike s 75, s 76 does not exclude the Crown's immunity from suit in the matters to which it refers. There is no constitutional imperative for the Parliament to confer jurisdiction on this Court in matters arising under the Constitution or involving its interpretation. In the case of matters to which s 76 applies, it is necessary to identify some law of the Commonwealth which confers a right to proceed against the State[11]. The distinction in this respect between

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10 (1997) 191 CLR 471 at 548 per Gummow and Kirby JJ.

11 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 205 per Gibbs J.

ss 75 and 76 was considered in *The Commonwealth v New South Wales*[12] and *Werrin v The Commonwealth*[13]. This submission, it is to be noted, assumes that the common law concept of the immunity from suit of the Crown in right of the Government of Western Australia is relevant to a claim that the State of Western Australia has levied an unconstitutional tax and should be ordered to repay the money it collected.

14 As was pointed out in *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport*[14], the subject of governmental obligation to repay unconstitutional taxes is complex. As in the present case, such taxes may have been passed on to third parties. As in the present case, such taxes may have been levied upon an understanding of the law which was based upon a long line of judicial authority. The merits of claims by individual taxpayers may vary; and the extent of claims may have significant budgetary implications. We are not presently concerned with the substantive law which determines such liability, or even with a law relating to limitation of periods within which action to recover overpaid taxes may be brought. We are concerned with the threshold question of a right to proceed.

15 The Attorney-General of the Commonwealth, intervening, argued that, in the present case, the right to proceed against the State of Western Australia is implied from the Constitution. It was accepted that the cause of action arises under the common law, and not the Constitution[15]. However, it was said that "[b]ecause the Constitution defines both the powers of the Commonwealth and, to a more limited extent, the powers of the States, the right to proceed against both the Commonwealth and the States in respect of matters concerned with the scope of such powers is conferred by the Constitution itself. In the case of the Commonwealth, the right to proceed can be implied from covering clause 5 and s 75(iii) of the Constitution. In the case of the States, the right to proceed can be implied from covering clause 5 and the particular provision limiting State powers (in this case, s 90)."

16 It may be doubted whether the first part of covering cl 5, which is that to which the argument refers, adds anything to what is necessarily implied in the Constitution itself. Subject to that qualification, I would accept the Attorney-General's argument. The incongruity between the concept of the Crown's immunity from suit, understood in the light of its historical and theoretical

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12 (1923) 32 CLR 200 at 207, 215.

13 (1938) 59 CLR 150 at 165.

14 (1955) 93 CLR 83 at 100.

15 *Kruger v The Commonwealth* (1997) 190 CLR 1.

foundations, and the scheme of the federal arrangements established in the Constitution, is striking. It is true that s 78 empowers the Parliament to make laws conferring rights to proceed against a State; but it does not follow that, in the absence of such a law, there is no right to proceed against a State where the matter in issue concerns the State's failure to observe the provisions of the Constitution itself, or the working out of the division of powers and functions effected by the Constitution.

17 Section 75 confers jurisdiction; and s 76 empowers Parliament to confer jurisdiction. Both provisions address the authority of a court to determine a justiciable controversy. The closely related issue of present concern is the right to proceed against a body politic, in a dispute arising under the Constitution, where the dispute involves a contention that the body politic has exceeded the limits placed upon its authority by the Constitution.

18 *The Commonwealth v New South Wales*[16] concerned a civil action arising out of a collision between two government owned vessels. In that context, Isaacs, Rich and Starke JJ, discussing the relationship between ss 75, 76 and 78, said that s 75, of its own force, conferred a right to proceed in the cases it covered, and that s 78 enabled the Commonwealth Parliament, if it thought fit, to do the same in other matters within the judicial power[17]. In that respect, they appeared to treat the giving of a right to proceed as involved in the conferring of jurisdiction. As Dixon J observed in *Werrin*[18], the material parts of the judgment are directed to the actionable liability of the Crown for tort. *Werrin* was a case of a claim against the Commonwealth for the recovery of overpaid sales tax. The goods in respect of which the tax was paid were secondhand, and therefore sales tax was not payable. The case turned upon the substantive law governing the right to recover such overpayments, and, in particular, the meaning and effect of a Commonwealth statute regulating such a right of recovery. It was not about common law rules relating to Crown immunity from suit. It stands as authority for the proposition that the Parliament has legislative power "to say that a sum of money erroneously collected under a tax Act by administrative officers acting in good faith should be retained".[19] Such a law is a law with respect to taxation. Dixon J considered whether the Constitution contained some provision fettering the power of the Federal Parliament to bar an existing cause of action against the Commonwealth. In that connection, he addressed s 75(iii), and the joint

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16 (1923) 32 CLR 200.

17 (1923) 32 CLR 200 at 215.

18 (1938) 59 CLR 150 at 161.

19 (1938) 59 CLR 150 at 161.

judgment of Isaacs, Rich and Starke JJ in *The Commonwealth v New South Wales*. He doubted that their Honours regarded s 75 as a source of substantive liability, and referred to the blurring between substantive law and procedure which often occurs[20]. He thought the explanation of what they said was that s 75 was seen as sufficient to expose the State and the Commonwealth to a remedy for tortious liability. Even so, s 75 was not a source of substantive liability, and did not deny to Parliament the power to extinguish a cause of action that had accrued[21].

19 To say that the Constitution implies a right to proceed against a State in a case such as the present is not necessarily to deny that, within limits, the Commonwealth can regulate the manner in which such a claim may be brought in federal jurisdiction against the State[22]. But the existence of such a capacity is not presently in question.

20 Some of the arguments in this Court proceeded upon the premise that it was s 64 of the Judiciary Act, enacted at least partly in pursuance of the power given by s 78 of the Constitution, that conferred the appellant's right to proceed. I do not accept that premise.

21 Section 79 of the Judiciary Act provides that the laws of a State, including the laws relating to procedure, 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 in all cases to which they are applicable. According to the first respondent, that section applies here; s 6 of the Crown Suits Act of Western Australia is such a law; this is a case to which it is applicable; and neither the Constitution nor a law of the Commonwealth otherwise provides.

22 The Crown Suits Act is described, in its long title, as an Act to make better provision for suits by and against the Crown (defined as the Crown in right of the Government of Western Australia) and for other purposes relative thereto. It applies to causes of action which accrue after its commencement (s 4). Section 5 provides that subject, amongst other provisions, to s 6, the Crown, as defined, may be sued in the same manner as a subject. Section 6 imposes a condition upon the right of action otherwise conferred by s 5. Sections 5 and 6 should be read together as parts of a State legislative scheme dealing with the

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20 (1938) 59 CLR 150 at 166-167.

21 (1938) 59 CLR 150 at 168.

22 As to invalidly imposed Commonwealth taxes, see *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 166-167, 182-183, 204 and 209.

subject of Crown immunity from suit. As was noted earlier, they purport to define the circumstances in which any right to proceed against the Government of Western Australia exists. In my view, either they are not applicable to the present action because the rules relating to Crown immunity from suit are irrelevant to a claim based upon a contention that a State has acted in contravention of a limitation upon its power or authority imposed by the Constitution, or if they are applicable, then the Constitution otherwise provides. The Constitution, by implication, confers the appellant's right to proceed against the State of Western Australia, and recourse to the provisions of the Crown Suits Act is neither necessary nor appropriate.

23 Reference was earlier made to s 47A of the *Limitation Act* 1935 (WA). It provides that, subject to certain qualifications, no action shall be brought against any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, unless the prospective plaintiff gives to the prospective defendant, as soon as practicable after the course of action accrues, a notice containing certain information.

24 It was argued by the first respondent that, assuming (contrary to its main argument) that s 64 of the Judiciary Act applies, (a contention advanced positively, but in my view unnecessarily, by the appellant), then the effect of s 64 is to render s 47A of the Limitation Act applicable and thereby to defeat the appellant's claim. On the approach I take, this is the only aspect of s 64 that requires consideration.

25 On the assumption expressed, the rights of the parties are to be as nearly as possible the same as in a suit between subject and subject. Section 47A deals with a suit against a very particular kind of defendant, in relation to a very particular kind of act of neglect, or default. In broad terms, it deals with agents of the Crown, and confers upon them a protection similar in some respects to that provided to the Crown by the Crown Suits Act. If s 64 were to operate in the present case, it would not do so by putting the Government of Western Australia in the place of an agent of the Government of Western Australia; it would do so by putting the Government of Western Australia in the place of an ordinary citizen. Section 64 speaks of rights in a suit between subject and subject; not rights in a suit between subject and Crown agent. It is unnecessary to decide whether the language of s 47A otherwise covers the cause of action here asserted by the appellant; it suffices to note that it is at least arguable that it does not.

26 The appellant has a right to proceed against the State. That right does not depend upon, and is not subject to, the Crown Suits Act. There should not have been summary judgment for the first respondent.

27 The proceedings should be amended to name the appellant as British American Tobacco Australia Ltd. The appeal should be allowed with costs.

Orders 2, 3 and 4 made by the Full Court, in their application to the first respondent, should be set aside, and, in place of those orders, the appeal to the Full Court by the first respondent should be dismissed with costs.

28 McHUGH, GUMMOW AND HAYNE JJ. On 5 August 1997, in *Ha v New South Wales*[23], this Court declared that certain provisions of the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) were invalid as imposing a duty or duties of excise within the meaning of s 90 of the Constitution.

29 The appellant ("BAT"), then named Rothmans of Pall Mall (Australia) Ltd, carried on in Western Australia the business of tobacco wholesaling within the meaning of s 6(1) of the *Business Franchise (Tobacco) Act* 1975 (WA) ("the Franchise Act"). The scheme of that statute followed that in the New South Wales legislation. Section 6 of the Franchise Act required that the business of tobacco wholesaling be carried on only under and in accordance with a licence under the Franchise Act. Section 12B provided that fees payable under the Franchise Act were debts due to Her Majesty and payable to the Commissioner of State Taxation ("the Commissioner"), the present second respondent. The Commissioner is identified by the definition in s 2(1) of the Franchise Act, when read with s 112 of the *Public Sector Management Act* 1994 (WA), as the person holding that office under the latter statute.

30 On 15 July 1997, shortly before the decision in *Ha*, BAT paid to the Commissioner an amount of $6,957,528.30. This was the last payment made for renewal of BAT's licence. Thereafter BAT entered into discussions with the State of Western Australia ("the State") with a view to repayment of these moneys. Nothing now turns for present purposes upon the apparent failure of those discussions.

31 By writs of summons with annexed statements of claim issued out of the Supreme Court of Western Australia on 14 April 1998 and 14 July 1998, BAT sought recovery from the State and the Commissioner of licence fees as moneys had and received to the use of BAT. It now is common ground that the only repayment sought is of that made on 15 July 1997 and that BAT's cause of action accrued on 5 August 1997 when the decision in *Ha* was delivered. The first writ was served on or about 12 April 2000 and the second writ on 28 April 2000. The two actions later were consolidated. In the consolidated action, BAT also claimed declaratory relief in respect of the invalidity of the Franchise Act of the same nature as that obtained in *Ha* with respect to the New South Wales statute. It is not suggested that there are any relevant differences between the legislation in the two States.

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23 (1997) 189 CLR 465.

The windfall tax legislation

32 In response to the decision in *Ha*, three federal statutes were enacted: the *Franchise Fees Windfall Tax (Collection) Act* 1997 (Cth) ("the Collection Act"), the *Franchise Fees Windfall Tax (Imposition) Act* 1997 (Cth) ("the Imposition Act") and the *Franchise Fees Windfall Tax (Consequential Amendments) Act* 1997 (Cth) ("the Amendments Act"). In general terms, and in respect of amounts that a State is liable to repay to persons by reason of the invalidity of State franchise fees legislation (including, as regards Western Australia, the Franchise Act), the legislation imposes upon those persons a tax (identified as "windfall tax") equivalent to the amount of that State's liability[24].

33 The effect of s 6(1)(b) of the Collection Act is that the windfall tax is limited to payments made under State franchise fees laws before 5 August 1997 (the date of the delivery of the judgment in *Ha*) and in respect of a licensing period commencing before that date. Both the Collection Act and the Imposition Act are taken to have commenced their operation on 5 August 1997. Section 9 of the Collection Act, when read with the definition of "taxable amount" in s 6, so operates as to oblige a State to withhold windfall tax from amounts it is liable to repay under a court order and to remit the tax to the Commissioner; a State then is discharged from liability to pay or account to any person other than the Commissioner. The Amendments Act, in general terms, amends federal income tax legislation to ensure that "taxable amounts", being the amounts which States are liable to repay, do not attract income tax, and also that the windfall tax does not attract a deduction.

34 The Attorney-General of the Commonwealth (an intervener in this Court) submits that at this stage of the litigation between BAT and the State no question arises respecting the operation of the windfall tax legislation. This is because there has been no determination of BAT's claim to repayment by the State. No party or other intervener submits otherwise.

The jurisdiction of the Supreme Court

35 It is convenient at this stage to pause to consider the nature of the jurisdiction invoked by BAT. This is important for at least two reasons. First, the parties appear at no stage in the Supreme Court to have considered that it was

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24 cf s 20 of the *Finance Statutes Amendment Act* 1981 (BC) which inserted a new s 25 in the *Gasoline Tax Act* 1948 (BC) and was considered by the Supreme Court of Canada in *Air Canada v British Columbia* [1989] 1 SCR 1161 at 1192-1194, 1211-1212.

federal jurisdiction that had been engaged, thereby depriving this Court of the benefit of the reasoning of the Supreme Court upon the issues now accepted as arising. Secondly, the consideration later in these reasons of those issues will be assisted by an immediate appreciation of the basic jurisdictional framework within which the litigation is placed.

36 Subject to the exclusions specified in s 38, s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") invested the Supreme Court with federal jurisdiction in a range of "matters" appearing in ss 75 and 76 of the Constitution. One such category (not excluded by s 38) was matters "arising under this Constitution, or involving its interpretation". That is the first category of matter in which original jurisdiction can be conferred upon this Court by the Parliament pursuant to s 76(i) of the Constitution and upon State courts by a law such as s 39 which is supported by s 77(iii) of the Constitution. The action instituted by BAT answered that description and thereupon the Supreme Court was seised of federal jurisdiction.

37 It should be added, if only to put the point to one side, that, correctly, no reliance has been placed upon s 75(iv) of the Constitution (in conjunction with s 39(2) of the Judiciary Act) as founding federal jurisdiction. Section 75(iv) identifies matters:

> "[b]etween States, or between residents of different States, or between a State and a resident of another State".

The authorities in this Court, which are to be followed until a successful challenge be made to them, establish that (i) an artificial person, including a corporation such as BAT, cannot be a "resident" within the meaning of s 75(iv), and (ii) even if the Commissioner be a "resident" of Western Australia, the joinder of the State, plainly not a resident, denied to that side of the record the character of a matter between inter-State residents. The authorities for the first proposition are affirmed in *Crouch v Commissioner for Railways (Q)*[25] and those for the second were applied by Gaudron J in *Rochford v Dayes*[26]. As was said in *Re Patterson; Ex parte Taylor*[27], "this Court should not embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so".

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25 (1985) 159 CLR 22.

26 (1989) 63 ALJR 315; 84 ALR 405. See also Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002) at 99-105.

27 (2001) 207 CLR 391 at 473 [249].

38 Further, as was also pointed out in *Re Patterson*[28], there are sound prudential considerations for it long having been the settled practice of the Court to reserve its opinion on questions of constitutional construction until it is necessary to decide them. It follows that we confine our reasons to those that are necessary for the disposition of the present matter, expressing no opinion on questions that were not raised in argument and do not fall for decision.

39 The claim to declaratory relief respecting the invalidity of the Franchise Act plainly involves a matter to which s 76(i) and s 77(iii) of the Constitution speak. What of the further claim for moneys had and received? The categories of case in which that action lies are not closed[29]. The claim made by BAT is that the receipt by the State (or the Commissioner on its behalf) of the licence fees was to the use of BAT because the payment was in relief of liability for an unconstitutional impost. There is a distinction, emphasised by Barwick CJ and Menzies J in *Felton v Mulligan*[30], between a matter "arising under" the Constitution and a matter "involving its interpretation". However, the better view is that BAT's action for moneys had and received "arises under" the Constitution because the asserted obligation to repay would not exist were it not for the operation of s 90 to invalidate the Franchise Act[31].

40 To conclude that the action for moneys had and received "arises under" the Constitution is not to accept that any liability on the part of the State to effect repayment springs without more from s 90 of the Constitution. The *Bivens* action for damages[32], developed in the United States since 1971, has not been adopted by this Court. It was rejected in *Kruger v The Commonwealth*[33]. No application was made to re-open that holding. Two points respecting *Bivens* may be added to what was said in *Kruger*. First, the majority in *Bivens*[34] stressed that

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28 (2001) 207 CLR 391 at 473-474 [248]-[252].

29 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 524-525 [14]-[15], 551-555 [90]-[100].

30 (1971) 124 CLR 367 at 374, 382-383.

31 See *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

32 After *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971).

33 (1997) 190 CLR 1 at 46-47, 93, 125-126, 146-148.

34 403 US 388 at 394-395 (1971).

State law remedies (there being no national common law in the United States and no national court of final appeal) might be inadequate or hostile to the federal constitutional interest. Secondly, *Bivens* suits against State governments are not allowed because of the preclusion by the Eleventh Amendment of suits against States in federal courts[35].

41 Rather, in the present case, the common law action attracts federal jurisdiction, in accordance with the decisions construing the phrase "arising under" in s 76(i) and (ii) of the Constitution because it is the operation of s 90 upon the Franchise Act which is said to render the retention of the moneys against conscience. Thus, in *Sargood Bros v The Commonwealth*[36], Isaacs J referred to the statement by Lord Mansfield in *Moses v Macferlan*[37] that the gist of the action for money had and received was "that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money" (original emphasis).

42 In *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport*[38], this Court considered a claim to moneys had and received for charges levied under State law which had been held to contravene s 92 of the Constitution. Fullagar J emphasised that the common law action was informed by the Constitution in a crucial respect. His Honour said[39]:

> "The right asserted is a common law right, but an essential element in the cause of action is that the moneys in question were unlawfully exacted from it. If the unlawfulness of the exaction depended upon State law, the State could, of course, by statute make the exaction retrospectively lawful, or abolish the common law remedy in respect of the exaction. But the unlawfulness of the exaction does not depend upon State law. It depends on the Constitution. No State law can make lawful, either prospectively or retrospectively, that which the Constitution says is unlawful."

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35 *Alabama v Pugh* 438 US 781 (1978); *Burton v Waller* 502 F 2d 1261 at 1273 (1974); Chemerinsky, *Federal Jurisdiction*, 3rd ed (1999), §9.1.4.

36 (1910) 11 CLR 258 at 303.

37 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

38 (1955) 93 CLR 83; affd (1956) 94 CLR 177 (PC); [1956] AC 527.

39 (1955) 93 CLR 83 at 102-103. The Supreme Court of Canada spoke in similar terms in *Amax Potash Ltd v Saskatchewan* [1977] 2 SCR 576 at 590-592, and referred to *Antill Ranger*.

He added[40]:

> "A claim for repayment of moneys alleged to have been exacted in contravention of s 92 [of the Constitution] is a matter arising under the Constitution or involving its interpretation."

The same is true where, as here, the contravention was of s 90 of the Constitution. The points made by Fullagar J answer any complaint that, without the adoption of a *Bivens* action into Australian constitutional law, the effectiveness of the exclusive power conferred upon the Commonwealth may be mocked by State legislation or executive action.

43 The claim by BAT to repayment is framed along the lines of the comparable claims in *Antill Ranger* and thereafter in *Barton v Commissioner for Motor Transport*[41] and *Mason v New South Wales*[42]. It was pleaded in those cases that the money was had and received to the use of the plaintiff because it had unlawfully been demanded by the defendant *colore officii* and paid involuntarily. At the time of these cases, a distinction was drawn, respecting recovery on the further ground of mistaken payment, between mistakes of law and mistakes of fact. Since the decision of this Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*[43], a mistake by BAT as to the validity of the Franchise Act, a matter of law, would not stand in the way of a claim for money had and received put on this further ground of mistaken payment.

44 Further, none of the foregoing reasoning as to the constitution and nature of the action instituted by BAT engages the statute law of Western Australia for the determination of the rights and liabilities in the action. For example, the State statute law respecting limitation of actions could not apply directly in the exercise of federal jurisdiction[44]. The reason was expressed by Gleeson CJ,

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40 (1955) 93 CLR 83 at 103.

41 (1957) 97 CLR 633 at 651.

42 (1959) 102 CLR 108 at 109. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

43 (1992) 175 CLR 353; cf *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

44 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87, 93; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 35 [41]; *Re Macks; Ex parte Saint* (2000) 204 CLR

(Footnote continues on next page)

Gaudron and Gummow JJ in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*[45]:

> "An attempt by State law to achieve that result would, as to this Court, be repugnant to s 75 of the Constitution. Where jurisdiction was conferred by a law made by the Parliament in exercise of its powers under s 77 of the Constitution, the State law also would be invalid for inconsistency under s 109 of the Constitution". (footnote omitted)

45 Any relevant constraints must be found in federal not State law. As to federal law, there can be no issue regarding the standing of BAT or the existence of a Ch III "matter" in this litigation[46]. Reference already has been made to the windfall tax legislation; these are laws with respect to "taxation" as provided in s 51(ii) of the Constitution. No question arises in this appeal from the subjection of this and the other powers in s 51 to the other provisions of the Constitution, including Ch III. Those opposing BAT do not refer to any other federal legislation, for example, a federal limitation law, which affects the availability to BAT of the appropriate common law rights and remedies to vindicate the operation of s 90 of the Constitution upon the Franchise Act[47].

46 Rather, as will appear, reliance is placed upon generally expressed and ambulatory provisions of the Judiciary Act, ss 79 and 64. There are disputes respecting the construction of those provisions to "pick up" State law and, dependent thereupon, claims of invalidity.

The strike out application

47 The respondents applied to strike out the statements of claim on grounds assuming the operation of certain State laws. The application by the respondents was unsuccessful and on 14 August 2000 an order was made dismissing the chamber summons. Thereafter, the Full Court (Malcolm CJ, Wallwork J and

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158 at 187 [58]; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 588 [59].

45 (2001) 204 CLR 559 at 591-592 [68].

46 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

47 cf the remarks of Fullagar J in *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 103 and *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633 at 659-660.

Stein AJ) granted to the present respondents leave to appeal and allowed the appeal, ordering the whole of the consolidated statement of claim be struck out and judgment be entered for the respondents.

48 The only issue on which in this Court BAT challenges the decision of the Full Court concerns entry of judgment for the State. It accepts that summary judgment was properly entered in favour of the Commissioner. With respect to the action against the State, the principal remaining issue in this Court concerns the operation of s 6 of the *Crown Suits Act* 1947 (WA) ("the Crown Suits Act"). On its face, s 6 places the State in a privileged position by requiring the giving of particular notice before commencement of action against it. BAT accepts that, if s 6 is applicable, it was not satisfied and summary judgment was properly entered in favour of the State.

49 It is convenient to deal with the operation of s 6 in three steps: first, to consider its provisions; secondly, by reference to the submissions made in this Court, to consider ss 76(i) and 78 of the Constitution; and thirdly, again by reference to those submissions, to consider the operation of s 79 and then s 64 of the Judiciary Act.

50 At the second step, reference will be made to the conferral of any necessary right to proceed against a State as a party, a subject to which a deal of attention was given in argument. But, as appears from what has been said earlier in these reasons, the question of right to proceed invites attention, in this case, to the Constitution and to federal law, not to the Crown Suits Act. Section 39 of the Judiciary Act, supported as it is by ss 76(i) and 78 of the Constitution, invests jurisdiction in State courts in matters arising under the Constitution or involving its interpretation. It necessarily subjects the States to the exercise of the judicial power thus invested. That is a conclusion which is consistent with, even required by, the text and structure of the Constitution. Historic common law doctrines of Crown immunity which lie behind the enactment of the Crown Suits Act are not relevant to, and do not affect, the conclusion that the State was amenable to the suit which BAT instituted.

51 The further question which then arises, and the third step in these reasons, is whether by some federal law (either s 79 or s 64 of the Judiciary Act) the relevant provisions of the Crown Suits Act are to be applied in the suit brought by BAT. That further question is not answered by the conclusion reached about right to proceed. It should, however, be answered no.

The Crown Suits Act

52 As it appears in the Crown Suits Act, the term "Crown" is defined in s 3 as meaning "the Crown in right of the Government of Western Australia". Section 6 is to be read with s 5. Section 5 states:

> "(1) Subject to this Act, the Crown may sue and be sued in any Court or otherwise competent jurisdiction in the same manner as a subject.
>
> (2) Every proceeding shall be taken by or against the Crown under the title 'the State of Western Australia.'"

53 The immediately relevant portion of s 6 is sub-s (1). The terms of s 6(1) appear to distinguish between a "right of action" which lies, a "cause of action" which accrues, and "an action" which is brought or commenced. The sub-section states:

> "Subject to the provisions of subsections (2) and (3) of this section, no *right of action* lies against the Crown *unless* –
>
> (a) the party proposing to take action gives to the Crown Solicitor, *as soon as practicable* or within three months (whichever of such periods is the longer), *after the cause of action accrues*, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the party and his solicitor or agent; and
>
> (b) *the action* is *commenced* before the expiration of one year from the date on which the cause of action accrued,
>
> and for the purposes of this section where the act, neglect, or default on which the proposed action is based is a continuing one, no *cause of action* in respect of the act, neglect or default *accrues until* the act, neglect or default has ceased but the notice required by paragraph (a) of this subsection may be given and *an action may* thereafter *be brought* while the act, neglect or default continues." (emphasis added)

54 It is accepted that BAT's cause of action accrued on 5 August 1997. No notice in writing was given within the three month period specified in par (a) of s 6(1) of the Crown Suits Act. The Full Court, no doubt encouraged by the way in which the case then was put by the parties, treated the Crown Suits Act as applicable of its own force. The Full Court held that no notice was given "as soon as practicable" within the meaning of par (a) of s 6(1). The action had been commenced before the expiration of one year after 5 August 1997 so that par (b)

was satisfied. However, if s 6(1) of the Crown Suits Act otherwise applies in federal jurisdiction, the deficiency with respect to par (a) is fatal for BAT.

55 The effect of s 6(1) appears to be that, although a cause of action may have accrued, no right of action lies, and so no action may be brought or commenced, unless the requisite notice is given and the stipulated one year period has not expired. There is a question whether the sub-section imposes conditions which are of the essence of a new right, or bar existing causes of action. The distinction is drawn in various decisions of this Court, beginning with *The Crown v McNeil*[48]. The Crown Suits Act repealed the *Crown Suits Act* 1898 (WA) which was construed by Isaacs J in *McNeil*[49] as falling within the first category. That this is true of the present legislation is apparent when ss 5 and 6 are read together. The State subjects itself to action in the same manner as a subject but does so on the conditions specified in s 6.

56 This linkage between the two sections in the Crown Suits Act is important for present purposes. To speak of s 79 of the Judiciary Act "picking up" s 6 divorced from its attachment to s 5 would be to change or limit the meaning of s 6.

The submissions in this Court

57 BAT now puts its case in various ways. Initially, perhaps reflecting the emphasis given to the State legislation in the Supreme Court, it focused its submissions upon the interaction between s 6(1) of the Crown Suits Act and the provisions of ss 64 and 79 of the Judiciary Act. However, as the argument developed, BAT fixed upon an anterior starting point. This concerns the nature and content of the matter arising under the Constitution, jurisdiction in respect of which was conferred upon the Supreme Court by s 39(2) of the Judiciary Act.

Sections 76(i) and 78 of the Constitution

58 Section 76(i) of the Constitution does not identify any particular party, though the bodies politic to the federal compact, or one or more of them, may

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48 (1922) 31 CLR 76 at 99-101. See also *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 276-277; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 130-131, 156; *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507-508 [11]-[12].

49 (1922) 31 CLR 76 at 99-101.

readily be contemplated as parties in constitutional cases. Section 76(i) may be contrasted with s 75(iv) which fixes upon the presence of a State as a party as the connecting factor for the attraction of federal jurisdiction in matters (a) between States and (b) between one State and a resident of another State. (Section 75(iv) also applies to matters between those who are residents of different States but nothing turns on this for present purposes.) Unlike s 76(i), in none of its operations does s 75(iv) identify the content of the matter which otherwise answers these descriptions as to parties.

59 Section 78 of the Constitution states:

> "The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power."

It follows from the judgments of Brennan CJ, Gaudron J, and Gummow and Kirby JJ in *The Commonwealth v Mewett*[50] and of McHugh J in *Austral Pacific Group Ltd (In liq) v Airservices Australia*[51] that, in an action against the Commonwealth in contract and tort, it is the common law that provides the source of liability and s 75(iii) denies the operation of what otherwise might be doctrines of Crown or Executive immunity which could be pleaded in bar to that common law cause of action. The result is that a cause of action in tort or contract can be brought against the Commonwealth by virtue of the combined operation of the common law of Australia and the Constitution itself without reference to a federal law based upon s 78 of the Constitution. The same may be said of actions in tort or contract between States or between a State and a resident of another State to which s 75(iv) applies. But the action by BAT does not answer any of the descriptions of "matter" given in s 75(iv).

60 The power conferred by s 78 will have a field of operation where a law of the Parliament which confers jurisdiction with respect to matters identified in one or more of the paragraphs in s 76. Thus, a law under which there arises a matter in which original jurisdiction is conferred for s 76(ii) may give a new substantive right against the Commonwealth or a State[52]. The present case concerns legislation implementing the power, not conferred by s 76(ii), but by s 76(i). There is, as mentioned above, no express identification of any party in the text of s 76(i) and the conferral of jurisdiction by s 39(2) of the Judiciary Act with

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50 (1997) 191 CLR 471 at 491, 527, 550-551.

51 (2000) 203 CLR 136 at 157 [59].

52 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 551.

respect to the Supreme Court (as by s 30(a) with respect to this Court) does not do more than invoke the terms of s 76(i). Nevertheless, as a matter of necessary implication, the conferring of jurisdiction with respect to matters arising under the Constitution (or involving its interpretation) involves the conferral of any necessary right to proceed against a State as a party in that matter.

61 The Constitution contains various provisions imposing obligations or restraints upon the exercise of the legislative, executive and judicial powers of the State. Section 77(ii) authorises the making of federal laws which define the extent to which the jurisdiction of a federal court is exclusive of that which "belongs to" the courts of the States. Section 114 forbids a State, without the consent of the Parliament of the Commonwealth, raising or maintaining any naval or military force. Section 115 forbids the States to coin money. Section 90, which is in point in this litigation, has the effect of denying the competency of the State legislatures to impose duties of customs or of excise and to grant bounties on the production or export of goods. Reference has been made to cases such as *Antill Ranger* and *Mason* which, at the time of their decision, reflected a particular interpretation of s 92 of the Constitution leading to the invalidity of various State legislation.

62 Thus, it is to be expected from the text and structure of the Constitution and the new federal legal order it established that matters will arise under the Constitution or involve its interpretation where one or more of the States is a party. In *Griffin v South Australia*[53], Isaacs ACJ said of s 76(i) that it "necessarily includes States as possible litigants". A law like s 39 of the Judiciary Act which invests jurisdiction in the terms of s 76(i) is a law which necessarily subjects the States to the relevant exercise of the judicial power of the Commonwealth to resolve the controversy reflected in the matter arising under the Constitution or involving its interpretation. Such a law may also be seen as an exercise of the power under s 78 to confer rights to proceed against the State in respect of a matter within the limits of the judicial power, namely within s 76(i). Historic common law doctrines which in England restricted the liability of the Crown or its amenability to suit cannot stand in the way of these conclusions[54].

63 This reasoning leads to the conclusion that in the present case no further federal law was required to render the State amenable to the exercise of the

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53 (1924) 35 CLR 200 at 205.

54 cf the remarks to similar effect of Lord Bingham of Cornhill in *Gairy v Attorney General of Grenada* [2002] 1 AC 167 at 178.

federal jurisdiction invoked by BAT when it instituted the consolidated action in the Supreme Court. As indicated earlier in these reasons, State legislation of itself could not control the constitution of the action or its outcome.

Section 79 of the Judiciary Act

64 The question then is whether, in addition to s 39(2) of the Judiciary Act, there is further federal legislation which requires some other outcome which is adverse to BAT and, if so, whether that legislation validly operates to achieve that result. It is in that way that ss 64 and 79 of the Judiciary Act enter the picture.

65 The common law of Australia respecting the action for money had and received supplies, to the extent that it is not qualified by relevantly applicable federal statute, the principles for the adjudication of the dispute respecting the repayment of moneys sought by BAT. Section 79 of the Judiciary Act directs where the Supreme Court is to go for the applicable statute law dealing with matters of procedure. But, as the phrase in s 79 "*including* the laws relating to procedure, evidence, and the competency of witnesses" shows, s 79 is not limited to laws of that description.

66 Section 79 states:

> "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."

BAT refers to the statement in *Solomons v District Court of New South Wales* by five members of the Court that the text of s 79 contains various limitations[55]:

> "First, the section operates only where there is already a court 'exercising federal jurisdiction', 'exercising' being used in the present continuous tense. Secondly, s 79 is addressed to those courts; the laws in question 'shall … be binding' upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws. Thirdly, the compulsive effect of the laws in question is limited to those 'cases to which they are applicable'. To that it may be

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55 (2002) 76 ALJR 1601 at 1606 [23]; 192 ALR 217 at 224.

added, fourthly, the binding operation of the State laws is 'except as otherwise provided by the *Constitution*'."

67 The third and fourth points are of importance for this appeal. The notion that the compulsive effect of the laws lifted up by s 79 is limited to those "cases to which they are applicable" is reflected in the statements made in various cases[56] that the State laws do not have their meaning changed. It is here that the interrelation between ss 5 and 6 of the Crown Suits Act is important. As indicated earlier in these reasons, to pick up s 6(1), divorced from its interrelation with s 5, would be to give it a changed meaning. Section 6 imposes a condition by which the State places itself, by dint of s 5, in the same position as a subject with respect to actions by and against the State. To pick up ss 5 and 6 and translate them into the federal jurisdiction invested by s 39(2) with respect to a matter arising under the Constitution or involving its interpretation, as with the action by BAT, would be a work of supererogation. This is because, as indicated earlier in these reasons, a federal law such as s 39(2) of the Judiciary Act which exercises the power given the Parliament by ss 76(i) and 77(iii) of the Constitution, where a State is a party to the controversy, necessarily also confers the right to proceed against the State. The terms of s 79 allow of such situations by the express limitations therein to accommodate what is "otherwise provided" in (i) the Constitution or (ii) the laws of the Commonwealth. Section 39(2) of the Judiciary Act, as applied in the present case, is such a law of the Commonwealth[57].

Section 64 of the Judiciary Act

68 There is an alternative or additional path by which s 79 is to be seen as not "picking up" s 6(1) of the Crown Suits Act. Section 64 of the Judiciary Act is a law of the Commonwealth which may "otherwise provide" within the meaning of s 79.

69 Section 64 states:

"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

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56 Collected in *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [13]. See also the remarks of Mason J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 94-95.

57 cf *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55.

be given and costs awarded on either side, as in a suit between subject and subject."

The term "suit" is defined in s 2 of the Judiciary Act as including "any action or original proceeding between parties". BAT submits that if, contrary to its primary submission, s 6(1) of the Crown Suits Act may be divorced in consideration from s 5 of that statute, it puts the State in a special position above that enjoyed by others bringing actions against the State. To apply s 6(1), by dint of s 79 of the Judiciary Act, as a surrogate federal law in the Supreme Court would deny the requirement by s 64 that the rights of BAT and the State in that action be as nearly as possible the same as those in a suit between subject and subject. That submission should be accepted and those to the contrary by the State and its supporting interveners should be rejected.

70 Section 64 replaced what in *Baume v The Commonwealth*[58] O'Connor J called the "temporary" statute, the *Claims against the Commonwealth Act* 1902 (Cth)[59]. O'Connor J pointed out[60] that "[t]he temporary Act of 1902 gave a right merely to petition the Crown in the form of a petition of right and it was in the power of the Government to appoint a nominal defendant, but if the Government refused to do so the subject had no remedy." That passage may require reconsideration in the light of *Air Canada v British Columbia (Attorney General)*[61]; there, mandamus issued to the Attorney-General of that Province to advise the Lieutenant Governor to grant a fiat to a petition of right under which a claim was made for the return of money levied by the Province under an allegedly invalid statute.

71 The significance of s 64 was seen by O'Connor J in *Baume* to lie in its emphasis upon "the equality of subject and Crown in litigation"[62]. That, however, does not fully identify the significance of s 64. It applies in any suit to

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58 (1906) 4 CLR (Pt 1) 97 at 119.

59 Section 8 stated that the statute was to expire on 31 December 1903, but it was repealed by s 3 of the Judiciary Act which commenced on 25 August 1903.

60 (1906) 4 CLR (Pt 1) 97 at 119. See also *Daly v State of Victoria* (1920) 28 CLR 395; (1921) 29 CLR 491.

61 [1986] 2 SCR 539.

62 (1906) 4 CLR (Pt 1) 97 at 119.

which the Commonwealth or a State is a party and, in *The Commonwealth v Miller*, Isaacs J pointed out[63]:

> "The full force of the provision is better appreciated if we suppose a case where the litigants are the Commonwealth on one side and a State on the other, or a case between two States."

72 That remark emphasised the importance of s 64 in the structure of federal jurisdiction which provided for species of litigation unknown at common law and in the Colonies before federation. The present litigation, a matter arising under the Constitution or involving its interpretation, is an example. For this reason, the progenitors in various of the Colonies, including Western Australia, of the Crown Suits Act and decisions such as *Farnell v Bowman*[64], whilst important, should not obscure the particular significance of s 64 in the federal constitutional system.

73 In *The Commonwealth v Anderson*[65], Dixon CJ emphasised that:

> "it is the rights of parties as in a suit between subject and subject, not the law, that are to apply as nearly as may be".

Thereafter, it was said in the joint judgment in *Bass v Permanent Trustee Co Ltd*[66]:

> "It was held in *Maguire v Simpson*[67] that s 64 of the *Judiciary Act* has an ambulatory operation so that it may extend rights in proceedings in

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63 (1910) 10 CLR 742 at 753.

64 (1887) 12 App Cas 643. See also Finn, "Claims Against the Government Legislation", in Finn (ed), *Essays on Law and Government*, vol 2, *The Citizen and the State in the Courts*, (1996), 25 at 26-32.

65 (1960) 105 CLR 303 at 310.

66 (1999) 198 CLR 334 at 350 [28].

67 (1977) 139 CLR 362 at 388 per Gibbs J, 395 per Stephen J, 397 per Mason J, 407 per Murphy J. See also *Moore v The Commonwealth* (1958) 99 CLR 177 at 182 per Dixon CJ; *Suehle v The Commonwealth* (1967) 116 CLR 353 at 356-357; *Downs v Williams* (1971) 126 CLR 61 at 100 per Gibbs J; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

which the Commonwealth or a State is a party by reference to subsequent legislation. It was also held in that case[68], and reaffirmed in *The Commonwealth v Evans Deakin Industries Ltd*[69], that s 64 operates to apply substantive as well as procedural laws, although that distinction is, perhaps, not one that sheds any great light on this or any other area of the law[70]. And, it follows from *Evans Deakin* that s 64 may operate to confer a cause of action against the Commonwealth which would not have existed 'if s 64 had not equated the substantive rights of the parties to those in a suit between subject and subject'[71]."

74 The Commonwealth, which intervenes partly in support of BAT and partly in support of the State, seeks leave to re-open *Maguire* and *Evans Deakin* in so far as they hold that s 64 applies to substantive and procedural laws of the States. Leave should be refused. First, *Maguire* was decided 25 years ago and has been applied on innumerable occasions in the exercise of federal jurisdiction by a range of courts. Secondly, the Commonwealth would limit s 64 to State laws answering its preferred description of "adjectival". What was said in *Bass* respecting the distinction between procedural and substantive laws would apply to this substituted distinction. Thirdly, this appeal can be decided, as already indicated, without any necessary reference to s 64.

75 With respect to *Evans Deakin*, a particular and further question arose from the circumstance that what was involved was a State statute which, on one view of the matter, created both right and remedy in such a fashion that one could not be dissociated from the other, with the result that the time when the right arose could not be deferred until the seeking of the remedy by the institution of an action. This was a point upon which Brennan J dissented[72]. That particular

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68 *Maguire v Simpson* (1977) 139 CLR 362 at 373 per Barwick CJ, 377-378, 388 per Gibbs J, 400 per Mason J, 405 per Jacobs J, 407 per Murphy J.

69 (1986) 161 CLR 254 at 262 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ. See also *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 476 per Hayne J.

70 See, eg, in relation to choice of law questions *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 57-58, 62 per Gaudron J. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 549-550 per Gummow and Kirby JJ.

71 *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 267, referring to *Pitcher v Federal Capital Commission* (1928) 41 CLR 385.

72 (1986) 161 CLR 254 at 276, 277. See also *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 142 [11], 158 [61].

difficulty does not arise in the present case. The source of right and remedy is found not in any State statute but in the interaction between the Constitution and the common law. Thus, this is not an appropriate occasion to consider whether the correctness of *Evans Deakin* should be reconsidered.

76 Three other principal objections were taken to the operation of s 64 in the manner for which BAT contends. The first reflected a submission for the Commonwealth in *Evans Deakin*[73]. This had been that s 64 could only apply where there existed a "validly constituted suit" to which the Commonwealth or a State was a party. However, in *Evans Deakin*, the majority said in their joint judgment[74]:

> "The Supreme Court is given jurisdiction to entertain a suit to which the Commonwealth is a party by the combined effect of s 39(2) of the *Judiciary Act* and s 75(iii) of the Constitution. When an action is brought against the Commonwealth in the Supreme Court the condition for the operation of s 64 is satisfied: see *The Commonwealth v Anderson*[75]. Once the suit is commenced the substantive rights of the parties shall be, as nearly as possible, as in a suit between subject and subject."

Likewise, in the present litigation, the Supreme Court was invested with jurisdiction by the combined effect of s 39(2) of the Judiciary Act and s 76(i) of the Constitution and when the action was brought in the Supreme Court the condition for the operation of s 64 was satisfied.

77 It was submitted against BAT nevertheless that the action in the Supreme Court was not "validly constituted". This was said to be because there had been a failure to comply with the notice provisions in s 6(1) of the Crown Suits Act, a matter which went to the existence of the cause of action. For the reasons given earlier, s 6(1) is to be read with s 5 and when so construed is not picked up and translated into federal law. That is because other provision is made by the laws referred to in the last paragraph which invested the Supreme Court with federal jurisdiction to entertain the action.

78 Secondly, it was submitted, particularly by New South Wales which intervened in support of the State, that the phrase in s 64 "as nearly as possible" was of decisive importance. The submission was that this criterion was

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73 (1986) 161 CLR 254 at 255, 256.

74 (1986) 161 CLR 254 at 264.

75 (1960) 105 CLR 303 at 310.

incapable of fulfilment here because to apply s 64 would prejudice the peculiar governmental interest in the protection of public revenue against reimbursement of moneys levied and collected without valid legislative mandate.

79 There have been differences of opinion respecting the significance of the phrase in question. In *The Commonwealth v Miller*[76], this Court rejected the proposition that the phrase excluded the Commonwealth from an obligation to give discovery because the requirement for an affidavit attesting to the discovery "would be an indignity"[77] or because the Commonwealth as a body politic could not take an oath. With respect to the latter submission, Higgins J said[78]:

> "Therefore, to comply with the words 'as nearly as possible' in sec 64, the obvious course is to direct that the answer to interrogatories and the affidavit of discovery be made by some suitable officer of the Commonwealth."

80 Later, Kitto J, speaking of a particular State law, said[79]:

> "[I]f, in its original setting any provision of that law was so expressed as not to apply to the Crown, s 64 nevertheless explicitly makes it applicable, *as completely as possible*, to the determination of the rights of the Commonwealth or State against its opponents and of their rights against the Commonwealth or State". (emphasis added)

81 On the other hand, in *South Australia v The Commonwealth*[80], Dixon CJ made observations from which the State (and those interveners which support it) sought to draw comfort for their case that s 64 can have no operation with respect to s 6 of the Crown Suits Act where what is sought is the recovery of moneys extracted by the State without the authority of valid statute. In that case, his Honour indicated that because the subject-matters of private and public law were "necessarily different", there would be some respects in which rights of parties could not be rendered "as nearly as possible" the same within the meaning of

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76 (1910) 10 CLR 742.

77 (1910) 10 CLR 742 at 756.

78 (1910) 10 CLR 742 at 758.

79 *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397 at 427.

80 (1962) 108 CLR 130 at 139-141.

s 64. Examples of that impossibility had been given by Else-Mitchell J in *The Commonwealth v Lawrence*[81].

82 Later, in *The Commonwealth v Burns*[82], Newton J noted with apparent approval the absence of a submission that s 64 prevented the application of the principle in *Auckland Harbour Board v The King*[83]. This was to the effect that payments made out of consolidated revenue without legislative authority might be recovered by the Executive Government and that, for example, questions of estoppel which might arise in an action between citizens were not relevant. The effect of the submission of the State is that similar reasoning applies where recovery is sought not by but against the State in respect not of moneys disbursed without authority but moneys collected without authority.

83 The truth of the matter is to the contrary. *Auckland Harbour Board* reflects the fundamental constitutional principle prohibiting the Executive Goverment from spending public funds except under legislative authority[84]. Further, that authority of the legislature, in Australia, will be absent where the legislation relied upon is invalid, here by reason of the operation of s 90 of the Constitution. The action by BAT is in furtherance of rather than in opposition to the operation of basic constitutional principle.

84 In *Amax Potash Ltd v Saskatchewan*[85], the Supreme Court of Canada said of the unsuccessful submissions in that case by Saskatchewan and Alberta:

> "The two Provinces apparently find nothing inconsistent or repellent in the contention that a subject can be barred from recovery of sums paid to the Crown under protest, in response to the compulsion of the legislation later found to be *ultra vires*."

However, those remarks are not directly in point for this appeal. The phrase presently under consideration does not appear in legislation barring such recovery. The extent to which the Commonwealth might legislate to curtail or

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81 (1960) 77 WN (NSW) 538 at 540-541.

82 [1971] VR 825 at 830.

83 [1924] AC 318 at 326-327.

84 See *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 575-576, 597-599.

85 [1977] 2 SCR 576 at 590.

limit the pursuit by BAT of the rights to recovery which it may otherwise have is not in issue here. Rather, the question is whether a facilitative provision such as s 64 of the Judiciary Act, which otherwise assists BAT, should be given a limited operation by an expanded, and contradictory, reading of the phrase "as nearly as possible". The submissions made against BAT respecting the construction of s 64 should be rejected.

85 Finally, a submission by South Australia, which also intervened, should be noted. Whilst it is well settled that s 64 applies only to suits in federal jurisdiction[86], even within that field of operation of the section there are statements in the authorities which question the valid operation of s 64 in suits to which the State is a party, particularly (which is not the case here) the moving party[87]. In *Evans Deakin*, doubt was expressed in the joint judgment[88]:

> "whether the Commonwealth Parliament has a general power to legislate to affect the substantive rights of the States in proceedings in the exercise of federal jurisdiction".

It was upon such statements that South Australia built its submissions.

86 South Australia submitted that (i) the only available power to support s 64 in relation to the States was s 78 of the Constitution; (ii) s 78 is limited to "rights to proceed *against* ... a State"; (iii) s 64 speaks more broadly of "any suit to which the Commonwealth or a State is a party" and thus is invalid in its application to the States; and (iv) s 64 could not be "read down" other than by excluding the States from its operation and therefore wholly fails.

87 Submission (iv) should be rejected, thereby making it unnecessary to rule upon the preceding submissions. The Commonwealth correctly submitted that upon the hypothesis presented by South Australia, s 64 might be read down to operate differentially between the Commonwealth and the States, and to apply to the suits a federal jurisdiction, including those based upon s 76(i) of the Constitution, in which the State has the character of a defendant.

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86 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 223, 234; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 474; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 414 [48], 439 [135].

87 For example, *Maguire v Simpson* (1977) 139 CLR 362 at 401, 404-405; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 203.

88 (1986) 161 CLR 254 at 263.

Conclusions

88 The appeal should be allowed with costs. Orders 2, 3 and 4 of the orders made by the Full Court should be set aside. In place thereof, the appeal to the Full Court should be dismissed with costs.

89 KIRBY J. This is another appeal arising out of the constitutional invalidation of the State tobacco licensing laws operating before 1997. Pursuant to such laws, the States of the Commonwealth raised very large amounts of revenue. By this Court's decision in *Ha v New South Wales*[89] the State laws were held invalid. Numerous problems then arose as to the entitlement to recover payments that had been made on the erroneous assumption of the validity of those laws.

"An important constitutional value"

90 *Recovery of invalid taxes*: In *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*, Mason CJ observed[90]:

> "There is [a] fundamental principle of public law that no tax can be levied by the executive government without parliamentary authority, a principle which traces back to the Bill of Rights 1688 (Imp)[91]. In accordance with that principle, the Crown cannot assert an entitlement to retain money paid by way of causative mistake as and for tax that is not payable in the absence of circumstances which disentitle the payer from recovery. It would be subversive of an important constitutional value if this Court were to endorse a principle of law which, in the absence of such circumstances, authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake."

91 In a federal polity, such as the Commonwealth of Australia, the foregoing passage is necessarily understood as requiring a clarification of the "fundamental principle of public law" so that no tax may be levied by an executive government without *valid* parliamentary authority. This additional requirement derives from the language and implications of the Constitution itself.

92 The foregoing is the starting point for analysis in the present appeal[92]. It was overlooked by the Full Court of the Supreme Court of Western Australia

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89 (1997) 189 CLR 465.

90 (1994) 182 CLR 51 at 69. See also *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 597-599 where the history of unconstitutional exaction of taxation is described by McHugh J.

91 (1688) 1 W & M, Sess 2, c 2 ("By levying Money for and to the Use of the Crown, by pretence of Prerogative, for other Time, and in other Manner, than the same was granted by Parliament").

92 From a judgment of the Full Court of the Supreme Court of Western Australia: *The State of Western Australia v Rothmans of Pall Mall (Australia) Ltd* [2001]

(Footnote continues on next page)

from which this appeal comes. It is a point that distinguishes this case from earlier proceedings in *Roxborough v Rothmans of Pall Mall Australia Ltd*[93] in which an attempt was made (successful in the event) to recover moneys paid by retailers to a wholesaler pursuant to contracts framed to conform to the system of State licence fees on the sale of tobacco products. The wholesaler in that case, which failed in its resistance to the action of the retailers, was the present appellant, British American Tobacco Australia Ltd ("BAT"), then known by its former name. The foundation for the proceedings was the decision of this Court in *Ha*[94]. The basis of that decision was that, properly understood, the State law imposed a duty of excise. That is a form of taxation the imposition of which is reserved by the Constitution to the Federal Parliament[95].

93 In *Roxborough*[96], I dissented from the conclusion that the retailers could recover the payments that they had made. The point of distinction between the approach I favoured and that of the majority was a view I took of the implications of the Constitution for the principles of the common law and of equity as they bound private parties. In the present case, the law of a different State is involved[97]. But there is no relevant distinction of legal principle on that ground.

94 *Centrality of the Constitution*: It was central to my reasoning in *Roxborough* (as it is here) that this Court is "obliged to solve the legal problem that has arisen … by reference to the constitutional invalidation of a taxation statute"[98]. Rules of the common law and of equity upon which a party might rely to achieve recovery in such circumstances "always adapt themselves to the Constitution"[99]. They offer a solution necessarily "fashioned in a way that is

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WASCA 25. The Full Court reversed a decision of Master Sanderson who, on 14 August 2000, had dismissed the State's application for summary judgment.

93 (2001) 208 CLR 516.

94 (1997) 189 CLR 465.

95 Constitution, s 90. Note also the special provisions in relation to Western Australia in s 95 of the Constitution, now spent.

96 (2001) 208 CLR 516 at 559 [111], 579-580 [174].

97 The State law in *Ha* was the *Business Franchise Licences (Tobacco) Act* 1987 (NSW). In the present case, the State law is the *Business Franchise (Tobacco) Act* 1975 (WA).

98 *Roxborough* (2001) 208 CLR 516 at 560-561 [117].

99 *Roxborough* (2001) 208 CLR 516 at 563 [124].

harmonious with the postulates upon which constitutional invalidity, and its outcomes, fall to be decided"[100].

95 Because of the "important constitutional value" referred to by Mason CJ in *Royal Insurance*, I suggested in *Roxborough* that a different principle would apply where proceedings were brought not (as there) between private parties but in order to oblige a governmental party "to disgorge funds unlawfully collected by invalid taxes"[101]. Such a distinction has been recognised in judicial decisions both in the United States of America and in Europe. Ultimately, such a distinction "derives its justification from the way in which the constitutional context shapes the applicable legal rules"[102]. In the case of a governmental defendant, there are special reasons, traceable to public law and ultimately to the Constitution, that oblige recovery[103]. This is so because recovery from the polity that exacts an unconstitutional tax is ordinarily the most effective, appropriate and just way of enforcing the "important constitutional value" at stake and discouraging future breach of it.

96 The issue that occasioned my dissent in *Roxborough* no longer separates me from the other members of this Court. In this case, the Constitution is accepted as the starting point for deriving the legal rights and obligations of the parties, both substantive and procedural. On the face of things, the first respondent, the State of Western Australia ("the State"), which exacted the constitutionally invalid tax from the appellant, BAT, should therefore be required to surrender the tax it unlawfully collected and to refund the same to the taxpayer that paid the tax. For my analysis of the issues in this appeal, this "important constitutional value" is crucial to the resolution of the remaining points of controversy that fall for decision.

The facts and legislation

97 *The facts and statutes*: The facts are explained in other reasons[104]. The applicable legislation may also be found there. Leaving aside the Constitution itself[105], the relevant legislation falls into four categories. These are (1) the

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100 *Roxborough* (2001) 208 CLR 516 at 563 [124].

101 *Roxborough* (2001) 208 CLR 516 at 567-568 [136].

102 *Roxborough* (2001) 208 CLR 516 at 569 [142].

103 See *Roxborough* (2001) 208 CLR 516 at 574 [155].

104 Reasons of Gleeson CJ at [1]-[5]; reasons of McHugh, Gummow and Hayne JJ ("joint reasons") at [28]-[31], [47].

105 Notably ss 75(iii) and (iv), 76(i) and 77(iii).

applicable provisions of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[106]; (2) the provisions of the *Business Franchise (Tobacco) Act* 1975 (WA) ("the Franchise Act") effectively invalidated by the decision of this Court in *Ha*; (3) the provisions of the *Crown Suits Act* 1947 (WA) ("the Crown Suits Act")[107]; and (4) a provision of the *Limitation Act* 1935 (WA)[108] ("the Limitation Act").

98 Also set out in other reasons is a description of the course that these proceedings took in the Supreme Court of Western Australia. Doubtless responding to the arguments of the parties, that Court did not notice that the proceedings were in federal jurisdiction, involving therefore the exercise of the judicial power of the Commonwealth. That was undoubtedly the case, at least because the matter brought by BAT against the State was one "arising under [the] Constitution, or involving its interpretation"[109]. With respect to such matters, the Federal Parliament, pursuant to the Constitution, has made a law investing a court of a State with the relevant federal jurisdiction, namely the Judiciary Act, s 39(2).

99 *Implications of federal jurisdiction*: It follows from these incontestable facts that the analysis whereby the Full Court held that s 6(1) of the Crown Suits Act operated of its own force to govern the outcome of the proceedings could not be sustained as a matter of law. As it was the failure of BAT to give the notice provided for in s 6(1) that had founded the conclusion of the Full Court that BAT's proceedings were bound to fail, the premise upon which summary judgment was entered by the Full Court against BAT was knocked away. Once this point was established, the balance of the proceedings in this Court became a search on the part of the State (supported in this respect by other States intervening and, in large part, by the Commonwealth) for provisions of federal law that would sustain or uphold, as applicable in federal jurisdiction, the notice requirements of the Crown Suits Act or (as a fallback position) a notice requirement of the Limitation Act.

100 In this way, the central issue in this appeal became one of reconciling two important constitutional values. The first, already mentioned, is the principle that a polity that lacks constitutional authority to receive payments extracted from a taxpayer should normally be obliged to refund such payments. The second is the principle that a key invention of the Constitution, whereby federal jurisdiction may be vested in State courts, should normally be safeguarded and upheld, not

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106 Especially ss 39(2), 58, 64, 79.

107 ss 5 and 6. See joint reasons at [52]-[53].

108 s 47A. See reasons of Gleeson CJ at [4], [23].

109 Constitution, s 76(i).

stultified[110]. This can best be achieved in practice if, to the full extent provided by law[111], State laws are picked up, and adapted, so as to apply to the resolution of matters in federal jurisdiction. BAT's arguments, in effect, laid emphasis upon the first constitutional value. The State, and the interveners, laid emphasis upon the second.

Common ground

101 There was much common ground between the parties. It permitted this Court to concentrate on the differences that emerged before it.

102 Thus, there was no suggestion that the decision in *Ha* should be reopened or that the principle in that case did not apply to the Franchise Act of Western Australia. Nor was it contested that BAT's action against the State attracted federal jurisdiction and that the Supreme Court of Western Australia was exercising such jurisdiction when it purported to give summary judgment in favour of the State.

103 The amenability to summary judgment of BAT's action was ultimately the only legal issue in contest. That contest was to be resolved by the application of the principles of law that govern the provision of summary judgment. Such relief is not restricted to a case that is simple or self-evident. Establishing that a party has no reasonably arguable cause of action may sometimes require extended legal analysis[112]. In the case of novel causes of action, a measure of caution should be exercised in providing summary judgment[113]. This is especially so where the facts, adduced at trial, might cast light and colour upon the resolution of the legal questions. But no such concerns arise on the facts of the present appeal.

104 BAT accepted that, if s 6 of the Crown Suits Act applied to its proceedings, it had not satisfied the obligation to give notice to the State before

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110 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 591 [68]; *Solomons v District Court of New South Wales* (2002) 76 ALJR 1601 at 1617 [83]; 192 ALR 217 at 238-239.

111 Under the Constitution or the Judiciary Act.

112 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 84; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 268 [162].

113 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 36; cf *Lenah Game Meats* (2001) 208 CLR 199 at 268 [161]; *Wickstead v Browne* (1992) 30 NSWLR 1 at 5.

action as there provided. On the face of things, if the premise were established, that conclusion would justify the entry of summary judgment. On the other hand, if s 6 of the Crown Suits Act did not apply to the proceedings brought by BAT against the State (subject to the supplementary argument concerning the applicability of the Limitation Act), the judgment would have to be set aside. The matter would then proceed to trial on the defences raising legal issues that have not so far been considered.

105 The high measure of concurrence between the parties thus presents a comparatively simple principal question. Yet it is not one simple to answer. It is whether, as a matter of law, s 6 of the Crown Suits Act applied to BAT's matter in federal jurisdiction. If it did, the judgment of the Full Court, although for different reasons, would be affirmed. If it did not, the judgment would have to be set aside and the matter remitted for trial unless the Limitation Act defence could sustain the summary judgment.

106 There are three preliminary points that I must mention. They concern assumptions that were made in presenting the foregoing issue for decision in this Court. I must identify them because, otherwise, it will be assumed that I make the assumptions inherent in the reasoning of others. I do not. It is important for me to say why this is so. No judge is bound to accept the concessions of parties, or the assumptions that they adopt about the law – least of all the Constitution[114]. One day the assumptions accepted in this case will be challenged. Other important and arguable issues will then be disentangled.

Diversity jurisdiction: a constitutional foundation?

107 *Suits by interstate "residents"*: By s 75(iv) of the Constitution, it is provided that this Court shall have original jurisdiction in all matters:

> "between States, or between residents of different States, or between a State and a resident of another State".

108 BAT's statement of claim, annexed to the writ issued out of the Supreme Court of Western Australia, asserts in par 1 that BAT is "a company incorporated in the State of New South Wales". The second respondent, the Commissioner of State Taxation of Western Australia, was sued by that statutory title. The Commissioner is no longer an active party to these proceedings. In this Court, BAT accepted that its action should be confined to its claim against the State. Nevertheless, when the proceedings were commenced in the Supreme Court of Western Australia, clearly the Commissioner was a resident of that State. On the face of things, it would therefore appear that the matter propounded in the

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114 *Roberts v Bass* (2002) 77 ALJR 292 at 320-321 [143]-[144]; 194 ALR 161 at 199.

proceedings was one "between residents of different States" or "between a State and a resident of another State". Without any resort to laws enacted by the Federal Parliament, and on the basis of an express constitutional provision, federal jurisdiction would be established. The judicial power of the Commonwealth would be engaged.

109 The supposed defect in this reasoning about the constitutional words lies in early decisions of this Court holding that a corporation cannot be a "resident" within s 75(iv) of the Constitution[115]. The decisions establishing that principle involved a remarkable narrowing of the constitutional language. In my view, it is a narrowing unjustified by the text or the context. In many ways it is reminiscent of judicial holdings in Australia and elsewhere at the same time to the effect that a "person", when referred to in legislation (for example for the purpose of admission to professional practice) did not include a woman[116]. The only justification for such a narrow interpretation of s 75(iv) of the Constitution was the expressed judicial fear about an extension of the jurisdiction of this Court that might result in an inundation of work that this Court could not easily deflect to other courts in the views then held concerning the obligation of this Court to discharge a jurisdiction conferred on it by the Constitution.

110 Today, such fears have receded. The reasons include the statutory powers of this Court to remit proceedings, including to a court of a State where there is at any time pending a cause involving the exercise of federal jurisdiction[117]. True, a new spectre has arisen, to revive the early fears, following the action of the Federal Parliament in purporting to define the jurisdiction of federal courts other than this Court, and to provide for exclusive jurisdiction of matters in federal courts, with the apparent intent to restrict, or prevent, remittal or removal of causes to other courts[118]. But such transitory concerns cannot control the

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115 *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 307, 331-337; *Watson and Godfrey v Cameron* (1928) 40 CLR 446 at 448. There are many other illustrations of resistance to s 75(iv) of the Constitution. See for example *R v Langdon; Ex parte Langdon* (1953) 88 CLR 158 at 161, 163; *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169.

116 *In re Edith Haynes* (1904) 6 WAR 209; Graycar and Morgan, *The Hidden Gender of Law*, 2nd ed (2002) at 42.

117 Judiciary Act, s 42. See also s 40(2).

118 See for example *Migration Act* 1958 (Cth) s 476(4); cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 132 [134]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407-408 [7]-[15]; 168 ALR 407 at 409-411.

meaning of constitutional language[119]. In a proper case, this Court should reconsider the early determination that corporations, including statutory corporations, cannot be "residents" of a different State for the purposes of s 75(iv) of the Constitution. Self-evidently, corporations are, and were at the time when the Constitution was made, legal persons. They were then, and still are, frequent litigants in the courts. Their existence was contemplated by the Constitution itself[120]. Although in 1985 in *Crouch v Commissioner for Railways (Q)*[121] this Court declined to reopen its early holding on the meaning of s 75(iv), the decision is open to the strongest doubt and criticism. In my view it is wrong[122]. One day this Court will say so.

111 As I have pointed out, there was another (statutory) foundation for the claim to federal jurisdiction, namely the power in s 76(i) of the Constitution whereby the Parliament could make laws conferring original jurisdiction on this Court in any matter "arising under this Constitution, or involving its interpretation". BAT's claim involves the interpretation of the Constitution (and on one view arises under its terms). It therefore attracts federal jurisdiction on that basis.

112 *Constitutional foundation for suits*: I have mentioned this first preliminary point for a purpose. In respect of s 76 of the Constitution, and the list of matters there appearing, federal jurisdiction has only an indirect foothold in the Constitution. There it is dependent upon the making of laws by the Federal Parliament. In the matters mentioned in s 75, including s 75(iv), federal jurisdiction is conferred by the Constitution itself. By implication, the matters of federal jurisdiction expressly provided by the Constitution are core or cardinal matters for which an irreducible minimum jurisdiction was thought to be constitutionally essential.

113 Leaving aside the provisions of pars (i) and (ii) of s 75 (which concern relations with other countries) and par (v) (which is a vital means of upholding the rule of law in relation to the Executive Government of the Commonwealth[123])

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119 There are, in any case, sanctions that may be imposed by the Court against needless invocation of diversity jurisdiction, including in costs. See for example *Cox v Journeaux* (1934) 52 CLR 282.

120 eg Constitution, s 51(xiii), (xx).

121 (1985) 159 CLR 22 at 24.

122 cf *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407 at 426.

123 *Plaintiff S157/2002 v The Commonwealth* (2003) 77 ALJR 454 at 473-475 [98]-[104]; 195 ALR 24 at 50-52 applying *Australian Communist Party v The*

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the provisions of pars (iii) and (iv) reflect, in the Australian context, an important feature of a federal polity. Such a polity is made up of a national entity (in Australia, the Commonwealth) and subnational entities (the States). The powers of government of the nation (legislative, executive and judicial) are divided and distributed, according to the Constitution, between these entities. Inevitably, there will be disputes as to where power in a particular case lies. It is inherent in s 75(iii) and (iv) that the resolution of such questions involves federal jurisdiction and the exercise of the judicial power of the Commonwealth. It is to prevent any risk that, misguidedly or by oversight or mistake, the Parliament might restrict the exercise of federal jurisdiction in such matters, that express provision is made by s 75, not only for the existence of the federal jurisdiction in question but for its conferral on this Court as an irreducible minimum.

114 It would be hard to imagine a clearer indication than appears in s 75(iii) and (iv) of the recognition that, in matters involving the respective powers of the Commonwealth and the States, where questions of constitutional validity of governmental acts are commonly difficult or impossible to avoid, a specific means and judicial venue are provided for their resolution. It would be inconsistent with this explicit constitutional arrangement for legislation to be enacted, whether federal or State, that purported to constrain or restrict the federal jurisdiction so provided in a way limiting or curtailing its exercise.

115 By s 78 of the Constitution, the Federal Parliament is empowered to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power". However, that provision, appearing after the three constitutional sections providing for federal jurisdiction, can only be a facultative one. It is limited by its terms to conferring "rights". Such "rights" are only those that permit the beneficiary "to proceed". And the rights to proceed are in respect of the "matters within the limits of the judicial power".

116 *Irreducible jurisdiction and power*: To the extent that provisions of the Judiciary Act[124] rest for their validity upon the terms of s 78 of the Constitution, such provisions must partake of the beneficial character contemplated by that section. They are not to be read as diminishing, restricting or imposing limitations upon the incidents of federal jurisdiction necessary to fulfil the scheme of the Constitution. On the contrary, this Court has repeatedly held that s 78 empowers the Parliament, as necessary, to create and confer substantive

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Commonwealth (1951) 83 CLR 1 at 193; cf *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89].

124 Notably ss 39, 64 and 79.

rights, not just procedural rights[125]. Implicit in the constitutional scheme is the provision to the independent Judicature (and in the matters mentioned in s 75, irreducibly to this Court) of the judicial power of the Commonwealth to resolve conflicts of a defined constitutional character. Relevantly, BAT's claim is such a conflict.

117 The foregoing conclusion helps to clarify the essential federal and constitutional character of BAT's claim and of the jurisdiction exercised by the courts of Australia to resolve contested questions about its enforcement.

Existence of a constitutional cause of action

118 *Statutory and constitutional rights*: A second preliminary question arises as to whether it is necessarily implicit in the Constitution itself that a cause of action exists upon which a party may sue, to vindicate its constitutional rights, at least where those rights involve a claim to reimbursement of an invalidly extracted tax.

119 Such a proposition is by no means heterodox. If it can be held (as it often is) that an ordinary statute gives rise to a private cause of action so as to vindicate its provisions[126], how much more powerful are the arguments for recognising such an implication in a constitutional text? Typically, such a text concerns very important matters and is expressed in succinct language that does not purport to cover, in terms, every aspect of its application. Necessarily, implications must be derived from the text and structure of the document. The history of the Australian Constitution has repeatedly demonstrated the importance of

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125 *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397 at 427; *Maguire v Simpson* (1977) 139 CLR 362 at 370, 400-401, 405; *Bropho v Western Australia* (1990) 171 CLR 1 at 20-21; cf *Peters* (1991) 24 NSWLR 407 at 430-434.

126 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 422-423 [250]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 76-80 [213]-[222] referring to *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 736.

constitutional implications[127]. Nowhere has this been more so than in the case of the exercise of the judicial power[128].

120 In the present proceedings, the relevant questions would be these: Having regard to the express terms of s 90 of the Constitution, which provides that the imposition of duties of excise is exclusive to the Federal Parliament, where it is shown that a State Parliament has purported to impose a duty of excise on a taxpayer, in breach of that constitutional proscription, does an implied constitutional cause of action exist by which the taxpayer may recover the invalid impost paid on the mistaken assumption that the State law was valid? Is such a cause of action implicit as a means of vindicating the proscription of the Constitution?

121 If such an implied cause of action were found in the Constitution, any purported intrusion of State legislation to defeat or limit its successful enforcement would be unlikely to succeed. Federal legislation might regulate the enforcement of such a claim. But it would seem unlikely that a State law, purporting to defend the State against recovery designed to vindicate the Constitution, would be picked up and treated as "applicable" to a claim in a State court exercising federal jurisdiction in such a matter. (In the view that I take of s 75(iv) such a cause of action between BAT and the State could always be brought in the original jurisdiction of this Court circumventing any need to bring proceedings in a State court or to rely on State laws to render the State liable as such).

122 *United States analogues*: In *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*[129], the Supreme Court of the United States decided an analogous question arising under the United States Constitution. The

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127 eg *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Austin v The Commonwealth* (2003) 77 ALJR 491 at 497 [19]-[20], 517 [116], 536 [218], 547 [275]; 195 ALR 321 at 328-329, 355, 382, 397.

128 eg *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. In some cases the emergence of the implication is incomplete. See for example *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486-491 and 501-503; cf 466-469, 474-480 and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] per Gaudron J and at 373 [116] of my own reasons.

129 403 US 388 (1971).

appellant there claimed to have suffered an actionable wrong by reason of the entry into his apartment of federal agents who, without warrant, searched the apartment and arrested him on narcotics charges, allegedly without probable cause. He brought proceedings in the federal District Court claiming damages. That Court dismissed the suit on the basis that there was no federal cause of action[130]. However, the Supreme Court upheld the argument that there was a constitutional cause of action based on breach of the Fourth Amendment[131]. The availability of such an action had been a matter of uncertainty for some time[132].

123 It was central to the reasoning of Brennan J, who wrote the opinion of the Supreme Court of the United States, that the Constitution imposed a limitation on the exercise of governmental power[133] and that damages constituted a conventional remedy, in the common law legal system, for the vindication of rights in the event of an invasion of personal interests[134]. His Honour cited *Marbury v Madison*[135] to demonstrate that:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

124 In *Bivens* it was held that the appellant did not have to prove that the provision of damages was *essential* to uphold the Constitution in order to establish this right of action. It was sufficient that he should show a violation of the Constitution to be "entitled to redress his injury through a particular remedial mechanism normally available in the federal courts"[136]. The same view has been taken in this Court concerning private causes of action based on ordinary statutory provisions. The existence of statutory procedures to uphold the statutory prescription is not necessarily fatal to the co-existence of an action for damages based on the statute.

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130 The District Court also held that the federal agents were immune from suit. The Court of Appeals affirmed the decision on the first ground only.

131 Brennan J delivered the opinion of the Court; Harlan J concurred in a separate opinion; Burger CJ, Black and Blackmun JJ dissented.

132 cf *Bell v Hood* 327 US 678 (1946).

133 *Bivens* 403 US 388 at 394 (1971).

134 403 US 388 at 395-396 (1971).

135 5 US 137 at 163 (1803) cited 403 US 388 at 397 (1971).

136 403 US 388 at 397 (1971).

125 The dissentients in the Supreme Court in *Bivens* feared what was termed "another avalanche of new federal cases"[137]. This was a view reminiscent of the early decisions in this Court on s 75(iv) of the Australian Constitution. The spectre of avalanches, floods and other natural catastrophes is often invoked by those who resist the orderly exposition and elaboration of the law according to principle. However, in *Bivens* that concern was rejected by the majority[138]. In every new thought about the law or the Constitution judicial anxieties of such a kind must be faced. The legal mind often displays a tendency to resist novelty because it challenges its repose. We must be alert to this trend so that we can avoid unwarranted manifestations of it.

126 Damages, in our law, include not only general damages in tort (of the kind for which Mr Bivens sued) but also special damages (for which BAT sues). Special damages include the recovery of a specific money sum founded in a cause of action framed in contract, including implied contract[139], on the principles of restitution[140] on the basis of a constructive trust or a *sui generis* cause of action based on the Constitution itself afforded to redress invalid governmental action taken under colour of office (*colore officii*)[141].

127 *Constitutional actions in Australia*: So far, this Court has not adopted a view of the enforcement of the Constitution that extends to implying from its terms (even language as emphatic and exclusory as s 90) an implied constitutional cause of action enjoyed by a party for redress in the case of a breach of a constitutional prohibition[142]. In *Kruger v The Commonwealth*[143] four members of the Court considered this issue explicitly in the circumstances of that case, namely Brennan CJ[144], Toohey J[145], Gaudron J[146] and Gummow J[147].

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137 403 US 388 at 430 per Blackmun J, diss (1971).

138 403 US 388 at 391 fn 4 (1971).

139 eg the *indebitatus* claim upheld in *Roxborough* (2001) 208 CLR 516 at 524-525 [14], 539 [62]; cf 574-577 [156]-[164].

140 *Roxborough* (2001) 208 CLR 516 at 570-574 [144]-[155] citing *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 177, 191 and *123 East Fifty-Fourth Street Inc v United States* 157 F 2d 68 (1946) per Learned Hand J.

141 *Roxborough* (2001) 208 CLR 516 at 563-570 [125]-[143].

142 Reasons of Gleeson CJ at [14]; joint reasons at [40].

143 (1997) 190 CLR 1.

144 (1997) 190 CLR 1 at 46-47.

Technically, for the purpose of deriving a binding rule from *Kruger* on this point, the reasoning of Gaudron J must be disregarded because her Honour was in dissent as to the ultimate disposition of the proceedings. However, from the answers given by the Court to the questions separated for decision in *Kruger* it is clear that the Court held that the Constitution did not contain any right, as alleged in that case, breach of which would give rise to a right of action sounding in damages[148].

128 It could be said that *Kruger* is distinguishable from the present case and that recovery of an invalid tax, collected in breach of a constitutional prohibition, is different from the causes of action propounded by the plaintiffs respectively in *Bivens* and *Kruger*. Nevertheless, there is no escaping the way in which this Court expressed its opinion in *Kruger*. A lot of words were written. But in the end, they come down to little more than Toohey J's aphorism that "[t]he implied limitation [in the Constitution] operates as a restriction on legislative power, not as grounding a cause of action"[149]. There is no suggestion in the reasoning in *Kruger* that a different approach would follow from an express constitutional prohibition such as that stated in s 90. The Court's approach was said by Brennan CJ to follow from a view of the Australian Constitution as an instrument of government and one "concerned with the powers and functions of government and the restraints upon their exercise"[150].

129 It is, with respect, an invalid leap of logic from the identification of the suggested character of the Constitution (even accepting it for the moment to be accurate and complete) to a conclusion that the instrument "reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes"[151]. Alike with the majority of the Supreme Court of the United States in *Bivens*, I see no reason to infer such a restrictive "intention". "Intention" is a judicial fiction. It can only be given content according to the Constitution's purposes, express or implied.

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145 (1997) 190 CLR 1 at 93.

146 (1997) 190 CLR 1 at 125-126.

147 (1997) 190 CLR 1 at 146-148.

148 See the answer to question 2: *Kruger* (1997) 190 CLR 1 at 176-177.

149 *Kruger* (1997) 190 CLR 1 at 93.

150 *James v The Commonwealth* (1939) 62 CLR 339 at 362 cited by Brennan CJ in *Kruger* (1997) 190 CLR 1 at 46.

151 *Kruger* (1997) 190 CLR 1 at 46.

Where the applicable purpose is to prohibit a State Parliament from imposing a duty of excise[152] my view is that the "intention" of the Constitution is to permit the right in those from whom the invalid "duty of excise" has been extracted to sue to obtain repayment of the sum.

130 In *Kruger*, Gaudron J was reassured in her conclusion that there was "no necessity to invent a new cause of action" because she had concluded that there were common law rights already available in that case which the plaintiffs could invoke to vindicate the rights that she held them to enjoy[153]. So it is now held, because BAT may sue the State on an *indebitatus* count at common law for moneys had and received by the State to the use of BAT as an exaction of an invalid duty of excise. The defect of this reasoning has been noted in earlier cases[154]. If a party must rely on common law rights to vindicate itself against governmental conduct beyond the powers provided by the Constitution (even, in this case, prohibited by its terms) that party is vulnerable to the legislative abolition of such rights. Alternatively, such rights might be so circumscribed by procedural requirements (such as a notice before action) or limitations imposed upon the bringing of proceedings, as effectively to limit or curtail the enforcement of such rights, although they derive ultimately from the constitutional prohibition.

131 If (as intuition suggests) such abolition or restriction could not validly be given effect, this must be so because ultimately the Constitution will itself recognise, and uphold, a private action brought to vindicate its provisions in this regard. Litigants already bring many proceedings of various kinds that invoke the beneficial protection of the Constitution. I am unpersuaded by the reasoning in *Kruger* that this Court should deny the kind of constitutional cause of action that the Supreme Court of the United States found implied in *Bivens*. If the New Zealand courts, following *Bivens*, can derive by the techniques of the common law an action for damages for the violation by public employees of the civil rights of others, without aid of an entrenched constitutional provision[155], how much stronger is the footing for such a claim in the Australian constitutional context? At least, how much stronger is such a claim in the case of a demand for the recovery of an unconstitutional tax exacted in the face of an explicit constitutional prohibition?

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152 As s 90 of the Constitution does.

153 *Kruger* (1997) 190 CLR 1 at 125-126.

154 *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 at 102-103 per Fullagar J.

155 *Simpson v Attorney-General (NZ) (Baigent's Case)* [1994] 3 NZLR 667 at 702 noted by Gummow J in *Kruger* (1997) 190 CLR 1 at 147.

132 In his reasons in *Kruger*, Gummow J drew comfort from the lack of necessity in this country that was said to have forced United States courts to provide remedies where, by contrast here, the Judiciary Act provides differently and the Constitution relates differently to the common law[156]. But what the Australian Parliament has enacted in the Judiciary Act, it may repeal[157]. As an issue of principle, in matters of constitutional doctrine, it is impossible to rely upon the terms of current legislation to vindicate the Constitution. It is true that, by decisions of this Court, the common law in Australia, unlike that of the United States, has a national character. However, that differentiation reinforces, and does not undermine, my approach.

133 It is impossible for the common law or the principles of equity[158] to conflict with the Constitution. Such law, including in respect of proceeding for the recovery of invalid payments, moulds itself to the constitutional provisions. The facts of this case make it simpler in Australia to invoke the common law and rules of equity to supplement, with a single national voice, the norms of the Constitution. Whatever dispute there may be about the provision of damages for implied constitutional torts (as upheld in *Bivens* and rejected in *Kruger*), a constitutional claim for reimbursement of an invalidly exacted tax is a much clearer case. In effect, it is no more than a constitutional means of upholding the "important constitutional value" mentioned earlier in these reasons[159]. The fact that there may presently be other common law and equitable remedies is irrelevant. Where the Constitution speaks clearly in terms of a prohibition, its words necessarily carry the power of its own vindication and enforcement.

134 *A constitutional source of rights*: It follows that, if I were approaching the question in this appeal as I think it should be answered, I would resolve it by reference to an implied cause of action, derived from the Constitution itself, permitting recovery of an invalid tax levied in breach of a constitutional provision. I would overrule *Kruger* to the extent that it holds otherwise. I do not accept the view that the leave of a majority of the Court is necessary for the correction of erroneous constitutional decisions[160]. There is no hint of such a

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156 *Kruger* (1997) 190 CLR 1 at 148 per Gummow J referring to *Lange* (1997) 189 CLR 520 at 562-564.

157 *Kartinyeri* (1998) 195 CLR 337 at 356-357 [15]-[16], 375-376 [66]-[70]; cf 419-422 [169]-[175].

158 *Lenah Game Meats* (2001) 208 CLR 199 at 279-280 [192].

159 *Royal Insurance* (1994) 182 CLR 51 at 69. See above at [90].

160 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 per Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ; cf *Re Governor, Goulburn*

(Footnote continues on next page)

procedural requirement in the Constitution itself and it cannot be imposed by judicial *fiat*.

135 In so far as the joint reasons[161] rely on what Gummow and Hayne JJ said in *Re Patterson; Ex parte Taylor*[162], I would point out that, on the constitutional question in that case, that was a dissenting opinion which evidenced an unwillingness to accept the majority holding overruling *Nolan v Minister for Immigration and Ethnic Affairs*[163]. In so far as the joint reasons in this case suggest that the Justices of this Court are bound by majority determinations about the meaning of the Constitution until a majority give permission to reopen past authority on the point[164], I disagree. It is neither what the Constitution says nor what the Justices of this Court have done, including in *Re Patterson*. Nor is such a course compatible with the special legal character of the basic law of a nation and the constitutional duty of this Court[165]. No Justice can be relieved of that duty, by a past or present majority in the Court – still less by the way the parties (who are so bound until the law is re-expressed by a majority of the Court) make concessions or conduct their litigation. It is by voices of the judges expressed in dissent[166] that parties may be encouraged eventually to raise objections about erroneous judicial interpretations. Only in that way is error ultimately corrected and the true meaning of the Constitution expounded.

136 This Court should read the Australian Constitution as a charter for the government of the Australian people. Intellectual limitations dating to a time when it was viewed as nothing more than an Imperial statute or an economic pact between colonies should long since have been discarded. History, including

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Correctional Centre; Ex parte Eastman (1999) 200 CLR 322 at 358 [95], 369-370 [122]; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 407 [58]; *Ha v New South Wales* (1996) 70 ALJR 611 at 614; 137 ALR 40 at 43-44.

161 Joint reasons at [38].

162 (2001) 207 CLR 391 at 473 [248]-[249].

163 (1988) 165 CLR 178; cf *Taylor* (2001) 207 CLR 391 at 491 [300] per Kirby J.

164 cf *Evda* (1984) 154 CLR 311 at 316 per Deane J.

165 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 395-397 per Windeyer J.

166 eg the long series of dissents of Isaacs J concerning the so called doctrine of immunity of State instrumentalities leading up to *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers Case*") (1920) 28 CLR 129. There are many other examples.

recent history, denies such a character to the Constitution. It is beyond time for this Court to recognise the need for a fresh approach to its interpretation: one more in harmony with the Constitution's function and purpose and with the mainstream of judicial opinion in the contemporary common law world[167]. Our Constitution is an instrument of government. But it is also a source of rights and obligations of the people, not necessarily dependent for their vindication upon legislation vulnerable to change or reliant upon governmental action susceptible to the power of interests that may not always coincide with those of the citizens.

137 These conclusions notwithstanding, because the majority of this Court approaches BAT's action in a different way, and views it as an action at common law that arises "under [the] Constitution, or involv[es] its interpretation"[168] (but is not sourced there with the consequences such a source would import) it is necessary for me, in the state of present authority, to pursue the same course.

The State, the Constitution and Crown suits

138 *Constitutional status of the States*: This brings me to a third preliminary point. It concerns the distinctive status of a State of the Commonwealth, summoned into existence by the Constitution.

139 Once the colonies named in s 6 of the covering clauses to the Constitution were "admitted into … the Commonwealth as States" they became, and were to be named, States as "parts of the Commonwealth"[169]. So also, in my opinion, were "the territories" there mentioned parts of the Commonwealth. This did not mean that the States' colonial history, origins and governance became irrelevant. Express provision was made for the continuance, as at the establishment of the Commonwealth, of "the Constitution of each State of the Commonwealth" until "altered in accordance with the Constitution of the State"[170]. The Constitution also saved the powers of the Parliament of a Colony which became the Parliament of a State[171] and of the laws in force in the Colony which continued in force in the State[172] until Parliament provided otherwise. Decisions of this Court

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167 Cooke, "Final Appeal Courts: Some Comparisons", (2003) 12 *Commonwealth Lawyer* 43 at 45.

168 Constitution, s 76(i).

169 *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12), s 6.

170 Constitution, s 106.

171 Constitution, s 107.

172 Constitution, s 108.

have made clear the features of constitutional continuity between the colonies, as they were, and the States, as they became[173].

140 Nevertheless, the federal arrangements established by the Constitution, and the necessary interrelationship between the States *inter se* (and to a limited extent, their respective relationships with the government of the United Kingdom[174]) made it impossible to conceive of the States, after federation, as merely the colonies retitled. Their position in the new federal Constitution was substantively different. As States, they partly share in the aggregate governmental powers of a new national entity, the Commonwealth of Australia. This change requires reconceptualisation of the legal character of the States. However, that process has taken a long time even to begin, such is the hold on the legal mind of entrenched notions.

141 *The States and Crown immunity*: In *The Commonwealth v Mewett*[175], Gummow J and I, after referring to the history of the doctrine of Crown immunity in England, pointed out that the doctrine could not make an easy passage into Australian constitutional law, at least once the federal Constitution established the Commonwealth and the States and postulated an independent judicature with the constitutional power and duty to decide controversies involving them.

142 As we pointed out in *Mewett*[176], a similar observation had earlier been made by Murphy J[177] in respect of the distinctive governmental character of the powers provided for in the Constitution. Yet, although these insights have become generally accepted[178] (and are endorsed by the reasoning of other members of this Court in this case[179]), historically they took a long time to emerge. Until they became accepted, there was a great deal of erroneous thinking concerning the constitutional character of a State of the Commonwealth.

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173 *Yougarla v Western Australia* (2001) 207 CLR 344 at 369 [64], 377-378 [89].

174 See Constitution, ss 58, 59, 74; cf s 51(xxxviii).

175 (1997) 191 CLR 471 at 542-545.

176 (1997) 191 CLR 471 at 546-55; see also at 491 per Brennan CJ and at 527 per Gaudron J.

177 In *Johnstone v The Commonwealth* (1979) 143 CLR 398 at 406.

178 See for example *Austral Pacific Group Ltd (In Liq) v Airservices Australia* (2000) 203 CLR 136 at 157 [59] per McHugh J.

179 See for example reasons of Gleeson CJ at [11]-[12] and joint reasons at [59].

This thinking assumed, without challenge, that a State represented, in some way, nothing more than a particular manifestation of the Crown. Hence, statutory texts and judicial decisions were replete with statements to the effect that a State of the Commonwealth was legally equivalent to the Crown in right of that geographical area of Australia. With the benefit of hindsight, appreciation of the democratic origins of the federal Constitution and analysis of its text, we can now see that such descriptions were fundamentally misconceived.

143 However correct it might have been to conceive of a British colony beyond the seas, politically speaking, as a manifestation of the Crown (later refined, when the unity of the Crown was abandoned, as a manifestation of the Crown in a particular geographical "right"), such a notion was inapposite to a constituting polity of the Australian Commonwealth. It was a notion or legal metaphor rarely expressed in relation to the Commonwealth itself, that is, the federal polity. Doubtless this was because of the entirely novel character of the Commonwealth as a national political entity that had no earlier legal existence in any form. But in the States, where there remained a continuity of legislation (including constitutional legislation)[180] the perception of their true legal character was slow to dawn.

144 Before the present Crown Suits Act, the Parliament of Western Australia, in colonial times, had enacted a statute of the same title[181]. This was done just before federation. Historically, upon the creation of the State, it was natural enough that little thought would be given to the need for new constitutional thinking, and new statutory provisions, to provide for the enforcement of liability against the new and different political entity constituted by the *State*. Instead, a confusion between the constitutional State and the Crown persisted. It did so, notwithstanding the increasingly circumscribed role which the Crown played as such (including at a State level) in the legislature, executive and judicial organs of the State – the last, by the federal Constitution, fully integrated into the independent Judicature of the Commonwealth[182].

145 *A similar question in Ireland*: I referred to these considerations in passing in the last case in which application was made (as now repeated in this appeal) to reopen the rule established by the decision of this Court in *The Commonwealth v*

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180 *Yougarla* (2001) 207 CLR 344 at 377-378 [89].

181 *Crown Suits Act* 1898 (WA).

182 *Kable* (1996) 189 CLR 51.

Evans Deakin Industries Ltd[183]. In *Bass v Permanent Trustee Co Ltd*[184] I expressed doubt as to:

> "whether, at this stage in the understanding of the nature of a State of the Commonwealth, as provided for in the Constitution, it is appropriate to continue to treat it as an emanation of the Crown; and whether, in the Australian Commonwealth a State enjoys (as has until now been assumed) the immunity from suit historically attributed to the Crown as the personification of the sovereign".

146 I drew attention, in *Bass*, to the reasoning of Walsh J in the Supreme Court of Ireland in *Byrne v Ireland*[185]. His Lordship there considered the liability of the Irish State in the context of the suggestion that the immunity of the Crown had devolved upon the successive manifestations of the Irish polity[186]. The question addressed the State as initially established, before the republican constitution, by the Constitution of the Irish Free State in 1922. At that stage, Ireland remained (as the Commonwealth and the States of Australia still are) a constitutional monarchy under the Crown.

147 In *Byrne*[187], Walsh J concluded that the importation of the prerogative immunity of the Crown from English law to the new constitutional Irish State had evidenced "an erroneous over-simplification"[188]. It was a result of lawyers and judges who had embraced that opinion overlooking "the fact that the basis of the Crown prerogatives in English law was that the King was the personification

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183 (1986) 161 CLR 254. See also *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107; cf *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 582-583, 604.

184 (1999) 198 CLR 334 at 374-375 [99], footnotes omitted.

185 [1972] IR 241 at 272-273.

186 See also *Attorney-General v Great Southern and Western Railway Co of Ireland* [1925] AC 754 at 765-766, 774-775 on the effect on the Irish Free State of liability undertaken by the United Kingdom Government before formation of the Irish Free State; *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] QB 892 at 929-930 on whether the Crown in right of the United Kingdom owed treaty obligations to Indigenous peoples in Canada.

187 Writing with the concurrence of Ó Dálaigh CJ.

188 [1972] IR 241 at 272.

of the state"[189] whereas the establishment of a new and distinct State in Ireland by a written constitution deriving its authority ultimately from the people whose will gave it birth, introduced a new and different character to the State. Similar views were expressed in *Byrne* by Budd J[190]. A contrary opinion was stated by FitzGerald J[191]. Some measure of the fundamental differences that can exist on such basic questions of constitutional principle may be seen in the fact that the trial judge, whose decision was overturned by the majority of the Supreme Court of Ireland, described some of the propositions advanced to him, and subsequently upheld, as "preposterous"[192].

148 *Crown Suits Act and the State*: The significance of this issue to BAT's proceedings is that the Crown Suits Act, invoked by the State in this case, does not, in its terms, purport to impose an obligation to give notice in writing as a pre-condition to an action against the *State* of Western Australia as such. It expresses that obligation as a precondition to a "right of action [lying] against the Crown"[193]. An "action" (being in the context an action against the *Crown*) must be commenced within the specified period of a year. But if, under the Australian Constitution, the action in question lies not against the *Crown* but against the *State*, as such, a statutory provision addressed to the requirement to give notice to, and to commence proceedings against, the Crown within a specified time is irrelevant. Upon this hypothesis, the source of BAT's cause of action lies elsewhere. It lies against the State of Western Australia which it has sued by that name. The Crown Suits Act says nothing at all in relation to it.

149 This view of the meaning of ss 5 and 6 of the Crown Suits Act may still leave work for that Act to perform, in respect of residual Crown liability in Western Australia where no issue arises of the liability of the State as a constitutional polity created by the federal Constitution. But in the context of that Constitution, at least, the State enjoys a constitutional status as such, indeed one that renders it liable to the exercise of federal jurisdiction in this Court pursuant to s 75(iv) of the Constitution and in State courts pursuant to the Constitution and the Judiciary Act. That liability, expressly stated, reconfirms in the Australian context the error of oversight identified by the Supreme Court of Ireland in *Byrne* in assuming that a State law is necessary to render the State liable to be sued in a State court, because it is a manifestation of the Crown. In

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189 [1972] IR 241 at 272.

190 [1972] IR 241 at 302-303 with the concurrence of Ó Dálaigh CJ and O'Keeffe P.

191 [1972] IR 241 at 310-311.

192 [1972] IR 241 at 255 per Murnaghan J.

193 Crown Suits Act, s 6(1).

my opinion, the language of s 75(iv) of the Australian Constitution denies that assumption.

150 Upon the basis of the foregoing reasoning, the source of the supposed problems of BAT, in terms of ss 5 and 6(1) of the Crown Suits Act, disappears. There being no State law expressly addressed to the obligation of notice to the State, as such, or requiring the commencement of the action within a year of the accrual, no question arises as to whether, conformably with the federal Constitution, any such requirements are picked up and applied to BAT's claim.

151 *Conclusion – an open question*: Although this is the way that I would dispose of the principal obstacle posited by the State in these proceedings[194], I accept that there may be arguments to the contrary that have not been fully canvassed in the way the arguments proceeded in the hearing of this appeal. For example, by s 3 of the Crown Suits Act, the term "Crown" is defined to mean "the Crown in right of the Government of Western Australia". Whilst this is not, as such, the "State", it is conceivable that a purposive construction of that Act might treat the references to "Crown" as no more than a statutory shorthand for the "State". Such an interpretation would derive some support from the provision in s 5(2) of the Crown Suits Act directing that proceedings against the Crown are to be taken under the title "the State of Western Australia", although I am conscious that there is a world of difference between titles and substance.

152 To reach a final view on the extent to which (if at all) the former immunity of the Crown survived the change of the one-time Australian colonies into States of the Commonwealth, and inured to the advantage of such States, it would be necessary to invite more detailed submissions than were received on that issue. Such submissions would have to address the way in which governmental immunity has evolved in other constitutional democracies[195] and the extent to which some form of immunity may be postulated, or tolerated, by the language of s 78 of the Constitution.

153 With all of the foregoing reservations about the assumptions which the parties made before us concerning the approach that this Court should take to the issues before it, I therefore turn to the conclusions that I would reach on the matter as it was argued.

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194 There would remain the defence based on the Limitation Act, s 47A.

195 cf *Bropho* (1990) 171 CLR 1 at 15, 22-23.

The Crown Suits Act and the Judiciary Act

154 *A constitutional right to proceed*: In the view that I take, that the Constitution was the proper starting point for resolving the supposed impediment to BAT's claim posed by the State, like other members of the Court[196], I would conclude that the right of BAT to proceed against the State was implied from, or possibly stated in, the Constitution itself. It did not require a State law, such as the Crown Suits Act, to afford that right (with the consequent risk that it might be afforded on procedural or other conditions that were not fulfilled in the particular case).

155 Upon these premises I agree with Gleeson CJ that there was a question anterior to that presented by the State[197]. It lay behind much of the argument in this Court. It was to be answered by a reflection on the implications of the federal Constitution itself. I agree that the Constitution, by implication, confers BAT's right to proceed against the State of Western Australia and recourse to the provisions of the Crown Suits Act for that purpose is neither necessary nor appropriate[198]. I also agree with the joint reasons that "State legislation of itself could not control the constitution of the action or its outcome"[199].

156 That leaves the questions presented by the arguments of the State concerning whether, notwithstanding this foundation for BAT's right to proceed, State law restrictions, in the form of s 6(1) of the Crown Suits Act or s 47A of the Limitation Act are picked up and applied in federal jurisdiction by force of s 79 of the Judiciary Act and this notwithstanding the terms of s 64 of the Judiciary Act.

157 *Application of the Judiciary Act*: So far as s 79 of the Judiciary Act is concerned, I agree with the joint reasons that, given that the Constitution itself impliedly affords BAT the right to proceed against the State, federal law "otherwise provided" both in the Constitution and (to the extent necessary) by s 39(2) of the Judiciary Act[200]. The provisions of s 6(1) of the Crown Suits Act cannot be severed from s 5 of that Act. The two sections constitute an integrated

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196 Reasons of Gleeson CJ at [15]-[16]; joint reasons at [39].

197 Reasons of Gleeson CJ at [9].

198 Reasons of Gleeson CJ at [22]. See also joint reasons at [60].

199 Joint reasons at [63].

200 Joint reasons at [67]. See also *Solomons* (2002) 76 ALJR 1601 at 1606-1607 [23]-[25], 1612-1614 [57]-[62]; cf at 1621-1623 [111]-[120]; 192 ALR 217 at 224-225, 232-234, 245-247.

State scheme for Crown (and possibly State) liability. In a matter in federal jurisdiction involving the State as a party they are inapplicable and therefore ineffective.

158 It is necessary to consider s 64 of the Judiciary Act because of the supplementary argument of the State invoking s 47A of the Limitation Act. By s 64 of the Judiciary Act it is provided that, in the particular case of a suit in which, relevantly, a State is a party, the rights of the parties "shall as nearly as possible be the same, and judgment may be given … as in a suit between subject and subject".

159 By s 47A of the Limitation Act particular provision is made in respect of actions brought against any person, excluding the Crown, for acts done in pursuance (putting it generally) of statutory or other public authority. In such cases it is obligatory for the proposed plaintiff, as soon as practicable, to give notice of action. By this provision of State law, agents of the State, and on one view the State itself as a constitutional entity, are arguably protected from suit by procedural preconditions that do not apply to a suit between subject and subject.

160 *Arguable questions invalidate judgment*: The State, supported by other governmental parties, urged that a leeway was recognised in s 64 of the Judiciary Act for the special governmental characteristics, relevantly, of a State, by the words in s 64 "as nearly as possible". In a greater understanding of a State's need for protection, it is conceivable that a basis might be established to exempt the State, in this regard, from the requirement, in federal jurisdiction, that the rights of the parties in a suit against it should generally be the same as in a suit between subjects so as to expel notice provisions. Given that the foundation of BAT's right to proceed lies in the Constitution itself and to vindicate a constitutional provision, it seems highly doubtful that s 47A of the Limitation Act, with its special protective provisions, could impede BAT's recovery. Section 64 of the Judiciary Act might be read as giving effect, in this respect, to the high constitutional purpose that would otherwise be frustrated by a narrow reading. State statutory impediments are not made more palatable (or valid) by being conceptualised as preconditions to the existence of a suit when their practical effect is to defeat the success of the suit claiming reimbursement of moneys extracted by a constitutionally invalid tax.

161 It is unnecessary to resolve this question finally. It is sufficient to say that, on several grounds, it is arguable that s 47A of the Limitation Act is not applicable to the action BAT has commenced against the State, is not picked up by s 79 of the Judiciary Act and is excluded by s 64 of that Act. In these proceedings it is also unnecessary to consider whether, and if so to what extent, federal legislative power extends to pick up, and apply, the State law in an action in federal jurisdiction that has the effect of protecting a State from liability in respect of moneys recovered as a tax which the State Parliament had no power to enact. That question may arise at a later stage of these proceedings.

Conclusion and orders

162 It follows that this Court must set aside the summary judgment entered by the Full Court of the Supreme Court of Western Australia. At the very least BAT's case was reasonably arguable. So much followed once it was appreciated that the matter involved the exercise of federal jurisdiction. Indeed, once the case was seen as an action involving the federal Constitution (if not actually based upon it) the possibility of special State procedural laws impeding the vindication of federal constitutional interests became difficult, perhaps impossible, for the State ultimately to sustain.

163 I therefore agree in the orders proposed by Gleeson CJ.

164 CALLINAN J. The facts and relevant legislative provisions are fully stated in the judgment of McHugh, Gummow and Hayne JJ.

165 There is now no question that the first respondent has levied and been paid by the appellant, an unconstitutional tax. Questions (if any) as to compulsion (actual or implied), the need or otherwise for payment to have been made under protest, the relevance of payment under a mistake of law, and as to the proper characterization of the appellant's cause of action against the respondents need not be answered at this stage of the proceedings. It is enough, for present purposes, that the appellant has shown that it has an arguable case against the first respondent for recovery of money as a result of its unconstitutional legislation, to bring the case within federal jurisdiction under ss 76(1), 77 and 78 of the Constitution.

166 It is also clear that a State, any more than the Commonwealth, may not legislate to validate what the Constitution does not permit it to do. What are not so clear, but do not need to be decided, are the nature and extent of the immunity enjoyed by a State as a separate Constitutional polity, almost certainly rightly assumed to exist by the framers[201], and to be available to be invoked by the States[202]. Nor is it necessary to revisit the controversy as to the existence or otherwise of any similar immunity in favour of the Commonwealth[203].

167 I would accept that if the *Judiciary Act* 1903 (Cth) were to operate to pick up ss 5 and 6 of the *Crown Suits Act* 1947 (WA) (the "State Act"), the rights of the parties would not be as nearly as possible the same as those between other parties. Three possible arguments are advanced by the first respondent as to why any provision of the *Judiciary Act* does not, or cannot avail the appellant. The first is that a suit against the State, even one arising out of a Constitutional breach by it, is sui generis: that therefore no occasion for a comparison of "rights" can arise in such a case; and, secondly, on a lower plane, in any event a polity, a government, is by its very nature in such a different position from a non-governmental party that there must always be a qualification or reservation in favour of the governmental party as a defendant, in respect of litigation arising out of the conduct of affairs of state. I leave aside for present purposes the third possible argument.

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201 Among other matters Ch 5 of the Constitution entrenches the States and there are numerous provisions referring to governors of a State who represent the Crown in the States. (See also s 7 of the *Australia Act* 1986 (Cth)).

202 See *Official Report of the National Australasian Convention Debates*, (Sydney), 2 March to 9 April 1891, vol 1 at 957.

203 *The Commonwealth v Mewett* (1997) 191 CLR 471.

168 The first argument should be rejected. Even though the action arises out of a Constitutional breach it is not an action for a breach of a Constitutional duty or rule. Nor is it an action or claim of a kind peculiar to a governmental activity legitimately undertaken, or one which a government has abstained from taking. It is a claim in common law. That reasoning also defeats the second possible argument in this case. The role of the Constitution is an overarching one. Even though the differences (as for example, with respect to recovery and enforcement, ostensible authority and like matters) between the position of a polity and some other type of party in litigation may sometimes be exaggerated, there may well be cases in which a State party may enjoy a special immunity, advantage or other privilege, but this cannot be one of them.

169 The third suggested argument of the first respondent is a more formidable one: that s 64 of the *Judiciary Act* only applies after there is a suit in being, and that ss 5 and 6 of the State Act may accordingly operate to defeat the appellant's action in default of the giving of the notice within time which is a condition precedent to it. This, the first respondent submits, is the consequence of an ordinary reading of s 64, in particular of the words, "in any suit". It was decided in *The Commonwealth v Evans Deakin Industries Ltd*[204] however that s 64 of the *Judiciary Act* operates to apply both substantive and procedural laws, and accordingly could and did confer a cause of action against the Commonwealth[205]. Because I do not see any relevant distinction between the Commonwealth and a State in this particular case, whilst that decision stands, it meets the third argument of the respondent State. This is not, in my opinion, an occasion to reopen the decision in *Evans Deakin*. The existence here of the underlying Constitutional breach is reason enough for that.

170 I would also wish to leave open any question of the existence of any general power (which I am disposed to doubt) of the Commonwealth to legislate in any, or all ways in respect of suits against the States arising out of activities unaffected by the Constitution.

171 Sections 39(2) and 79 of the *Judiciary Act* operating in the manner described by McHugh, Gummow and Hayne JJ produce the consequence that the appellant's action does not fail for non-compliance with the State Act.

172 Subject to the matters that I have mentioned I agree with the judgment and orders proposed by McHugh, Gummow and Hayne JJ.

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204 (1986) 161 CLR 254.

205 (1986) 161 CLR 254 at 269 per Brennan J.