

FIRST PRINT

**LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS)
AMENDMENT BILL 1993**

NEW SOUTH WALES



EXPLANATORY NOTE

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

The object of this Bill is to amend the Limitation of Actions (Recovery of Imposts) Act 1963 in relation to the recovery of taxes paid under any legislation that is found to be invalid. The Principal Act already prevents the bringing of proceedings to recover such a tax after 12 months after it has been paid.

No claim will be able to be made in respect of taxes paid under invalid legislation, where the invalidity arises from a non-legislative change of the law—for example, where the courts, having previously held a taxation Act to be valid, decide later that it is invalid.

A person claiming repayment of tax will be limited to recovering only the amounts that have not been passed on, and which will not be passed on, whether directly or indirectly, to another person (for example, a customer of the claimant). The object of this is to prevent windfall gains to claimants.

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 is a formal provision giving effect to the Schedule of amendments.

Schedule 1 (1) and (2) amend the long and short titles of the Principal Act, consequent on the insertion of provisions that prevent recovery of certain amounts paid by way of tax.

Schedule 1 (3) inserts definitions into the Principal Act.

Schedule 1 (4) (a) and (b) make amendments consequential on the insertion of the definitions.

Schedule 1 (4) (c) inserts into section 2 a statement that the existing provision providing for a limitation period of 12 months applies to proceedings for the recovery of money on the ground of the invalidity of taxation legislation. This merely makes explicit what is implicit in the existing section.

Limitation of Actions (Recovery of Imposts) Amendment 1993

Schedule 1 (5) inserts new sections 3–7.

Proposed section 3 prevents recovery of taxes that were valid under previous interpretations of the law.

Proposed section 4 prevents recovery of taxes unless the claimant satisfies the court that they have not been passed on, and will not be passed on, to another person.

Proposed section 5 extinguishes a right to recover taxes if recovery is prevented by the Principal Act.

Proposed section 6 will characterise the provisions of the Principal Act as part of the substantive law of the State, so that when the law of the State is applied in another jurisdiction as the law governing the proceedings, the provisions of the Act (which relate to limitation periods and other limitation matters) will also be applied.

Proposed section 7 makes it clear that the Principal Act applies to money paid voluntarily or under compulsion, and whether or not under protest, and that the Principal Act has effect despite any other Act. The section also makes it clear that the amendments apply to money paid, and proceedings commenced, before or after the commencement of the proposed Act and that the original provisions of the Principal Act (as amended by the proposed Act), together with the definition section, have effect as from the commencement of the Principal Act.

FIRST PRINT

**LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS)
AMENDMENT BILL 1993**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Limitation of Actions (Recovery of Imposts) Act 1963 No. 21

SCHEDULE 1—AMENDMENTS

**LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS)
AMENDMENT BILL 1993**

NEW SOUTH WALES



No. , 1993

A BILL FOR

An Act to amend the Limitation of Actions (Recovery of Imposts) Act 1963 in relation to the recovery of certain taxes, fees, charges and other imposts.

Limitation of Actions (Recovery of Imposts) Amendment 1993

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Limitation of Actions (Recovery of Imposts) Amendment Act 1993.

5 Commencement

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

**Amendment of Limitation of Actions (Recovery of Imposts) Act 1963
No. 21**

3. The Limitation of Actions (Recovery of Imposts) Act 1963 is
10 amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Long title:

15 After “imposts;”, insert “to provide that certain taxes, fees, charges and other imposts are not recoverable in certain circumstances;”.

(2) Section 1 (**Short title**):

Omit “Limitation of Actions (Recovery of Imposts) Act 1963”, insert instead “Recovery of Imposts Act 1963”.

20 (3) After section 1, insert:

Definitions

1A. In this Act:

25 “**invalidity**” of taxation legislation includes invalidity of a portion of the legislation or of an application of the legislation;

“**pay**” a tax includes recover the tax by legal proceedings;

“**proceedings**” includes proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief;

30 “**tax**” includes a fee, charge or other impost;

Limitation of Actions (Recovery of Imposts) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

“taxation legislation” means:

- (a) an Act imposing or relating to a tax; or
- (b) a provision of such an Act; or
- (c) a regulation under such an Act; or
- (d) a provision of such a regulation.

(4) Section 2 (**Limitation on time for the bringing of proceedings to recover taxes**):

(a) From section 2, omit “action or proceeding” wherever occurring, insert instead “proceedings”. 10

(b) From section 2, omit “, fee, charge or other impost” wherever occurring.

(c) After section 2 (2), insert:

(3) Without affecting the generality of this section, and for the avoidance of doubt, it is declared that this section applies to proceedings for the recovery of money (paid by way of tax or purported tax) on the ground of, or on grounds that include, the invalidity of taxation legislation. 15

(4) This section does not apply to money that is not recoverable because of section 3. 20

(5) Sections 3–7:

After section 2, insert:

Certain taxes not recoverable following non-legislative changes of the law

3. (1) In this section, “**non-legislative change of the law**” means a change of the law or of legal principles, or a change in what is generally perceived to be the state of the law or of legal principles, but does not include a change made by legislation. 25

(2) Money paid by way of tax or purported tax is not recoverable on any of the grounds referred to in subsection (3), if: 30

(a) the ground came into existence because of a non-legislative change of the law; and

(b) the money was paid before the change. 35

Limitation of Actions (Recovery of Imposts) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

(3) The grounds are:

- (a) the ground of invalidity of any taxation legislation; or
- (b) the ground of mistake (whether of law or of fact) as to the validity or invalidity of any taxation legislation; or
- (c) any other restitutionary ground relating to the validity or invalidity of any taxation legislation.

(4) Subsection (2) does not apply to proceedings for the recovery of money that, assuming the legislation concerned had been valid, would have represented an overpayment of a tax, if the legislation provides for the refund of the money.

Passing on of tax

4. (1) Proceedings referred to in section 2 or 3 (4) to recover an amount paid are however maintainable only to the extent that the person bringing the proceedings (“**the claimant**”) satisfies the court that the claimant has not charged to or recovered from, and will not charge to or recover from, any other person any amount in respect of the whole or any part of the amount paid. This applies whether or not any such amount has been itemised or otherwise separately identified in any invoice or other documentation.

(2) A reference in this section to the claimant extends to a predecessor, successor or assignee of the claimant.

(3) This section has effect despite anything in section 2 or 3, or in any other Act.

Ending of right of recovery

5. If because of this Act money paid by way of tax or purported tax ceases to be or is not recoverable, the right to recover the money is extinguished.

Characterisation of this Act

6. The provisions of this Act are to be regarded as part of the substantive law of the State.

Application

7. (1) This Act applies to money paid whether voluntarily or under compulsion, and applies whether or not the payment was made under protest.

Limitation of Actions (Recovery of Imposts) Amendment 1993

SCHEDULE 1—AMENDMENTS—*continued*

(2) This Act has effect despite the provisions of any other Act.

(3) The amendments made to this Act by the Limitation of Actions (Recovery of Imposts) Amendment Act 1993 apply to money paid, and proceedings commenced, whether before or after the commencement of that Act.

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(4) Sections 1A and 2 (1)–(3) of this Act as amended by the Limitation of Actions (Recovery of Imposts) Amendment Act 1993 have effect for all purposes, and are taken always to have had effect for all purposes, as from the commencement of this Act.

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LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS)

AMENDMENT

BILL 1993

SECOND READING SPEECH

MR PRESIDENT,

THE MAIN PURPOSE OF THE LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS) AMENDMENT BILL 1993 IS TO AMEND EXISTING STATUTORY AND COMMON LAW RIGHTS OF RECOVERY BY TAXPAYERS IN THE EVENT OF A COURT INVALIDATING OR CHANGING THE INTERPRETATION OF THE LAW, SO AS TO PROTECT THE STATE FROM HAVING TO MAKE LARGE, UNFORESEEN REFUNDS OF TAX VALIDLY COLLECTED BEFORE THE COURT DECISION.

HONOURABLE MEMBERS MAY HAVE NOTICED THE COMMENTS RECENTLY ATTRIBUTED TO THE CHIEF JUSTICE OF THE HIGH COURT OF AUSTRALIA, SIR ANTHONY MASON ON THE ROLE OF JUDGES.

SIR ANTHONY SAID:

- "IT IS SCARCELY TO BE CREDITED THAT ANYONE WITH ANY UNDERSTANDING OF THE JUDICIAL PROCESS NOW BELIEVES THE FAIRY TALE THAT JUDGES 'DISCOVER' THE LAW AND THEN DECLARE IT, WITHOUT ACTUALLY MAKING IT, AS THOUGH THE JUDGES RESEMBLED THE DELPHIC ORACLE REVEALING THE INTENTION OF THE PAGAN GODS".

JUDGE MADE CHANGES TO THE LAW ARE A FACT OF LIFE. THE GOVERNMENT DOES NOT TAKE ISSUE WITH THAT.

IT IS, HOWEVER, THE RESPONSIBILITY OF GOVERNMENT TO ENSURE THAT THERE IS NO UNDUE BURDEN ON THE PUBLIC PURSE AS A CONSEQUENCE OF SUCH CHANGES.

MR PRESIDENT, A PARTICULAR NEED FOR THIS LEGISLATION HAS ARISEN AS A RESULT OF A HIGH COURT APPEAL IN CAPITAL DUPLICATORS -V- AUSTRALIAN CAPITAL TERRITORY AGAINST A BACKDATED LICENSING SCHEME IN THE ACT INVOLVING "X" RATED VIDEOS.

THE A.C.T. LICENSING SCHEME IS SIMILAR TO THE BACKDATED LICENSING OR BUSINESS FRANCHISE SCHEMES OPERATED BY THE STATES AND TERRITORIES IN RESPECT OF TOBACCO, PETROLEUM PRODUCTS AND LIQUOR. THOSE SCHEMES INVOLVE THE IMPOSITION OF A LICENCE FEE CALCULATED BY REFERENCE TO PRODUCT SALES EFFECTED IN SOME PERIOD BEFORE THE FEE FALLS DUE. THEY ENJOY THE APPROVAL OF A NUMBER OF HIGH COURT CASES FOLLOWING ON THE DENNIS HOTELS CASE IN 1960.

THE HIGH COURT HEARD ARGUMENT IN THE CASE IN APRIL OF THIS YEAR, AND A DECISION IS PENDING.

THE ESSENCE OF THE MATTER NOW BEFORE THE HIGH COURT IS THAT BACKDATING SCHEMES MAY NOT BE AN EFFECTIVE WAY AROUND SECTION 90 OF THE COMMONWEALTH CONSTITUTION WHICH GIVES THE COMMONWEALTH A MONOPOLY ON EXCISE DUTIES.

AN ADVERSE DECISION IN CAPITAL DUPLICATORS WOULD PUT AT RISK ANNUAL NEW SOUTH WALES REVENUES FROM TOBACCO, PETROLEUM PRODUCTS AND LIQUOR LICENCE FEES.

IN NEW SOUTH WALES SUCH LICENCE FEES WILL RAISE AN ESTIMATED \$1.389 BILLION IN 1993/94, OR 15% OF TOTAL REVENUE FROM STATE TAXES, FEES AND FINES, AND 7.5% OF TOTAL RECEIPTS FROM ALL SOURCES.

THE STATES AND TERRITORIES COLLECTIVELY RAISE APPROXIMATELY \$3.8 BILLION PER ANNUM FROM SUCH LICENSING SCHEMES.

THE DECISION MAY ALSO HAVE IMPLICATIONS FOR OTHER STATE TAXES AND CHARGES.

IN ADDITION TO THE PROSPECTIVE LOSS OF REVENUE, EVEN LARGER AMOUNTS ARE AT RISK IF THE HIGH COURT WERE TO RETROSPECTIVELY OVERRULE DENNIS HOTELS.

THE AMOUNT POTENTIALLY AT RISK OF HAVING TO BE REFUNDED HAS BEEN SUBSTANTIALLY INCREASED BY RECENT COURT DECISIONS ON REFUNDS OF PAYMENT MADE DUE TO A MISTAKE OF LAW.

IN A 1992 CASE, DAVID SECURITIES PTY LTD -V- THE COMMONWEALTH, THE HIGH COURT HELD THAT THERE WAS NO COMMON LAW RULE OPERATING IN AUSTRALIAN LAW TO PRECLUDE THE RECOVERY OF MONEYS PAID UNDER A MISTAKE OF LAW.

THE RESULT IS THAT THERE IS NO PRIMA FACIE RULE TO PREVENT RECOVERY OF LICENCE FEES PREVIOUSLY PAID IF THE HIGH COURT WERE TO OVERTURN DENNIS HOTELS.

IN THE CAPITAL DUPLICATORS CASE, THE NEW SOUTH WALES SOLICITOR GENERAL ARGUED, ON BEHALF OF THE STATES, THAT, IF THE HIGH COURT DECIDES TO OVERRULE DENNIS HOTELS, IT SHOULD DO SO PROSPECTIVELY.

IF THE HIGH COURT DOES NOT ACCEPT THIS ARGUMENT, THE STATES WILL HAVE TO RELY ON COMMONWEALTH AND STATE SAFETY NET LEGISLATION TO LIMIT THE THREAT POSED TO STATE FINANCES SHOULD IT BECOME NECESSARY TO MAKE LARGE REFUNDS OF LICENCE FEES.

IN ARGUMENT BEFORE THE HIGH COURT THE COMMONWEALTH SOLICITOR GENERAL STATED.

"THE COMMONWEALTH HAS INDICATED TO SOUTH AUSTRALIA AND HAS INDICATED GENERALLY TO THE STATES THAT IT IS PREPARED, IN THE EVENT THAT DENNIS HOTELS WERE TO BE OVERRULED, TO IMPOSE AT A UNIFORM RATE DENNIS HOTELS - TYPE IMPOSTS IN RESPECT OF EXISTING...IMPOSTS [OF THIS TYPE] AND TO DISTRIBUTE THE AMOUNTS SO COLLECTED TO THE STATES."

THE COMMONWEALTH SOLICITOR GENERAL ALSO ADVISED THE COURT OF:

"...THE COMMONWEALTH'S ACCEPTANCE THAT IT IS PREPARED TO TAKE IMMEDIATE ACTION TO PROTECT EXISTING REVENUE BASES OF THE STATES WHICH MAY BE AFFECTED BY AN OVERRULING OF DENNIS HOTELS."

COMMONWEALTH AND STATE OFFICIALS HAVE BEEN WORKING TOGETHER TO PREPARE A PACKAGE OF COMMONWEALTH LEGISLATIVE MEASURES TO PROTECT STATE LICENCE FEE REVENUES ALREADY COLLECTED.

WORK IS ALSO PROCEEDING ON UNIFORM IMPOSTS UNDER COMMONWEALTH LEGISLATION, WHICH CAN BE INTRODUCED QUICKLY TO REPLACE THE REVENUE CURRENTLY GENERATED BY STATE LICENCE FEES IF SUCH MEASURES ARE REQUIRED.

HOWEVER, AT THIS STAGE THE COMMONWEALTH HAS NOT INFORMED THE STATES OF THE DETAIL OF THE PROPOSED SAFETY NET ARRANGEMENTS.

MR PRESIDENT, THE BILL PRESENTLY BEFORE THE HOUSE REPRESENTS AS GOOD A SAFETY NET AS THE STATE IS UNILATERALLY ABLE TO PROVIDE IN RELATION TO CLAIMS FOR REFUNDS OF TAXES AND FEES, AND WILL COMPLEMENT MEASURES THAT THE STATES HAVE REQUESTED THE COMMONWEALTH TO INTRODUCE.

THE LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS) AMENDMENT BILL APPLIES THE LIMITATION PERIOD TO ALL STATE TAXES, INCLUDING FEES, CHARGES OR OTHER IMPOSTS, NOTWITHSTANDING ANY OTHER LEGISLATION.

THE AMENDMENT BILL IMPOSES AN ADDITIONAL REQUIREMENT THAT THE CLAIMANT FOR A REFUND MUST PROVE THAT THE TAX HAS NOT BEEN PASSED ON EITHER DIRECTLY OR INDIRECTLY. IT WOULD BE MANIFESTLY UNJUST TO ALLOW A BUSINESS TO RECOVER FROM THE STATE, TAXES WHICH IT HAD PASSED ON.

IT ALSO PROVIDES THAT AN IMPOST IS NOT RECOVERABLE AT ALL IF THE INVALIDITY OF THE IMPOST AROSE FROM A CHANGE IN THE LAW OR LEGAL PRINCIPLES, SUCH AS MIGHT OCCUR AS A RESULT OF A COURT DECISION.

MR PRESIDENT, THIS IS THE FIELD OF JUDGE MADE LAW TO WHICH I REFERRED EARLIER.

MR PRESIDENT, I COMMEND THE BILL TO THE HOUSE AND, FOR THE ASSISTANCE OF HONOURABLE MEMBERS I TABLE A SUMMARY OF ITS PROVISIONS.

**LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS)
AMENDMENT ACT 1993 No. 96**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Limitation of Actions (Recovery of Imposts) Act 1963 No. 21

SCHEDULE 1—AMENDMENTS

**LIMITATION OF ACTIONS (RECOVERY OF IMPOSTS)
AMENDMENT ACT 1993 No. 96**

NEW SOUTH WALES



Act No. 96, 1993

An Act to amend the Limitation of Actions (Recovery of Imposts) Act 1963 in relation to the recovery of certain taxes, fees, charges and other imposts. [Assented to 30 November 1993]

Limitation of Actions (Recovery of Imposts) Amendment Act 1993 No. 96

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Limitation of Actions (Recovery of Imposts) Amendment Act 1993.

Commencement

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

Amendment of Limitation of Actions (Recovery of Imposts) Act 1963 No. 21

3. The Limitation of Actions (Recovery of Imposts) Act 1963 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Long title:

After “imposts;”, insert “to provide that certain taxes, fees, charges and other imposts are not recoverable in certain circumstances;”.

(2) Section 1 (**Short title**):

Omit “Limitation of Actions (Recovery of Imposts) Act 1963”, insert instead “Recovery of Imposts Act 1963”.

(3) After section 1, insert:

Definitions

1A. In this Act:

“**invalidity**” of taxation legislation includes invalidity of a portion of the legislation or of an application of the legislation;

“**pay**” a tax includes recover the tax by legal proceedings;

“**proceedings**” includes proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief;

“**tax**” includes a fee, charge or other impost;

SCHEDULE 1—AMENDMENTS—*continued*

“taxation legislation” means:

- (a) an Act imposing or relating to a tax; or
- (b) a provision of such an Act; or
- (c) a regulation under such an Act; or
- (d) a provision of such a regulation.

(4) Section 2 (**Limitation on time for the bringing of proceedings to recover taxes**):

- (a) From section 2, omit “action or proceeding” wherever occurring, insert instead “proceedings”.
- (b) From section 2, omit “, fee, charge or other impost” wherever occurring.
- (c) After section 2 (2), insert:

(3) Without affecting the generality of this section, and for the avoidance of doubt, it is declared that this section applies to proceedings for the recovery of money (paid by way of tax or purported tax) on the ground of, or on grounds that include, the invalidity of taxation legislation.

(4) This section does not apply to money that is not recoverable because of section 3.

(5) Sections 3–7:

After section 2, insert:

Certain taxes not recoverable following non-legislative changes of the law

3. (1) In this section, “**non-legislative change of the law**” means a change of the law or of legal principles, or a change in what is generally perceived to be the state of the law or of legal principles, but does not include a change made by legislation.

(2) Money paid by way of tax or purported tax is not recoverable on any of the grounds referred to in subsection (3), if:

- (a) the ground came into existence because of a non-legislative change of the law; and
- (b) the money was paid before the change.

SCHEDULE 1—AMENDMENTS—*continued*

(3) The grounds are:

- (a) the ground of invalidity of any taxation legislation; or
- (b) the ground of mistake (whether of law or of fact) as to the validity or invalidity of any taxation legislation; or
- (c) any other restitutionary ground relating to the validity or invalidity of any taxation legislation.

(4) Subsection (2) does not apply to proceedings for the recovery of money that, assuming the legislation concerned had been valid, would have represented an overpayment of a tax, if the legislation provides for the refund of the money.

Passing on of tax

4. (1) Proceedings referred to in section 2 or 3 (4) to recover an amount paid are however maintainable only to the extent that the person bringing the proceedings (“**the claimant**”) satisfies the court that the claimant has not charged to or recovered from, and will not charge to or recover from, any other person any amount in respect of the whole or any part of the amount paid. This applies whether or not any such amount has been itemised or otherwise separately identified in any invoice or other documentation.

(2) A reference in this section to the claimant extends to a predecessor, successor or assignee of the claimant.

(3) This section has effect despite anything in section 2 or 3, or in any other Act.

Ending of right of recovery

5. If because of this Act money paid by way of tax or purported tax ceases to be or is not recoverable, the right to recover the money is extinguished.

Characterisation of this Act

6. The provisions of this Act are to be regarded as part of the substantive law of the State.

Application

7. (1) This Act applies to money paid whether voluntarily or under compulsion, and applies whether or not the payment was made under protest.

Limitation of Actions (Recovery of Imposts) Amendment Act 1993 No. 96

SCHEDULE 1—AMENDMENTS—*continued*

(2) This Act has effect despite the provisions of any other Act.

(3) The amendments made to this Act by the Limitation of Actions (Recovery of Imposts) Amendment Act 1993 apply to money paid, and proceedings commenced, whether before or after the commencement of that Act.

(4) Sections 1A and 2 (1)–(3) of this Act as amended by the Limitation of Actions (Recovery of Imposts) Amendment Act 1993 have effect for all purposes, and are taken always to have had effect for all purposes, as from the commencement of this Act.

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

