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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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TAXATION ADMINISTRATION AMENDMENT  
(RECOVERY OF TAX DEBTS) BILL 1986

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EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer  
the Hon. P.J. Keating, M.P.)



## GENERAL OUTLINE

The Taxation Administration Amendment (Recovery of Tax Debts) Bill 1986 will amend the Taxation Administration Act 1953 to modify, in relation to the recovery of unpaid tax, any application of the law of a State or Territory dealing with the limitation of actions to recover debts.

The provisions of the Bill will operate to modify a State or Territory limitation law only where the unpaid tax is being, or has been, disputed by the lodgment of an objection against an assessment or decision of the Commissioner of Taxation. Further, the modified application of a particular State or Territory limitation law will occur only where that law applies to the recovery of unpaid tax by virtue of section 64 of the Judiciary Act 1903.

The modification of State and Territory limitation laws will enable an action for the recovery of a taxation debt to be commenced within the appropriate period specified in the relevant limitation law measured not from the due date of the debt, but from the date on which all proceedings arising out of the lodgment of an objection disputing the debt are finalised. In so modifying State and Territory limitation laws, the Bill overcomes the decision of the Queensland Full Supreme Court in Deputy Commissioner of Taxation v Moorebank Pty Ltd.

The modification will apply to all actions to recover unpaid tax irrespective of when the tax became due and payable, but will not apply to cases that have already been decided by the courts.

## FINANCIAL IMPACT

The amendments proposed by this Bill will prevent the potential loss of revenue of the order of \$900 million of which some \$200 million would be collected in the 1986-87 financial year.

## MAIN FEATURES

The amendment of the Taxation Administration Act 1953 proposed by this Bill is of a safeguarding nature and is designed to overcome the decision of the Full Court of

the Queensland Supreme Court on a demurrer to a defence to an action by a Deputy Commissioner of Taxation to recover unpaid tax that had been outstanding for more than 6 years and unpaid penalty tax that had been outstanding for more than 2 years in the event that the High Court affirms that decision on appeal.

The amendment will vary the period during which an action for the recovery of a taxation debt (tax, duty or charge or additional tax, additional duty or additional charge) may be commenced in cases where liability for the debt is, or has been, disputed.

The amendment will, however, not apply if a State or Territory law relating to the limitation of actions for commencement of recovery proceedings in respect of debts is held not to apply to the recovery of Commonwealth taxation debts.

In a majority decision handed down on 3 September 1986 in DCT v Moorebank Pty Ltd, the Full Court of the Supreme Court of Queensland decided that the time limits specified in the Queensland Limitation of Actions Act 1974 for the commencement of proceedings to recover a debt applied, by virtue of section 64 of the Commonwealth Judiciary Act 1903, to the commencement of proceedings to recover taxation debts owed to the Commonwealth. Broadly, section 64 of the Judiciary Act applies to litigation involving the Commonwealth brought in a State or Territory the laws of that State or Territory applicable to litigation between citizens. The effect of the Queensland Supreme Court decision is that, in that State, the commencement of an action for the recovery of tax is subject to a 6 year limitation period and the commencement of an action for the recovery of additional tax for late payment is subject to a 2 year limitation period. The Commissioner of Taxation has sought special leave of the High Court to appeal to that Court from the decision of the Queensland Supreme Court.

If, under the existing law, a State or Territory law has the effect of limiting the period in which an action for recovery of a taxation debt may be commenced, this Bill will, in specified cases, vary the date on which the limitation period ends.

The variation will only occur where a person has lodged an objection against an assessment or decision of the Commissioner of Taxation that gave rise to the taxation debt. In a case where no objection has been taken by a person, the time limits specified in any applicable State or Territory limitation law will operate.

It is proposed that, in a case where an objection has been lodged, any applicable limitation period will be taken to have ended as if it had commenced to run from the time when the objection, or any subsequent appeal proceedings in the Administrative Appeals Tribunal or a court in relation to the decision on the objection became final.

By a further measure contained in the Bill, for the purposes of any application of a State or Territory limitation law, additional tax imposed for the late lodgment of a tax return, the making of a false or misleading statement or participation in a tax avoidance scheme is to be treated as "tax" and not as a "penalty". This will mean that, generally, a longer limitation period will apply to the recovery of such unpaid additional tax.

The amendment proposed in the Bill is to apply to all actions for the recovery of tax debts, whether or not the debts became due and payable before, or become due and payable after, the enactment of the Bill. An exception to this will be where a court has, before the introduction into the Parliament of this Bill, given a decision (including a decision on a demurrer to a defence) in an action to recover unpaid tax where the application of a limitation law was argued before the court that gave the decision.

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A more detailed explanation of the provisions of the Bill is contained in the following notes.

Clause 1 : Short title, etc

Sub-clause (1) of this clause provides for the amending Act to be cited as the Taxation Administration Amendment (Recovery of Tax Debts) Act 1986.

Sub-clause (2) facilitates references to the Taxation Administration Act 1953 which is the Act being amended by this Bill. The Taxation Administration Act 1953 is referred to in clause 3 as "the Principal Act".

Clause 2 : Commencement

Under clause 2, the amending Act is to come into operation on the day on which it receives the Royal Assent. But for this clause, the Act would, by virtue of sub-section 5(1A) of the Acts Interpretation Act 1901, come into operation on the twenty-eighth day after the date of Assent. The amendment being made to the Principal Act will, on commencement, apply to a cause of action to recover a tax debt whenever that cause of action arose or arises.

Clause 3 : Modification of limitation laws applying to the recovery of tax debts

Clause 3 will insert a new section - section 14ZKA - in the Principal Act. The broad effect of this section will be that any application of a law of a State or Territory dealing with the limitation of actions for the recovery of debts will be modified in certain actions for the recovery of taxation debts.

Sub-section 14ZKA (1) contains definitions of a number of terms that are used throughout new section 14ZKA.

"limitation law" is a term used to describe a law in force in a State or Territory which specifies a period after the expiration of which court action cannot be commenced in respect of a particular cause of action - broadly, the facts which give a person the right to institute a proceeding in the courts to obtain judicial relief (paragraph (a)). Paragraph (b) deals with the situation where the law of the State or Territory provides for the extinguishment of a cause of action or of the right to bring proceedings in relation to a cause of action, e.g., section 63 of the New South Wales Limitation Act, 1969. The period provided in a limitation law is referred to in new section 14ZKA as the "limitation period".

"objection" is defined to have the same meaning as that term has in sub-section 3(1) of the Taxation (Interest on Overpayments) Act 1983. Broadly, the term refers to the procedure available under a specified provision of a taxation law by which a person may dispute a tax liability. Tax liability is an existing term defined in section 2 of the Principal Act to mean a liability to the Commonwealth arising under a taxation law. A taxation law is in turn defined to mean the Principal Act and all other Acts and regulations of which the Commissioner of Taxation has the general administration. The term "objection" is used in new sub-section 14ZKA(2) to describe those situations where a tax debt (see next definition) is being disputed.

"tax debt" means a tax liability (see notes on definition of "objection") which is due and payable.

Sub-section 14ZKA(2) is the operative provision which, in the specified circumstances, modifies the effect of the State and Territory limitation laws in relation to the recovery of taxation debts. It will only operate if, in a particular State or Territory, a limitation law in force in that State or Territory applies by virtue of section 64 of the Judiciary Act 1903 to limit the period in which an action to recover a tax debt may be commenced.

If a particular limitation law does not apply, either by its express terms or on its construction, because it is held that section 64 of the Judiciary Act does not operate to apply that law to the recovery of tax debts or because of other provisions of a taxation law (e.g., section 30 of the Gift Duty Assessment Act 1941), section 14ZKA will have no application. If a limitation law does apply in relation to an action for the recovery of a tax debt by virtue of section 64 of the Judiciary Act, section 14ZKA will modify the date on which the limitation period would otherwise end. The section also specifies that the modification is deemed always to have been in effect. Thus, a modified limitation period will apply to any tax debt whenever that debt was incurred. The section does not, however, impose any tax liability. It operates only in relation to tax liabilities already imposed under other taxation laws.

By sub-paragraph (a)(i), the circumstance in which a limitation period is modified is set out. This is where a person has lodged or lodges an objection against an assessment or decision of the Commissioner that has given rise to the tax debt being recovered. In ascertaining the modified limitation period sub-paragraph (a)(ii) requires

it to be assumed that the period commenced to run on the date on which all action in relation to the objection ceased to be pending. This date would normally be the date on which the decision on the objection was notified by the Commissioner, the date on which a decision on any reference to the Administrative Appeals Tribunal or a Supreme Court is given or the date on which a decision on any appeal to a higher court is given.

The purpose of paragraph (b) is to ensure that a tax debt payable under one of the specified provisions is subject to the limitation period applicable to an ordinary tax debt and not that applicable to penalties. Under some State and Territory limitation laws the limitation period for the recovery of a penalty is shorter than that applicable to the recovery of ordinary debts.

By paragraph (b), a tax debt payable under a provision of a tax law specified in the paragraph is deemed not to be, or not to have been, a penalty or a sum by way of penalty. The provisions specified in sub-paragraphs (b)(i) to (ix) are those that deal with the imposition of additional tax, additional duty or additional charge, broadly, for the making of a false or misleading statement, the late lodgment of a return or for participation in a tax avoidance scheme. Apart from Part VIII of the Fringe Benefits Tax Assessment Act 1986 (sub-paragraph (b)(iv)), these provisions were inserted in the various taxation laws by the Taxation Laws Amendment Act 1984. That Act repealed the then existing provisions that dealt with the imposition of additional tax for late or incorrect returns and participation in tax avoidance schemes. Sub-paragraph (b)(x) therefore ensures that additional tax imposed under one of the repealed provisions is treated in the same way as the additional tax imposed under the existing provisions.

Additional penalty tax for late or non-payment of a tax liability (e.g., section 207 of the Income Tax Assessment Act 1936) is excluded from the operation of paragraph (b). Thus, additional tax of this kind will continue to be subject to the limitation period applicable to any penalty provided, of course, that the relevant State or Territory limitation law applies in that way.

Sub-section 14ZKA(3) will ensure that the modified limitation period applicable under sub-section (2) applies to any cause of action that accrued at any time before or after the commencement of the section, irrespective of when the tax debt arose. An exception to this rule is contained in sub-section 14ZKA(4) - see notes that follow.

Sub-section 14ZKA(4) will specify certain circumstances where the modified limitation period



ascertained under sub-section 14ZKA(2) will not apply. These circumstances are where either -

on or before the date of introduction of the Bill a court has made a decision on a demurrer to so much of a defence as is based on the application of a limitation period to a cause of action for the recovery of a tax debt (paragraph (a)). Broadly, a demurrer is a pleading which alleges that the defence filed by a person in respect of a writ shows no good cause of action or defence. This was the legal procedure followed by the Deputy Commissioner of Taxation in several cases recently the subject of consideration by the Full Court of the Supreme Court of Queensland, including DCT v Moorebank Pty Ltd. The Court overruled the demurrers, in effect deciding the point of law against the Deputy Commissioner; or

a court judgment or order has been given or made on or before the date of introduction of the Bill so as to bring to finality by that court a cause of action to recover a tax debt (sub-paragraph (b)(i)) where the application of a limitation law was raised by the taxpayer as a defence to that cause of action (sub-paragraph (b)(ii)). In this situation it will make no difference whether the decision was in favour of, or against, the Commissioner of Taxation or whether the decision is affirmed or overruled on appeal to a higher court. Thus, a modified limitation period will not apply in a case in New South Wales which has been decided by a single judge of the Supreme Court of that State in favour of the Commissioner, but is on appeal by the taxpayer to the Full Court of that Supreme Court with the decision reserved. This will be so even if the Full Court upholds the appeal.

In summary, sub-section 14ZKA(4) will ensure that new section 14ZKA does not apply to a taxpayer who has successfully contested an action (whether on the hearing of a demurrer to a defence, or on a cause of action either at first instance or on appeal) for the recovery of a tax debt on the basis that the action is barred by the application of a limitation law. However, for sub-section 14ZKA(4) to apply, a court must have given judgment on the demurrer or cause of action, or made an order deciding the question, on or before the date of introduction into the Parliament of this Bill.

Sub-section 14ZKA(5) sets out the situations in which an objection procedure in connection with an objection is pending at a particular time for the purposes of paragraph 14ZKA(2)(a). As explained previously, the limitation period is taken to have ended at the time it would have ended assuming it commenced on the date that an objection procedure in connection with the relevant tax debt ceased to be pending. An objection procedure is pending if:

- . the Commissioner has not decided an objection and given written notice of the decision on the objection to the person who lodged the objection (paragraph (a));
- . no decision has been made in respect of an application for an extension of time in relation to the objection. This means that an objection procedure would be pending where, for example, there was before the Administrative Appeals Tribunal or a Supreme Court an undecided application for an extension of time in which to lodge a request for reference on a decision on the objection (paragraph (b));
- . the time for instituting proceedings, e.g., an appeal, under a taxation law or the Administrative Appeals Tribunal Act 1975 in connection with an objection had not yet ended (paragraph (c)); or
- . a proceeding that was instituted in relation to the objection under a taxation law or the Administrative Appeals Tribunal Act 1975 has not yet been determined. This means that an objection procedure will be taken as being current as long as there is outstanding a decision by the Administrative Appeals Tribunal or a court in connection with a decision on an objection (paragraph (d)).

Sub-section 14ZKA(6) will explain, for the purposes of paragraphs 5(c) and 5(d), when an objection by a person against an assessment or decision of the Commissioner is to be treated as finalised.

Under paragraph (6)(a) where an objection or a request for a reference to the Administrative Appeals Tribunal or a Supreme Court or an appeal to a court has lapsed or otherwise been terminated (e.g., where a company that has lodged an appeal has been dissolved before that appeal has been heard) that proceeding is to be regarded as having been finalised.

By virtue of paragraph (6)(b) the possibility that an extension of time for the lodgment of an objection or a request for reference of a decision on an objection to the Administrative Appeals Tribunal or Supreme Court or an appeal to another court might be granted is to be disregarded in ascertaining whether the time for instituting proceedings has expired.

Sub-section 14ZKA(7) is a measure designed to ensure that, in proceedings before a court to determine whether a limitation law applies by virtue of section 64 of the Judiciary Act 1903 to the recovery of a tax debt, new section 14ZKA is to be disregarded in deciding that question.

This sub-section is considered necessary because a court may conclude that, because the Parliament considered it necessary to enact new section 14ZKA, Parliament took the view that section 64 of the Judiciary Act has the effect of attracting the application of limitation laws to actions by the Commissioner of Taxation to recover tax debts. The intention of sub-section (7) is that that question ought to be decided by the courts without any implication being drawn one way or the other from the enactment of this section.





