

FIRST PRINT

CHOICE OF LAW (LIMITATION PERIODS) BILL 1993

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The Limitation (Amendment) Bill 1993 is cognate with this Bill.

The High Court, in *McKain v. R.W. Miller & Company (South Australia) Pty. Limited* (1991) 174 C.L.R. 1, decided that, according to the general rules as to choice of law, limitations are treated as governed by the law of the place where the proceedings are brought, regardless of where the cause of action arose. This may tend to encourage forum shopping to take advantage of the longest limitation periods.

The object of this Bill is to ensure that limitation laws are treated as matters of substantive law for the purposes of choice of law and therefore governed by the law of the cause and not that of the forum. Accordingly, when the law of another place (being another State, a Territory or New Zealand) is applied by a New South Wales court as the law governing the proceedings, the limitation laws of that place will also be applied.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Clause 3 defines "court" and "limitation law" for the purposes of the proposed Act.

Clause 4 provides that the proposed Act applies to causes of action that arose before the commencement of the proposed Act but not to proceedings instituted before that commencement.

Clause 5 ensures that a limitation law of another State, a Territory or New Zealand is treated as a substantive law by New South Wales courts applying choice of law rules.

Clause 6 provides that if a New South Wales court exercises a discretion under a limitation law of another jurisdiction, it is to exercise that discretion in a manner comparable to the way in which the courts of that jurisdiction would exercise the discretion.

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Clause 7 provides that the proposed Act will not apply in relation to New Zealand until it is proclaimed to apply in relation to that country, and modifies the transitional provisions accordingly.

Clause 8 is a standard provision requiring the Minister to review the operation of the Act after 5 years.

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CHOICE OF LAW (LIMITATION PERIODS) BILL 1993

NEW SOUTH WALES



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CHOICE OF LAW (LIMITATION PERIODS) BILL 1993

NEW SOUTH WALES



No. , 1993

A BILL FOR

An Act relating to limitation periods for choice of law purposes.

See also Limitation (Amendment) Bill 1993.

Choice of Law (Limitation Periods) 1993

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Choice of Law (Limitation Periods) Act 1993.

5 Commencement

2. This Act commences on a day to be appointed by proclamation.

Definitions

3. In this Act:

“court” includes arbitrator;

10 “limitation law” means a law that provides for the limitation or exclusion of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced.

Application

15 4. This Act extends to a cause of action that arose before the commencement of this Act, but does not apply to proceedings instituted before the commencement of this Act.

Characterisation of limitation laws

20 5. If the substantive law of a place, being another State, a Territory or New Zealand, is to govern a claim before a court of the State, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court.

Exercise of discretion under limitation law

25 6. If a court of the State exercises a discretion conferred under a limitation law of a place, being another State, a Territory or New Zealand, that discretion, as far as practicable, is to be exercised in the manner in which it is exercised in comparable cases by the courts of that place.

Application to New Zealand

30 7. (1) This Act does not apply in relation to New Zealand until it is declared by proclamation that it does so apply. The proclamation may be the proclamation commencing this Act or another proclamation.

Choice of Law (Limitation Periods) 1993

(2) If the substantive law of New Zealand is to govern a claim before a court of the State and proceedings have been instituted on the claim before that declaration takes effect, this Act does not apply to those proceedings. This subsection has effect despite section 4.

Review of Act

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8. (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

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(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

CHOICE OF LAW (LIMITATION PERIODS) BILL 1993

AND COGNATE BILL

SECOND READING SPEECH

MR PRESIDENT,

CHOICE OF LAW RULES ARE THE LEGAL RULES WHICH DETERMINE WHAT LAW SHOULD BE APPLIED WHEN A FACTUAL SITUATION IS LINKED TO MORE THAN ONE LEGAL SYSTEM. HONOURABLE MEMBERS WILL APPRECIATE THAT EACH STATE AND TERRITORY HAS ITS OWN SYSTEM OF LAWS TO DEAL WITH MANY CONTINGENCIES IN EVERY DAY LIFE. THOSE SYSTEMS OF LAW MIGHT COMPETE WITH EACH OTHER IN DIFFERENT WAYS. FOR INSTANCE, A CONTRACT MAY BE MADE IN QUEENSLAND BUT IS TO BE PERFORMED IN NEW SOUTH WALES; A MOTOR ACCIDENT MAY HAPPEN IN SOUTH AUSTRALIA BUT A CAR AND/OR A DRIVER COME FROM A DIFFERENT STATE OR A TAX MAY BE IMPOSED BY NEW SOUTH WALES LAW BUT THE TAXPAYER MAY BE SITUATED IN ANOTHER STATE.

ON 19 DECEMBER 1992 THE FULL BENCH OF THE HIGH COURT OF AUSTRALIA DELIVERED JUDGEMENT IN W T MCKAIN -V- R W MILLER AND CO (SOUTH AUSTRALIA) PTY LTD.

MR PRESIDENT, ONE OF THE QUESTIONS RAISED BY THOSE PROCEEDINGS WAS THE APPROPRIATE CHARACTERISATION, WITHIN AN AUSTRALIAN OR AUSTRALASIAN CONTEXT OF LIMITATION PROVISIONS FOR CHOICE OF LAW PURPOSES.

IF LIMITATION STATUTES ARE CHARACTERISED AS PROCEDURAL THEN THE COURT IN WHICH THE CASE IS PROSECUTED WILL NOT APPLY THE LIMITATION PROVISIONS OF ANOTHER PLACE BUT WILL IMPOSE ITS OWN LIMITATION PROVISIONS REGARDLESS OF WHETHER ITS OWN LAW GOVERNS THE SUBSTANTIVE ISSUES BETWEEN THE PARTIES. THIS OBVIOUSLY ENCOURAGES FORUM SHOPPING BY PLAINTIFFS WHOSE ACTIONS ARE OUT OF TIME IN ONE JURISDICTION IN FAVOUR OF FORUMS OFFERING MORE GENEROUS LIMITATION PERIODS.

IF, ON THE OTHER HAND, LIMITATION STATUTES ARE CHARACTERISED AS SUBSTANTIVE, FOR CHOICE OF LAW PURPOSES THEN PLAINTIFFS WILL GAIN NO ADVANTAGE BY "SHOPPING" ELSEWHERE.

MR PRESIDENT, IN MCKAIN -V- MILLER THE HIGH COURT, BY A 4:3 MAJORITY JOINT JUDGMENT HELD THAT LIMITATION STATUTES SHOULD BE CHARACTERISED AS PROCEDURAL.

THE EFFECT OF THE DECISION WAS THAT NO SINGLE LAW WOULD APPLY TO A PARTICULAR SET OF CIRCUMSTANCES.

THE PRINCIPLES ON WHICH IT WAS BASED WERE STRONGLY CRITICISED BY THE AUSTRALIAN LAW REFORM COMMISSION IN ITS DISCUSSION PAPER NO 44 OF JULY 1990 ENTITLED "CHOICE OF LAW RULES". THAT PAPER STATED, AT P.53, THAT THE RULE THAT LIMITATION PERIODS BE TREATED AS PROCEDURAL FOR CHOICE OF LAW PURPOSES HAS PROVED TO BE A SOURCE OF DISPUTE AND UNCERTAINTY AMONG JUDGES AND COMMENTATORS. THE COMMISSION REJECTED THE RULE AND CANVASSED ALTERNATIVES.

MR PRESIDENT, THE AUSTRALIAN LAW REFORM COMMISSION RELEASED ITS FINAL REPORT ON CHOICE OF LAW (NO 58) IN MARCH 1992 AND IN CHAPTER 10 OF THAT REPORT ELABORATED UPON SOME OF THE DISADVANTAGES OF THE CURRENT LAW.

FIRST, ON A POLICY LEVEL, THE COMMISSION CONSIDERED THE MAJOR OBJECTION TO THE CLASSIFICATION OF LIMITATION PERIODS AS PROCEDURAL TO BE THAT THE PURPOSE OF THE LAW OF THE PLACE ESTABLISHING THE CAUSE OF ACTION MAY BE THWARTED.

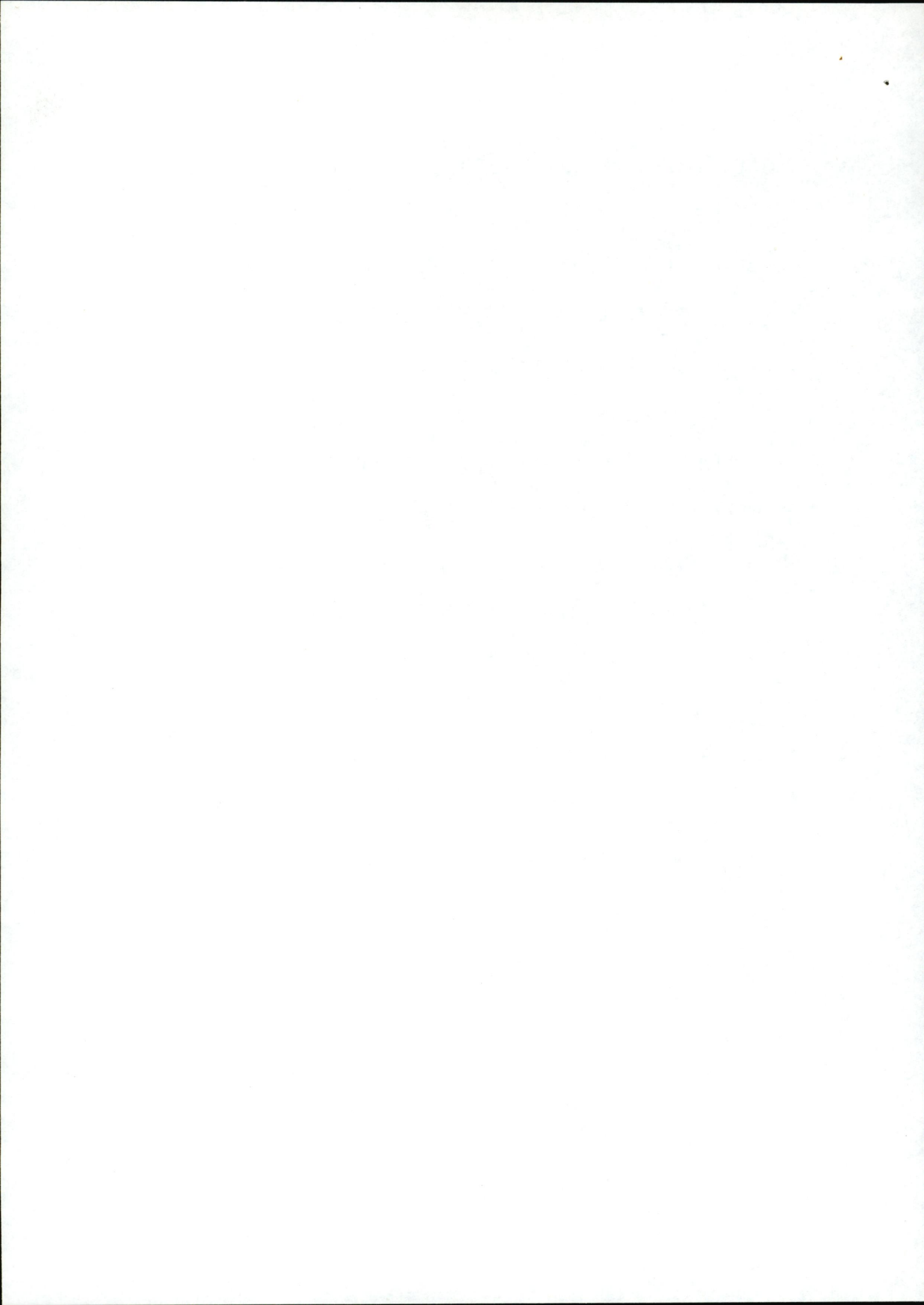
SO, FOR EXAMPLE, THE RULE COULD OPERATE TO BAR A CLAIM THAT COULD STILL BE ACTIONABLE IN THE PLACE IN WHICH IT AROSE. CONVERSELY, THE COMMISSION NOTED, IT CAN FRUSTRATE THE PURPOSE OF THE JURISDICTION ESTABLISHING THE CAUSE OF ACTION BY KEEPING ALIVE CLAIMS THAT ITS LEGISLATURE WOULD WISH TO BE TREATED AS STALE.

THE COMMISSION CONSIDERED THAT BOTH PARTIES TO AN ACTION SHOULD BE ABLE TO ACT ON THE ASSUMPTION THAT A PARTICULAR INCIDENT IS DETERMINED BY THE LAW WHICH GOVERNS ITS SUBSTANCE. OTHERWISE, OF COURSE, BOTH MUST KEEP TRACK OF THE LAWS OF ANY OTHER PLACE WHICH MIGHT BE ABLE TO ASSUME JURISDICTION OVER A CLAIM BECAUSE OF SOME CONNECTION WITH IT. THE COMMISSION PROPOSED THAT IF THE LEGISLATURE OF ONE OF THOSE OTHER PLACES HAS PRESCRIBED A PARTICULAR LIMIT, THE PRINCIPLE OF COMITY REQUIRES THAT IT SHOULD BE APPLIED IN PREFERENCE TO THE LAW OF THE PLACE IN WHICH THE MATTER IS PROSECUTED.

AGAIN ON A POLICY LEVEL, THE COMMISSION NOTED THAT IT HAD BECOME CLEAR FROM A NUMBER OF RECENT HIGH COURT DECISIONS THAT THE PRACTICE OF FORUM SHOPPING IS TO BE

DISCOURAGED. IT PROCEEDED TO NOTE IN THAT CONNECTION THAT THERE CAN BE NO MORE FERTILE FIELD FOR A FORUM SHOPPER THAN STATES AND TERRITORIES WITH DIFFERENT LIMITATION PERIODS. IF LIMITATION PERIODS ARE REGARDED AS PROCEDURAL, THEY ARE NECESSARILY BROUGHT WITHIN THE LAW OF THE JURISDICTION IN WHICH THE ACTION IS PURSUED. IF THAT FORUM ALLOWS A LITIGANT A LONGER TIME IN WHICH TO BRING AN ACTION THERE WILL BE A SIGNIFICANT ADVANTAGE IN BRINGING THE ACTION IN THAT FORUM WITH THE EFFECT THAT THE OBJECT AND PURPOSE OF THE JURISDICTION IN WHICH THE CAUSE OF ACTION ARISES IS DEFEATED .

NOT SURPRISINGLY, MR PRESIDENT, THE COMMISSION RECOMMENDED THAT LIMITATION PERIODS SHOULD BE TREATED AS MATTERS OF SUBSTANCE.



AT THE JULY 1992 MEETING OF THE STANDING COMMITTEE OF ATTORNEYS GENERAL MINISTERS ASKED THE SPECIAL COMMITTEE OF SOLICITORS-GENERAL TO REPORT ON WHAT ACTION SHOULD BE TAKEN TO RESOLVE THE DIFFICULTIES CREATED BY THE HIGH COURT'S DECISION IN MCKAIN -V- MILLER.

IN THAT REPORT THE SPECIAL COMMITTEE UNANIMOUSLY RECOMMENDED ADOPTION OF THE AUSTRALIAN LAW REFORM COMMISSION'S RECOMMENDATIONS.

STANDING COMMITTEE MINISTERS ADOPTED THAT RECOMMENDATION AND MODEL LEGISLATION WAS PREPARED. THE "CHOICE OF LAW" BILL CURRENTLY BEFORE THE HOUSE CONFORMS TO THOSE MODEL PROVISIONS. THE LIMITATION (AMENDMENT) BILL IS DECLARATORY OF THE RESULT SOUGHT TO BE ACHIEVED AND WILL OPERATE TO SUPPLEMENT THE CHOICE OF LAW BILL PENDING ENACTMENT OF CORRESPONDING LEGISLATION IN OTHER STATES AND TERRITORIES.

MR PRESIDENT, THE BILLS PRESENTLY BEFORE THE HOUSE WILL, AMONGST OTHER THINGS, ENSURE THAT THE LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS) BILL 1993 AND SIMILAR LIMITATION LEGISLATION ENACTED BY OTHER STATES AND TERRITORIES, WILL BE EFFECTIVE.

THE EFFECT OF THE CHOICE OF LAW (LIMITATION PERIODS) BILL IS THAT EVEN IF PROCEEDINGS CHALLENGING TAXES PAID IN OTHER JURISDICTIONS ARE PURSUED THROUGH NEW SOUTH WALES COURTS, THE LIMITATION PERIOD IMPOSED BY THE TAXING STATE WILL APPLY.

EQUALLY, MR PRESIDENT, UNDER THE LIMITATION (AMENDMENT) BILL, COURTS IN OTHER JURISDICTIONS HEARING ACTIONS FOR THE RECOVERY OF TAXES PAID PURSUANT TO ANY INVALID NEW SOUTH WALES LEGISLATION, WILL BE OBLIGED TO OBSERVE THE LIMITATION PERIODS APPLYING IN THIS STATE.

THE OPERATION OF THESE ASSOCIATED BILLS GOES, OF COURSE, FAR BEYOND ACTIONS FOR THE RECOVERY OF TAXES IMPOSED UNDER LEGISLATION THAT MIGHT BE FOUND TO BE INVALID. IT IS, HOWEVER, IN THAT CONTEXT, MR PRESIDENT, THAT THE MEASURES ARE CURRENTLY IN FOCUS.

IN SHORT, MR PRESIDENT THE CHOICE OF LAW (LIMITATION PERIODS) BILL 1993 DEALS WITH THE PROBLEM IDENTIFIED AS A RESULT OF THE 1991 HIGH COURT DECISION IN MCKAIN -V- MILLER.

THE BILL SEEKS TO RECOGNISE THE LAW OF A JURISDICTION DEALING WITH LIMITATION PERIODS AS PART OF THE SUBSTANTIVE LAW OF THAT JURISDICTION. THE RESULT WILL BE TO CURTAIL FORUM SHOPPING.

THE LIMITATION (AMENDMENT) BILL 1993 PROVIDES THAT NEW SOUTH WALES LAWS RELATING TO NEW SOUTH WALES LIMITATION PERIODS FORM PART OF THE SUBSTANTIVE LAW OF THIS STATE, THUS COMPLEMENTING THE MEASURES IN THE CHOICE OF LAW (LIMITATION PERIODS) BILL.

I COMMEND THE BILLS TO THE HOUSE, AND FOR THE

ASSISTANCE OF HONOURABLE MEMBERS, I TABLE A SUMMARY OF
THEIR PROVISIONS.

CHOICE OF LAW (LIMITATION PERIODS) ACT 1993 No. 94

NEW SOUTH WALES



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CHOICE OF LAW (LIMITATION PERIODS) ACT 1993 No. 94

NEW SOUTH WALES



Act No. 94, 1993

An Act relating to limitation periods for choice of law purposes.
[Assented to 30 November 1993]

See also Limitation (Amendment) Act 1993.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Choice of Law (Limitation Periods) Act 1993.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Definitions

3. In this Act:

“**court**” includes arbitrator;

“**limitation law**” means a law that provides for the limitation or exclusion of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced.

Application

4. This Act extends to a cause of action that arose before the commencement of this Act, but does not apply to proceedings instituted before the commencement of this Act.

Characterisation of limitation laws

5. If the substantive law of a place, being another State, a Territory or New Zealand, is to govern a claim before a court of the State, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court.

Exercise of discretion under limitation law

6. If a court of the State exercises a discretion conferred under a limitation law of a place, being another State, a Territory or New Zealand, that discretion, as far as practicable, is to be exercised in the manner in which it is exercised in comparable cases by the courts of that place.

Application to New Zealand

7. (1) This Act does not apply in relation to New Zealand until it is declared by proclamation that it does so apply. The proclamation may be the proclamation commencing this Act or another proclamation.

Choice of Law (Limitation Periods) Act 1993 No. 94

(2) If the substantive law of New Zealand is to govern a claim before a court of the State and proceedings have been instituted on the claim before that declaration takes effect, this Act does not apply to those proceedings. This subsection has effect despite section 4.

Review of Act

8. (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

*[Minister's second reading speech made in—
Legislative Assembly on 17 November 1993
Legislative Council on 19 November 1993]*

