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Time limits on loans payable on demand

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Time limits on loans payable on demand

We make this Report pursuant to the reference to this Commission received 11 February 2004.

The Hon Justice Michael Adams
Chairperson

The Hon Justice David Hodgson

The Hon Gordon Samuels AC, CVO, QC

Professor Michael Tilbury

October 2004

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TERMS OF REFERENCE

In a letter to the Commission received on 11 February 2004, the Attorney General, the Hon R J Debus MP asked the Commission "to investigate and report on the issue of time limits on loans payable on demand".

PARTICIPANTS

Division Members

Pursuant to section 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams

The Hon Justice David Hodgson

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury (Commissioner-in-Charge)

Officers of the Commission

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SUMMARY OF RECOMMENDATIONS

Recommendation 1: see page 10

The *Limitation Act 1969* (NSW) should be amended to provide that the limitation period for a loan payable on demand should run from the date on which demand is first made for repayment. This provision should not affect the accrual of the cause of action

Recommendation 2: see page 11

The limitation period for loans payable on demand should be three years after the demand has been made.

Recommendation 3: see page 12

The ultimate bar for loans payable on demand should apply 30 years from the date the loan was made.

Recommendation 4: see page 13

A demand for repayment of a loan payable on demand need not be in writing before the limitation period can begin to run.

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"Demand" should be defined to mean an unconditional demand for immediate payment, including a demand that allows the borrower a reasonable time to arrange payment.

Recommendation 6: see page 14

A demand for part only of the loan should not have the effect of barring future demands in respect of the balance of the loan.

Recommendation 7: see page 16

For the purposes of determining whether or not the loan is payable on demand, the terms of a collateral obligation to pay the amount of the debt or any part of it should be read into the terms of the loan agreement itself and, to the extent of any inconsistency between the terms, prevail over them.

1. INTRODUCTION

The reference

1.1 In a letter to the Commission received on 11 February 2004, the Attorney General, the Hon R J Debus MP asked the Commission "to investigate and report on the issue of time limits on loans payable on demand".

1.2 The Commission produced a draft Report which was circulated to potentially interested parties in June 2004 and made available on the Commission's website. The Commission received several detailed and useful submissions on the issues raised in the draft Report.[1] The matters raised in the submissions have been incorporated into this Report. To assist in the Commission's deliberations the New South Wales Parliamentary Counsel drafted the *Limitation Amendment (Loans Payable on Demand) Bill 2004*. A copy is contained in Appendix A of this Report. The Commission acknowledges the substantial contribution of the Parliamentary Counsel's Office to this Report.

The current law

1.3 It is settled law that a loan payable on request (that is, one where no time for repayment is specified or where the loan is stated to be payable "on demand") creates an immediate debt.[2] This means that the lender's cause of action accrues when the borrower receives the money; the lender can then commence action for its recovery at any time. Because the cause of action accrues at the first moment the lender can commence action, the loan is subject to a six year limitation period from when the borrower receives the money.[3]

1. Alist of submissions is contained in Appendix B to this report.
2. See *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 566. See also *Ogilvie v Adams* [1981] VR 1041 at 1043, 1052-1059; England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (21st Report, Cmnd 6923, 1977) at para 3.20-3.21. A loan payable on demand is to be distinguished from a loan payable on condition that a demand is made, eg, a promise to pay a collateral sum upon request, which is treated as a condition precedent to the bringing of an action: see *Re Brown's Estate* [1893] 2 Ch 300 at 304-305; *D & J Fowler (Aust) Ltd v Bank of New South Wales* [1982] 2 NSWLR 879 at 882-883, 886.
3. *Limitation Act 1969* (NSW) s 14(1)(a).

1.4 While this situation is unlikely to cause injustice in the case of commercial loans (which will usually be concluded on legal advice and stipulate dates for repayment in their terms), it is argued that it may cause injustice in the case of loans between friends or family members where the expectation is often that the money will not be repaid until the lender demands it.[4] This is illustrated by *Woodward v McGregor*, a recent case in the New South Wales Supreme Court.[5] A wife, on the winding up of her husband's company agreed to give a loan of $65,000 to her husband on 1 June 1995. The husband died on 12 August 2001 and the wife attempted to claim the $65,000 from the deceased estate which had become subject to a family provision application by a daughter of a previous marriage of the deceased. Master McLaughlin held, in conformity with the settled law on the question, that the limitation period commenced on the date the loan was made and that any claim on the estate was, therefore, barred. The Victorian Supreme Court had considered a similar situation in 1975.[6]

1.5 The administration of an insolvent estate and the division of property in a divorce are other particular examples of situations where limitations on debts payable on demand may operate unfairly when loans are made between family members and friends. In these cases, the borrower, or their successor in title, can potentially take advantage of the operation of the limitation period to retain the benefit of the loan.[7]

4. England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (21st Report, Cmnd 6923, 1977) at para 3.22.
5. *Woodward v McGregor* [2003] NSWSC 672.
6. *Ogilvie v Adams* [1981] VR 1041 where a trustee in bankruptcy sought repayment from a deceased wife's estate of $63,200 lent by her deceased bankrupt husband in April 1957. The repayment was demanded in July 1972, some 15 years later. The claim was unsuccessful.
7. This Report is concerned only with situations where a borrower denies they have any obligation to pay the debt once they are outside the limitation period. Under the current law, if a borrower can be taken to have acknowledged the debt, the confirmation provisions of the *Limitation Act 1969* (NSW) will apply to extend the limitation period (s 54). For example, a borrower making an interest payment to a lender may be taken to have confirmed the lender's cause of action to recover the principal loan. This situation is not affected by the recommendations made in this Report.

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1.6 Master McLaughlin's judgment in *Woodward v McGregor*, including remarks concerning "the unfairness and injustice which can result from the application of this rule of law to loans between family members or close friends",[8] was drawn to the attention of the Commission. The Commission conducted a preliminary investigation, as part of its Community Law Reform Program, to determine whether there was a need to investigate its import further with a view to making recommendations for reform. The Commission concluded that there was such a need and requested terms of reference from the Attorney General. In a letter to the Commission received on 11 February 2004, the Attorney General, the Hon R J Debus MP approved the Commission's proposal "to investigate and report on the issue of time limits on loans payable on demand".

8. *Woodward v McGregor* [2003] NSWSC 672 at para 85.

2. THE ADEQUACY OF THE CURRENT LAW

2.1 The Commission is persuaded that, in its application to loans between family members and close friends, the current law may give rise to the unfairness and injustice identified by Master McLaughlin in *Woodward v McGregor*.[9] The essential reason is that, in such cases, the law will generally operate to defeat the intention and expectations of the parties to the loan.

2.2 Commonly a loan between friends or family members is entered into orally and without legal advice. Where these parties do not make any agreement about the time at which the loan is to be repaid, their intention will be that the loan is payable when the lender requests its repayment.

Effectively, this means that the borrower agrees to repay the loan *at any time* that the lender makes a demand for payment. As Justice Young has explained:

> The reason why that is so really comes from the ancient idea that a loan of money, which constituted a debt, was a deposit of specific coins that the borrower was obliged to restore at any time. The nearest present day example is where one borrows one's neighbour's lawn mower. The lawn mower is returnable on demand, but one should have it ready at any time for the owner who may reclaim it whenever he or she wishes. If one looks through the early cases ... one can see that this is the basis of the principle. So that, "I promise to pay on demand" means "I am ready to pay at any time". This line of thinking extends from 1712 to the present day.[10]

2.3 The expectations of the parties do not change where the lender requests repayment of the loan more than six years after the date at which the borrower received the money under the loan. The Commission is of the view that, to the extent to which the parties can be taken to have thought of time limits when making their contract, and remembering that they are unlikely to have the benefit of legal advice in such informal circumstances, they would not expect that the mere lapse of six years (or any other time) from the date of receipt of the loan would defeat the claim. At most, they would expect a limitation period (of whatever duration) to run from the date of the demand for repayment. The effect of the present law is thus to allow a borrower who pleads the Statute of Limitations to defeat the intention of the parties at the time of entering into the contract that the loan would be payable on demand. In the case of loans between family members and friends, this seems unfair.

Reasons for retaining the current law

2.4 A number of reasons have, however, been identified for retaining the current law.

2.5 First, it has been suggested that the current arrangements protect persons who have already paid their debts (or been discharged from them) but, after the passage of many years,

9. *Woodward v McGregor* [2003] NSWSC 672.
10. *Drinkwater v Caddyrack Pty Ltd (No 3)* (NSW SC, No 3970/1996, Young J, 28 November 1997, unreported) at 4.

have destroyed the proof of payment.[11] This is merely an evidential point that the Commission finds unpersuasive as a general reason for retaining the present law. In any event, records of the movement of sums of money will usually be retained in some form by financial institutions.

2.6 Secondly it has been suggested that there may be an element of vindictiveness in reviving long dormant claims.[12] This could be especially so in the case of debts between family members and friends. In the words of Chief Justice Best:

> Long dormant claims have often more of cruelty than of justice in them ... The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it.[13]

The Commission considers that the motive for demanding repayment of a debt cannot qualify the intention with which the loan was entered into in the first place.

Dangers in changing the current law

2.7 While the Commission can find no compelling reasons for maintaining the present law, at the same time, the Commission does not favour any reform of the law that would:

- alter the ingredients of a cause of action for the repayment of a debt under a contract of loan;[14] or
- transform other settled bodies of law; or
- defeat legitimate commercial expectations.

2.8 The first danger arises in so far as any reform of the limitation period for loans payable "on demand" unwittingly results in a formal demand becoming a prerequisite to the action.[15] Careful drafting averts this danger. Thus, English reforms allowing a loan to be recoverable provide that the limitation period applies "*as if* the cause of action to recover the debt had accrued on the date on which the demand was made".[16] This is one way of leaving the cause of action intact.

2.9 The second danger arises where a loan is supported by a collateral obligation, in practice, a promissory note. For the reasons outlined in paragraphs 4.14-4.18 of this Report, this danger is illusory since the Commission's proposed reform of the law will not affect the substantive law relating to promissory notes.

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11. *Ogilvie v Adams* [1981] VR 1041 at 1053; *Thomson v Eastwood* (1877) 2 AC 215 at 248-249.
12. *Ogilvie v Adams* [1981] VR 1041 at 1053.
13. *A'Court v Cross* (1825) 3 Bing 329 at 332-333; 130 ER 540 at 541-542.
14. See H G Beale (ed), *Chitty on Contracts* (29th ed, Sweet and Maxwell, 2004) Vol 2 at para 38-232.
15. See England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (21st Report, Cmnd 6923, 1977) at para 3.19, 3.23 (the relevant rule of law belongs to the substantive law of contract rather than to the law of limitations).
16. *Limitation Act 1980* (Eng) s 6(3) (emphasis added).

2.10 The third danger presents itself in the case of commercial loans payable on demand. In such cases, the effect of allowing the period of limitation to run from the date of demand could be to extend the life of loans beyond the limitation period. The Commission has found no evidence suggesting that such extension will, in practice, be of concern in commercial cases. This is hardly surprising. While parties to commercial transactions may intend that a debt payable "on demand" is payable at any time, they will not generally intend that the debt should become unenforceable within any particular period of time, except that set by limitation statutes. A change in that period will be a matter on which parties to commercial transactions will generally have legal advice. In any event, commercial loans will normally specify a date for repayment or be conditional on a demand for repayment or on some other matter, thus taking them outside the category of debts payable "on demand".[17]

2.11 Commercial loans are also highly likely to involve the periodic payment of interest.[18] Loans that involve the periodic payment of interest will generally not come within the proposed reform since payments will be required on specified dates. Moreover, periodic payments, if made, may amount to confirmation of the loan agreement.[19]

17. Compare *Boyden v Stern* (England and Wales, High Court of Justice, Chancery Division, 27 March 2002, Ferris J, unreported), but it is questionable whether this case involved a "loan".
18. Loans payable on demand with interest (see *Norton v Ellam* (1837) 2 M & W 461; 150 ER 839) are unlikely to occur frequently in a modern commercial environment.
19. *Limitation Act 1969* (NSW) s 54(2)(a)(ii).

3. REFORM IN OTHER JURISDICTIONS

Reforms in the United Kingdom

3.1 In the United Kingdom the law has been reformed to overcome the injustice caused in cases of loans between family members and friends. The first of these reforms, contained in the *Prescription and Limitation (Scotland) Act 1973* (Scot), was recommended by the Scottish Law Commission in 1970.[20] This was followed in England and Wales by reforms now contained in the *Limitation Act 1980* (Eng)[21] which were recommended by the Law Reform Committee in 1977.[22]

3.2 The English provisions create an exception to the general six year limitation period on causes of action accruing under simple contracts established by s 5 of the *Limitation Act 1980* (Eng):

> **6 Special time limit for actions in respect of certain loans**
>
> (1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.
>
> (2) This section applies to any contract of loan which-
>
> (a) does not provide for repayment of the debt on or before a fixed or determinable date; and
>
> (b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;
>
> except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.
>
> (3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.
>
> (4) In this section "promissory note" has the same meaning as in the Bills of Exchange Act 1882.

20. Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions* (Report 15, 1970) at para 79. See also Scottish Law Commission, *Prescription and Limitation of Actions* (Memorandum No 9, 1969) at para 57.
21. Originally inserted as *Limitation Act 1939* (Eng) s 2AA by *Limitation Amendment Act 1980* (Eng) s 1.
22. England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (21st Report, Cmnd 6923, 1977) at para 3.19-3.26.

3.3 The Law Commission of England and Wales has recently reviewed the law relating to the limitation of actions. The Law Commission favoured a "core regime" based on the general principle that the period of limitation does not begin to run until the plaintiff is or, in the circumstances, ought reasonably to be aware of the fact that he or she has suffered an injury (a "date of knowledge" or "discovery-based" regime).[23] This core regime would replace the current limitation law that focuses generally on the date of the accrual of the cause of action. However, in respect of loans payable on demand, the Law Commission stated that it did not wish to undermine the policy behind the current English provisions. The Law Commission recommended that, in such cases, the cause of action "should not accrue until a written demand for repayment has been made".[24] This recommendation appears to go further than s 6 of the *Limitation Act 1980* (Eng) since it directly affects the accrual of the cause of action, as opposed to the time at which the limitation period begins to run.

Proposals in other jurisdictions

3.4 The Queensland Law Reform Commission in its review of the law of limitations in 1998 recommended that, in claims for repayment of a debt payable on demand, the limitation period should commence "when a default in performance has occurred after a demand for performance has been made".[25] This followed the recommendation of the Law Reform Commission of Western Australia (adopting an Alberta provision)[26] that "a claim based on a demand obligation" should arise "when a default in performance occurs after a demand for performance is made".[27] All of these recommendations were made in the context of proposed "discovery-based" regimes.

23. England and Wales, Law Commission, *Limitation of Actions* (Report 270, 2001) especially at para 3.7.
24. England and Wales, Law Commission, *Limitation of Actions* (Report 270, 2001) at para 4.4-4.6.
25. Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)* (Report 53, 1998) at 208.
26. *Limitations Act 1996* (Alta) s 3(3)(c). Recommended by Alberta Law Reform Institute, *Limitations* (Report 55, 1989) at 71-72.
27. Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions* (Project No 36 Part 2, 1997) at 177.

4. REFORMING THE LAW IN NEW SOUTH WALES

The Commission's principal recommendation

4.1 A number of options for reforming the current law have presented themselves. One is that where money is lent and no date or other condition is specified for its repayment, the limitation period should run from the date on which demand is first made for repayment. However, some concerns were expressed about having a limitation period which, in effect, commences at the election of the lender.[28] One option to deal with these concerns would be to have the limitation period commence as it now does but allow for an extension of time for good reason. Under this proposal, if an application for extension of time is made, the onus could be placed on the borrower to show why the period should not be extended. This would have the effect of discouraging some litigation.[29] However, this leaves open the possibility that borrowers could litigate the point, however baseless the grounds (this is more likely given the tensions that sometimes arise in disputes between family members and friends). The Commission prefers to remove such opportunities for litigation entirely from the range of options available to borrowers and so does not favour this option.

4.2 The Commission's conclusion is that where money is lent and no date or other condition is specified for its repayment, the limitation period should run from the date on which demand is first made for payment. This recommendation is not intended to change the nature of the cause of action on a loan payable on demand.[30]

RECOMMENDATION 1

The *Limitation Act 1969* (NSW) should be amended to provide that the limitation period for a loan payable on demand should run from the date on which demand is first made for repayment. This provision should not affect the accrual of the cause of action.

4.3 In making this principal recommendation the Commission has considered the following matters that affect the detail of any reform of the law of New South Wales:

- when the limitation period should commence;
- the length of the limitation period;
- whether the demand should be in writing;
- what should constitute a demand;
- whether the legislation should deal expressly with collateral obligations; and
- the effect of the reform on claims by or against deceased estates.

28. J W Carter, *Submission*.
29. J W Carter, *Submission.*
30. See para 2.8.

Commencement of the limitation period

4.4 Recommendations for reform of the law in Western Australia, Queensland and Alberta[31] have raised a question whether, in the case of loans payable on demand, time should run from:

- when the demand for repayment has been made; or
- when a default in performance has occurred after a demand for payment has been made.

Whatever the advantage of the latter option in the case of a discovery-based limitations regime (rather than an accruals model), the Commission is of the view that its implementation in the current law of New South Wales would create uncertainty as it would then have to be determined when there had been a default in performance. This would depend, in part, on the nature and terms of the demand. In the Commission's view, the preferable course is to follow the English model under which the limitation period runs from the time when the demand is made.

Length of the limitation period

4.5 The Commission has considered whether the limitation period should be six years once a demand for repayment has been made. A six year limitation period would be consistent with current provisions in relation to other contracts.[32] The Commission is, however, concerned that a limitation period which extends six years after demand is simply too long, especially in light of the fact that the commencement date would be at the election of the lender. One submission suggested that a three year limitation period might be more appropriate in the context.[33] The Commission agrees with this suggestion.

RECOMMENDATION 2

The limitation period for loans payable on demand should be three years after the demand has been made.

Ultimate bar

4.6 Under the current law the period of limitation is subject to an ultimate bar of 30 years from the date it first starts running.[34] If recommendation 1 is implemented this would mean that loans payable on demand would continue to be recoverable during a period that extends indefinitely into the future until a demand is made.

31. See para 3.4.
32. *Limitation Act 1969* (NSW) s 14(1)(a).
33. J W Carter, *Submission*.
34. *Limitation Act 1969* (NSW) s 51.

4.7 An ultimate bar is considered necessary so that there will not be an indefinite time for bringing actions no matter what other circumstances pertain.[35] Under the current *Limitation Act 1969* (NSW) the ultimate bar has the effect of barring action even when other provisions have allowed for an extension of the limitation period, for example, by acknowledgment or confirmation of the obligation from the borrower.[36] Some submissions have accordingly suggested that there should be an effectual ultimate bar at 30 years after the making of the loan.[37]

4.8 The Commission agrees with this suggestion and considers that 30 years is a sufficient time for a lender to make a claim, even for an informal arrangement of the sort envisaged by these reforms. The ultimate bar provisions of the *Limitation Act 1969* (NSW) will, therefore, need to be amended to make it clear that the ultimate bar applies 30 years from the date the loan was entered into.

RECOMMENDATION 3

The ultimate bar for loans payable on demand should apply 30 years from the date the loan was made.

Requirement that the demand be in writing

4.9 On balance the English Law Reform Committee recommended that the demand for repayment should be in writing. Arguments in favour of writing include the greater reliability of written evidence particularly in cases where the borrower is dead.[38] Arguments against writing include the trend in some cases to move away from a requirement of writing (for example in sale of goods) and "where a debt has been incurred between friends, an oral acknowledgment may be freely given and accepted in circumstances in which the creditor would never think of asking for anything in writing".[39] It might also be considered odd that a loan which may not be evidenced by writing could require writing in order to be recalled.

4.10 In light of the general nature of loans between family members and friends, the Commission is of the view that it should not be necessary for a demand for repayment to be in writing.

RECOMMENDATION 4

A demand for repayment of a loan payable on demand need not be in writing before the limitation period can begin to run.

35. NSW Law Reform Commission, *First Report on Limitation of Actions* (Report 3, 1967) at 127.
36. Under *Limitation Act 1969* (NSW) s 54.
37. J Bryson, *Submission*; P Blackburn-Hart, *Submission* at 2.
38. England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (21st Report, Cmnd 6923, 1977) at para 2.67.
39. England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (21st Report, Cmnd 6923, 1977) at para 2.66.

The meaning of demand

4.11 Recommendation 1 envisages that, in the case of loans payable on demand, the limitation period should run from the date on which demand is made for payment. This leaves open the question of what constitutes a "demand" for this purpose. The question may arise in the following cases:

- Where the demand specifies a fixed future date for payment (for example, "pay me four years from today");
- Where the demand specifies a determinable future date for payment (for example, "pay me when I retire");
- Where the demand is conditional (for example, "pay me if I reach retirement age"); and
- Where the demand allows time for payment (for example, "pay me by close of business on Monday").

4.12 In the case of loans payable on condition that demand is made, authority establishes that "[t]here must be a clear intimation that payment is required to make a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided that it has this effect".[40] In the Commission's view, the law should mirror this position in the case of loans payable on demand. If the lender were able to demand payment subject to a condition or at a fixed future date, the lender would effectively have the power to change the nature of the obligation (under which the borrower is liable to pay at once and at any time).[41] Subject to one qualification, "demand" should, therefore, mean an unconditional demand for immediate payment. The qualification is that if the lender's demand allows the borrower a time within which to arrange payment which is reasonable, having regard to the consideration that the borrower under such a loan should maintain an ability to repay it promptly if required, the demand should not be regarded as falling foul of the requirement that it be an unconditional demand for immediate payment. Indeed, even if a demand does not expressly allow a reasonable time for payment, it may be construed as doing so,[42] even if this means only such time as is reasonably necessary to effect the mechanics of payment.[43]

RECOMMENDATION 5

"Demand" should be defined to mean an unconditional demand for immediate payment, including a demand that allows the borrower a reasonable time to arrange payment.

40. *Re Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd* (1905) 6 SR (NSW) 6 at 9 (Walker J).
41. See para 2.2. And see especially *Bond v Hongkong Bank of Australia Ltd* (1991) 25 NSWLR 286 at 328 (Mahoney JA).
42. *Bunbury Foods Pty Ltd v Bank of Australasia* (1984) 153 CLR 491 at 502-503.
43. *Bond v Hongkong Bank of Australia Ltd* (1991) 25 NSWLR 286 at 295 (Gleeson CJ), 318 (Kirby P), approving *Bank of Baroda v Panessar* [1987] 1 Ch 335 at 348 (Walton J). But compare *Bunbury Foods Pty Ltd v Bank of Australasia* (1984) 153 CLR 491 at 503-504.

4.13 A lender may demand payment of part of the loan from the borrower, leaving the balance of the loan outstanding. The Commission is of the view that a demand for part only of the loan should not, for the purpose of the statute of limitations, operate so as to bar future demands in respect of the outstanding balance of the loan.

RECOMMENDATION 6

A demand for part only of the loan should not have the effect of barring future demands in respect of the balance of the loan.

Collateral obligations

4.14 In reforming the law to take account of arrangements between family members and friends, an issue arises as to the effect that any reform will have on collateral obligations entered to support the loan. In this context we are usually talking about the use of promissory notes as collateral security and would expect them to be used most often in a commercial context. However, there will be cases involving contracts between family members and friends where the parties may use promissory notes.[44]

4.15 In framing its recommendations, the English Law Reform Committee did not consider that collateral obligations presented a problem in this context and was content with making no recommendation on the point.[45] However, as drafted, s 6(2) of the *Limitation Act 1980* (Eng) does make reference to collateral obligations. It requires that, in order for time to start running as if the cause of action had accrued on the date of demand under the contract of loan, not only must the loan be payable on demand (that is not required on or before a fixed or determinable date) and be otherwise unconditional, but the collateral obligation (usually a promissory note), must be read into the contract of loan and must also meet the same requirements.[46]

4.16 Putting to one side the drafting of s 6(2), which has received considerable criticism for its complexity,[47] the Commission is of the view that there is a need to refer to collateral obligations in legislation reforming the law of limitations in its application to loans payable on demand. It is true that such reference is not needed where a promissory note is payable on demand and otherwise unconditional. In such a case the obligation will not qualify in any relevant respect the terms of the principal contract of loan. Whether the lender takes action under the contract of loan or the promissory note, the action will be limited, under the Commission's proposals, three years

44. For example, *Boot v Boot* (1996) 73 P & CR 137 (CA); *Von Goetz v Rogers* (England and Wales, Court of Appeal (Civil Division), 19 July 1998, unreported).
45. England and Wales, Law Reform Committee, *Final Report on Limitation of Actions* (Twenty-first Report, Cmnd 6923, 1977) at para 3.26.
46. *Limitation Act 1980* (Eng) s 6(2), as interpreted by the English Court of Appeal in *Boot v Boot* (1996) 73 P & CR 137.
47. See, eg, *Boot v Boot* (1996) 73 P & CR 137 at 139-141. See also D Petkovic, "Limitation periods for on demand loans" (1996) 15(1) *International Banking and Finance Law* 2 at 2; N Levy, "Loans: Time to pay up" (1999) 149 *New Law Journal* 18 at 18.

after the date of demand. This is the same result that is achieved by the current English provisions where a promissory note is payable on demand and otherwise unconditional.[48]

4.17 The position is, however, more complex where the promissory note is payable on or before a fixed date or otherwise subject to a condition for performance. Here, there is an inconsistency between the loan and the promissory note. In such a case, if the obligations are truly "collateral", they are "separate, concurrent, secure the same sum, rank equally and are enforceable in any order".[49] This would seem to allow the creditor the option of taking action under the loan or under the promissory note, which, under the proposals in this Report, would attract different limitation periods. The English legislation avoids this result by requiring that the terms of the collateral obligation be read notionally into the loan agreement itself.[50] The Commission supports this outcome because it gives effect to what the parties intended by including such terms in the promissory note.

4.18 In making its recommendation on this matter, the Commission wishes to stress that the recommendation is intended to affect only obligations that can truly be described as "collateral" in the sense mentioned in paragraph 4.17. In particular, our recommendation is not intended to alter or influence the common law relating to the determination whether obligations are collateral or not. This determination can only be made in each case by reference to the intention of the parties.[51] Nor is our recommendation intended to affect the law relating to collateral contracts properly so called, that is, contracts "the consideration for which is the making of another contract".[52]

RECOMMENDATION 7

For the purposes of determining whether or not the loan is payable on demand, the terms of a collateral obligation to pay the amount of the debt or any part of it should be read into the terms of the loan agreement itself and, to the extent of any inconsistency between the terms, prevail over them.

Claims by or against deceased estates

4.19 In New South Wales, the legislation relating to the survival of causes of action provides that when a person dies "all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person's estate".[53] At common law the cause of action accrues when the borrower receives the money under the loan.[54] It follows that the cause of action subsists at the date of the death of either party where the borrower had received the money under the loan at any time before the relevant death provided, of course,

48. See *Boot v Boot* (1996) 73 P & CR 137.
49. *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 135 (Dixon J). Consider also *Gardiner v Grigg* (1938) 38 SR (NSW) 524 at 534-535 (Jordan CJ).
50. See *Boot v Boot* (1996) 73 P & CR 137 at 140 (Waite LJ). See also *Von Goetz v Rogers* (England and Wales, Court of Appeal, 29 July 1998, unreported).
51. See especially *Hoyt's Proprietary Ltd v Spencer* (1919) 27 CLR 133 at 148 (Isaccs J), citing *Gartside v Silkestone and Dodworth Coal and Iron Co* (1882) 21 Ch D 762 at 767-768.
52. See *Heilbut Symons & Co v Buckleton* [1913] AC 30 at 47.
53. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1).
54. See para 1.1.

that no limitation period prevents the claim. Recommendation 1 does not change the nature of the cause of action.[55] Under the Commission's recommendations, the period of limitation applicable to the claim by a lender against the borrower's estate or by a lender's estate against the borrower or the borrower's estate would be three years from the date of demand of the money by the lender (if the lender made the demand during his or her life) or by the lender's estate. No change in the law is necessary in this regard.

4.20 In *Woodward v McGregor*,[56] which is discussed in paragraph 1.4, Master McLaughlin left open the possibility that if the limitation period had not expired before the death of the borrower, the borrower's executor would have been obliged, at common law,[57] to fulfil the contractual duty of the deceased to repay the loan even though the limitation period on the contract of debt had expired before the lender made the claim. If the Commission's recommendations are implemented it becomes unnecessary to investigate this line of argument.

4.21 Further concerns were raised in submissions concerning the protection of executors or administrators of a deceased borrower and beneficiaries if the lender were to demand payment after the debts of the estate had been paid and the assets already distributed.[58]

4.22 So long as an executor or administrator of a deceased borrower's estate follows the prescribed procedures and waits the prescribed time, the executor or administrator may distribute the assets having regard to any claims of which they are notified and they will not be liable in respect of any claims of which they did not have notice.[59] This means that under the Commission's proposed reforms an executor or administrator will be protected against claims that are made in respect of a loan payable on demand even when those claims are not yet statute barred, so long as they have followed the correct procedure and not received notice of the claims before they distribute the estate.

4.23 However, once an estate has been distributed, a lender may have the right to follow assets of the estate to which they are entitled into the hands of the beneficiaries of the estate.[60] This situation is one that appertains to all cases in which an estate has been properly administered but there are later found to be legitimate claims against the estate. The reform of this provision, if thought desirable, should properly be dealt with in the context of administration of estates and not in the context of a review of a small part of the law of limitations.[61] In any case, this circumstance is unlikely to arise in the situations covered by the current reforms since a lender who has entered into a loan payable on demand will usually be well known to the borrower and will, in the normal course of events, become aware of the death of the borrower and, consequently, of the need to make claims in relation to any loans that may have been entered into.

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55. See para 2.8, 4.2.
56. *Woodward v McGregor* [2003] NSWSC 672 at para 87-88.
57. See *Angullia v Estate and Trust Agencies (1927) Ltd* [1938] 3 All ER 106 explaining the judgment of Romilly MR in *Cooper v Jarman* (1860) LR 3 Eq 98.
58. J W Carter, *Submission*; P Blackburn-Hart, *Submission*.
59. *Wills Probate and Administration Act 1898* (NSW) s 92.
60. *Wills Probate and Administration Act 1898* (NSW) s 95.
61. The administration of deceased estates is being reviewed by the National Committee for Uniform Succession Laws: see New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (DP 42, 1999).

5. THE WIDER CONTEXT

5.1 The Commission notes that, if implemented, its recommendations in this Report will constitute yet one more piecemeal reform of the law of limitations in New South Wales. The Commission is of the view that the law of limitations would benefit from a more holistic approach to reform similar to reviews undertaken in Western Australia, Queensland and England.[62]

62. Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions* (Project No 36 Part 2, 1997); Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)* (Report 53, 1998); and England and Wales, Law Commission, *Limitation of Actions* (Report 270, 2001).

APPENDICES

- Appendix A: Draft Limitation Amendment (Loans Payable on Demand) Bill 2004
- Appendix B: Submissions

New South Wales

Draft Limitation Amendment (Loans Payable on Demand) Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Limitation Act 1969* to provide for the limitation period for a loan payable on demand to be three years and to run from when a demand for payment is first made.

At present, the *Limitation Act 1969* provides for the relevant limitation period to be six years and to run from when the cause of action first accrues. The cause of action first accrues on a loan payable on demand when the loan is made because it is settled law that a loan payable on demand creates an immediate debt (*Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 566). Hence, under the current law, the limitation period could run out on a loan payable on demand before a demand for payment is even made.

This Bill gives effect to the Recommendations of the NSW Law Reform Commission in its report entitled *Time limits on loans payable on demand* (Report 105), which made reference to the judgment of *Woodward v McGregor* [2003] NSWSC 672.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

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

Clause 3 is a formal provision that gives effect to the amendments to the *Limitation Act 1969* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [2] provides for the limitation period for a cause of action founded on a loan payable on demand (and any collateral obligation also payable on demand) to be 3 years running from the date on which a demand for payment is first made. Such a demand for payment must be an unconditional demand for immediate payment (although a reasonable time for payment may be allowed). The limitation period runs on a demand for payment of only part of the debt arising from such a loan only in respect of the part of the debt that is the subject of the demand. Schedule 1 [2] further provides that a demand need not be made in writing and may be made by or on behalf of any one of joint lenders.

A loan or collateral obligation is ***payable on demand*** if it:

(a) does not provide for payment of the debt arising from the loan on or before a fixed or determinable date, and

(b) the obligation to pay the debt arising from the loan is not conditional on a demand for payment made by or on behalf of the lender or on any other matter.

Schedule 1 [1] makes an amendment consequential on the amendment made by Schedule 1 [2].

Schedule 1 [4] provides for the ultimate bar for loans payable on demand to be thirty years running from the date on which the cause of action first accrues. **Schedule 1 [3]** makes a consequential amendment.

Schedule 1 [6] enacts a transitional provision providing that an amendment made by the proposed Act does not apply to a loan made before the commencement of the amendment. **Schedule 1 [5]** makes a consequential amendment.

New South Wales

Limitation Amendment (Loans Payable on Demand) Bill 2004

Contents

New South Wales

Limitation Amendment (Loans Payable on Demand) Bill 2004

No , 2004

A Bill for

An Act to amend the *Limitation Act 1969* to make further provision for the limitation period for loans payable on demand; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Limitation Amendment (Loans Payable on Demand) Act 2004*.

2 Commencement

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

3 Amendment of Limitation Act 1969 No 31

The *Limitation Act 1969* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 14 General

Insert at the end of section 14 (2) (b):

, or

(c) a cause of action to which section 26A applies.

[2] Section 26A

Insert after section 26:

26A Loans payable on demand

(1) An action on a cause of action founded on a loan payable on demand is not maintainable if brought after the expiration of a limitation period of 3 years running from the date on which a demand for payment is first made by or on behalf of the lender.

(2) A demand for payment is not a demand for payment for the purposes of this section unless it is an unconditional demand for immediate payment. A demand for payment that allows a reasonable time for payment can still be considered an unconditional demand for immediate payment.

(3) If the demand is for payment of only part of the debt arising from the loan, this section applies to an action only to the extent that it is in respect of the part of the debt that is the subject of the demand.

(4) The demand for payment does not have to be made in writing.

(5) In the case of joint lenders, a demand for payment by or on behalf of any one of them constitutes a demand for payment for the purposes of this section.

(6) This section does not apply to a loan payable on demand that is supported by a collateral obligation unless the collateral obligation is itself payable on demand. A loan is ***supported*** by a collateral obligation if, in connection with taking out the loan, the borrower enters into the collateral obligation to pay the amount (or part of the amount) of the debt arising from the loan, such as by delivering a promissory note as security for the debt.

(7) For the purposes of subsection (1), a cause of action founded on a loan payable on demand includes a cause of action founded on a collateral obligation, itself payable on demand, that supports a loan payable on demand.

(8) A loan, or a collateral obligation that supports a loan, is ***payable on demand*** if it satisfies both of the following requirements:

(a) it does not provide for payment of the debt arising from the loan on or before a fixed or determinable date, and

(b) the obligation to pay the debt arising from the loan is not conditional on a demand for payment made by or on behalf of the lender or on any other matter.

(9) This section does not apply to a cause of action founded on a deed.

(10) This section does not affect when a cause of action accrues.

[3] Section 51 Ultimate bar

Omit section 51 (2). Insert instead:

(2) This section does not apply to the following:

(a) a cause of action in relation to which an order has been made under Subdivision 3 of Division 3 (Discretionary extension for latent injury etc),

(b) a cause of action for which a limitation period is fixed by section 26A.

[4] Section 51A

Insert after section 51:

51A Ultimate bar—loans payable on demand

Notwithstanding the provisions of this Part, an action on a cause of action for which a limitation period is fixed by section 26A is not maintainable if brought after the expiration of a limitation period of thirty years running from the date on which the cause of action first accrues.

[5] Schedule 5 Further transitional provisions

Omit "**Limitation (Amendment) Act 1990**". Insert instead:

Part 1 Limitation (Amendment) Act 1990

[6] Schedule 5, Part 2

Insert after clause 5:

Part 2 Provisions consequent on enactment of Limitation Amendment (Loans Payable on Demand) Act 2004

6 Operation of amendments

An amendment made by the *Limitation Amendment (Loans Payable on Demand) Act 2004* does not apply to a cause of action that first accrued before the commencement of the amendment.

APPENDIX B

SUBMISSIONS

Professor J W Carter, 12 July 2004

Law Society of New South Wales, 21 July 2004

The Hon Justice John Bryson, 22 July 2004

Mr Paul Blackburn-Hart, 23 July 2004

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