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REVIEW OF THE *LIMITATION OF ACTIONS ACT* 1974 (QLD)

Report No 53

Queensland Law Reform Commission
September 1998

To: The Honourable Matt Foley MLA
Attorney-General, Minister for Justice and Minister for the Arts

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its report on the Review of the *Limitation of Actions Act 1974* (Qld).

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Previous Queensland Law Reform Commission publications in this reference:

Information Paper: Review of the *Limitation of Actions Act 1974* (Qld)
(QLRC WP49, April 1997)

Discussion Paper: Review of the *Limitation of Actions Act 1974* (Qld)
(QLRC WP50, December 1997)

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SUMMARY OF RECOMMENDATIONS

This Report reviews the *Limitation of Actions Act 1974* (Qld). It makes the following recommendations:

1. Queensland limitation law should continue to be classified as procedural rather than substantive. The existing exceptions to the general rule should be retained.
2. The general principle that the limitation period commences on the date when the cause of action accrues should be replaced.
3. There should be a general limitation period, which should be the lesser of:
 - (a) three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:
 - (i) that the injury had occurred;
 - (ii) that the injury was attributable to the conduct of some other person;
 - (iii) that the injury, assuming liability on the part of some other person, warranted bringing a proceeding;
 - or
 - (b) ten years after the date on which the conduct, act or omission giving rise to the claim occurred.

“Injury” should be defined to mean personal injury, property damage, economic loss or, in the absence of any of these, non-performance of an obligation or the breach of a duty.

“Duty” should be defined as any duty under the law.

“Personal injury” should be defined to include all forms of trespass to the person.

The plaintiff should bear the onus of proving that the action was commenced within the discovery limitation period and the defendant should bear the onus of proving that the action was not commenced

within the alternative limitation period.

The legislation should not attempt to define the test of knowledge to be applied to a corporate plaintiff.

4. There should be a judicial discretion to extend the limitation period in the interests of justice if the prejudice to the defendant in having to defend an action after the expiration of the limitation period and the general public interest in the finality of litigation are outweighed by other factors.

The exercise of the discretion should not be restricted to claims for personal injury.

In determining whether to exercise the discretion, the court should consider all the circumstances of the case, including:

- the reasons why the plaintiff seeks to make a claim at this time;
- the extent to which, having regard to the time when the action is brought, there is or is likely to be prejudice to the defendant;
- the nature of the plaintiff's injury;
- the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- the conduct of the defendant after the injury occurred, including:
 - (a) the extent, if any, to which the defendant resisted or co-operated with attempts by the plaintiff to ascertain facts which were or might be relevant to the plaintiff's cause of action against the defendant; and
 - (b) any other conduct of the defendant which contributed to the plaintiff's timing in bringing the action;
- the duration of any disability of the plaintiff arising on or

after the date on which the injury became discoverable;

- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable;
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

5. The proposed legislative scheme should apply generally to equitable claims as well as to common law claims.
6. Claims for fraudulent breach of trust should not be specifically excluded from the operation of the scheme.
7. The proposed legislative scheme should not affect the ability of a court of equitable jurisdiction to refuse relief on equitable grounds.
8. In relation to extension of the limitation period:

Minority

- Neither the discovery limitation period nor the alternative limitation period should run against a plaintiff who is a minor.
- The “custody of a parent” rule should not be adopted.

Disability

- “Disability” should be defined as:
 - The lack of physical or mental capacity to
 - (a) understand the nature and foresee the effects of decisions about a claim; or
 - (b) communicate or otherwise give effect to those decisions.
- Both the discovery limitation period and the alternative limitation period should be suspended during any period when the plaintiff is under a disability.
- Suspension of the limitation period in favour of a plaintiff who is under a disability should not be affected by the appointment of a

substitute decision-maker.

Successive disabilities

- The existing provisions relating to successive disabilities should be retained.

Prisoners

- There should not be a specific provision allowing for the suspension of the limitation period in favour of prisoners.

War

- There should not be a specific provision allowing for the suspension of the limitation period in the case of war.

9. Claims by stolen children or their families as a result of removal policies or by relinquishing mothers should not be specifically excluded from the general scheme, but should be dealt with by the exercise of judicial discretion.

10. Claims for childhood sexual abuse or domestic violence should not be specifically excluded from the general scheme, but should be dealt with by the exercise of judicial discretion.

11. Claims which involve fraud on the part of the defendant or the defendant's agent or in which the defendant or the defendant's agent has concealed relevant information from the plaintiff should not be excluded from the general scheme, but should be dealt with by the exercise of judicial discretion.

12. There should not be a specific provision suspending the limitation period in circumstances where there has been a mistake on the part of the plaintiff.

13. In relation to claims for the recovery of land, the limitation period should be ten years from the date of adverse possession or, if later, from the date on which the plaintiff's interest became an interest in possession. The alternative limitation period should be suspended during any period when the plaintiff is under a disability. The three year discovery period should not apply.

14. In relation to mortgages:

- for claims concerning interests in land which are mortgaged, the limitation period should be ten years from the date on which the conduct, act or omission giving rise to the claim occurred;
- claims relating to the redemption of mortgaged personalty should be made subject to the legislative scheme;
- for claims relating to mortgaged personalty, the limitation period should be the lesser of:
 - three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:
 - (i) that the injury had occurred;
 - (ii) that the injury was attributable to the conduct of some other person;
 - (iii) that the injury, assuming liability on the part of some other person, warranted bringing a proceeding;or
 - ten years after the date on which the conduct, act or omission giving rise to the claim occurred.

15. In a claim for contribution between tortfeasors, the limitation period should be the lesser of:

- three years after the date when the person claiming contribution knew or, in the circumstances, ought to have known:
 - (i) that the claimant for contribution had incurred liability in the principal claim;
 - (ii) that the injury on which the principal claim was based was, in part, attributable to the conduct of some other person;
 - (iii) that the damages in the principal claim, assuming liability on the part of some other person, warranted making a claim for contribution;or
- ten years after the earlier of:

- the date when the person claiming contribution was made a defendant in the principal claim; or

- the date when the person claiming contribution incurred liability through settlement of the principal claim.

16. Provisions equivalent to sections 75 and 76 of the *Limitation Act 1969* (NSW) should be included in Queensland limitation legislation.

17. In a claim for repayment of a debt repayable on demand, there should be a limitation period of three years commencing when a default in performance has occurred after a demand for performance has been made.

18. If a new scheme of limitation legislation is enacted the following transitional provisions should apply:

- A plaintiff whose cause of action arises prior to the commencement of the new legislation, and is not at that time statute-barred, should be allowed to bring proceedings within either the existing or the new limitation period, whichever is longer.

- Causes of action which have become statute-barred under the existing legislation should not be automatically revived by the new legislation. However, plaintiffs should be entitled to apply to the court under the new legislation for an extension of the limitation period in personal injury claims.

- A plaintiff who has commenced statute-barred proceedings under the existing limitation period should not automatically be entitled to the benefit of the new legislation, but should be able to apply to the court under the new legislation for an extension of the limitation period in personal injury claims.

- The new legislation should not apply to actions concluded by settlement or judgment under the existing legislation.

CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

The former Attorney-General, the Honourable Denver Beanland, requested the Queensland Law Reform Commission, as part of its Fifth Program, to review the *Limitation of Actions Act 1974* (Qld), with a view to potential amendment in order to:

- give due recognition to the enhanced capacity of the medical profession to indicate the cause of disease and injury arising from events occurring outside current limitation periods for the bringing of actions;
- overcome difficulties caused by the general rule that a limitation period commences when the cause of action accrues;
- provide for situations of latent damage to property or latent loss or damage resulting from reliance on negligent advice;
- simplify the legislation by providing for a limitation period of general application.

In this Report, the Commission has not - with one exception - considered limitation periods for matters which are specifically excluded by the *Limitation of Actions Act 1974* (Qld),¹ or for actions for which a limitation period is fixed by some other Act.²

The Commission acknowledges that, because of the number of limitation provisions found in other enactments, the legislative scheme which it puts forward in this Report is not capable of operating as a complete code. Nonetheless, the Commission believes that, to the greatest extent possible,

¹ For example, the Act does not apply to criminal proceedings (*Limitation of Actions Act 1974* (Qld) s 6(3)(a)), a cause of action within the Admiralty jurisdiction of the court that is enforceable in rem (*Limitation of Actions Act 1974* (Qld) s 10(6)(a)), or a claim relating to a mortgage or charge on a ship (*Limitation of Actions Act 1974* (Qld) s 26(6)). However, in Chapter 10 of this Report, the Commission discusses the application of limitation periods to equitable claims, even though s 10(6)(b) of the Act provides that the Act does not apply to "a claim for specific performance of a contract or for an injunction or other equitable relief, save so far as any provision thereof may be applied by analogy".

² For example, a family provision application under s 41 of the *Succession Act 1981* (Qld), an application under s 126 of the *Land Title Act 1994* (Qld) to prevent a caveat lodged with the Registrar of Titles from lapsing or an application under s 100 of the *Vocational Education, Training and Employment Act 1991* (Qld) for the recovery of wages owing to an apprentice. A statutory provision requiring notice of a claim to be given within a specified time may also have the effect of imposing a limitation period: see for example *Motor Accident Insurance Act 1994* (Qld) s 37(4).

the law relating to limitation periods should be located in one place. In particular, the Commission is concerned at the extent to which various rules of court have, in the past, been used as a means of circumventing the consequences of the expiration of limitation periods.³ The Commission is strongly of the view that rules of procedure should not be able to be used to override statutory provisions.

2. BACKGROUND

The nature and purpose of limitation legislation are explained in Chapter 2 of this Report.

Limitation legislation is generally seen as the province of litigation lawyers, of little interest or concern for ordinary members of the community. However, it involves significant and sometimes competing issues of public policy and has the potential to substantially affect the outcome of disputes which end in court action between the parties.

It has been observed that:⁴

The topic of limitation periods was for many years a neglected area of the law, often being regarded as a rather dull and technical subject lacking in practical importance. In recent years new developments, especially in the area of latent damage, have attracted considerable attention, and the importance of limitation periods has again been recognised.

3. TIME FRAME FOR THE REFERENCE

The Attorney-General requested that the reference be completed within twelve months of its commencement. The terms of reference were finalised at the beginning of April 1997. The reference was therefore due for completion in April 1998. However, in October 1997 the Commission sought, and was granted, an extension of approximately six months.

Although the opportunity for consultation has been somewhat restricted by the short time frame allocated to the reference, the Commission has endeavoured to provide the greatest possible opportunity for public input into

³ See for example Rules of the Supreme Court O 3 rr 11, 13 and O 32 r 1. See also *Lynch v Kedell* [1985] 2 Qd R 103; *Bridge Shipping Pty Ltd v Grant Shipping SA* (1991) 173 CLR 231; *Hayward v Darling Downs Aircraft Services Pty Ltd* [1993] 2 Qd R 153.

⁴ A McGee, *Limitation Periods* (2nd edition 1994) 2-3.

the reference within the available time.

In April 1997 the Commission published and distributed an Information Paper⁵ for consultation purposes. The Commission placed advertisements in the national, state and regional press advising of the availability of the Information Paper and calling for submissions.

A Discussion Paper⁶ was published in December 1997, and was widely distributed to relevant organisations and interested individuals. Internet access was also made available.⁷

4. INFORMATION PAPER

The Commission's Information Paper was produced in order to provide information to interested people on the issues the Commission envisaged would need to be addressed during the course of the review, and to assist people in making submissions. The Information Paper gave a brief summary of the current law, and highlighted some of the difficulties which, in the view of the Commission, may arise under the law as it is at present. The paper also outlined approaches which have been proposed or adopted in some other comparable jurisdictions and indicated some possible options for reform in Queensland.

The Information Paper invited submissions on matters referred to in the paper, or on any other relevant matters. To assist respondents to identify areas of concern on which they wished to comment, the Appendix to the Information Paper listed a number of specific issues.

5. DISCUSSION PAPER

The purpose of the Discussion Paper was to encourage further public response by presenting a more detailed analysis of the existing law and of the issues raised by it.

⁵ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁶ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁷ Current publications and information about the Commission may be obtained from the Commission's Home Page at <<http://www.qlrc.qld.gov.au>>.

The paper examined the nature and purpose of limitation law, and summarised the existing legislation in Queensland and in other Australian jurisdictions. Reference was made to recent developments and recommendations for reform in Canada, New Zealand and Western Australia. The Commission put forward for discussion its preliminary recommendations for the general reform of limitation law in Queensland. On a number of specific issues, the Commission did not express a preliminary view, but sought input from interested individuals and organisations.

The Commission invited submissions on the issues discussed in the paper, and on other matters which respondents considered relevant to the reference.

6. SUBMISSIONS

Twenty-three written submissions were received in response to the Information Paper. These submissions were of great assistance to the Commission in identifying relevant issues.

There were a further twenty-one written submissions to the Discussion Paper. These submissions were also of assistance to the Commission in the formulation of its final recommendations.

A list of respondents to the Information Paper is set out in Appendix 1 to this Report. A list of respondents to the Discussion Paper is set out in Appendix 2 to this Report.

The Commission wishes to thank all respondents to the Information Paper and the Discussion Paper for their participation in the reference and for their contribution to the recommendations made by the Commission in this Report.

7. THE COMMISSION'S RECOMMENDATIONS

In this Report, the Commission makes its final recommendations in this reference. The recommendations are summarised at pages i-vi of the Report.

The major changes recommended by the Commission are that there should be a limitation period of general application, rather than the multiplicity of periods which exists at present; that the limitation period should not commence until the plaintiff knows (or in the circumstances ought to know) certain facts, rather than commencing at the date of accrual of the cause of

action as it does at present; that the discovery-based limitation period should be counter-balanced by an alternative limitation period the expiration of which would statute-bar the action even if the discovery period had not expired; and that the existing judicial discretion to extend the limitation period should be expanded to apply to claims for damage other than personal injury.

Implementation of the Commission's recommendations would produce the following results:

- In the majority of personal injury cases, where the plaintiff would be aware of his or her injury within a relatively short time, there would be little, if any, change to the existing three year limitation period.
- In the majority of other cases, where the plaintiff would be aware of his or her loss or damage within a relatively short time, the existing six year limitation period would be reduced to three years.
- In those comparatively rare cases, where the plaintiff does not discover for some time that he or she has sustained injury, loss or damage, the limitation period would be three years from when the plaintiff obtained or, in the circumstances, ought to have obtained the relevant information.
- In all cases, subject to the exercise of judicial discretion or suspension of the limitation period during, for example, any period when the plaintiff was a minor or was under a disability, an action would be statute-barred ten years from the date of the allegedly wrongful act, conduct or omission on the part of the defendant, even though the plaintiff was still unaware of the injury, loss or damage.

In Appendix 3 to the Report there is a comparative table showing how the existing law would be changed by the implementation of the Commission's recommendations.

The Commission believes that implementation of its recommendations would result in a balanced limitation system, which would be fair to both plaintiffs and defendants, and which would be significantly simpler than the existing legislation.

CHAPTER 2

LIMITATION LEGISLATION

1. WHAT IS A STATUTE OF LIMITATION?

A statute of limitation is legislation which sets time limits for bringing court proceedings. The time within which a person (the plaintiff) must commence an action to enforce a right is called the “limitation period”. The length of the limitation period generally depends on the nature of the claim.⁸

If proceedings are commenced after the expiration of the limitation period specified for a claim of that particular kind, the person against whom they are brought (the defendant) may plead as a defence that the proceedings are “statute-barred”.⁹

An action which fails because the plaintiff commenced it outside the relevant limitation period is not decided on the merits. The plaintiff may or may not have had a valid claim. The defendant will be able to resist the claim simply on the ground that the limitation period has expired. A limitation period protects a defendant, whether or not the defendant would otherwise have been able to defend the claim.

2. THE PURPOSE OF LIMITATION PERIODS

Limitation legislation is intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce a right or rights claimed by the plaintiff.

The imposition of limitation periods has been justified on a number of grounds based on fairness, certainty and public policy.

(a) Fairness

It is argued that it is not fair that a potential defendant should be subject to an indefinite threat of being sued.

Delay in bringing proceedings may unfairly prejudice a defendant’s ability to

⁸ The limitation periods imposed by the *Limitation of Actions Act 1974* (Qld) are set out on pp 30-32 below.

⁹ The effect of the expiration of a limitation period is discussed at pp 10-11 below.

contest the plaintiff's claim. The longer the time which elapses before the action is commenced, the harder it will be for a defendant to contest the plaintiff's allegations: evidentiary problems are likely to increase as time passes. It may not be possible to trace witnesses, or those who can be found may no longer have a sufficiently clear recollection of events. Written records may have been lost or destroyed:¹⁰

Although written records may be more durable than the memory of a witness, they may still be lost, or deteriorate in quality over time. The improvement in our capacity to record and store information in retrievable form has increased the amount of documentary information available, but in order to keep the amount of information handled to manageable levels, and to reduce storage costs, many institutions have implemented document destruction policies, whereby documents not required for immediate needs are destroyed after a set interval.

Although plaintiffs may also be affected by deterioration of evidence over the passage of time, it can be argued that a potential defendant is in a more vulnerable position than a plaintiff. This is because the plaintiff decides when to commence proceedings, and can use the time before the claim is brought to collect evidence, while the defendant may not even be aware that he or she is at risk of being sued and is therefore unlikely to take any steps to preserve the necessary evidentiary material. It can also be argued that, because it is the plaintiff whose interests have been harmed, the plaintiff is likely to have a clearer recollection of events and that, because of the prejudicial effect of delay on the defendant's case, the plaintiff's evidence is likely to be preferred to the defendant's.

(b) Certainty

It is also argued that there should be a time when people can feel confident about arranging their affairs in the knowledge that a claim can no longer be brought against them.

This is not just an argument in favour of fairness for the defendant:¹¹

Not only potential defendants, but third parties need to have confidence that rights are not going to (be) disturbed by a long-forgotten claim. Financial institutions giving credit to businesses, for example, have an interest in knowing that a borrower's affairs will not be damaged by the revival of years old litigation. Buyers who want to purchase land or goods held by a potential seller want to know that their title cannot be disturbed by a third party to the deal.

¹⁰ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 11-12.

¹¹ *Id.*, 13.

Modern conditions and technology have resulted in substantially increased awards of damages for compensation. The threat of open-ended liability for manufacturers, businesses, professional advisers and other defendants means that they are unable to calculate with any degree of certainty their potential degree of exposure. Limitation periods allow more accurate assessment of the extent of liability and are therefore in the overall economic interest. Otherwise, the burden of insuring against and defending unlimited claims will inevitably be passed on to society through higher insurance premiums and increased costs for goods and services:¹²

... it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong.

In other words:¹³

A reasonable limitations system can relieve the society of a cost burden which simply is not justified in terms of the benefits which would be conferred on a tiny group of claimants by keeping defendants vulnerable to claims.

(c) Public policy

It is generally recognised that the public has an interest in resolving disputes as quickly as possible. Limitation periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely.

It is also generally recognised that limitation periods help improve the administration of justice. The longer the delay before a claim is brought, the more likely it is that the quality of the evidence will have deteriorated. It will be considerably more difficult for a court to achieve a just resolution of the dispute if the reliability of the evidence has been affected by the passage of time. This, in turn, will reflect on the public perception of the judicial system. There is also the question of the burden imposed on the court system by the need to adjudicate claims which have been made tenuous by the length of time which elapsed before proceedings were commenced. Further, since the law is constantly evolving to meet changing societal conditions and cultural values, it will be harder to measure the conduct of a defendant against the standards prevailing at the time when the alleged infringement of the plaintiff's rights took place:¹⁴

¹² *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 553.

¹³ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 32.

¹⁴ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 13.

It is desirable that claims which are brought should be brought at a time when documentary evidence is still available and the recollections of witnesses are still reasonably fresh. This is the best way to ensure a fresh trial and thus to maximise the chance of doing justice. It also ensures that public money is not wasted in the hearing of claims that cannot be dealt with properly.

3. THE NEED TO BALANCE COMPETING INTERESTS

In the common law world, the origin of legislation imposing limitation periods can be traced back for centuries. The policy underlying the enactment of limitation legislation is based on the considerations outlined above.¹⁵

A limitation period should not be seen therefore as an arbitrary cut-off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.

However, despite the reasons for enacting limitation legislation, the result may be unfair for some plaintiffs, where the delay in commencing the action is not caused by any fault on the plaintiff's part. For example, the plaintiff may not have been aware of the existence of the injury or of its severity within the relevant limitation period:¹⁶

The limitation period should be sufficiently long to allow plaintiffs to recognise and consider their cause of action, to take legal advice on their case, and to attempt to negotiate a settlement with defendants. ... A limitation period which leads to the plaintiff's claim becoming time-barred before the plaintiff is, or could reasonably be, aware of the existence of a claim is unjust to a plaintiff.

Limitation periods may also have a negative impact on the administration of justice.¹⁷

... the interests of society will not be served if plaintiffs are obliged to bring proceedings before they have had an opportunity to explore the possibility of settlement, which could equally waste judicial resources.

...

The possible consequences of setting a limitation period which is too short should also be considered. At least in the short term, this will increase the number of plaintiffs whose claims are time-barred. In a number of cases, the

¹⁵ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 553.

¹⁶ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 15.

¹⁷ *Id.*, 14.

plaintiff may in consequence have a claim for negligence against his or her solicitor. The trial of that negligence action will require the court to examine, at second hand, the plaintiff's chance of success in the original action. A significant increase in the number of such actions would strain judicial resources.

It has been noted that:¹⁸

... in encouraging the timely resolution of disputes, a limitations system must strike a proper balance among the interests of potential claimants, potential defendants and society at large. Potential claimants have an interest in obtaining a remedy for injury from legally wrongful conduct; potential defendants have an interest in being protected from endless claims; and society at large has an interest in providing a range of remedies for injury from wrongful conduct and an orderly and fair process for determining when it is appropriate to award them.

¹⁸

Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 16.

CHAPTER 3

CLASSIFICATION OF LIMITATION LEGISLATION

1. INTRODUCTION

There are two kinds of limitation legislation. Statutory provisions which impose time limits for bringing civil actions are generally classed as either procedural or substantive. The distinction between procedural and substantive limitation periods is based on the effect of the expiration of the limitation period.

(a) Procedural

Limitation provisions traditionally state that an action “shall not be brought” after the relevant limitation period has expired. Legislation expressed in these terms has the effect, after the limitation period has expired, of cutting off resort to the courts for enforcement of a claim. It bars access to a remedy which may have been available if litigation were successful. However, the expiration of the limitation period does not extinguish the right on which the claim is based.¹⁹

Statutes of limitation which operate to prevent the enforcement of independently existing rights of action ... are typically described as denying a remedy while not destroying or extinguishing an underlying right.

The right itself is still recognised by the law, and a plaintiff who has alternative means (within the law) of asserting the right is entitled to use those means to enforce it.²⁰

This kind of limitation legislation is classified as procedural.

(b) Substantive

Some limitation provisions generally operate to automatically extinguish the right on which a claim is based, once the limitation period for bringing proceedings to enforce the right has expired.

The reason for enacting legislation which has this effect is that, given that the purpose of a limitation statute is to prevent claimants from suing after the

¹⁹ *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 per Mason CJ at 19.

²⁰ See *C & M Matthews Ltd v Marsden Building Society* [1951] Ch 758; *Allen v Waters & Co* [1935] 1 KB 200.

specified period of time has elapsed, it is “both more realistic and theoretically sound” for the legislation to provide that the right no longer exists after the limitation period has expired, rather than to merely bar the remedy.²¹ It is considered undesirable, by leaving a claim in existence without the support of a court ordered remedy, “to leave settled expectations open for ever afterwards to disturbance by accident or by contrivance”.²²

This kind of limitation legislation is classified as substantive.

2. THE RELEVANCE OF THE PROCEDURAL/SUBSTANTIVE DISTINCTION

The procedural/substantive differentiation has a number of important consequences. It is relevant to the following issues:

(a) Pleading and proof

If the limitation law is procedural, the onus is on a defendant to plead that an action is statute-barred. If the defendant does not plead the Act, the action may proceed even though it is out of time. In Queensland, for example, the Rules of the Supreme Court require a defendant to plead the expiration of a procedural limitation period in order to rely on it as a defence.²³ If the defence is not pleaded, a court will not, of its own motion, refuse a remedy, even though it is obvious that the proceedings have been commenced out of time.²⁴

There is some difference of opinion as to who bears the onus of proof once the limitation issue has been raised. Windeyer J in *Australian Iron & Steel Ltd v Hoogland*,²⁵ relying on the judgment of Dixon J in *Cohen v Cohen*²⁶ and the cases cited therein, indicated (obiter) that the burden of proving that an action is within time would lie with the plaintiff. However, the Full Court of the Supreme Court of Victoria has held that, once the issue has been raised, if

²¹ Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) 126-127.

²² New South Wales Law Reform Commission, Report No 3: *Report on the Limitation of Actions* (October 1967) para 14.

²³ Rules of the Supreme Court O 22 r 14.

²⁴ *Commonwealth of Australia v Mewett* (1995) 59 FCR 391 per Lindgren J at 419.

²⁵ (1962) 108 CLR 471.

²⁶ (1929) 42 CLR 91.

the accruing of the cause of action in time is no part of the cause of action, the plaintiff need not allege or prove it.²⁷

On the other hand, if the limitation period is substantive, compliance is an essential element of the plaintiff's case and it should be for the plaintiff to plead compliance and to establish that the action was brought within time. However, this position can be reversed by statute. In New South Wales, for example, the defendant is required to plead the limitation defence,²⁸ even though the legislation provides that expiration of the limitation period extinguishes the right on which the claim is based²⁹ and is therefore substantive.³⁰ The requirement has been held not to change the substantive nature of the limitation periods provided by the Act.³¹

(b) Waiver

If the limitation period is procedural, the defendant may waive the right to rely on the limitation defence.³²

However, if the limitation period is substantive, it would appear to be a precondition to the existence of the court's jurisdiction that the action be brought within time. Accordingly, the expiration of the limitation period would be incapable of being waived by the defendant.³³ It has been observed that there is a noticeable lack of authority as to whether the expiration of a limitation period which is substantive in character is capable of being ignored by the court.³⁴

(c) Estoppel

A defendant may be estopped from relying on the expiration of a procedural limitation period. For example, the defendant's conduct may lead the plaintiff

²⁷ *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.

²⁸ *Limitation Act 1969* (NSW) s 68A.

²⁹ *Id.*, ss 63-68.

³⁰ See pp 10-11 above.

³¹ *Commonwealth of Australia v Dixon* (1988) 13 NSWLR 601 per Hope JA at 609.

³² *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 per Mason CJ at 405-406.

³³ *Id.*, per Brennan J at 425-426.

³⁴ *Australian Torts Reporter*, Vol 1 at 10,103.

to assume that the defendant will not rely on a limitation defence, and to act, or refrain from acting in relation to the claim, on the basis of that assumption.³⁵

However, if the court's jurisdiction is conditional upon the commencement of proceedings within a specified time (that is, if the limitation period is substantive) and a defendant cannot waive the time requirement, it may also be that the defendant cannot be estopped from relying on a limitation defence.

(d) Extension of the limitation period

An application for extension of the limitation period may be made after the original limitation period has actually expired. This may happen if, for example, the plaintiff has suffered latent injury which does not manifest itself until after the expiration of the limitation period.

Expiration of a procedural limitation period does not pose a problem: the cause of action continues to exist and it is only the remedy which is barred.³⁶ Extension of the limitation period therefore does not involve the revival of a right which has been extinguished.

However, if the limitation period is substantive rather than merely procedural, expiration of the limitation period extinguishes the underlying right with the result that there is no remaining right to be enforced even if the period is extended. The New South Wales Act deals with this situation by providing that, where a court makes an order extending a limitation period, the prior expiration of the limitation period has no effect for the purposes of the Act.³⁷ It has been held that the effect of the legislative scheme in New South Wales is to postpone the absolute extinguishment of the right of action until the expiration of the period in which application may be made for an extension of time to commence proceedings or until the defendant pleads extinguishment, whichever is later.³⁸

³⁵ See for example *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

³⁶ See *Reeves v Thomas Borthwick and Sons* (unrept, Demack J, Supreme Court of Queensland, 16 August 1996), where it was held that, since the underlying right survived the expiration of the limitation period and was not extinguished by the refusal of an application for an extension of time, a second application could be made provided that the requirements of the Act were satisfied.

³⁷ *Limitation Act 1969* (NSW) s 61.

³⁸ *Commonwealth of Australia v Mewett* (1995) 59 FCR 391 per Cooper J at 403 and per Lindgren J at 421.

(e) Choice of law rules

In disputes involving interjurisdictional elements, the court determining the dispute will apply its own procedural law, but will apply the substantive law which governs the dispute according to the principles of private international law. As a result, there has been extensive litigation in relation to the classification of potentially applicable limitation law.

The question of choice of law rules has now been dealt with by a co-operative approach involving all Australian jurisdictions. Each State and Territory agreed to enact legislation providing that, if the substantive law of another Australian jurisdiction governs a claim before a court within the enacting jurisdiction, a limitation law of that other jurisdiction is to be regarded as part of that jurisdiction's substantive law and applied accordingly.³⁹

3. ARGUMENTS FOR AND AGAINST THE DISTINCTION

The designation as procedural of limitation statutes which bar the remedy but do not extinguish the underlying right has not been without criticism. Two members of the High Court of Australia have expressed the view that the existence and extent of a remedy are commonly accepted as an incident and measure of a right and that the unavailability of a remedy will, in most cases, be far more significant than the theoretical persistence of the underlying right. Moreover, the effect of the expiration of a limitation period is to confer a right on a defendant which, if exercised, has important substantive consequences - namely, allowing the defendant to plead the limitation period as an absolute defence.⁴⁰

Proponents of the view that limitation law should be substantive rather than procedural have emphasised that, in practical terms, the distinction is of little effect. The New South Wales Law Reform Commission concluded that:⁴¹

³⁹ *Limitation Act 1985* (ACT) s 5; *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5, *Limitation Act 1969* (NSW) s 78(2); *Choice of Law (Limitation Periods) Act 1994* (NT) s 5; *Choice of Law (Limitation Periods) Act 1996* (Qld) s 5, *Limitation of Actions Act 1974* (Qld) s 43A(2); *Limitation of Actions Act 1936* (SA) s 38A; *Limitation Act 1974* (Tas) s 32C; *Choice of Law (Limitation Periods) Act 1993* (Vic) s 5; *Choice of Law (Limitation Periods) Act 1994* (WA) s 5.

⁴⁰ See *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 per Mason CJ and Deane J. However, these comments were made in the context of a case involving choice of law rules and the question of the classification of limitation legislation for the purpose of choice of law rules is now the subject of legislation. See note 39 above.

⁴¹ New South Wales Law Reform Commission, Report No 3: *Report on the Limitation of Actions* (October 1967) para 323.

... it is a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely as an occasional embarrassment to the student, the lawyer and the citizen.

However, as already noted, a number of important consequences flow from the classification of limitation legislation.⁴² Although the recommendations of the New South Wales Law Reform Commission were implemented by the *Limitation Act 1969* (NSW), no other Australian jurisdiction has followed suit. More recently the New Zealand Law Commission and the Law Reform Commission of Western Australia have recommended against such a change.

The New Zealand Commission expressed the view that limitation legislation should be generally directed to limitation defences against the seeking of a court remedy, and only incidentally to matters of right and title.⁴³ The Western Australian Commission endorsed this approach and noted that it is consistent with recent developments in limitation law in Canada.⁴⁴ It recommended that the running of a period of limitation should continue to bar the remedy and not the right.⁴⁵ The Commission observed that:⁴⁶

This will preserve the important principle that a defendant may choose not to rely on a limitation defence and instead defend the action on other grounds. In such a case the plaintiff's action can proceed even though the limitation period has expired, and if the requirements for estoppel are satisfied the defendant would be prevented from reverting to his strict legal rights and relying on the Limitation Act.

In England, the Law Commission has also provisionally rejected the idea that expiration of the limitation period should extinguish the underlying right.⁴⁷ That Commission recognised the argument put forward in other jurisdictions that it is not the purpose of limitation legislation to extinguish rights. It considered another important factor to be the preservation of the requirement that a limitation defence must be specifically pleaded by the defendant. The Law Commission expressed the view that attempts to statutorily retain this

⁴² See pp 11-13 above.

⁴³ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 102-103.

⁴⁴ *Limitations Act 1996* (Alta).

⁴⁵ However, the Commission's general recommendation did not apply to actions for the recovery of land.

⁴⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 191.

⁴⁷ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 393-396.

requirement, while at the same time providing that expiration of the limitation period extinguishes the plaintiff's rights, would be logically inconsistent.⁴⁸ It argued that if the plaintiff's right has been extinguished by the passage of time, the fact that the defendant does not plead the defence should not be sufficient to restore the right. The Commission also considered that making "extinction" the general rule could create difficulties, particularly in contribution claims.⁴⁹

4. THE QUEENSLAND POSITION

Queensland limitation legislation follows the traditional pattern. The *Limitation of Actions Act 1974* (Qld) is generally procedural: that is, it operates to bar the remedy but not to extinguish the right. There are, however, two exceptions to this general proposition. First, the right or title of the plaintiff is extinguished if an action for the recovery of land (including a redemption action) is not brought within the relevant limitation period.⁵⁰ Similarly, in certain circumstances, expiration of the limitation period for an action to recover chattels extinguishes the plaintiff's title to the chattels.⁵¹

5. THE DISCUSSION PAPER

In the Discussion Paper,⁵² the Commission considered whether there should be any change to the *Limitation of Actions Act 1974* (Qld) to alter the nature and classification of the provisions of that Act imposing time limits for bringing civil actions.⁵³ The Commission's preliminary view was that there should not be such a change. However, rather than make a preliminary recommendation, the Commission invited submissions on the following issues:

- Are there any problems which arise from the procedural nature of

⁴⁸ Cf *Limitation Act 1969* (NSW) ss 63-68A.

⁴⁹ Contribution claims are discussed in Chapter 19 of this Report.

⁵⁰ *Limitation of Actions Act 1974* (Qld) s 24(1). The effect of expiration of the limitation period in claims relating to the recovery of land is discussed in Chapter 17 of this Report.

⁵¹ Id, s 12(2).

⁵² Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974* (Qld) (December 1997).

⁵³ Id, 11-13.

Queensland limitation law?

- Should Queensland limitation law continue to merely bar the remedy, or should it extinguish the underlying right?
- If it should continue to merely bar the remedy, should the existing exceptions to the general rule be continued?
- What are the advantages or disadvantages resulting from the change to the nature of New South Wales limitation law?

6. SUBMISSIONS

Four of the submissions received by the Commission in response to the Discussion Paper considered the issue of the appropriate classification of limitation legislation.⁵⁴ Three respondents agreed that Queensland limitation legislation should continue to be of a procedural nature - that is, that expiration of the limitation period should continue to merely bar the remedy rather than extinguish the underlying right.⁵⁵ One respondent, a community legal service, noted that:⁵⁶

Ensuring that limitations law is procedural in its nature provides a better mechanism for judicial discretion to be exercised in cases where plaintiffs seek to make claims after the limitation period has expired.

In relation to the question of whether the existing exceptions to the general rule should be continued, the Australian Finance Conference commented:⁵⁷

We believe that, even though in many instances the practical effect of barring the remedy is to extinguish the underlying right, it is not appropriate for a limitation law to address substantive rights, except in an incidental way. As a result we believe exceptions to the general rule are necessary to give operation to those unusual circumstances such as the case of adverse possession, where in contrast to the general rule the expiry of the limitation period does operate to extinguish title rights.

However, the fourth respondent, the Queensland Law Society Inc, expressed the view that the nature of Queensland limitation legislation ought to be changed from procedural to substantive. The Society advanced the following

⁵⁴ Submissions 10, 16, 18, 20.

⁵⁵ Submissions 10, 16, 18.

⁵⁶ Submission 18.

⁵⁷ Submission 16.

reasons in favour of its submission:⁵⁸

- there is little appreciable benefit in the continued existence of a right, in the absence of a legally enforceable remedy;
- choice of law conflicts between Australian jurisdictions already treat limitation legislation as substantive;
- the existing legislation already includes some provisions which have a substantive effect, specifically relating to abolition of title to land or chattels;
- estoppel issues can be dealt with by the exercise of judicial discretion to extend the limitation period.

7. THE COMMISSION'S VIEW

The Commission agrees with the approach adopted in most other jurisdictions to the effect that limitation legislation should be concerned with limitation defences and should not generally deal with matters of right and title. The Commission believes its view is supported by the absence in the submissions of any evidence of problems caused by the existing rule or of particular advantages of the New South Wales legislation. In the view of the Commission, the New South Wales legislation, which requires specific provisions to ensure that a right which has been extinguished by the expiration of the limitation period can be revived so that the limitation period can be extended, is unnecessarily complex.

The Commission also believes that the existing exceptions should be retained, as any change would involve not merely limitations law but substantive property rights.

8. RECOMMENDATION

The Commission recommends that Queensland limitation law should continue to be classified as procedural rather than substantive, and that the existing exceptions to the general rule should be retained.

58

Submission 20.

CHAPTER 4

THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

1. INTRODUCTION

All States and Territories in Australia have limitation legislation which prescribes the maximum time in which actions may be brought. Except in the case where the running of time is suspended, or an application is successfully made for an extension of time in which to commence an action, the effect in all jurisdictions is to “statute bar” proceedings commenced outside the prescribed period. In New South Wales, this operates substantively to extinguish the cause of action. In all other jurisdictions, the cause of action remains, but may not be enforced through the courts.

Generally, actions in tort and on simple contracts must be brought within six years, except in the Northern Territory where actions must be commenced within three years. There are exceptions to these rules which are explored below.

2. NEW SOUTH WALES

(a) General

Actions for the enforcement of simple contracts⁵⁹ or for account must be commenced within six years.⁶⁰ For a contract under seal the period is twelve years.⁶¹ Actions for tortious claims must generally be commenced within six years.⁶² However, personal injury actions accruing on or after 1 September 1990 must be commenced within three years.⁶³ Actions for the recovery of land must be commenced within twelve years,⁶⁴ except for recovery of crown land where the prescribed period is thirty years.⁶⁵

⁵⁹ *Limitation Act 1969* (NSW) s 14(1)(a).

⁶⁰ *Id.* s 15.

⁶¹ *Id.* s 16.

⁶² *Id.* s 14(1)(b).

⁶³ *Id.* s 18A.

⁶⁴ *Id.* s 27(2).

⁶⁵ *Id.* s 27(1).

(b) Extension provisions

There are three sets of provisions in the New South Wales limitation legislation governing extension of the limitation period. One set of provisions applies to causes of action for personal injury accruing prior to 1 September 1990.⁶⁶ Another set applies to actions for personal injury accruing on or after 1 September 1990.⁶⁷ The third set deals with actions for personal injury whenever arising, provided there was latent injury involved.⁶⁸

(i) Actions for personal injury accruing before 1 September 1990

In relation to the first set of provisions, an extension of time may be granted provided that a material fact of a decisive character relating to the cause of action was not within the plaintiff's means of knowledge until after the commencement of the final year of the limitation period.⁶⁹ There is authority for the view that, if the fact relied upon to justify the grant of an extension was not within the plaintiff's means of knowledge at that time, it is irrelevant whether the fact was, or was not, within the plaintiff's means of knowledge by the time the application for extension was made.⁷⁰

(ii) Actions for personal injury accruing on or after 1 September 1990

In relation to actions accruing on or after 1 September 1990, a court may extend the limitation period for a period not exceeding five years where it is "just and reasonable" to do so.⁷¹ In assessing whether it is just and reasonable, the court must have regard to:

- the length of and reasons for the delay;
- the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available;
- the time at which the nature and extent of the injury became

⁶⁶ Id, ss 57-60.

⁶⁷ Id, ss 60A-60E.

⁶⁸ Id, ss 60F-60J.

⁶⁹ Id, ss 58(2), 59(2).

⁷⁰ *Broken Hill Pty Co Ltd v Waugh* (1988) 14 NSWLR 360 at 370.

⁷¹ *Limitation Act 1969* (NSW) ss 60C, 60D.

known to the plaintiff;

- the time at which the plaintiff became aware of a connection between the injury and the defendant's act or omission;
- any conduct of the defendant which induced the plaintiff to delay bringing the action;
- the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received;
- the extent of the plaintiff's injury or loss.⁷²

(iii) Actions in which the personal injury is latent

The court may extend the limitation period indefinitely if the plaintiff can show that he or she was unaware of the fact, nature, extent or cause of the injury, disease or impairment before the expiration of the limitation period.⁷³ The plaintiff must make an application to extend the period of limitation within three years of when the plaintiff became aware (or ought to have become aware) of the fact, nature, extent or cause of the injury.⁷⁴ These requirements are mandatory and not directory.⁷⁵ The test as to whether a person did not know that personal injury had occurred, or was unaware of the nature and extent of the personal injury or the connection between the personal injury and the defendant's acts or omissions has been held to be a subjective and not an objective test.⁷⁶

Notwithstanding the above extension provisions, the maximum time in which an action may be commenced in New South Wales is thirty years.⁷⁷

⁷² Id, s 60E(1).

⁷³ Id, s 60G(2), 60H(2); *Electricity Commission of New South Wales v Plumb* (1992) 27 NSWLR 364 per Handly JA at 372.

⁷⁴ *Limitation Act 1969* (NSW) s 60I(1)(b).

⁷⁵ *Dedousis v The Water Board* (1994) 181 CLR 171.

⁷⁶ *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1.

⁷⁷ *Limitation Act 1969* (NSW) s 51.

3. VICTORIA

(a) General

Actions for the enforcement of simple contracts⁷⁸ or for account must be commenced within six years.⁷⁹ For a contract under seal the limitation period is fifteen years.⁸⁰ Actions for tortious claims must be commenced within six years,⁸¹ except actions for personal injuries consisting of a disease or disorder contracted by any person. In these cases, the limitation period is still six years, but time does not begin to run until the date on which the plaintiff first knew that he or she had suffered the injury and that the injury was caused by the defendant.⁸² Actions for the recovery of land must be commenced within fifteen years,⁸³ except actions for recovery of crown land where no limitation period applies.⁸⁴ There is no limitation period prescribed in respect of land owned by the Public Transport Corporation.⁸⁵

(b) Extension provisions

A court may extend the limitation period for an indefinite period, but only in respect of actions which include damages for personal injuries. The Court may grant such an extension where it is “just and reasonable so to do”.⁸⁶ There is no requirement as to ignorance of a material fact, and an applicant is not required to provide evidence establishing a prima facie case.⁸⁷ The matters to be considered in deciding whether to grant an extension of time include:⁸⁸

⁷⁸ *Limitation of Actions Act 1958* (Vic) s 5(1)(a).

⁷⁹ *Id.* s 5(2).

⁸⁰ *Id.* s 5(3).

⁸¹ *Id.* s 5(1)(a).

⁸² *Id.* s 5(1A).

⁸³ *Id.* s 8.

⁸⁴ *Id.* s 7.

⁸⁵ *Id.* s 7(A).

⁸⁶ *Id.* s 23A(2).

⁸⁷ *Taylor v Western General Hospital* [1986] VR 250.

⁸⁸ *Limitation of Actions Act 1958* (Vic) s 23A(2).

- the length of and reasons for the delay on the part of the plaintiff;
- the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- the extent, if any, to which the defendant had taken steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;
- the duration of any disability of the plaintiff arising on or after the date the cause of action accrued;
- the extent to which the plaintiff acted promptly and reasonably once he or she knew the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received.

4. AUSTRALIAN CAPITAL TERRITORY

(a) General

Actions for the enforcement of simple contracts⁸⁹ or for account must be commenced within six years.⁹⁰ For a contract under seal the period is twelve years.⁹¹ Actions for tortious claims must be commenced within six years.⁹² There is no limitation period prescribed for claims relating to land.⁹³

(b) Extension provisions

The extension provisions are similar to those in the Victorian legislation. They apply only to actions for personal injury. The only additional factor

⁸⁹ *Limitation Act 1985 (ACT)* s 11.

⁹⁰ *Id.*, s 12.

⁹¹ *Id.*, s 13.

⁹² *Id.*, s 11.

⁹³ *Id.*, s 5(a).

which must be considered by the court in deciding whether to allow an application for extension is the conduct of the defendant after the cause of action accrued to the plaintiff.⁹⁴

5. SOUTH AUSTRALIA

(a) General

Actions for the enforcement of simple contracts⁹⁵ or for account must be commenced within six years.⁹⁶ For a contract under seal the period is fifteen years.⁹⁷ Actions for tortious claims must be commenced within six years,⁹⁸ except for actions for personal injuries where the applicable limit is three years.⁹⁹ Actions for the recovery of land must be commenced within fifteen years.¹⁰⁰

(b) Extension provisions

The court may extend the time for:

- instituting an action;
- doing any act or taking any step in an action;
- doing any act or taking any step with a view to instituting an action.¹⁰¹

An extension of time may be granted only if, in all the circumstances, it is just to do so,¹⁰² and provided that one of two circumstances is met.

The court must be satisfied that either:

⁹⁴ Id, s 36.

⁹⁵ *Limitation of Actions Act 1936* (SA) s 35(a).

⁹⁶ Id, s 35(b).

⁹⁷ Id, s 34.

⁹⁸ Id, s 35(c).

⁹⁹ Id, s 36(1).

¹⁰⁰ Id, s 4.

¹⁰¹ Id, s 48(1).

¹⁰² Id, s 48(3).

- facts material to the plaintiff's case were not ascertained by him or her until some point of time occurring twelve months before the expiration of the limitation period or occurring after the expiration of that period and the action was commenced within twelve months after the ascertainment of those facts by the plaintiff;¹⁰³ or
- the plaintiff's failure to institute an action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of the representations or conduct and any other relevant circumstances.¹⁰⁴

The High Court of Australia considered the meaning of "facts material to the plaintiff's case" in *Sola Optical Australia Pty Ltd v Mills*.¹⁰⁵ It held that a fact does not need to have a bearing on a plaintiff's decision to commence proceedings in order to be "material". The Court held that a fact is material to a plaintiff's case "if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to justify bringing the action and is of sufficient importance to be likely to have a bearing on the case".¹⁰⁶

As to whether a court would consider it just to extend the limitation period, Bray CJ has suggested that there are five paramount matters to be considered:¹⁰⁷

- the length of the delay;
- the explanation for the delay;
- the hardship to the plaintiff if the action is dismissed and the cause of action left statute-barred;
- the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay;
- the conduct of the defendant in the litigation.

¹⁰³ Id, s 48(3)(b)(i).

¹⁰⁴ Id, s 48(3)(b)(ii).

¹⁰⁵ (1987) 163 CLR 628.

¹⁰⁶ Id, 636.

¹⁰⁷ *Ulowski v Miller* [1968] SASR 277.

Two additional factors were considered relevant in *Lovett v Le Gall*.¹⁰⁸

- the conduct of the plaintiff; and
- the nature, importance and circumstances surrounding the ascertainment of the new material facts.

There is a special provision in South Australia allowing a person bringing an action for which the limitation period is less than twelve months to bring that action up to twelve months from the time when the cause of action arose.¹⁰⁹

6. NORTHERN TERRITORY

(a) General

Actions for the enforcement of simple contracts¹¹⁰ or for account must be commenced within three years.¹¹¹ For a contract under seal the period is twelve years.¹¹² Actions for tortious claims must be commenced within three years.¹¹³ There is no limitation period in respect of claims for land.

(b) Extension provisions

The extension provisions in the Northern Territory are very similar to those in the South Australian legislation. In addition to the factors declared in South Australia to be paramount in deciding whether it is just to grant an extension, Kearney J in *Forbes v Davies*¹¹⁴ suggested that a court should also consider the extent to which, having regard to the delay, the evidence is likely to be less cogent than if the action had been brought within the time allowed.

¹⁰⁸ (1975) 10 SASR 479.

¹⁰⁹ *Limitation of Actions Act 1936* (SA) s 47(1). There are exceptions to this rule outlined in s 47(2).

¹¹⁰ *Limitation Act 1981* (NT) s 12(1)(a).

¹¹¹ *Id*, s 13.

¹¹² *Id*, s 14(1).

¹¹³ *Id*, s 12(1)(b).

¹¹⁴ (1994) Aust Torts Reps 61,392 (81-279).

7. TASMANIA

(a) General

Actions for the enforcement of simple contracts¹¹⁵ or for account must be commenced within six years.¹¹⁶ For a contract under seal the limitation period is twelve years.¹¹⁷ Actions for tortious claims must be commenced within six years,¹¹⁸ except for actions for personal injury, which must be commenced within three years.¹¹⁹ Actions for the recovery of land must be commenced within twelve years,¹²⁰ except for recovery of crown land where the prescribed period is thirty years.¹²¹

(b) Extension provisions

A court may extend the time for bringing a personal injuries action or a dependency claim for such period as the court thinks necessary, provided the extension does not exceed six years from when the cause of action accrued.¹²² The court must be satisfied that, in all the circumstances, it is just and reasonable to permit the extension of time.¹²³ In *Marr v Green*,¹²⁴ Green CJ suggested that the primary enquiry should be directed to the specific issue of the reason for the applicant's failure to commence proceedings in time, rather than the general issue of how diligently the claim was pursued during that period.

¹¹⁵ *Limitation Act 1974* (Tas) s 4(1)(a).

¹¹⁶ *Id.*, s 4(2).

¹¹⁷ *Id.*, s 4(3).

¹¹⁸ *Id.*, s 4(1)(a).

¹¹⁹ *Id.*, s 5(1).

¹²⁰ *Id.*, s 10(2).

¹²¹ *Id.*, s 10(1).

¹²² *Id.*, s 5(3).

¹²³ *Ibid.*

¹²⁴ (1994) Aust Torts Reps 61,374 (81-277).

8. WESTERN AUSTRALIA

(a) General

Actions for the enforcement of simple contracts¹²⁵ or for account must be commenced within six years.¹²⁶ For a contract under seal the limitation period is twenty years.¹²⁷ Actions for tortious claims must be commenced within six years.¹²⁸ Actions for the recovery of land must be commenced within twelve years.¹²⁹

(b) Extension provisions

The only type of claim for which the limitation period may be extended is an action in respect of personal injury or death caused by the inhalation of asbestos. In this case, the limitation period begins to run from the date when the plaintiff knew, or might reasonably have been able to ascertain, that he or she was suffering from a significant injury which was due, in whole or in part, to the acts or omissions of an identified person.¹³⁰

9. SUSPENSION OF THE LIMITATION PERIOD¹³¹

The legislation in all jurisdictions provides that, if the plaintiff is suffering from a disability, then the limitation period is suspended. The principal difference between the various provisions relates to whether the disability must exist at the time of the accrual of the cause of action, or whether a supervening event can postpone the operation of the legislation. The former is the case in Tasmania, Victoria and Western Australia. In all other jurisdictions, the latter approach applies.

In all jurisdictions, the limitation period will be suspended if the plaintiff is a

¹²⁵ *Limitation Act 1935* (WA) s 38(1)(c)(v).

¹²⁶ *Id.* s 38(1)(c)(ii), (iii).

¹²⁷ *Id.* s 38(1)(e)(i).

¹²⁸ *Id.* s 38(1)(c)(vi).

¹²⁹ *Id.* s 4.

¹³⁰ *Id.* s 38A(6), (9).

¹³¹ See generally RD Balkin and JLR Davis, *Law of Torts* (2nd edition 1996) 812-814.

minor, or is suffering from a mental illness which substantially affects the plaintiff's ability to manage his or her own affairs.¹³² In the Northern Territory, the Australian Capital Territory and New South Wales, the fact that the plaintiff is physically impaired may also suspend the limitation period.¹³³ Undergoing a term of imprisonment will, in New South Wales and the Northern Territory,¹³⁴ suspend the operation of the limitation legislation. Finally, in New South Wales, Victoria and the Australian Capital Territory, the fact that a plaintiff is engaged in war will suspend the running of time.¹³⁵

In all jurisdictions except South Australia and Western Australia, time may be postponed if:

- the plaintiff's action is based upon the fraud of the defendant or of an agent of the defendant; and
- facts relevant to the right of action were deliberately concealed from the plaintiff.

In these circumstances, time does not commence to run until the plaintiff has, or with reasonable diligence could have, discovered the fraud or concealment.¹³⁶

¹³² *Limitation Act 1985* (ACT) s 8(3)(b); *Limitation Act 1969* (NSW) s 11(3); *Limitation Act 1981* (NT) s 4(1); *Limitation of Actions Act 1936* (SA) s 45(2); *Limitation Act 1974* (Tas) s 2(2), 3; *Limitation of Actions Act 1958* (Vic) s 3(2), (3); *Limitation Act 1935* (WA) s 40.

¹³³ *Limitation Act 1985* (ACT) s 8(3)(b); *Limitation Act 1969* (NSW) s 11(3)(b); *Limitation Act 1981* (NT) s 4(1).

¹³⁴ *Limitation Act 1969* (NSW) s 11(3)(b)(ii); *Limitation Act 1981* (NT) s 4(1).

¹³⁵ *Limitation Act 1985* (ACT) s 8(3)(b)(ii); *Limitation Act 1969* (NSW) s 11(3)(b)(iii); *Limitation of Actions Act 1958* (Vic) s 23(2).

¹³⁶ *Limitation Act 1985* (ACT) s 33; *Limitation Act 1969* (NSW) s 55; *Limitation Act 1981* (NT) s 42; *Limitation of Actions Act 1936* (SA) s 25; *Limitation Act 1974* (Tas) s 32; *Limitation of Actions Act 1958* (Vic) s 27; *Limitation Act 1935* (WA) s 27.

CHAPTER 5

THE *LIMITATION OF ACTIONS ACT 1974* (QLD)

1. EXISTING LIMITATION PERIODS

The *Limitation of Actions Act 1974* (Qld) (the Act) sets out the general limitation periods within which various kinds of civil actions must be commenced. However, the Act does not apply to actions which are specifically excluded by the Act itself¹³⁷ or to actions for which a limitation period is fixed by some other Act.¹³⁸

The Act provides a number of different limitation periods:

- | | | |
|--------------|---|--|
| Twelve years | ● | an action to recover land ¹³⁹ |
| | ● | an action to recover money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land ¹⁴⁰ |
| | ● | a foreclosure action in respect of mortgaged personal property ¹⁴¹ |
| | ● | an action in respect of claims to the personal estate of a deceased person, or to a share or interest in the estate, whether under a will or on intestacy ¹⁴² |
| | ● | an action upon a specialty ¹⁴³ |
| | ● | an action upon a judgment ¹⁴⁴ |
| Six years | ● | an action founded on simple contract, quasi- |

¹³⁷ See note 1 above.

¹³⁸ See note 2 above.

¹³⁹ *Limitation of Actions Act 1974* (Qld) s 13.

¹⁴⁰ Id, s 26(1).

¹⁴¹ Id, s 26(2).

¹⁴² Id, s 28.

¹⁴³ Id, s 10(3).

¹⁴⁴ Id, s 10(4).

contract or tort, where the damages claimed do not consist of or include damages in respect of personal injury¹⁴⁵

- an action to enforce a recognisance¹⁴⁶ or an award where the agreement to arbitrate is not under seal¹⁴⁷

- an action to recover a sum recoverable under an enactment, other than a penalty or forfeiture¹⁴⁸

- an action for an account¹⁴⁹

- an action to recover arrears of rent¹⁵⁰

- an action to recover arrears of interest due under a mortgage or other charge¹⁵¹

- an action by a beneficiary against a trustee for a non-fraudulent breach of trust or to recover trust property where the property has come into the possession of the trustee in the absence of fraud¹⁵²

Three years ● an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or otherwise) in which the damages claimed consist of or include damages for personal injury or for injury resulting from the death of any person¹⁵³

Two years ● an action to recover a penalty or forfeiture.¹⁵⁴

¹⁴⁵ Id, s 10(1)(a).

¹⁴⁶ Id, s 10(1)(b).

¹⁴⁷ Id, s 10(1)(c).

¹⁴⁸ Id, s 10(1)(d).

¹⁴⁹ Id, s 10(2).

¹⁵⁰ Id, s 25.

¹⁵¹ Id, s 26(5).

¹⁵² Id, s 27(2).

¹⁵³ Id, s 11.

¹⁵⁴ Id, s 10(5).

In an action for contribution between joint tortfeasors, the limitation period is the lesser of:¹⁵⁵

- a period of two years from the date when the right of action for contribution arose; or
- a period of four years from the expiration of the limitation period for the principal action.

There is no limitation period for an action by a beneficiary under a trust for fraudulent breach of trust by the trustee or for the recovery of trust property in the possession of the trustee, or previously received by the trustee and converted to the trustee's use.¹⁵⁶

2. COMMENCEMENT OF THE LIMITATION PERIOD

The Act generally provides that the time specified as the limitation period for a particular kind of claim will start to run when the cause of action arises or accrues.

A cause of action is a factual situation which gives rise to the right to sue: it consists of every fact which it is necessary for the plaintiff to prove to succeed in the action.¹⁵⁷

The Act specifies the dates on which certain actions are deemed to accrue.¹⁵⁸ Otherwise, the time at which a cause of action accrues depends on the nature of the action. For example, in an action for breach of contract, the cause of action generally accrues at the date of the alleged breach.¹⁵⁹ The action will therefore be barred six years after the breach, even if the loss for which the plaintiff is seeking compensation took place at a later time.¹⁶⁰ If the cause of action is a tort which requires proof of damage, such as negligence or nuisance, the limitation period begins when the damage

¹⁵⁵ Id, s 40.

¹⁵⁶ Id, s 27(1).

¹⁵⁷ *Read v Brown* (1888) 22 QBD 128 per Lord Esher MR at 131. See also *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 per Wilson J at 245.

¹⁵⁸ See for example *Limitation of Actions Act 1974* (Qld) ss 14-19.

¹⁵⁹ See for example *Howell v Young* (1826) 5 B & C 259, 108 ER 97; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197 at 203; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384.

¹⁶⁰ *Howell v Young* (1826) 5 B & C 259, 108 ER 97.

occurs,¹⁶¹ even if the damage is not immediately obvious to the plaintiff.¹⁶² However, if the cause of action is a tort for which it is not necessary to prove damage, such as trespass, the cause of action accrues when the wrongful act which constitutes the tort is committed.¹⁶³

3. EXTENSION OF THE LIMITATION PERIOD

Part 3 of the *Limitation of Actions Act 1974* (Qld) includes several provisions which allow plaintiffs additional time to bring their actions in certain circumstances.

(a) Recommencing the limitation period

One method by which the specified limitation period is extended in certain circumstances is by changing the date when the cause of action accrues, so that a new limitation period starts running.¹⁶⁴

(b) Deferring commencement of the limitation period

If a person is under a disability - for example, minority - when the cause of action accrues, the limitation period does not begin to run until the person ceases to be under the disability or dies, whichever happens first.¹⁶⁵ In other words, the time in which an action may be brought is extended by deferring the date on which the limitation period begins. Similarly, the limitation period for an action based on fraud or mistake is deferred until the plaintiff discovers the fraud or mistake or, with reasonable diligence, could have discovered it.¹⁶⁶

(c) Extending the limitation period

¹⁶¹ See for example *Davie v New Merton Board Mills Ltd* [1959] AC 604.

¹⁶² See for example *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 778; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1.

¹⁶³ See for example *Dawson v Commonwealth* (1994) 12 WAR 29.

¹⁶⁴ See for example *Limitation of Actions Act 1974* (Qld) s 35(1).

¹⁶⁵ *Id.*, s 29.

¹⁶⁶ *Id.*, s 38.

A plaintiff who is claiming damages for personal injury in an action for negligence, trespass, nuisance or breach of duty¹⁶⁷ may apply to have the limitation period extended.¹⁶⁸ The plaintiff must show that:

- a material fact of a decisive character relating to the right of action was not within the plaintiff's means of knowledge until some time after the commencement of the final year of the limitation period specified by the Act;

and

- there is evidence to establish the right of action apart from a defence based on the expiration of the limitation period.

"Material facts" include:¹⁶⁹

- the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
- the identity of the person against whom the right of action lies;
- the fact that the negligence, trespass, nuisance or breach of duty caused personal injury;
- the nature and extent of the personal injury caused by the negligence, trespass, nuisance or breach of duty;
- the extent to which the personal injury was caused by the negligence, trespass, nuisance or breach of duty.

Material facts are of a "decisive character" only if a reasonable person knowing those facts and having taken appropriate advice about them would regard them as showing that:¹⁷⁰

- an action would (apart from the expiration of the limitation period) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action;
- the plaintiff ought, in his or her own interests, and taking his or her

¹⁶⁷ Whether the duty is imposed by contract or by statute or otherwise.

¹⁶⁸ *Limitation of Actions Act 1974* (Qld) s 31.

¹⁶⁹ *Id.* s 30(a).

¹⁷⁰ *Id.* s 30(b).

circumstances into account, bring the action.

The court may, if it is satisfied about these matters, order that the limitation period be extended to a year after the date when the plaintiff became aware of the material fact.¹⁷¹

This provision does not change the date on which the cause of action accrues or defer the commencement of the limitation period. It gives a plaintiff who can demonstrate that he or she was unaware of a material fact additional time in which to commence proceedings, thus extending the length of the limitation period itself.

A similar application may also be made if the plaintiff is claiming damages for negligence, trespass, nuisance or breach of duty in respect of injury resulting from the death of any person,¹⁷² or if the action involves a claim for damages for personal injury which has survived on the death of the injured person for the benefit of the person's estate.¹⁷³

¹⁷¹ This is a discretionary power. The court is not obliged to exercise it even though the statutory conditions are met unless, in all the circumstances of the case, justice is best served by so doing. See *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per Dawson J at 544 and per McHugh J at 554.

¹⁷² *Limitation of Actions Act 1974* (Qld) s 31.

¹⁷³ *Id.*, s 32.

CHAPTER 6

PROBLEMS WITH THE EXISTING LAW

In the Information Paper¹⁷⁴ and the Discussion Paper,¹⁷⁵ the Commission identified a number of problems with the existing provisions of the *Limitation of Actions Act 1974* (Qld). These problems are discussed below, in the light of comments received in response to the Commission's preliminary papers.

1. LATENT DAMAGE

The limitation period for an action generally commences when the cause of action accrues.¹⁷⁶ However, in some cases a potential plaintiff may not have the opportunity to realise that the cause of action has accrued. For example, the limitation period in an action for breach of contract commences when the breach occurs.¹⁷⁷ However, it may be some time before the plaintiff becomes aware that the breach has taken place. In such a situation, the limitation period will be running, even though the plaintiff is unaware of what has happened. Similarly, in an action for negligence or nuisance, where the limitation period begins when the plaintiff incurs loss or damage, the plaintiff may not be aware that he or she has been injured and that the limitation period has therefore commenced.¹⁷⁸

Some kinds of damage are not immediately apparent. There are, for example, some insidious diseases which may be present long before they manifest themselves sufficiently to be diagnosed. Similarly, property damage resulting from faulty materials, design or construction may not become apparent for many years after it was initially caused. If the damage remains hidden for a considerable length of time, the limitation period may have even expired before the plaintiff realises what has occurred.

One of the submissions received by the Commission in response to its

¹⁷⁴ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997) 10-13.

¹⁷⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 31-36.

¹⁷⁶ See pp 32-33 above.

¹⁷⁷ See note 159 above.

¹⁷⁸ See notes 161, 162 above.

Information Paper¹⁷⁹ expressed the view that “probably the most important consideration is whether, by reason of the time that has elapsed, a fair trial is possible” and concluded that “some significant basis would need to be found to justify an expansion of the existing limitation regime”.¹⁸⁰ However, the importance of ensuring that the interests of potential defendants are not prejudiced by the passage of time must be balanced against the need to ensure that potential plaintiffs are not denied the possibility of bringing an action because they have not had the opportunity to become aware of relevant facts.

In some situations, the *Limitation of Actions Act 1974* (Qld) allows an action to be brought after the expiration of the limitation period if the loss or damage complained of by the plaintiff consists of or includes personal injury.¹⁸¹ The plaintiff may apply to the relevant court to have the limitation period extended. The criteria which the plaintiff must satisfy are set out on pages 33-34 of this Report. They include that a material fact of a decisive character was not within the plaintiff’s means of knowledge until some time after the commencement of the final year of the limitation period specified by the Act. The limitation period may be extended to a year after the date when the plaintiff became aware of the material fact. This means that the plaintiff must apply for an extension of the limitation period within a year of becoming aware of the material fact.

Apart from this requirement, there is no ultimate time limit after which proceedings may not be commenced. This is of particular relevance in some kinds of case - for example, those involving claims for diseases such as asbestosis or mesothelioma, which have particularly long latency periods before they are detected and diagnosed, or for the cumulative effects of long-term exposure to toxic substances.

However, the granting of an extension of the limitation period is not automatic. The court’s power to extend the limitation period is a discretionary one. Even though the plaintiff has met all the statutory conditions, the court is not obliged to grant an extension unless, in all the circumstances of the case, justice is best served by so doing.¹⁸²

The extension provisions are complex and extremely technical and have

¹⁷⁹ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

¹⁸⁰ Submission 12 (IP).

¹⁸¹ *Limitation of Actions Act 1974* (Qld) ss 31, 32.

¹⁸² *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per Dawson J at 544 and per McHugh J at 554.

been a fertile source of litigation. Their drafting and difficulty of interpretation and application have been the subject of extensive judicial criticism. The English legislation from which they are derived - and which has since been repealed - was described as having "a strong claim to the distinction of being the worst drafted Act on the statute book".¹⁸³ Equivalent provisions in the New South Wales legislation - which have also been repealed - were criticised by the High Court of Australia for their "complexity and obscurity".¹⁸⁴ The New South Wales Law Reform Commission observed that "key terms in the statutory formula ... have still not been clearly defined. Indeed, they probably defy definition in such a way as to create real certainty about the operation of these provisions of the legislation".¹⁸⁵ More recently, the former Chief Justice of Queensland has commented on their "ambiguity in the expression of concepts".¹⁸⁶

Another problem with the extension provisions is that they apply only where the loss or damage incurred by the plaintiff consists of or includes personal injury. There is no mechanism for extending the limitation period where the plaintiff claims to have suffered only some other kind of injury - for example, property damage or economic loss.

However, these kinds of damage may also be difficult to detect. For example, the damage caused by defective work or materials in building construction may not be discovered for some time. Similarly, damage resulting from negligent design or inspection may also remain hidden until the limitation period has expired. The restricted application of the extension provisions can lead to harsh results.

In some jurisdictions, courts have overcome the problem in relation to defective buildings by categorising the damage to the plaintiff as economic loss which does not crystallise until the defect becomes obvious and the value of the property is affected.¹⁸⁷ Although there is no authoritative Australian decision on this point, the distinction between ordinary physical damage to property and economic loss resulting from the diminution of value

¹⁸³ *Smith v Central Asbestos Co Ltd* [1973] AC 518 per Lord Reid at 529.

¹⁸⁴ *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 per Murphy ACJ at 238. See also per Deane J at 250 and per Dawson J, with whom Brennan J agreed, at 253.

¹⁸⁵ New South Wales Law Reform Commission, Report No 50: *Limitation of Actions for Personal Injury Claims* (October 1986) 19.

¹⁸⁶ *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 per Macrossan CJ at 436.

¹⁸⁷ See for example *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 (Canada); *Invercargill City Council v Hamlin* [1996] AC 624 (PC) (New Zealand).

of property has received some recognition.¹⁸⁸ According to this approach, the cause of action does not accrue until the damage becomes sufficiently obvious to cause the value of the building to deteriorate.

Similarly, loss caused by negligent advice may not crystallise until a significant period of time after the advice has been given and acted upon. For example, if a person receives negligent advice about the value of property, and lends money secured against the purported value of that property, damage resulting from reliance on the negligent advice may not become apparent until some date in the future when the limitation period may have expired. In this situation also, it has been held that the cause of action will not arise until the existence of the loss becomes ascertainable.¹⁸⁹

These developments in case law protect against injustice arising from a situation in which a claim may be statute-barred before a plaintiff even knows of its existence. However, one respondent to the Discussion Paper commented that they may also prove to be a double-edged sword, capable of operating against a plaintiff as well as in his or her favour. The respondent considered it conceivable that situations may arise in which it is apparent that the plaintiff's position has been prejudiced and that loss is inevitable, but in which the plaintiff will not be able to bring an action until the loss, rather than being merely potential, has actually been incurred. In such a case, the right to sue may, in the view of the respondent, be unduly deferred.¹⁹⁰

The direction of case law may change in the future and, in any event, the desirability of depending on judicial creativity is questionable. Further, any protection currently given by case law is provided at the expense of potential defendants, who may face the prospect of open-ended liability.¹⁹¹

It would seem that the current law does not provide an acceptable balance between certainty and justice. The problem of latent damage has led to a discoverability starting date being adopted in some areas but not all areas so that, for some plaintiffs, a cause of action can be lost within six years of accrual even though they did not know, and could not reasonably know, of it. On the other hand, the complete lack of a long-stop in personal injury actions means that defendants can never be wholly sure that their liability is terminated.

¹⁸⁸ See for example *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 per Deane J at 503-505; *Hawkins v Clayton* (1988) 164 CLR 539 per Deane J at 587-588, Mason CJ and Wilson J concurring.

¹⁸⁹ See for example *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

¹⁹⁰ Submission 3.

¹⁹¹ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 244.

2. CATEGORISATION OF CLAIMS

In order to determine the applicable limitation period, it is necessary to identify the kind of action which is being brought in any particular case. There are two reasons for this. First, under the existing legislation, different kinds of actions are subject to different limitation periods.¹⁹² Second, the limitation periods for different kinds of actions may also start to run at different times.¹⁹³

If the factual situation of the case gives rise to more than one cause of action, there may be more than one applicable limitation period. For example, it is generally recognised that liability in tort and contract can co-exist.¹⁹⁴ However, while a cause of action in contract accrues at the time when the contract is breached, a cause of action in a tort such as negligence or nuisance does not accrue until damage occurs. This means that in some situations - for example, where a client incurs a loss as a result of negligent advice from a professional person - the cause of action in negligence is likely to accrue later than the cause of action for breach of contract. As a result, the limitation period for a negligence claim may still be running after a claim for breach of contract has become statute-barred.¹⁹⁵ This situation inevitably leads to argument about the appropriate classification of a claim:¹⁹⁶

The complexity and uncertainty of the existing law means that in many cases the classification of a particular cause of action for limitation purposes, or whether the limitation period has expired or not, is disputed between the plaintiff and the defendant. These disputes need to be resolved in litigation which is subsidiary to the plaintiff's main claim, an expensive process for both the plaintiff ... and the defendant. It is also expensive in terms of the court resources which have to be made available.

3. COMPLEXITY

Statutory limitation schemes aim to provide a reasonable period of time for a plaintiff to discover the infringement to his or her rights and to bring a claim

¹⁹² See pp 30-32 above.

¹⁹³ See pp 32-33 above.

¹⁹⁴ *Esso Petroleum Co Ltd v Mardon* [1976] QB 801; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384; *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd R 33; *Bryan v Maloney* (1995) 182 CLR 609; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

¹⁹⁵ See for example *Wright v Borzi* [1979] Qd R 179.

¹⁹⁶ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 244.

for a remedy. However, the fact patterns of individual disputes often vary widely, and it is difficult to determine what is a “reasonable” limitation period of general application.

The Queensland legislation attempts to overcome this problem by providing a number of different limitation periods for different causes of action.¹⁹⁷ The result of this approach is to make the scheme more complex.¹⁹⁸

If the number of limitation rules is small, the system may be easy to understand and efficient to operate, but the danger is that the mechanical application of its broad rules to cases on the fringe of a category of remedial claims may produce injustice. Increasing the number of rules and the number of categories of claims will tailor the system, but each increase will make the system more complex and less efficient to operate because of the difficulty in determining which cases fall into which statutory categories.

The existence of so many rules makes the system difficult to understand and to apply.¹⁹⁹

The consequence of this complexity must inevitably be confusion for many practitioners. While, no doubt, specialist lawyers have got used to the complexity, the ‘high street’ solicitor can be forgiven for approaching the law of limitations with a considerable degree of trepidation. Certainly there are numerous pitfalls for the uninitiated.

If the law on limitations is difficult to understand for practitioners, it must be incomprehensible for members of the public. This is unacceptable, especially since the consequences of misunderstanding the law can be to eliminate valid claims.

In the Discussion Paper, the Commission referred to a number of submissions received in response to the Information Paper which raised the question of the continued relevance, in contemporary conditions, of the existence of different limitation periods for different kinds of claims.²⁰⁰ These submissions commented on the need for a more uniform approach. One respondent observed that:²⁰¹

There is very little rational unity to the range of limitation periods prescribed in the present legislation.

¹⁹⁷ The existing limitation periods are set out on pp 30-32 above.

¹⁹⁸ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 48.

¹⁹⁹ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 243.

²⁰⁰ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 35, 57.

²⁰¹ Submission 3 (IP).

Another noted:²⁰²

Many of the substantial limitation periods beyond three years provided for by the Act are more referable to “by-gone” days rather than the present era when commercial decisions as to conducting litigation are made much more promptly.

Similarly, one respondent expressed the view that:²⁰³

... 12 and 6 year limitation periods, which relate to property, were fixed in days when the world moved at a slower pace. Given the current explosion of communications technology, there seems to be no reason why limitation periods for actions relating to property need to be longer than any other limitation period.

On the other hand, a submission made in response to the Discussion Paper supported the concept of different limitation periods for different kinds of claims.²⁰⁴

The manner in which evidence at trial is presented depends to a large extent on the type of claim which is being made. For example, evidence in personal injuries actions tends to rely more heavily on the recollections of individual witnesses and oral evidence. On the other hand, commercial disputes are more reliant upon documentary evidence. This, in my opinion, is a valid reason for maintaining a distinction between limitation periods for various types of claims.

4. LACK OF RELEVANCE TO POLICY OBJECTIVES

Limitations law is intended to encourage plaintiffs to commence proceedings within a reasonable time. However, a litigant may well be entitled to question the relevance of arguments about the classification of a claim to the question of whether or not the claim was brought in a timely fashion:²⁰⁵

Whether or not a limitations defence is available to a defendant often depends on how a specific claim before the court is characterized as to type. When this occurs, neither the litigation nor its result can be explained to the litigants in terms which have anything to do with the common sense issue of whether or not the claim was brought as soon as it reasonably could and should have been brought.

²⁰² Submission 21 (IP).

²⁰³ Submission 13 (IP).

²⁰⁴ Submission 19.

²⁰⁵ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 25.

5. SUBMISSIONS

The Commission received twenty-one written submissions in response to the Discussion Paper. Six of those submissions specifically addressed the need for reform to make limitation law simpler, fairer and more certain.²⁰⁶ A community legal centre commented:²⁰⁷

The limitation periods which currently apply in Queensland are complex in the sense that the calculation of any period of limitation is largely dependent on the nature of the claim being brought. In relation to any given conduct, there may be a variety of claims arising and accordingly a variety of applicable limitation periods. A more universally applicable period of limitation would improve potential claimant's understanding of their legal rights, and the remedies available, and hence better equip them to institute legal proceedings within the time limitation. Such a limitation period would simplify the application of limitations law and ultimately provide the community with better access to justice.

The Queensland Law Society Inc also observed:²⁰⁸

The existing limitation legislation, based upon the date of accrual of causes of action, whilst in most cases readily workable by legal practitioners, can offer little interest to or involvement by the general public.

A number of submissions also implicitly supported the need for reform.²⁰⁹ Three submissions accepted the need for limited reform.²¹⁰

²⁰⁶ Submissions 10, 13, 15, 16, 18, 20.

²⁰⁷ Submission 18.

²⁰⁸ Submission 20.

²⁰⁹ Submissions 4, 7, 14.

²¹⁰ Submissions 3, 5, 19.

CHAPTER 7

COMMENCEMENT OF THE LIMITATION PERIOD

1. INTRODUCTION

Limitation legislation defines the time limits within which civil proceedings must be commenced. The date on which the limitation period starts to run is therefore of particular importance. In order for the system to work fairly and effectively, the commencement date must be readily ascertainable. It must also give the potential plaintiff sufficient time to obtain the information necessary to initiate the action.

2. EXISTING LEGISLATION

The *Limitation of Actions Act 1974* (Qld) generally provides that the time specified as the limitation period for a particular kind of claim will start to run when the cause of action arises or accrues.

A cause of action is a factual situation which gives rise to the right to sue: it consists of every fact which it is necessary for the plaintiff to prove to succeed in the action.²¹¹

The Act specifies the dates on which certain actions are deemed to accrue.²¹² Otherwise, the time at which a cause of action accrues is determined by the common law. The decided cases provide different accrual dates for different kinds of actions. For example, in an action for breach of contract, the cause of action generally accrues at the date of the alleged breach.²¹³ If the cause of action is a tort which requires proof of damage, such as negligence or nuisance, the limitation period begins when the damage occurs.²¹⁴ However, if the cause of action is a tort for which it is not necessary to prove damage, such as trespass, the cause of action accrues when the wrongful act which constitutes the tort is committed.²¹⁵ The common law rules relating to the

²¹¹ *Read v Brown* (1888) 22 QBD 128 per Lord Esher MR at 131. See also *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 per Wilson J at 245.

²¹² See for example *Limitation of Actions Act 1974* (Qld) ss 14-19.

²¹³ See for example *Howell v Young* (1826) 5 B & C 259, 108 ER 97; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197 at 203; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384.

²¹⁴ See for example *Davie v New Merton Board Mills Ltd* [1959] AC 604.

²¹⁵ See for example *Dawson v Commonwealth* (1994) 12 WAR 29.

accrual of particular causes of action are detailed and complex.²¹⁶

3. ADVANTAGES OF AN ACCRUAL BASED SYSTEM

The advantages of an accrual based system were summarised by the Law Reform Commission of Western Australia:²¹⁷

(1) It provides some certainty, in the sense that the rules as to when the cause of action accrues are generally well settled, having been developed by the common law over the last hundred years. However, it has to be acknowledged that the rules do not always make it possible to determine exactly when the cause of action accrued on the facts of a particular case.

(2) It is logical, because the limitation period commences at the moment when the cause of action is complete. This is the point when it becomes possible, at least theoretically, to commence proceedings.

(3) It has the ability to adapt to changing circumstances. It is apparent that in recent years Australian courts have moved towards the recognition of a rule that in most negligence cases the cause of action accrues when the damage becomes discoverable, a position already adopted in Canada and arguably in New Zealand. This has helped to overcome the problem that arises in latent damage cases: that the plaintiff may lose the right to sue before becoming aware of its existence.

(4) It provides an element of uniformity between Australian jurisdictions. All other States and Territories, like Western Australia, adopt the principle of limitation periods running from the date of accrual. Though the length of the limitation period may differ, limitation periods for particular causes of action are often the same from one jurisdiction to another, and the adoption of the accrual rule adds an additional layer of uniformity.

However, the Western Australian Commission also recognised that there are significant disadvantages inherent in an accrual based system, which must be weighed against the advantages.²¹⁸

4. PROBLEMS WITH AN ACCRUAL BASED SYSTEM

The rule that a limitation period commences when the cause of action accrues creates a number of problems. These problems raise serious doubts

²¹⁶ For a summary of these rules see Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 71-82.

²¹⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 96-97.

²¹⁸ *Id.*, 97-98.

as to whether a limitation system based on such a rule can meet the objectives of ease of ascertainment, certainty and fairness:²¹⁹

Unfortunately, the accrual rules are extremely complex, they are frequently uncertain, and they often result in a limitation period beginning at a time which is inappropriate insofar as the reasons for and the objectives of a limitation system are concerned.

The accrual rules often produce inappropriate results in terms of limitations policy because, in theory and usual practice, they are not based on that policy. ... When an accrual rule formulated in terms of general law policies is used to establish the commencement time for a limitation period, the period may begin either too soon or too late to satisfy the objectives of limitations policy.

The accrual rules are frequently uncertain because they change with the development of the general law. When that law evolves through judicial decisions, the process depends on specific cases. Cases arise randomly, in different jurisdictions, at different times, and with varying facts. ... Any accrual rule in a transitional stage will be relatively unpredictable.

(a) The date of accrual

Although the law about when a cause of action accrues may be reasonably certain, its application to individual situations is not always so clear. There are cases where, because of the difficulty in establishing precisely when the cause of action accrued, reliance on the accrual rules creates uncertainty.²²⁰

Negligence actions based on the effects of insidious diseases provide a good illustration. In a claim for negligence, the cause of action accrues when damage occurs.²²¹ However, pinpointing this date with any degree of accuracy may not be easy. Mesothelioma, for example, is a fatal form of lung cancer, caused by the inhalation of particles of asbestos. Although the particles cause changes to the tissue of the lungs, these changes may not produce any immediate symptoms, and a significant period of time may pass before the malignancy develops. In a recent case in the Supreme Court of Queensland the trial judge described the progress of the disease in this way:²²²

The asbestos fibres move to the peripheral part of the lung where they impinge

²¹⁹ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 88-89.

²²⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 97.

²²¹ See for example *Davie v New Merton Board Mills Ltd* [1959] AC 604.

²²² *Martindale v Burrows* [1997] 1 Qd R 243 per Derrington J at 245.

on the walls of the small airways and gradually move through the lung tissue until a large number reach the pleural surface. Once there they will irritate other pleura until through some unknown physiological process there is a malignant transformation in one or more mesothelial cells which form part of the pleura. It is at this point that the mesothelioma can be said to commence. Until then there are no physiological changes in that form or even precursors of it, but there may be physiological changes constituting an increased risk of the later development of it.

In that case, the plaintiff had, in the course of his employment, been exposed to long-term low doses of asbestos, starting in the 1950s. He did not consult his general practitioner about damage to his lungs until August 1995, when he complained of a cough and shortness of breath. Subsequent medical examinations revealed the presence of mesothelioma, which was diagnosed in November 1995. It was estimated that the final stage of malignant transformation was likely to have occurred some twelve to eighteen months prior to the diagnosis, that is between May and November 1994.

The plaintiff sought a declaration that his cause of action accrued during that time, when the tissue changes brought about by the asbestos particles became malignant. As indicated above, a cause of action in negligence accrues when the loss or damage in question is incurred. The issue to be decided was therefore at what point in time the plaintiff's injury was sustained. In holding that the cause of action accrued when the ingestion of the asbestos began to cause changes to the condition of the lungs, the judge said:²²³

Here, there was an ongoing established injury, imperceptible in its beginning and incremental nature, that has led to a cumulative result which was then perceptible and identifiable. In turn that has then proceeded to its further development, either of its own accord after ignition or by the further traumatic stimulus from the plaintiff's continuing ingestion of asbestos. The harm done to him in causing the changes to his body that would lead to such a result amounted to an injury.

...

It does not follow that if it is established that the condition has developed into mesothelioma, there will have been no relevant injury until the commencement of that development. The appearance of that condition establishes that the earlier morbid changes were indeed so serious as to be productive of mesothelioma at the later stage and were not merely potentially so. This means that the early changes did cause harm substantial enough to amount to injury at law.

On the other hand, the cause of action in such cases cannot arise until some actual injury has occurred. The potentiality of injury or harm is, by itself, insufficient to found a cause of action. Vulnerability to injury or the potential

²²³

Id, 245-246.

for harm does not constitute an injury.²²⁴ Accordingly, where inhalation of asbestos has led to pleural thickening of the lung which has caused no physical discomfort or disability and has only the potential for more serious developments, the physiological changes do not at that time constitute an injury because of the lack of any established harm.²²⁵

There are other situations where it is equally difficult to pinpoint the date when the cause of action accrued. For example, a plaintiff may claim damages for personal injury for “nervous shock” resulting from the defendant’s negligent behaviour. Damages of this kind are available only if the injury suffered by the plaintiff amounts to a recognised psychiatric condition.²²⁶ However, a considerable period of time may elapse between the act which gives rise to the emotional trauma and the development of a secondary reaction. The question thus arises as to whether the cause of action accrues at the time of the traumatic incident or at the time when the psychiatric illness manifests itself. It has been observed that:²²⁷

The latter alternative may present problems in pinpointing the date of accrual of the cause of action similar to those apparent in the disease cases; yet, although there is no real authority on the point, rationally this must be the alternative the law adopts. If liability is dependent on proof of a recognisable psychiatric illness, the limitation period cannot begin to run until such damage is suffered.

(b) Co-existing causes of action

Different causes of action accrue at different times. For example, an action for breach of contract accrues when the contract is breached, while a negligence action does not accrue until loss or damage has been sustained.²²⁸ Since the same factual situation can give rise to more than one cause of action, there may be more than one accrual date.²²⁹

²²⁴ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 per Mason CJ, Dawson, Gaudron and McHugh JJ at 526-527.

²²⁵ *Battaglia v James Hardy & Co Pty Ltd* (unrept, Vincent J, Supreme Court of Victoria, 12 March 1987); *Papadopoulos v James Hardy & Co Pty Ltd* (unrept, Kaye J, Supreme Court of Victoria, 12 February 1988).

²²⁶ *Mount Isa Mines v Pusey* (1970) 125 CLR 383; *Hinz v Berry* [1970] 2 QB 40; *McLoughlin v O'Brian* [1983] 1 AC 410.

²²⁷ NJ Mullany and PR Handford, *Tort Liability for Psychiatric Damage* (1993) 262.

²²⁸ See p 43 above.

²²⁹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 97.

Because causes of action can overlap, there can sometimes be two different accrual points applicable to the same factual situation, even if the limitation period is the same in both cases.

Accordingly, notwithstanding that the limitation periods for the different causes of action are the same length, if the causes of action accrue at different times then the limitation periods will expire at different times. In other words, where different causes of action co-exist, there may be more than one applicable limitation period. Where this happens, it is inevitable that disputes will arise about the correct categorisation of the claim and the relevant limitation period. The Alberta Institute of Law Research and Reform noted:²³⁰

With respect to harm, there is no functional reason consistent with limitations policy to distinguish between claims based on contract, tort, statute or duties of care based on any of the three. However, the accrual rules do recognise these distinctions, and because the applicable limitation period for a claim under the limitations system at law begins with the accrual of the claim, so does that system.

(c) Complexity

The system is based on a large number of complex rules.²³¹ The fact that different kinds of claims accrue at different times, together with the possibility of overlapping causes of action with different limitation periods, makes the system confusing for both practitioners and litigants.

(d) Unfairness

The accrual rule may be unfair to either the plaintiff or the defendant, depending on the circumstances of the case.

For example, in an action for negligence, the cause of action accrues when the loss or damage complained of takes place.²³² However, because some kinds of damage are not immediately obvious, the limitation period may have commenced before the plaintiff has had an opportunity to discover that the damage has been done. If the damage remains hidden for a considerable length of time, the limitation period may have actually expired before the

²³⁰ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 92.

²³¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 97.

²³² See p 43 above.

plaintiff realises what has happened. This situation is clearly unfair to the plaintiff. The accrual rule may also be unfair to the plaintiff when there are circumstances in which the plaintiff cannot reasonably be expected to commence an action even though it has accrued.²³³

On the other hand, the plaintiff's damage may not occur until a significant time after the defendant's allegedly negligent act. This situation may be unfair to the defendant. For example, if the cause of action in a claim based on "nervous shock" does not accrue until the onset of a recognisable psychiatric illness, the defendant faces the prospect of liability for an indefinite period.²³⁴

"Delayed shock" is not an uncommon phenomenon and post-traumatic stress disorder, for example, may not manifest itself for as long as 30 years after the traumatic event. When in such a case the specified limitation period is then added a situation arises which runs contrary to one of the central policy aims of limitation law - that actions should have a finite life and not surface to haunt defendants years after their tortious conduct.

(e) Development of new rules of categorisation

The sometimes harsh results of the application of the accrual rule may lead courts to develop new rules of categorisation to avoid the potential injustice. Examples of this situation are provided by cases involving claims for latent property damage where, to avoid denying a plaintiff the possibility of redress because the limitation period for an action based on negligence has expired, courts have categorised the plaintiff's claim as a claim for economic loss, for which the cause of action does not accrue until the loss has crystallised.²³⁵

Despite acknowledging that the accrual rule had some advantages, the Law Reform Commission of Western Australia recognised the importance, in the interests of simplicity and fairness, of adopting a uniform approach to all causes of action. The Western Australian Commission considered uniform principles to be necessary in order to eliminate the complexities of the existing legislation and to deal appropriately with new problems as they arise.²³⁶ It concluded that, despite the advantages of the accrual rule, reforms which retain the rule in its present or an amended form would not

²³³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 98. See p 151, 152 below.

²³⁴ NJ Mullany and PR Handford, *Tort Liability for Psychiatric Damage* (1993) 262.

²³⁵ See p 38 above.

²³⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 163.

satisfactorily achieve this objective.²³⁷

5. THE DISCUSSION PAPER

In the Discussion Paper,²³⁸ the Commission raised the question of whether the advantages of the accrual rule sufficiently outweigh the disadvantages to warrant keeping the rule in either its existing or an amended form.²³⁹

The Commission acknowledged that one possible reform would be to broaden the existing extension provisions to include claims for property damage and economic loss,²⁴⁰ and that another would be to defer the commencement of the limitation period for claims which depend on proof of damage until the time when the damage becomes discoverable. However, the Commission was of the preliminary view that changes of this kind would do little to reduce the complexity of the existing legislative scheme. There would still be different limitation periods for different kinds of claims; there would still be uncertainty about overlapping causes of action with different accrual dates; and there would still be argument about the categorisation of claims.

The Commission put forward the preliminary recommendation that the general principle that the limitation period commences on the date when the cause of action accrues should be replaced.²⁴¹

6. SUBMISSIONS

The Commission received twenty-one written submissions in response to the Discussion Paper. Of those submissions, almost half made no specific comment on this issue. There were eight submissions in favour of the Commission's preliminary recommendation.²⁴²

²³⁷ Id, 166-169.

²³⁸ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

²³⁹ Id, 43.

²⁴⁰ The existing extension provisions are discussed at pp 33-35 above.

²⁴¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 44.

²⁴² Submissions 7, 10, 13, 14, 15, 16, 18, 20.

The Institution of Engineers, Australia observed.²⁴³

Anecdotal evidence indicates that establishing the date of a “cause of action” in a court is an exercise in fantasy and opportunism and clearly highly productive of costs, both to the court system and the parties. Establishing the date of a cause of action is neither readily ascertainable nor certain.

The respondent also noted that:

Limitation periods commence at different times for different types of actions, which creates uncertainty with plaintiffs and defendants alike ...

The present Queensland law provides that the limitation period runs when the cause of action arises or accrues, that is, from when the damage or breach occurs. ... this may sometimes create harsh results, especially for latent damage, where a potential claimant may not have had the opportunity to become aware of the facts before the expiration of the limitation period.

However, five submissions were opposed to the Commission’s proposal.²⁴⁴ The Insurance Council of Australia Ltd expressed its belief that:²⁴⁵

... in the vast majority of the cases the existing regime of limitation periods based on accrual of cause of action does provide certainty, and that difficult cases arising from this general principle are few in number and such cases are the exception rather than the rule.

A member of the Queensland judiciary also commented that, despite the admitted difficulties which can arise under the present system, the accrual based system gives “a fundamental certainty and predictability to the limitation rule”.²⁴⁶

7. THE COMMISSION’S VIEW

The Commission is not persuaded that the disadvantages of the accrual rule are outweighed by the advantages. Although the rule achieves certainty in some categories of claims, it does so at the expense of uniformity, simplicity and fairness. The Commission remains of the view that many of the problems with the present legislation - for example, the complexity, the potential for overlapping claims in different causes of action and with different dates of accrual, and the unfairness which may arise - relate to the accrual

²⁴³ Submission 15.

²⁴⁴ Submissions 3, 5, 8, 11, 19.

²⁴⁵ Submission 5.

²⁴⁶ Submission 3.

date as the commencement of the limitation period. The Commission believes that these problems will not be overcome without a change in the basic structure of the present limitations scheme.

The Commission agrees with a commentator who has observed:²⁴⁷

Attempts to amend Acts which:

- (1) assign claims to different categories;
- (2) allot different time periods of fixed duration to those categories; and
- (3) provide for the commencement of time periods at the date of accrual of claims,

lead to unnecessarily technical, complex and cumbersome legislation. This strategy must be abandoned if the problems of latent damage and, indeed, of limitation law generally are to be solved in a simple and logical fashion.

This view is shared by the English Law Commission:²⁴⁸

... the case for a wide-ranging reform looks compelling. It would seem that only a comprehensive reform can produce a law of limitations that is coherent, certain, clear, just, modern and cost-effective.

8. RECOMMENDATION

The Commission recommends that the general principle that the limitation period commences on the date when the cause of action accrues should be replaced.

²⁴⁷ NJ Mullany, "Reform of the Law of Latent Damage", (1991) 54 *Modern Law Review* 349, 381.

²⁴⁸ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 4.

CHAPTER 8

ALTERNATIVE APPROACHES

1. INTRODUCTION

Developments in some overseas jurisdictions with legal systems similar to those which exist in the Australian States and Territories have focussed on alternative approaches to the date of the accrual of the cause of action as the commencement of the limitation period. The Law Reform Commission of Western Australia has also recently re-examined the reliance of existing limitations systems on the accrual date.

2. OTHER JURISDICTIONS

(a) Canada

Significant changes to limitations law have been implemented or proposed in two Canadian provinces. In Alberta, the Alberta Law Reform Institute published a report in 1989 recommending that the accrual system be replaced by a system based on a principle of discoverability.²⁴⁹ Legislation implementing the Institute's recommendations was enacted in 1996.²⁵⁰ Similar legislative changes were proposed in Ontario in 1992.²⁵¹

(i) Alberta

The Alberta Law Reform Institute rejected the accrual rule in favour of serving the interests of potential plaintiffs who may not have sufficient knowledge to commence proceedings within the traditional limitation period. However, the Institute's report also recognised the interests of potential defendants in repose - the certainty that after a specified period of time, proceedings cannot be commenced, whether or not the plaintiff has the requisite knowledge. The Institute summarised its recommendations in this way:²⁵²

The first basic principle is knowledge. ... The principle of knowledge involves building in discovery by the claimant to set the

²⁴⁹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989).

²⁵⁰ *Limitations Act 1996* (Alta). However, the legislation has not yet come into operation.

²⁵¹ *Limitations (General) Bill 1992* (Ont).

²⁵² Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 1-2.

limitations clock ticking. The limitation period does not begin to run until the claimant knows of the claim, that is, until he has “discovered” or “ought to have discovered” (i) that the injury had occurred, (ii) that it was to some degree attributable to the conduct of the defendant, and (iii) that it was sufficiently serious to have warranted commencing a proceeding. After discovery, the claimant has ... years within which to seek redress in a civil judicial proceeding. This ... period constitutes the “**discovery limitation period**”.

The second basic principle is repose. It ... serves the interests of defendants by providing an absolute cut off date ... within which the claimant must seek a remedial order. The ... period applies irrespective of whether the claimant has knowledge of the claim. The principle of repose facilitates longterm planning by persons subject to potential claims. ... This ... period constitutes the “**ultimate limitation period**”.

The defendant is entitled to a limitations defence when either the discovery limitation period or the ultimate limitation period expires, whichever occurs first.

...

Together, ... these dual principles - knowledge and repose - provide a fair balance between the interests of claimants and defendants, both individually and collectively, and satisfy the interests of society at large.

Other considerations guiding the Institute in formulating its recommendations were the need for comprehensibility and simplicity. The Institute expressed the view that limitation legislation should be as comprehensible as possible for everyone - whether a lawyer or not - affected by it, and that the legislative provisions should express fundamental principles designed to be applicable in most cases, rather than attempting to achieve technical solutions for rare cases.²⁵³

The Institute believed that its recommendations would benefit defendants as well as plaintiffs, because in many cases plaintiffs with the necessary knowledge would have to bring their actions sooner, and because there would be a finite period after which an action could not be brought.²⁵⁴

The Institute’s recommendations were substantially implemented by the *Limitations Act 1996* (Alta). The Act provides that a defendant is entitled to immunity from liability in respect of a claim, unless the claimant (plaintiff) commences proceedings within:²⁵⁵

²⁵³ Id, 31.

²⁵⁴ Id, 35.

²⁵⁵ *Limitations Act 1996* (Alta) s 3(1).

- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury²⁵⁶ for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
 or
 - (b) 10 years after the claim arose,
- whichever period expires first ...

The Act defines when a claim arises:²⁵⁷

- (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions arises when the conduct terminates or the last act or omission occurs;
- (b) a claim based on a breach of duty²⁵⁸ arises when the conduct, act or omission occurs;
- (c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;
- (d) ...
- (e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution can be based, whichever first occurs.

The Act also specifies when time begins to run against a successor in title,²⁵⁹ a principal,²⁶⁰ and a personal representative of a deceased person as

²⁵⁶ "Injury" is defined in s 1(f) to mean personal injury, property damage, economic loss, non-performance of an obligation, or in the absence of any of the former, the breach of a duty.

²⁵⁷ *Limitations Act 1996* (Alta) s 3(3).

²⁵⁸ "Duty" is defined in s 1(d) as "any duty under the law"; "law" is defined in s 1(g) to mean "the law in force in the Province" and includes statutes, judicial precedents and regulations.

²⁵⁹ *Limitations Act 1996* (Alta) s 3(2)(a).

²⁶⁰ *Id.*, s 3(2)(b).

successor in title of a claim.²⁶¹

The operation of the ultimate limitation period is suspended in certain circumstances. Factors which will suspend the limitation period are that:

- the defendant has fraudulently concealed the occurrence of the injury;²⁶²
- the plaintiff is a person under disability;²⁶³
- the claim is against a parent or guardian of the plaintiff and the cause of action arose while the plaintiff was a minor;²⁶⁴ and
- the claim is against any other person for a cause of action based on conduct of a sexual nature including, without limitation, sexual assault.²⁶⁵

Unlike the present Queensland legislation,²⁶⁶ the Alberta legislation does not exempt a claim for fraudulent breach of trust from the scheme. The imposition of a limitation period in such cases was based on the following recommendation of the Alberta Law Reform Institute:²⁶⁷

We do not see any fundamental difference between, for example, a breach of promises made under contract, and a breach of conditions imposed by trust. The discovery limitations period we propose is based on the discovery limitations principle that comes from equity and applies to breach of trust cases under the existing law. It will give trust beneficiaries a reasonable period of time within which to pursue their claims. ... We do not think that [a fixed period of two years from discovery] will unduly burden trust beneficiaries any more than it will persons entitled to a remedy for other reasons. The ultimate limitation period ... will give trustees the same protection that it gives to other potential defendants.

... Where the trustee has fraudulently concealed the fact of the injury the ultimate limitation period would be suspended indefinitely.

²⁶¹ Id, s 3(2)(c).

²⁶² Id, s 4(1).

²⁶³ Id, s 5(1). A “person under disability” is defined in s 1(i) to include a minor who is not under the actual custody of a parent or guardian and an adult who is unable to make reasonable judgments in respect of matters relating to the claim.

²⁶⁴ *Limitations Act 1996* (Alta) s 5(2)(a).

²⁶⁵ Id, s 5(2)(b).

²⁶⁶ See note 156 above.

²⁶⁷ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 37.

Furthermore, a breach of fiduciary duty that is continuous would give rise to successive claims. Again, the effect would be to suspend the ultimate limitation period indefinitely.

(ii) Ontario

The *Limitations Bill 1992* (Ont) was based on principles similar to those which underlie the Alberta legislation.

It provided for two limitation periods - a two year discovery period²⁶⁸ and an ultimate period of thirty years.²⁶⁹ However, the thirty year period was reduced to ten years in a number of special situations such as cases involving medical negligence²⁷⁰ or building defects.²⁷¹

The Bill provided for the ultimate limitation period to be suspended in certain circumstances, such as disability of the plaintiff, or conduct by the defendant which wilfully concealed the occurrence of the injury or misled the plaintiff as to the appropriateness of litigation as a remedy.²⁷² It made special provision for claims based on assault or sexual assault by suspending the discovery period during any time the plaintiff was incapable of commencing the proceeding because of his or her physical, mental or psychological condition.²⁷³ There was no limitation period in a proceeding arising from a sexual assault if at the time of the assault one of the parties to the assault had charge of the plaintiff, or was in a position of trust or authority in relation to the plaintiff or was someone on whom the plaintiff was dependent, whether financially or otherwise.²⁷⁴

The Bill also made allowance for the situation where the parties to a dispute attempt to resolve it by mediation. It provided that, if the plaintiff and

²⁶⁸ *Limitations Bill 1992* (Ont) cl 4.

²⁶⁹ *Id.*, cl 15(2).

²⁷⁰ *Id.*, cl 15(3), (4). However, by virtue of cl 15(5), these provisions did not apply if the claim was based on "the leaving of a foreign object having no therapeutic or diagnostic purpose in the body of the person with the claim".

²⁷¹ *Id.*, cl 15(6).

²⁷² *Id.*, cl 15(7).

²⁷³ *Id.*, cl 9(1). Cl 9(2) created a presumption that, unless otherwise proved, a plaintiff with a claim based on an assault was incapable of commencing the proceeding earlier than it was commenced if, at the time of the assault, one of the parties to the assault had an intimate relationship with the plaintiff or was someone on whom the plaintiff was dependent, whether or not financially. Cl 9(3) created a presumption that, unless otherwise proved, a plaintiff with a claim based on a sexual assault was incapable of commencing the proceeding earlier than it was commenced.

²⁷⁴ *Id.*, cl 16(h).

defendant agreed to submit the claim to an independent third party for resolution, the discovery limitation period would be suspended from the date of the agreement until the date the claim was resolved or one of the parties terminated or withdrew from the agreement.²⁷⁵

(b) New Zealand

The New Zealand Law Commission published a report on limitation of actions in 1988.²⁷⁶

The general thrust of the Commission's recommendations was the enactment of.²⁷⁷

²⁷⁵ Id, cl 10.

²⁷⁶ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988).

²⁷⁷ Id, viii-ix.

a new statute of wide application and having three central features -

- (a) a defence based on a standard three year limitation period, but subject to
- (b) extensions in certain specified circumstances, in particular where the claimant shows absence of knowledge of essential facts relevant to the claim, but generally subject to
- (c) a further defence based on a “long stop” limitation period of 15 years.

The Commission proposed that the legislation:²⁷⁸

provide for the defendant’s act or omission (on which a claim is based) to be the standard commencement date: it is relatively easily and objectively fixed, within the knowledge of the party who must plead it, and will apply in the vast majority of cases.

The Commission further recommended that, in addition to the standard period, there should be a “compensatory” period:²⁷⁹

representing the time passing between the date of occurrence of the act or omission on which the claim is based and the date on which the claimant gained (or reasonably should have gained) knowledge of any of the following facts:

- (a) the occurrence of the act or omission;
- (b) the identity of the person responsible;
- (c) the act or omission has caused harm;
- (d) that the harm is significant.

The standard limitation period would also be subject to extension if the act or omission on which the claim was based occurred before the plaintiff attained the age of eighteen years or if the plaintiff was incapable of, or substantially impeded in, managing his or her affairs with respect to the act or omission on which the claim was based for any period or periods of at least twenty-eight days. In the former situation, the limitation period would be extended until the plaintiff turned twenty-one - that is, the plaintiff would be allowed the standard limitation period after reaching the age of majority in New Zealand. In the latter situation, the limitation period would be extended by the length of time the plaintiff was incapacitated.²⁸⁰

²⁷⁸ Id, 61.

²⁷⁹ Id, 65.

²⁸⁰ Id, 86-87.

The Commission's recommendations also provided for extension of the long stop limitation period in three situations - fraud or conversion by defendant trustees; deliberate concealment by the defendant; and the infancy of the plaintiff.²⁸¹

(c) England

The Law Commission completed a consultation paper on the subject of limitation of actions in October 1997.²⁸² Although the paper was prepared for the purpose of comment, and does not represent the final views of the Commission, nonetheless the provisional proposals set out in the paper provide an indication of the approach currently preferred by the Commission in a number of areas.

The Commission's provisional preference was for a discovery-based system, where time would not start to run until the plaintiff knows, or ought reasonably to know, that he or she has a cause of action. The Commission acknowledged that a move to a discovery-based system would represent a major change from the existing law. It also recognised that, because the date of discoverability may vary from case to case depending on the particular plaintiff in question, a system based on discoverability could carry the disadvantage of uncertainty, leading to the danger of adding to the factual issues in dispute, increasing satellite litigation, and increasing legal costs. However, the Commission argued that the better way of achieving the necessary degree of certainty would be to combine the initial limitation period running from discoverability with an overall "long-stop" or ultimate limitation period running from the date of the defendant's alleged act or omission.²⁸³ The Commission concluded:²⁸⁴

While we are most anxious not to create needless uncertainty, at this stage in our thinking we believe that a reform of limitations law that ignored the injustice to plaintiffs of "latent damage" ... would be unacceptable. Moreover, we would hope that sufficient certainty could be achieved first, by spelling out in legislation the precise ingredients of the date of discoverability ... and secondly, by combining discoverability with a long-stop. ... We provisionally believe that the goal of a simple, fair and uniform limitation regime is one worth striving for even if, in the short term, there are areas where the law is rendered less certain than at present.

²⁸¹ Id, 103.

²⁸² Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997).

²⁸³ Id, 252-253.

²⁸⁴ Id, 257.

(d) Western Australia

In January 1997, the Law Reform Commission of Western Australia published a report which considered in detail the Canadian and New Zealand schemes outlined above.²⁸⁵

In relation to the Alberta model, the Commission noted that, in the light of recent case law concerning latent damage to buildings and reliance on professional advice,²⁸⁶ the Alberta model was “far from revolutionary”.²⁸⁷ It concluded that, although the opportunity for dispute over matters such as classification of the nature of a claim was not completely eliminated, it was substantially reduced.²⁸⁸ The Commission expressed the view that:²⁸⁹

The chief consequence of adopting legislation based on the Alberta model is that the Limitation Act can be much simpler. Instead of a greater or lesser number of limitation periods running from accrual, there is one basic period running from the point of discovery, thus eliminating disputes about which limitation period applies. No separate extension provisions are necessary, since the basic period and the extension period have been fused into one. A long stop period, running from when the cause of action arose, provides balance to the scheme by ensuring that there is a point at which the action is finally barred, thus providing protection for the interests of defendants.

In addition to the benefits of fairness and comprehensibility which the Alberta Law Reform Institute adopted from equitable limitation principles,²⁹⁰ the Law Reform Commission of Western Australia identified the following advantages in the Alberta approach:²⁹¹

- It would allow the adoption of one standard period, plus a long stop provision.
- The standard period could be shorter than under the traditional system, since it would not be necessary to allow time for discovery.

²⁸⁵ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997).

²⁸⁶ See p 38 above.

²⁸⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 151.

²⁸⁸ Id, 148-149.

²⁸⁹ Id, 150.

²⁹⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 23.

²⁹¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 150-151.

- Since there would be less need to discriminate between different causes of action and fewer classification problems, cases would not turn on technical issues such as classification and the application of the relevant accrual rule.

However, the Commission also highlighted a number of potential problems with the scheme:²⁹²

- The long stop period may rule out deserving claims. Even with a long stop period of thirty years as proposed in Ontario, there are some forms of latent disease which may not have been discovered within this time. The shorter period in Alberta would preclude not only these claims, but also claims for property damage which does not become manifest within ten years.²⁹³ There are other situations where, although the injury may not be latent, other factors may justify delay in bringing the claim.²⁹⁴
- The long stop period may start running before the cause of action is complete. If, as in the Alberta and Ontario schemes, the long stop period commences running at the date of the breach of duty, even though damage is not suffered until some time later, the ultimate limitation period for a cause of action such as negligence, which requires proof of damage, will commence before the cause of action has accrued.
- Identifying the point of discovery may not be simple.
- The discovery principle is inappropriate in certain cases. The application of a new regime to cases which raise questions of title to real property, for example, would involve substantive issues of real property law. The Ontario scheme excluded such claims.²⁹⁵ In Alberta, only the ten year ultimate limitation period applies.²⁹⁶

In relation to the recommendations of the New Zealand Law Commission, the Western Australian Commission observed:²⁹⁷

²⁹² Id, 152-155.

²⁹³ See for example *Invercargill City Council v Hamlin* [1996] AC 624 (PC) (New Zealand), where the damage remained latent for 17 years.

²⁹⁴ See Chapters 13 and 14 below.

²⁹⁵ *Limitations Bill 1992* (Ont) cl 2(a).

²⁹⁶ *Limitations Act 1996* (Alta) s 3(4).

²⁹⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 159-160.

It is in tort actions where proof of damage is an essential ingredient of the cause of action that the difference between the proposed rule and the accrual system makes most impact. Under the act or omission rule, in a negligence case the limitation period will start to run at the point of the defendant's negligent act or omission, even though the time gap between that negligence and the resulting damage may be considerable. This will affect not only the property damage and economic loss cases in which under the present rule the limitation period only starts to run when the damage becomes discoverable, but also personal injury cases in which time now runs from the suffering of damage, whether discoverable or not.

The Western Australian Commission favourably noted the following features of a limitation system based on the act or omission of the defendant.²⁹⁸

- It is simple and easily understood, especially by lay persons to whom the notion of accrual would be well-nigh incomprehensible.
- Because the limitation period commences at a particular point in time, there is some degree of certainty. However, the Commission also acknowledged that the date of the act or omission would not always be certain, and that there would be further uncertainty because of extension provisions.
- It removes the problem of different limitation periods in alternative actions in tort and contract, since in either case the limitation period would run from the breach of duty.

However, the Commission also identified a number of serious objections.²⁹⁹

- Though the point at which the act or omission occurs may be clear in many cases, there are others in which it will be uncertain.
- There would be too many cases in which it was necessary to rely on the extension provisions to give the plaintiff a right to sue. The imbalance between the standard period and the extension provisions would be particularly apparent in cases involving latent personal injury. Personal injury cases are not a problem in New Zealand, because in that country the right to sue for damages at common law has been replaced by a statutory compensation scheme. However, the act/omission alternative is not suitable for implementation in a jurisdiction where tort claims are still made for personal injury, unless it deals satisfactorily with such cases.
- In a claim based on a cause of action which requires proof of damage, the limitation period would commence before the cause of action was

²⁹⁸ Id, 160-161.

²⁹⁹ Id, 161-162.

complete and, therefore, presumably before the action could be brought. The Commission considered this situation to be anomalous and undesirable, even if the extension provisions applied.

The Western Australian Commission advocated the enactment of new legislation based, in the interests of simplicity and fairness, on a uniform approach to all causes of action. It concluded that such an approach was needed not only to eliminate the complexities of existing legislation, but also to deal appropriately with new problems as they arise.³⁰⁰

The Commission recommended that, with some minor exceptions, all claims should be subject to two limitation periods:³⁰¹

- a discovery limitation period of three years commencing when the plaintiff has the necessary knowledge, based on the criteria set out in the Alberta legislation;³⁰² and
- an ultimate limitation period of fifteen years.

As in Alberta, the claim would be time-barred once either limitation period had expired. However, unlike the Alberta scheme, the court would have a discretion to permit the action to proceed in certain exceptional cases.³⁰³

The Commission noted that its recommended discoverability rule would not differ dramatically from the approach already adopted in many jurisdictions - either by common law or statute - in areas such as claims for personal injuries, latent property damage or economic loss, or fraud. It observed:³⁰⁴

The Commission's recommendation for the adoption of a discoverability rule of general application simply generalises these individual instances and ensures that the approach of the law to the problem of latent damage is uniform in all situations.

...

In cases where the damage is immediately apparent - as, for example, in most cases of breach of contract - the discoverability approach would operate in the

³⁰⁰ Id, 163.

³⁰¹ Id, 171-172, 176.

³⁰² See pp 54-55 above.

³⁰³ The desirability of including a residual judicial discretion in a limitation scheme is discussed in Chapter 9 of this Report.

³⁰⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 173-174.

same way as the existing accrual rule: the limitation period would commence running on the date of the breach. However, in cases where the damage is latent, the rule would ensure that the limitation period would not commence running until the plaintiff became aware, or should reasonably have become aware, of the existence of a cause of action. Where there is overlapping liability in contract and tort, if the damage is not immediately discoverable the limitation period would not commence until it becomes discoverable, whether the cause of action is contract or tort.

3. THE DISCUSSION PAPER

In the Discussion Paper,³⁰⁵ the Commission expressed the preliminary view that, for common law claims, there should be a limitation period of general application which would be the lesser of two alternative periods - a specified time after the plaintiff was or, in the circumstances, ought to have been in possession of sufficient information to be able to commence proceedings, and a longer period after which, in all but the most exceptional cases, the plaintiff should not be able to commence proceedings. The Commission believed that this approach would benefit both plaintiffs and defendants.³⁰⁶

Accordingly, the Commission's preliminary recommendation was that, for common law claims, the limitation period should be the lesser of:³⁰⁷

- (a) three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:
 - (i) that the injury had occurred;
 - (ii) that the injury was attributable to the conduct of the defendant;
 - (iii) that the injury, assuming liability on the part of the defendant, warranted bringing a proceeding;
- or
- (b) fifteen years after the date on which the conduct, act or omission giving rise to the claim occurred.

³⁰⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

³⁰⁶ Id, 56.

³⁰⁷ Id, 60-61.

4. SUBMISSIONS

The Commission received twenty-one written responses to the Discussion Paper. Seven respondents did not directly address the question of an alternative limitations scheme.³⁰⁸ Eight submissions generally supported the Commission's preliminary recommendation,³⁰⁹ and six were opposed to it.³¹⁰

The submissions which opposed the Commission's proposal all objected to the possibility of a plaintiff having a period of fifteen years within which to bring a claim. They expressed concern at the effect which a fifteen year limitation period would have on the ability of the courts to conduct a fair trial and to maintain an acceptably high standard of justice:³¹¹

It is ... hard enough for our courts to determine what happened 2 or 3 years after the relevant events without asking them to determine what happened 15 or more years ago. Ordinary citizens cannot recall what was said many years ago, even on significant occasions. It is unreasonable to expect them to do so. It is unreasonable to expect our courts to, without diminishing the quality of justice, determine disputed questions of fact after such lengthy periods of time.

The assumption underlying these submissions appears to be that the fifteen year limit would apply in all cases. One respondent, for example, argued that:³¹²

The experience of insurers, especially in personal injury litigation, is that prior to the implementation of particular legislation e.g., *Motor Accident Insurance Act Qld 1994*, imposing shorter time frames within which claims had to be notified and brought, it was common-place for plaintiffs not to commence proceedings until almost the expiration of the limitation period. ... The adoption of an ultimate fifteen year limitation period would, in our, view, be highly undesirable.

...

The point is that if a plaintiff suffers moderate or severe injuries, then why should he or she not present their claim promptly rather than submit it possibly fifteen years later.

Another submission suggested that "trials would be routinely heard 20 years

³⁰⁸ Submissions 1, 2, 4, 6, 9, 12, 17.

³⁰⁹ Submissions 7, 10, 13, 14, 15, 16, 18, 20.

³¹⁰ Submissions 3, 5, 8, 11, 19, 21.

³¹¹ Submission 11.

³¹² Submission 5.

or more after the incident giving rise to the claim”.³¹³

These comments, and the assumption on which they appear to be based, do not accurately reflect the Commission’s proposal. Under the scheme put forward by the Commission, an action would have to be commenced within three years after the date when the plaintiff became or should have become aware of certain facts necessary to enable the plaintiff to commence proceedings but, in any event, no later than fifteen years from the date of the act which caused the plaintiff’s loss or injury.

The limitation period in the majority of cases would not be changed at all by the Commission’s proposal. For example, in most cases involving motor vehicle accidents, the plaintiff would be aware within a relatively short time after the accident of the relevant information - namely, that the injury had occurred, that the injury was attributable to the conduct of the defendant and that the injury was sufficiently serious to warrant bringing proceedings - so that the plaintiff would have to bring his or her claim within three years of obtaining that information. The existing limitation period would be increased, if at all, only by the amount of time reasonably necessary in the circumstances to obtain the information.

In other kinds of claim, where the existing limitation period is more than three years, the Commission’s proposal would mean that plaintiffs would have only three years from discovery of the relevant information to commence proceedings. As the information would be discoverable immediately or within a relatively short space of time in many cases, the limitation period would in fact be reduced.

The alternative period proposed by the Commission would become relevant only to the extent that the plaintiff was not immediately aware of a fact necessary to bring proceedings - such as, for example, the fact that the loss or injury had occurred or the real extent of the loss or injury. In such a situation, the alternative period would operate to protect the defendant by preventing the plaintiff from commencing an action more than a specified period of time after the act of the defendant which allegedly caused the loss or injury, regardless of when the plaintiff obtained the information.³¹⁴

On the other hand, there are at present some kinds of claim - for example, claims involving economic loss resulting from property damage or negligent advice - for which the courts have held that the limitation period does not

³¹³ Submission 19.

³¹⁴ However, in exceptional circumstances, a court would be able to extend the limitation period. See Chapter 9 of this Report.

begin to run until the plaintiff's loss has become ascertainable.³¹⁵ There is no ultimate statutory limit beyond which such a claim may not be brought. It is quite conceivable that proceedings could be commenced considerably more than fifteen years after the act which caused the damage. The scheme proposed by the Commission could in fact result in a reduced limitation period in these cases.

5. ISSUES FOR FURTHER CONSIDERATION

(a) Claims included in the scheme

In the Discussion Paper, the Commission proposed that there should be a limitation period of general application for common law claims.³¹⁶ However, the Commission did not, beyond the need for a plaintiff to obtain certain information relating to his or her "injury", define the kind of claim to which the scheme should apply.

In the *Alberta Limitations Act 1996*, the term "injury" is defined very broadly to mean "personal injury, property damage, economic loss, non-performance of an obligation, or in the absence of any of the former, the breach of a duty".³¹⁷ "Duty" is defined as "any duty under the law".³¹⁸

The Law Reform Commission of Western Australia suggested some refinement to the Alberta definitions. It noted that under the definition of "injury" the same conduct could constitute two different injuries, perhaps occurring at different times. For example, a breach of contract could be classified as "non-performance of an obligation". It might also result in personal injury, property damage or economic loss. The Western Australian Commission recommended that the definition should make clear when the discovery period will start to run in cases where there is more than one potential injury.³¹⁹ However, it did not propose a method of achieving this objective.

³¹⁵ See p 38 above.

³¹⁶ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 60.

³¹⁷ *Limitations Act 1996* (Alta) s 1(f).

³¹⁸ *Id.* s 1(d).

³¹⁹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 174.

This Commission agrees with the conclusion reached by the Law Reform Commission of Western Australia and with its recommendation. It believes that the uncertainty identified by the Western Australian Commission can be avoided by rewording the Alberta definition so that non-performance of an obligation, like a breach of duty, becomes relevant only in the absence of some identifiable kind of damage such as personal injury, property damage or economic loss. This approach would be consistent with the general thrust of the Commission's recommendations, which focus on the discoverability of loss or damage in determining when the limitation period should commence, but would not preclude claims such as breach of contract or trespass, which are actionable *per se*, and do not require proof of damage. It would also accommodate the Commission's recommendation, made in Chapter 10 of this Report, that equitable claims should also be included in the general limitations scheme.

The Law Reform Commission of Western Australia was also concerned that the Alberta definition of "injury" might not include some claims for trespass to the person. Not all such claims involve personal injury. For example, an action for assault can be based on the apprehension of imminent contact, rather than the actual contact itself. Similarly, an action for wrongful imprisonment need not involve personal injury. The Commission recommended that the definition of "injury" should make it clear that "personal injury" includes all cases of trespass to the person.³²⁰

This Commission agrees with the recommendation of the Western Australian Commission.

(b) The length of the limitation period

In the Discussion Paper, the Commission acknowledged that decisions about the length of limitation periods are to a large extent arbitrary.³²¹

It observed that it is now widely accepted that existing limitation periods of six years or more, which have their origins in an era when transport and communication took considerably more time than they do today, are no longer necessary or appropriate. It also noted that existing limitation periods were set on the basis that the limitation period would commence when the cause of action accrued, so that time had to be allowed within the limitation period for the plaintiff to become aware of the cause of action. It expressed the view that, if the limitation period did not commence until the plaintiff had

³²⁰ Id, 175.

³²¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 56.

acquired the necessary information, there would no longer be a need to incorporate such an allowance into the limitation period.³²²

Accordingly, the Commission proposed a general three year discovery period on the basis that three years is a familiar concept in the context of Australian limitation law.³²³ It is the present limitation period for claims involving personal injuries in most Australian jurisdictions,³²⁴ and is the existing limitation period under the Commonwealth *Trade Practices Act 1974*.³²⁵

Only six of the written submissions received by the Commission in response to the Discussion Paper specifically addressed the issue of the appropriate length of the discovery period.³²⁶ All endorsed the three year period proposed by the Commission. One submission, from the Financial Counselling Services (Qld) Inc, referred to the advantages for consumers in reducing the limitation period for the recovery of debt from six years to three.³²⁷

If the debt is disputed or there are some doubts about its amount, six (6) years delay will always disadvantage the consumer debtor more than the creditor.

Debtor clients find it difficult enough to keep records, contracts and statements in the short term, let alone over a six (6) year period. The creditor provider's resources are almost always superior in this regard.

The submission noted that under most consumer protection legislation, a consumer had only a two or three year period within which to seek redress.³²⁸ The respondent submitted that:

... if consumers' rights to bring actions relying on remedial legislation in their favour are subject to short limitation periods, bringing creditors' rights to pursue debts into line, is only fair.

Consistency is, in general, more just as well as being more easily understandable.

³²² Id, 57.

³²³ Id, 58.

³²⁴ See Chapters 4 and 5 above.

³²⁵ *Trade Practices Act 1974* (Cth) s 82(2).

³²⁶ Submissions 4, 7, 10, 14, 18, 20.

³²⁷ Submission 4.

³²⁸ See for example *Consumer Credit Code 1994* (Qld) s 73 (2 years), *Credit Act 1987* (Qld) ss 148-152 (1 year), *Trade Practices Act 1974* (Cth) s 82(2) (3 years), *Fair Trading Act 1989* (Qld) s 99 (3 years).

The Queensland Law Society Inc also favoured the three year period:

The “discovery”/three year limitation period is reasonable and consistent with remedies currently applicable to personal injuries claims, and under various other legislation including the Trade Practices Act 1974. The existence of a longer limitation period for contract and general commercial claims can not be justified, given modern methods of communication and business.

The Australian Finance Conference, the national finance industry association, impliedly accepted a general three year discovery period, although it advocated exceptions from that period in relation to actions for adverse possession and claims relating to mortgages of real property.³²⁹

The Commission also proposed an alternative limitation period of fifteen years, after which time a plaintiff’s claim would be barred in all but the most exceptional cases,³³⁰ whether or not the plaintiff had obtained all the necessary information within that period. Again, the Commission acknowledged that a decision about the length of the alternative period is arbitrary.³³¹ It ruled out a limitation period of thirty or forty years as unrealistic and unnecessarily harsh for the majority of defendants. It opted for fifteen years - the existing limitation period for some claims in England³³² and the Australian Capital Territory,³³³ and the period recommended by law reform bodies in New Zealand,³³⁴ Alberta³³⁵ and Western Australia³³⁶ - as a compromise between a shorter period of ten or twelve years, and a longer period of, for example, twenty years.

³²⁹ Submission 16. See Chapters 17 and 18 below.

³³⁰ See Chapter 9 below.

³³¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 58.

³³² *Limitation Act 1980* (UK) s 14B.

³³³ *Limitation Act 1985* (ACT) s 40.

³³⁴ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 100.

³³⁵ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 35.

³³⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 176.

One of the submissions, while endorsing the concept of an alternative limitation period, proposed that the period should be reduced from fifteen years to ten.³³⁷ The respondent expressed the view that this period would be sufficient.

After further consideration, the Commission accepts that a somewhat shorter alternative period may adequately achieve a balance between the interests of potential plaintiffs in not being unjustly precluded from commencing proceedings and the interests of potential defendants in having a fair trial. In coming to this conclusion, the Commission is mindful of the need to provide a mechanism to cater for meritorious claims which fall outside even the alternative limitation period.³³⁸

Another submission, from a community legal service, proposed that a plaintiff who discovered the relevant facts within the alternative limitation period should always have three years from the date of discovery to commence proceedings.³³⁹ Under the scheme put forward by the Commission, a plaintiff who did not discover the relevant information until a date within the last three years of the alternative period would have a correspondingly shorter limitation period. The Commission was not persuaded by the respondent's proposal. In the view of the Commission, greater certainty is achieved by defining the alternative limitation period as a fixed period of years. A plaintiff who was disadvantaged by not obtaining the necessary information until late in the alternative period would be able to apply for an extension of time to commence proceedings.³⁴⁰

The Australian Plaintiff Lawyers' Association submitted that there should be no ultimate limitation period.³⁴¹ In the view of the Commission, this proposal does not reflect an appropriate balance between the interests of plaintiffs and defendants. The Commission recognises that some claims brought after a considerable period of time has elapsed may have little chance of succeeding. It holds the view that it is therefore preferable to have such claims scrutinised by the court to determine whether they should be allowed to proceed.

(c) Onus of proof

³³⁷ Submission 15.

³³⁸ See Chapter 9 below.

³³⁹ Submission 18.

³⁴⁰ See Chapter 9 below.

³⁴¹ Submission 10.

A number of the submissions which objected to the concept of a discoverability period, rather than an accrual based system, raised the argument that the question of what the plaintiff knew or ought to have known was largely a subjective one, and that it would be unfair to require a defendant to prove such matters.³⁴² The Insurance Council of Australia expressed the view that:³⁴³

... a limitation concept based upon discovery of knowledge has its own inherent difficulties. Obtaining evidence to indicate precisely when a plaintiff knew or ought to have known that an injury had occurred, that it was attributable to the defendant, and that it warranted bringing a proceeding, imports knowledge of several elements with a high degree of subjectivity. Establishing with certainty a person's state of knowledge about the occurrence of an event or state of affairs is far more difficult than simply establishing when an event occurred. The ICA believes that to have a limitation period of the "discovery" type recommended by the Commission would enhance, not reduce, uncertainty and create significant unfairness to defendants and their insurers.

The question of which of the parties to a dispute carries the onus of proving whether or not court proceedings were commenced within the relevant limitation period may be of considerable significance to the outcome of the dispute. In England, the Law Commission observed:³⁴⁴

The point is one of some practical significance, for there will inevitably be cases where the action is fairly old, but there is some dispute as to whether time has run or not, and the evidence on the point is inconclusive. In such cases the outcome is likely to depend ultimately on the incidence of the burden of proof.

The existing Queensland limitation legislation does not deal with the issue of onus of proof. The matter is therefore left to be decided by the common law. Unfortunately, however, the cases are by no means clear. One commentator has remarked that "Lamentably the law remains obscured by disparate authority."³⁴⁵

It is generally agreed that where, as under the *Limitation of Actions Act 1974* (Qld), a limitation period is procedural rather than substantive, it is for the defendant to plead that the action is statute-barred, since it is no part of the plaintiff's cause of action to show that proceedings were commenced within

³⁴² Submissions 3, 5, 8.

³⁴³ Submission 5.

³⁴⁴ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 397-398.

³⁴⁵ NJ Mullany, "Australian Limitation Law - Relieving the Burden" (1993) 109 *The Law Quarterly Review* 215, 217.

time.³⁴⁶ This view is supported by the Rules of the Supreme Court, which require a defendant to plead the expiration of the limitation period in order to rely on it as a defence.³⁴⁷

The situation is less settled once a limitation defence has been raised by the defendant, and put in issue by the plaintiff.

Early English cases seem to suggest that, in order to succeed, a plaintiff must establish that the action was brought within the limitation period.³⁴⁸ More recently, the position in England has been stated to be that:³⁴⁹

... when a defendant raises the Statute of Limitations the initial onus is on the plaintiff to prove that his cause of action accrued within the statutory period. When, however, a plaintiff has proved an accrual of damage within (the relevant limitation period), the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.

Judicial decisions to this effect have been explained in the following terms:³⁵⁰

... the burden is initially on the defendant to plead limitation, but thereafter it is for the plaintiff to show when time began to run ... As a practical and tactical point, if the plaintiff is able to bring evidence establishing *prima facie* that the limitation period has not yet expired, then it will be necessary for the defendant to rebut this if he is to succeed on the limitation point, but the correct formulation is nevertheless to say that the burden of proof remains on the plaintiff.

There is little Australian authority on the point. The issue has been considered by the High Court on only a few occasions. In *Cohen v Cohen*,³⁵¹ Dixon J referred to the early English cases as deciding that the onus of proof lay upon the plaintiff.³⁵² Subsequently, Windeyer J quoted the rule as being that “when issue is joined on a plea of the Statute, the burden of proving that the action is within time is on the plaintiff”, citing as authority the cases

³⁴⁶ See Chapter 3 above.

³⁴⁷ Rules of the Supreme Court O 22 r 14. See pp 11-12 above.

³⁴⁸ See for example *Hurst v Parker* (1817) 1 Barn & Ald 92, 106 ER 34; *Beale v Nind* (1821) 4 Barn & Ald 568 at 571, 106 ER 1044 at 1045; *Wilby v Henman* (1834) 2 Cr & M 658, 149 ER 924.

³⁴⁹ *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 per Lord Pearce, with whom Lords Reid and Morris of Borth-y-Gest agreed, at 784. See also *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15.

³⁵⁰ A McGee, *Limitation Periods* (2nd edition 1994) 347-348.

³⁵¹ (1929) 42 CLR 91.

³⁵² *Id.*, 97.

referred to by Dixon J.³⁵³

However, it has been noted that:³⁵⁴

In the cases which support the view that the plaintiff bears the burden the matter is often dealt with by way of *obiter dictum* only and in none of them is there any substantial discussion of the question.

In a more recent High Court case, some members of the Court appear to accept that it is for the defendant to establish that proceedings were not commenced within the relevant limitation period.³⁵⁵ The Full Court of the Supreme Court of Victoria has now also cast doubt on the correctness of the traditional formulation of the rule:³⁵⁶

On principle one would expect the defendant to bear the onus, on the basis that it is no part of the cause of action ... that the claim is not statute barred.

The Court explained the early English decisions as either concerned with the need for the plaintiff to show that the case fell within a statutory exception to the relevant limitation period,³⁵⁷ or based on a misunderstanding of the rule of pleading that the burden of proof lies on a party who asserts the affirmative of the issue.³⁵⁸

But it has been clear for many years now that the true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case the proof of the allegation rests on him.

According to this view, the early cases held that, since it was the plaintiff who asserted the affirmative of the issue raised by a limitation defence, it was for the plaintiff to prove that the action had been brought in time. However, those cases were wrongly decided because the true effect of the rule is that, if it is not part of the cause of action that the action was brought in time, the plaintiff does not have to prove that it was. Rather, it is for the defendant to prove the assertion that the claim was not commenced within the relevant limitation period.

³⁵³ *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 per Windeyer J at 488.

³⁵⁴ *Pullen and Anor v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27 per Brooking, Tadgell and Hayne JJ at 74.

³⁵⁵ *Banque Commerciale S A v Akhil Holdings Ltd* (1990) 169 CLR 279 per Mason CJ and Gaudron J at 283 and per Toohey J at 303.

³⁵⁶ *Pullen and Anor v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27 at 72.

³⁵⁷ *Id.*, 73.

³⁵⁸ *Id.*, 76.

In a number of jurisdictions where a discovery limitation period has been either implemented or proposed, consideration has been given to the impact of the introduction of a discoverability test on the question of the onus of proof in relation to expiration of the limitation period.

The Alberta Institute of Law Research and Reform expressed the view that, where the commencement of the limitation period depended on the accrual of the cause of action, it was appropriate for the defendant to bear the onus of proving the facts necessary to sustain a limitation defence.³⁵⁹

A claim will normally accrue when the defendant's conduct breached a duty owed to the claimant, and if the time of occurrence of the defendant's conduct is in issue the defendant will, on balance, be in as good a position as the claimant to prove the relevant facts. Moreover, there is some legal logic in the principle that a defendant should carry the burden of proof as to a defence.

However, the Institute queried whether, in the context of a discoverability test, it would be reasonable to require a defendant to prove that a claimant knew, or should have known, certain facts. The Institute observed that:³⁶⁰

When a claimant first knew something is based on his state of mind, and is a subjective matter peculiarly within his own knowledge.

The Institute also noted that the objective written or oral evidence of what a claimant was told will usually be more available to the claimant than to the defendant, as would objective evidence of the claimant's situation in relation to the issue of when the claimant ought to have discovered the requisite knowledge. Accordingly, the Institute concluded that a claimant should carry the burden of proving that a claim was brought within a discovery limitation period.³⁶¹

In its final Report, the Institute recommended that a claimant should be required to prove that the action was commenced within the discovery limitation period, while a defendant should have to prove that the action was not commenced within the ultimate limitation period.³⁶² The Institute's recommendations were recently implemented.³⁶³

³⁵⁹ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 136.

³⁶⁰ *Id.*, 136-137.

³⁶¹ *Id.*, 137.

³⁶² Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 63, 74.

³⁶³ *Limitations Act 1996* (Alta) s 3(5). The Act is not yet in operation.

The Law Reform Commission of Western Australia agreed that it should be for a plaintiff to prove that the discovery limitation period has not expired.³⁶⁴

This is logical because the discovery rule depends on establishing the date on which the plaintiff first knew that the injury had occurred, that it was in some degree attributable to the conduct of the defendant, and that it was sufficiently serious to warrant bringing proceedings.

The Western Australian Commission recommended that the plaintiff should bear the onus of proving that the action was commenced within the discovery period, and that the defendant should have to prove that the action was not commenced within the ultimate limitation period.³⁶⁵

In England, the Law Commission considered it inappropriate for the burden of proof in relation to a discovery limitation period to be imposed on the defendant.³⁶⁶

The date of discoverability is concerned with the knowledge of the plaintiff rather than the defendant (although there will be many cases where both plaintiff and defendant are immediately aware of the plaintiff's cause of action). In consequence it will commonly be more difficult and more expensive for the defendant to provide evidence of the knowledge of the plaintiff at a particular date, than for the plaintiff to provide such evidence.

Although the Law Commission did not make a preliminary recommendation about the onus of proof for the ultimate or long-stop limitation period, it recognised that the long-stop represents a protection for defendants and that the defendant is best placed to know the date of the act or omission which would mark the commencement of the long-stop period.³⁶⁷

This Commission agrees that, in a discovery-based limitation scheme, it should be for the plaintiff to prove that his or her action was commenced within the discovery period and for the defendant to prove that the action was not commenced within the alternative ultimate or long-stop period.

(d) The test of discoverability

If limitation law is based, at least in part, on the concept of discoverability, it becomes necessary to determine what degree of knowledge on the part of

³⁶⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 196.

³⁶⁵ Ibid.

³⁶⁶ The Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 398.

³⁶⁷ Ibid.

the plaintiff will be sufficient to trigger the commencement of the discovery limitation period. Two issues which need to be addressed are what facts it is necessary for the plaintiff to know, and whether the plaintiff must have actual knowledge of those facts. A third issue relates to the test of knowledge to be applied when the plaintiff is a corporation.

(i) The relevant facts

In the Discussion Paper, the Commission identified the facts which it considered should be within the knowledge of the plaintiff before the discovery limitation period would be triggered.³⁶⁸ Those facts were:

- (i) that the injury had occurred;
 - (ii) that the injury was attributable to the conduct of the defendant;
- and
- (iii) that the injury, assuming liability on the part of the defendant, warranted bringing a proceeding.

The Commission has subsequently given consideration to the issue of whether it should be necessary for the plaintiff to be aware of the identity of the defendant before the discovery limitation period starts to run.

On the one hand, inclusion of the identity of the defendant as a triggering mechanism for commencement of the limitation period is logically consistent with the rest of the scheme proposed by the Commission. The general thrust of the Commission's proposed scheme is that, in most cases, the limitation period is three years from when the plaintiff knows or should have known the information necessary to bring the action. It is arguable that, if the limitation period is to be fixed by reference to knowledge, then the identity of the defendant should be an essential element, since a plaintiff can commence proceedings only if he or she is able to identify the party against whom those proceedings should be instituted. According to this approach, the discovery limitation period should not run against a plaintiff who does not know, and should not be expected to discover, who to sue.

On the other hand, the introduction of a discovery limitation period is intended to overcome the problems encountered by a plaintiff who suffers latent damage and therefore has no means of knowing that he or she has a cause of action. That situation is very different from the one which arises when the plaintiff knows that he or she has suffered injury, but does not know that the injury was attributable to the conduct of a particular person or

³⁶⁸ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 60-61.

persons. In these circumstances a plaintiff would be aware of the existence of the cause of action and would be put on notice to make enquiries about the identity of the person responsible for the injury. An alternative test would therefore be whether the plaintiff simply knew that the injury was attributable to the conduct of some other person.

In most cases, the identity of the defendant would in fact be known or would at least be readily ascertainable by the plaintiff at the time of the injury or shortly afterwards. The alternative approach would therefore arguably give greater certainty to defendants in relation to the commencement of the discovery limitation period. At the same time, it would not adversely affect the majority of plaintiffs. Where a plaintiff was not immediately aware of the defendant's identity, he or she would have three years within which to discover the relevant information. A plaintiff who was unable to identify the correct party within the three year discovery limitation period would be able to apply to the court for an extension of the limitation period.³⁶⁹ If a plaintiff had commenced proceedings and subsequently discovered that he or she was mistaken as to the identity of the defendant, in some circumstances the Rules of the Supreme Court would presently allow the addition or substitution of a party or cause of action, even though the limitation period had expired.³⁷⁰

However, there are some concerns with this approach. It could be argued, for example, that within a discovery-based system all plaintiffs should have the benefit of the alternative limitation period within which to find out the information necessary to make their claim, and that a plaintiff who is unable to ascertain the identity of the defendant within the discovery limitation period should not be put to the trouble and expense of having to apply for an extension of time. It is also conceivable that, if the identity of the defendant is not a fact which has to be known before the discovery limitation period is triggered, some plaintiffs may commence proceedings indiscriminately against a number of potential defendants in order to avoid the possibility of the discovery limitation period expiring before they have been able to determine the correct party. If this situation were to occur, it would be likely to increase the plaintiff's costs and could have a detrimental effect on both a defendant against whom proceedings were wrongly commenced and the efficiency of the court system.

The members of the Commission have been unable to arrive at a

³⁶⁹ See Chapter 9 of this Report for a discussion of the exercise of judicial discretion to extend the limitation period.

³⁷⁰ Rules of the Supreme Court O 3 rr 11, 13 and O 32 r 1. See for example *Lynch v Kedell* [1985] 2 Qd R 103; *Bridge Shipping Pty Ltd v Grant Shipping SA* (1991) 173 CLR 231; *Hayward v Darling Downs Aircraft Services Pty Ltd* [1993] 2 Qd R 153. But see also pp 1-2 above for the Commission's view about the use of rules of court to circumvent the consequences of the expiration of a limitation period.

unanimous conclusion on this issue. A minority of the members considers that, in light of the concerns raised by the second approach, there should not be any change to the Commission's preliminary recommendation that the discovery limitation period will not start to run until the plaintiff knows or, in the circumstances, ought to be aware of the defendant's identity. The majority accepts the logic of this view. However, the majority believes that few plaintiffs would be significantly disadvantaged if the discovery limitation period were to be triggered by the plaintiff's knowledge that his or her injury was attributable to some other person. Rather, the majority is now of the view that to require the plaintiff to have knowledge of the defendant's identity before the discovery limitation period is triggered would make it considerably more difficult to know whether the limitation period had commenced. In balancing the extent of the benefit afforded by the original proposal to a relatively small group of litigants against the extent of the benefit afforded to other litigants by the suggested change, the majority believes that any disadvantage which may be caused to a few plaintiffs by the change would be outweighed by the greater degree of certainty that would be achieved in most other cases.

(ii) Must the plaintiff have actual knowledge?

In the Discussion Paper, the Commission considered whether the plaintiff's knowledge should be assessed on a subjective or an objective basis. The Commission's preliminary recommendation was that the test should be based on what the plaintiff knew or, in the circumstances of the case, ought to have known.³⁷¹ In other words, the Commission's approach imposed an objective test of reasonableness on the particular circumstances of the plaintiff. The test proposed by the Commission was not only whether the plaintiff actually knew the relevant information, but whether, in all the circumstances of the case, it would have been reasonable to expect a person in the position of the plaintiff to have that knowledge.

One of the submissions to the Discussion Paper strongly objected to the test including a reference to whether the plaintiff ought to have known the relevant information. The Australian Plaintiff Lawyers' Association, an association of lawyers and other professionals devoted to the protection and enhancement of the rights of those injured at the hands of wrongdoers, argued that such a proviso, by its very nature, implies an objective "reasonable man" test. The submission advocated that the only test should be whether the plaintiff had actual knowledge.³⁷² The respondent further submitted that, in determining the extent of the plaintiff's knowledge,

³⁷¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 59-60.

³⁷² Submission 10.

consideration must be given to:

- the plaintiff's subjective circumstances including, but not limited to, the plaintiff's social, economic, cultural and religious background;
- the plaintiff's physical and psychological status.

However, the Commission does not agree that its proposed test involved a purely objective assessment of what the plaintiff should have known.

In considering the incorporation of a constructive knowledge test into modern discovery rules, the Alberta Institute of Law Research and Reform asked:³⁷³

But does this test mean what the actual claimant, with his abilities, ought to have discovered, or what a fictional reasonable claimant, perhaps with more or less ability, ought to have discovered?

The Institute concluded:³⁷⁴

... because a discovery rule exists primarily for the benefit of claimants, we believe that the constructive knowledge test should be based on what the actual claimant in a case, in his circumstances and with his abilities, ought reasonably to have discovered.

The New Zealand Law Commission observed:³⁷⁵

... an objective "hypothetical reasonable man" test could well work considerable injustice - undermining the essential thrust of the discoverability extension - if not able to be related to the health, intelligence and social competence of a particular claimant. Further, in a society which is becoming increasingly conscious of the distinctions between different cultural groupings, any objective test invites criticism for being based on monocultural assumptions.

The Law Reform Commission of Western Australia³⁷⁶ and the English Law Commission both also favoured a combined approach. The Law Commission explained the difference between such an approach and a

³⁷³ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 119.

³⁷⁴ Id, 124.

³⁷⁵ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 72.

³⁷⁶ Law Reform Commission of Western Australia, Project No 36 Part II : *Report on Limitation and Notice of Actions* (January 1997) 141.

purely objective assessment:³⁷⁷

The question should not be what a reasonable person would have discovered, but what the plaintiff himself would have discovered if he had acted reasonably. The personal characteristics of the plaintiff, such as his or her level of education and intelligence, and the plaintiff's resources, would therefore be relevant to the question whether the plaintiff acted reasonably ...

In the view of this Commission, the test proposed by the Law Commission neatly encapsulates the appropriate balance between the interests of the plaintiff and those of the defendant. The Commission is not persuaded to change its preliminary recommendation.

(iii) The corporate plaintiff

A company is a separate legal entity distinct from its members.³⁷⁸ It is sometimes said that a company is a legal person, or has legal personality. As a legal person, a company must have the ability to deal with other persons. The *Corporations Law* provides that a company has the legal capacity of a natural person.³⁷⁹ In particular, a registered company has the capacity to sue and be sued, and to hold, acquire and to dispose of property.³⁸⁰ It therefore has rights which it is entitled to enforce by taking court action.

However, there are obvious differences between a natural person and a legal person such as a corporation. One such difference concerns the "state of mind" of a corporation.³⁸¹

Companies, because they are non-human entities, can have no real knowledge. ... the question of when a company knows becomes difficult whenever knowledge is partially or unevenly distributed within it. Actual knowledge might be possessed by one director, but not his colleagues; by junior but not senior management; by one junior employee with some decision-making responsibilities; by a trainee; or by a member of the cleaning staff. It is also conceivable that knowledge might be split between several employees of the company.

The introduction of a discovery-based limitations scheme would therefore necessitate consideration of the test of knowledge to be applied

³⁷⁷ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 269-270.

³⁷⁸ *Salomon (Pauper) v A Salomon & Co Ltd* [1897] AC 22.

³⁷⁹ *Corporations Law* (Cth) s 161.

³⁸⁰ *Id.*, s 123(2).

³⁸¹ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 275.

when the plaintiff is a corporation.

Under the current Queensland legislation, the question of the plaintiff's knowledge arises in relation to sections 31 and 32 of the *Limitation of Actions Act 1974* (Qld). These are the present extension provisions. Because they are restricted to actions in which the damages claimed by the plaintiff consist of or include damages for personal injury, they do not apply to corporations. Knowledge is relevant also for the purposes of some of the existing provisions which have the effect of suspending the operation of the limitation period. For example, the limitation period for an action based on fraud or mistake is deferred until the plaintiff discovers the fraud or mistake or, with reasonable diligence, could have discovered it.³⁸² However, it appears that the issue of corporate knowledge has not arisen for judicial consideration in this context.³⁸³

In some jurisdictions where a discovery-based limitations scheme has been recommended or implemented, the question of corporate knowledge has not been specifically dealt with. Rather, the approach has been to leave the issue to be determined according to the principles of agency law.³⁸⁴

Agency has been described as the relationship between two parties, one of whom (the principal) expressly or impliedly consents that the other should act on his or her behalf so as to affect relations between the principal and third parties, and the other of whom (the agent) similarly consents so to act or so acts.³⁸⁵ Because a company is an artificial legal personality, it must always act through agents. The directors of a company are often referred to as agents of the company.³⁸⁶ Some employees of the company may also be agents.

Generally, under agency law, knowledge which is acquired by an agent will be attributed to the principal, provided that the information comes to the agent's knowledge during the course of his or her employment as agent and is of such a nature that the agent has a duty to communicate it to

³⁸² *Limitation of Actions Act 1974* (Qld) s 38.

³⁸³ In England, the Law Commission came to a similar conclusion in relation to an equivalent provision. See Consultation Paper No 151: *Limitation of Actions* (October 1997) 275-276.

³⁸⁴ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 150-151; Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 67; *Limitations Act 1996* (Alta) s 3(2)(b); New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 75; Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 199.

³⁸⁵ FMB Reynolds, *Bowstead and Reynolds on Agency* (16th edition 1996) 1.

³⁸⁶ But see RB Vermeesch and KE Lindgren, *Business Law of Australia* (8th edition 1995) 697.

the principal.³⁸⁷ The agency approach would therefore mean that the discovery limitation period would commence to run against a corporate plaintiff when a director or an employee of the company with a duty to communicate the relevant knowledge first actually acquired that knowledge in the course of acting as the company's agent.

The criteria to be satisfied before knowledge will be attributed to a company under the principles of agency law have been summarised as follows:³⁸⁸

- the person who acquires the information is an agent of the company;
- the person has authority from the company to receive the information on its behalf;
- the person is not under a duty to some other person (for example, where the person is director of another company) to refrain from communicating the particular information;
- in a case other than one in which the agent is employed by the company to inquire, the knowledge was not acquired privately or in the course of a previous transaction;
- the knowledge would not disclose a fraud committed by the person of which the company is a victim.

One consequence of this approach is that, even in relation to directors of the company, knowledge may not always be attributable to the company.³⁸⁹ Another is that the notion that the agent's knowledge will be imputed to the principal is frequently invoked in cases of varying types. One commentator has observed that the full applications of the rule have not been clearly decided.³⁹⁰ The English Law Commission considered that "the existing principles of agency apply awkwardly to the question of corporate knowledge for the purposes of limitation and it is not clear how the courts would apply them".³⁹¹

³⁸⁷ FMB Reynolds, *Bowstead and Reynolds on Agency* (16th edition 1996) 529-530. However, the general rule does not apply if the agent is party to fraud against the principal.

³⁸⁸ HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (8th edition 1997) 692.

³⁸⁹ See for example *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685.

³⁹⁰ FMB Reynolds, *Bowstead and Reynolds on Agency* (16th edition 1996) 530.

³⁹¹ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 276.

The Law Commission also gave some consideration to the “organic” or identification theory of corporate knowledge.³⁹² Under this theory, a corporation gains knowledge through the knowledge of those persons who are sufficiently closely associated with the direction of the company to be identified with it.³⁹³ The traditional test of whose acts and knowledge are to be regarded as those of the company itself is those persons who constitute its directing mind and will.³⁹⁴ However, it is not always simple to point to the people within an organisation who are the “directing mind and will”. Knowledge possessed collectively by the board of directors of a corporation will automatically be attributed to the corporation itself.³⁹⁵ But managerial functions and responsibilities of the board are often delegated to employees of the company. It therefore becomes necessary to determine whether such employees, in performing those functions, become part of the company’s directing mind and will.³⁹⁶

The basic test is whether the employee is one who, by the memorandum and articles of association or as a result of action taken by the directors or by the corporation in general meetings pursuant to its articles, has been entrusted with the exercise of the powers of the corporation.

There may be some circumstances where the identification theory would not attribute knowledge to a company, but where the intention of a particular piece of legislation would be defeated if it were not possible to fix the company with the knowledge of an employee. In a recent case, the Privy Council held that, in such a situation, the appropriate test is to consider whose knowledge is intended to count as the knowledge of the company for the purpose of the legislation in question.³⁹⁷

It is a question of construction in each case as to whether the particular rule requires that knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.

³⁹² Ibid.

³⁹³ See for example *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 32 FLR 360.

³⁹⁴ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 per Viscount Haldane LC at 713.

³⁹⁵ HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (8th edition 1997) 691.

³⁹⁶ *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 32 FLR 360 per Franki J at 379.

³⁹⁷ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 511.

The result of this approach is that, while it provides greater flexibility, there is no standard “identification” test which could be applied to the knowledge of corporate plaintiffs in the limitations context.

The Law Commission concluded that there should be specific statutory provisions setting out how discoverability would apply to corporate plaintiffs.³⁹⁸ In formulating its preliminary recommendations, the Law Commission was concerned that a company should not be able to benefit from a longer limitation period simply because information given to its junior employees had not been passed on within the company. The Law Commission provisionally proposed that:³⁹⁹

- there should be a general rule that a company has actual knowledge, for the purpose of the discoverability test, where an employee or officer has that knowledge;
- the general rule should not apply where the company can show that the employee or officer did not himself or herself have authority to act on the information, and
 - (a) the individual in question did not in fact communicate it to a superior or any one else within the company with the authority to act on the information; and
 - (b) the individual would not be expected, in the course of his or her employment or under a duty to the company, to communicate that information to a superior or anyone else within the company with the authority to act on the information;
- in an action by the company against a defendant who has deliberately concealed relevant facts from the company, the defendant’s knowledge should not count as the knowledge of the company;
- a company should be taken to have constructive knowledge of any fact relevant to its cause of action of which one of its employees or officers has constructive knowledge;
- the company should not be taken to have constructive knowledge if the company can show that the employee or officer concerned would not, if he or she had actual knowledge of the fact, be expected, in the course of his or her employment or under a duty to the company, to act on the information or to communicate the information to a superior or any one

³⁹⁸ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 277.

³⁹⁹ *Id.*, 279-281.

else within the company with the authority to act on the information.

This Commission, while favouring the adoption of an approach which promotes the greatest possible degree of certainty, is not persuaded that the formulation of a legislative test of corporate knowledge is a desirable option. In the Commission's view, the proposed test would be likely to lend itself to disputes over issues such as the scope of an officer or employee's authority, what was expected of the officer or employee in the course of his or her employment and whether or not there was a duty to communicate the information to some other person within the company.

These are all questions which would have to be answered according to the principles of agency law.

This Commission considers the common law tests of corporate knowledge are reasonably well defined and have the added advantage of flexibility to adapt to meet changing conditions and circumstances. It is concerned that a prescriptive legislative approach would not facilitate appropriate development of the law.

(e) The need for certainty

Two of the submissions received by the Commission in response to the Discussion Paper commented that the discoverability test was essentially subjective in nature, and expressed concern that the introduction of such a concept would lead to uncertainty and would unfairly disadvantage defendants and their insurers.⁴⁰⁰

In formulating its recommendations, the Commission's principal objective has been to attempt to strike an appropriate balance between certainty and fairness to both plaintiffs and defendants. The Commission considers that a system such as that which exists at present, which allows a limitation period to commence, and perhaps even to expire, while the plaintiff is unaware that he or she has suffered an injury cannot be described as fair. Nor, in the view of the Commission, can the existing legislation - with different limitation periods for different claims, difficulty in determining commencement dates and potential for overlapping limitation periods - be described as certain.

The Commission acknowledges that adoption of its preliminary recommendations would involve the general application in common law claims of some subjective elements which, under the existing legislation, are relevant only when an application is made to extend the limitation period in a personal injuries claim. However, the Commission has specifically rejected a

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Submissions 5, 19.

purely subjective approach.⁴⁰¹ While recognising the need for the circumstances of an individual plaintiff to be taken into account, the Commission's recommendations also require the plaintiff to act in a manner which is reasonable in those circumstances. The Commission has also recommended that the burden of proving the subjective elements should be placed on the plaintiff.⁴⁰²

The Commission recognises that, in an ideal world, absolute certainty about the date of commencement of a limitation period would result in less litigation and reduced costs. However, absolute certainty is probably impossible to achieve and, even if it were possible, should not be pursued at the expense of fairness to either party.

6. RECOMMENDATIONS

The Commission makes the following recommendations:

There should be a general limitation period, which should be the lesser of:

- (a) three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:**
 - (i) that the injury had occurred;**
 - (ii) that the injury was attributable to the conduct of some other person;⁴⁰³**
 - (iii) that the injury, assuming liability on the part of some other person, warranted bringing a proceeding;**

⁴⁰¹ See pp 78-79 above.

⁴⁰² See pp 70-75 above and p 86 below.

⁴⁰³ This recommendation is made by a majority of members of the Commission. The minority view is that the discovery limitation period should not commence until the plaintiff knew or, in the circumstances, ought to have known the identity of the defendant. See pp 75-77 above.

or

- (b) ten years after the date on which the conduct, act or omission giving rise to the claim occurred.**

“Injury” should be defined to mean personal injury, property damage, economic loss or, in the absence of any of these, non-performance of an obligation or the breach of a duty.

“Duty” should be defined as any duty under the law.

“Personal injury” should be defined to include all forms of trespass to the person.

The plaintiff should bear the onus of proving that the action was commenced within the discovery limitation period and the defendant should bear the onus of proving that the action was not commenced within the alternative limitation period.

The legislation should not attempt to define the test of knowledge to be applied to a corporate plaintiff.

CHAPTER 9

A RESIDUAL JUDICIAL DISCRETION

1. INTRODUCTION

The existing Queensland legislation permits the court to extend the limitation period in certain circumstances. The extension provisions are discussed in Chapter 5 of this Report.⁴⁰⁴ The power conferred by these provisions is a discretionary one. The court is not obliged to exercise it even though the statutory conditions are met unless, in all the circumstances of the case, justice is best served by so doing.⁴⁰⁵ The extension provisions apply only to cases where the damages claimed by the plaintiff consist of or include damages for personal injury.

In the Discussion Paper,⁴⁰⁶ the Commission raised the question of whether, if the present accrual based system were to be replaced by a discovery-based system together with an ultimate limitation period, a residual judicial discretion to extend the limitation period should be retained. It also considered whether such a discretion, if retained, should be restricted to personal injury claims.

2. THE LAW IN OTHER AUSTRALIAN JURISDICTIONS

In all Australian jurisdictions, the relevant limitation legislation confers a judicial discretion to extend the limitation period. In New South Wales, Victoria, the Australian Capital Territory and Tasmania the discretion applies only to claims for personal injuries. In Western Australia the discretion is even more limited, applying only to claims for personal injuries caused by the inhalation of asbestos.⁴⁰⁷

⁴⁰⁴ See pp 33-35 above.

⁴⁰⁵ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per Dawson J at 544 and per McHugh J at 554.

⁴⁰⁶ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁴⁰⁷ These provisions are summarised in Chapter 4 of this Report.

3. ARGUMENTS FOR AND AGAINST A RESIDUAL JUDICIAL DISCRETION

The Law Reform Commission of Western Australia has summarised the advantages and disadvantages of a judicial discretion to override a limitation defence.⁴⁰⁸

In the view of that Commission, the major objections to such a discretion are that:

- it would generate too much uncertainty, and it might make liability insurance expensive and difficult to obtain;
- it would lead to divergent approaches among judges in the exercise of the discretion;
- it would undermine the effectiveness of a fixed limitation period as a means of encouraging plaintiffs not to sleep on their rights, and cause a general slowing down of the process of proceeding with claims.

The Commission considered the arguments in favour of a discretion to be that:

- it would be a flexible alternative, allowing judges to balance the numerous factors involved and the relative hardships to the plaintiff and the defendant to achieve a just result;
- it would not necessarily involve a sacrifice of consistency;
- it would not necessarily lead to excessive delay because it would remain in the plaintiff's best interests to pursue a claim expeditiously.

The Alberta Institute of Law Research and Reform opposed a judicial discretion to override the limitation defence on the basis that it would "sacrifice the objectives of a limitations system".⁴⁰⁹ It recognised that the introduction of an ultimate limitation period may prevent some deserving claims from being made. However, it concluded that:⁴¹⁰

Within ten years after the occurrence of the events on which the overwhelming

⁴⁰⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 123.

⁴⁰⁹ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 135.

⁴¹⁰ Id, 156.

majority of claims are based, these claims will have been either abandoned, settled, litigated or become subject to a limitations defence under the discovery rule. The class of remaining potential claimants will have become very small, but without an ultimate period, the entire society of potential defendants will remain subject to a tiny group of claims. ... By this time the cost burden imposed on potential defendants, and through them on the entire society, of maintaining records and insurance to secure protection from a few possible claims will have become higher than can reasonably be justified relative to the benefits which might be conferred on a narrow class of possible claimants.

The Western Australian Commission recognised the importance of the arguments put forward by the Alberta Institute, but considered that they failed to take into account that there are exceptional kinds of cases in which the limitation rationales which ordinarily justify the barring of the claim once the limitation period has expired may not apply.⁴¹¹ The Commission identified two kinds of cases in which a claim might be unfairly defeated by the expiration of the ultimate limitation period:⁴¹²

- cases involving claims for damage which remains undiscoverable until after the ultimate limitation period has expired;
- cases where factors other than the latency of the injury prevent the plaintiff from bringing the action within the limitation period.

In England, the Law Commission also considered the advantages and disadvantages of a judicial discretion to allow an action to be commenced notwithstanding that the limitation period has expired:⁴¹³

The advantage of including a judicial discretion to disapply or exclude the (initial) limitation period is that it allows flexibility. A discretion to disapply or exclude the limitation period (running from the date of discoverability) enables the court to take into account factors other than those allowed for in the definition of the date of discoverability which have prevented the plaintiff from bringing proceedings before the expiry of the limitation period. Though the plaintiff may have had full knowledge of the facts giving rise to the proceedings, there may, perhaps, be circumstances where the plaintiff's conduct in not bringing proceedings before the end of the limitation period was excusable. The existence of a judicial discretion enables the court to prevent injustice to plaintiffs in such a position. The argument for a discretion to exclude the long-stop limitation period is very similar but in particular, any long-stop period of limitation will in some cases mean that the plaintiff's case is time-barred before he or she is in a position to take proceedings against the defendant (in some cases because the plaintiff could not reasonably know of the facts constituting the cause of action). If there is a judicial discretion to

⁴¹¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 179.

⁴¹² Id, 177-178.

⁴¹³ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 319-320.

exclude the long-stop period, it is possible to prevent injustice to such plaintiffs.

The primary disadvantages of a discretion to disapply or exclude the initial limitation period or the long-stop period are that any judicial discretion will to some extent subvert the purposes of a limitation system: there will no longer be certainty on the length of a particular limitation period. No potential defendant would be able to rely on the expiry of the limitation period as preventing further proceedings. Additional uncertainty may result from the exercise of the discretion, as it is impossible to ensure consistency: inevitably, different judges may come to a different decision on the facts of any case.

4. OTHER JURISDICTIONS

(a) Canada

In accordance with the views expressed by the Alberta Institute of Law Research and Reform, the legislation recently enacted in Alberta⁴¹⁴ does not include a judicial discretion to extend the limitation period.

Similarly, there was no provision in the proposed Ontario legislation⁴¹⁵ for extension of the limitation period by the exercise of judicial discretion. However, the proposed Ontario legislation differed significantly from the Alberta scheme in two important respects. First, it provided for a general ultimate limitation period of thirty years, as opposed to the ten year ultimate limitation period in Alberta.⁴¹⁶ Second, it made special provision for certain kinds of action - for example assault and sexual abuse - where a plaintiff may have knowledge of the cause of action but may be prevented from bringing the proceeding for other reasons.⁴¹⁷

(b) Western Australia

The Law Reform Commission of Western Australia noted that, in some jurisdictions, attempts were made to avoid potential injustice arising from the application of limitation periods by nominating particular categories of claim to which special rules applied. However, it rejected this approach. It

⁴¹⁴ *Limitations Act 1996* (Alta). The Act has not yet come into operation.

⁴¹⁵ *Limitations (General) Bill 1992* (Ont).

⁴¹⁶ *Id.*, cl 15(2).

⁴¹⁷ *Id.*, cl 16(h). See also pp 151, 152 below.

concluded that:⁴¹⁸

What is necessary is a more flexible rule which will allow courts to do justice to plaintiffs in those exceptional cases in which the two general limitation periods do not achieve a fair balance, without destroying the benefits of those rules in terms of giving peace and repose and allowing defendants' lives and business activities to continue free of the worries of potential litigation.

The Western Australian Commission recommended a narrow discretionary power to enable a court to disregard either the discovery period or the ultimate period in appropriate cases:⁴¹⁹

... the court [should be able] to make an order that either limitation period be extended in the interests of justice, but ... this should be possible only in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors.

The Commission recommended that the court should be able to take into account all the circumstances of the case, including the following factors:⁴²⁰

- (1) the length of and reasons for delay on the part of the plaintiff;
- (2) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- (3) the nature of the plaintiff's injury;
- (4) the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- (5) the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- (6) the conduct of the defendant after the cause of action arose, including the extent, if any, to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (7) the duration of any disability of the plaintiff arising on or after the date

⁴¹⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 180.

⁴¹⁹ *Id.*, 182.

⁴²⁰ *Id.*, 181-182.

on which the injury became discoverable;

(8) the extent to which the plaintiff acted properly and reasonably once the injury became discoverable;

(9) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

The Western Australian Commission did not believe it advisable for legislation to attempt to specify what factors should be sufficient to persuade a court to exercise the discretion. However, it pointed to a number of considerations which could provide guidelines, namely that:⁴²¹

- the latency of the injury would be relevant but not conclusive;
- generally, the law regards personal injury as a more serious matter than property damage or any other kind of injury;
- those whose business activities involve the production or use of substances which cause insidious diseases can reasonably be expected to take into account the possibility of claims, even many years after the risk-producing activity has ceased, and ensure that records are retained and insurance kept up to date;
- there are important differences between the two general limitation periods and a stronger case may be needed to justify the exercise of the discretion to extend the ultimate period than the discovery period.

(c) England

The Law Commission, after identifying the advantages and disadvantages of a judicial discretion,⁴²² came to the provisional conclusion that the disadvantages outweighed the advantages. It suggested that experience with the existing legislation demonstrated the difficulty of restricting the discretion. It also observed that the ability to ask a court to exercise its discretion or to seek a review of such an exercise constituted a huge drain on court resources, as well as involving the costs for defendants in resisting such applications.⁴²³

⁴²¹ Id, 182-183.

⁴²² See p 89 above.

⁴²³ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 322.

5. THE DISCUSSION PAPER

In the Discussion Paper,⁴²⁴ the Commission noted that there will inevitably be some cases where strict application of the relevant limitation period causes hardship to the plaintiff.⁴²⁵ In some cases, the plaintiff may have obtained the necessary information within the discovery limitation period, but may be prevented by other circumstances from commencing proceedings within time.⁴²⁶ There will also be some cases where even the alternative period is inadequate. For example, some forms of insidious disease - such as mesothelioma - may not manifest themselves for thirty or forty years. The Commission's preliminary recommendation was that there should be a limited residual judicial discretion to extend the limitation period in cases where it is in the interests of justice to do so, and that the exercise of the discretion should not be restricted to claims for personal injury.⁴²⁷ The Commission agreed with the Law Reform Commission of Western Australia that the discretion to extend the limitation period in the interests of justice should be exercised only in exceptional cases, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in the finality of litigation, are outweighed by other factors.⁴²⁸ The Commission gave careful consideration to the criteria which the Western Australian Commission recommended should be taken into account by a court in determining whether to extend the limitation period,⁴²⁹ as well as those factors which presently exist in legislation in other Australian jurisdictions.⁴³⁰

The Commission proposed that, in determining whether to exercise the discretion, the court should consider all the circumstances of the case, including:

- the length of and reasons for delay on the part of the plaintiff;

⁴²⁴ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁴²⁵ *Id.*, 67.

⁴²⁶ For example, see the discussion at pp 151, 152 below.

⁴²⁷ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 69.

⁴²⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 180.

⁴²⁹ See p 91 above.

⁴³⁰ See Chapter 4 of this Report for a discussion of limitation legislation in other Australian jurisdictions.

- the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- the nature of the plaintiff's injury;
- the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- the conduct of the defendant after the cause of action arose, including:
 - (a) the extent, if any, to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; and
 - (b) any other conduct of the defendant which contributed to the plaintiff's delay in bringing the action;
- the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable;
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

6. SUBMISSIONS

All the submissions which addressed the issue of judicial discretion recognised the need for the existence of such a discretion to ensure that limitation law remains sufficiently flexible to prevent injustice in deserving cases which cannot be accommodated within the general scheme.⁴³¹ Even those submissions which favoured the retention of an accrual based limitation scheme acknowledged that the present provisions conferring discretion to extend the limitation period are in need of reform.⁴³²

⁴³¹ Submissions 3, 5, 8, 10, 12, 14, 18, 19, 20.

⁴³² Submissions 3, 5, 8, 19.

The submissions agreed that the exercise of the discretion should not be confined, as at present, to cases involving personal injury, but should extend to other situations of latent damage.

However, there were some significant differences of opinion in relation to the factors which the court should take into account in deciding whether or not to extend the limitation period.

(a) The conduct of the defendant which resulted in the harm of which the plaintiff complains

The Insurance Council of Australia expressed the view that the conduct of the defendant which allegedly caused the loss or injury complained of should be regarded as a matter which goes more to the question of aggravated or punitive damages, and not as a matter for consideration as part of judicial discretion to extend the limitation period.⁴³³

The defendant's conduct is, by established rules, easily identified to have been negligent, in breach of contract, fraudulent, etc., and there is no need to look beyond that.

On the other hand, a community legal service pointed to the relevance of the defendant's conduct, and to the effects that some kinds of behaviour such as domestic violence and sexual abuse can have on the ability of a plaintiff to seek legal advice or initiate legal proceedings.⁴³⁴ Those effects may include:

- psychological, emotional and physical damage;
- intimidation;
- lack of confidence;
- the need for time to heal;
- fear, shame or guilt.

The Queensland Council for Civil Liberties also agreed that the severity (or otherwise) of the defendant's conduct ought to be relevant.⁴³⁵

The Commission accepts that, in many cases, the conduct of the defendant

⁴³³ Submission 5.

⁴³⁴ Submission 18.

⁴³⁵ Submission 14.

will be relevant only in the context of determining liability or assessing the amount of compensation which should be awarded to the plaintiff. However, in some circumstances, the conduct of the defendant will also be relevant to the explanation of the plaintiff's timing in bringing the action. The Commission therefore agrees that it should be one of the factors which a court is able to take into account in deciding whether to exercise its discretion to extend the limitation period.

(b) The conduct of the defendant after the cause of action arose, including the extent to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might have been relevant to the plaintiff's cause of action against the defendant

Two submissions considered that this could be interpreted as placing an unfair burden on the defendant. The Insurance Council of Australia saw no justification for importing a provision which suggests that:⁴³⁶

the defendant may have cast upon it an onus which presently does not exist, namely, that it must take some positive steps to assist the plaintiff in identifying matters relevant to establishing the plaintiff's cause of action.

Similarly, the Department of Families, Youth and Community Care expressed the view that the provision might be seen as "requiring some proactivity on the part of defendants".⁴³⁷ The Department suggested as more appropriate wording "the extent to which the defendant resisted or co-operated with attempts by the plaintiff, to ascertain facts ...".

The Commission accepts the point made by the submissions. It was not the intention of the Commission to alter the law with respect to disclosure, but rather to indicate a belief that the attitude of the defendant was a relevant factor in deciding whether or not the plaintiff should be granted additional time in which to commence proceedings. In other words, if the defendant had deliberately obstructed attempts by the plaintiff to obtain the necessary information, this fact might help to explain why the plaintiff had not acted sooner. The Commission agrees that the wording proposed by the Department of Families, Youth and Community Care would adequately reflect its concerns.

The Commission has also given further consideration to the use of the words "after the cause of action arose". The Commission now believes, in light of its recommended definition of "injury" in Chapter 8 above, and in the interests

⁴³⁶ Submission 5.

⁴³⁷ Submission 12.

of consistency, these words should be replaced by the words “after the injury occurred”.

(c) Prejudice to the defendant

A number of submissions supported the view that prejudice to the defendant should be a relevant factor.⁴³⁸

On the other hand, the Australian Plaintiff Lawyers’ Association suggested that there should be a specific proviso that prejudice to the defendant “must not of itself be grounds for the exercise of judicial discretion to be declined”.⁴³⁹

There are obviously situations where the length of time which has elapsed before proceedings are commenced could be prejudicial to the defendant. The Commission remains of the view that prejudice to the defendant should be a factor to be taken into account in deciding whether an extension of time should be granted to the plaintiff. However, it is only one such factor, and the court in reaching its conclusion must weigh it against a number of others. Accordingly, the Commission is not persuaded that the proviso is necessary.

(d) The length of and reasons for delay on the part of the plaintiff

A community legal service commented that:⁴⁴⁰

This language is judgement laden and attributes fault to the plaintiff even before a preliminary consideration of the circumstances has been undertaken.

The respondent proposed substituting the words “the reasons why the plaintiff has made a claim at this time” to ensure that no fault is immediately attributable to the plaintiff and to better facilitate a global consideration of the particular prevailing circumstances.

The Commission acknowledges that the wording used in the preliminary recommendation could be interpreted as an imputation of fault on the part of the plaintiff. This was not the Commission’s intention. The Commission agrees that an amendment along the lines of the proposed wording would be preferable, and that reference in other factors to delay on the part of the plaintiff should also be changed.

⁴³⁸ Submissions 5, 14, 18.

⁴³⁹ Submission 10.

⁴⁴⁰ Submission 18.

(e) The extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable

This provision was supported by a number of submissions.⁴⁴¹ However, a community legal service proposed that the plaintiff's conduct after the injury should be simply one of the factors to be taken into account in a subjective analysis of the circumstances surrounding the particular plaintiff. The respondent expressed the view that the court should give particular consideration to the circumstances of the individual plaintiff, including the nature of the plaintiff's injury and the remedy sought, and the plaintiff's social, cultural or economic background.⁴⁴²

In the view of the Commission, its preliminary recommendations, as modified above in the light of the submissions received, are sufficient to indicate to the court that it should undertake a subjective consideration of the plaintiff's position.

(f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received

One respondent considered that:⁴⁴³

This presupposes the availability of and access to (through geographical, cultural or economic resources) such advice and ... the language used imputes blame.

The submission proposed that the focus should be only on:

... the nature of any advice, leaving issues such as the availability of and access to expert advices (and indeed other information/legal services or general support networks) to be taken into account in the context of the plaintiff's social, cultural and economic background.

The Commission does not accept that this preliminary recommendation imputes any blame to the plaintiff. It requires the court to take into account all the circumstances of the case, not merely those specifically referred to. The subjective circumstances of the plaintiff, together with the availability of and access to advice, would obviously be relevant to the question of whether the plaintiff sought advice.

⁴⁴¹ Submissions 5, 10, 14.

⁴⁴² Submission 18.

⁴⁴³ Ibid.

7. RECOMMENDATION

The Commission recommends that there should be a judicial discretion to extend the limitation period in the interests of justice if the prejudice to the defendant in having to defend an action after the expiration of the limitation period and the general public interest in the finality of litigation are outweighed by other factors.

The exercise of the discretion should not be restricted to claims for personal injury.

In determining whether to exercise the discretion, the court should consider all the circumstances of the case, including:

- **the reasons why the plaintiff seeks to make a claim at this time;**
- **the extent to which, having regard to the time when the action is brought, there is or is likely to be prejudice to the defendant;**
- **the nature of the plaintiff's injury;**
- **the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;**
- **the conduct of the defendant which resulted in the harm of which the plaintiff complains;**
- **the conduct of the defendant after the injury occurred, including:**
 - (a) the extent, if any, to which the defendant resisted or co-operated with attempts by the plaintiff to ascertain facts which were or might be relevant to the plaintiff's cause of action against the defendant; and**
 - (b) any other conduct of the defendant which contributed to the plaintiff's timing in bringing the action;**

- the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable;
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

CHAPTER 10

EQUITABLE CLAIMS

1. INTRODUCTION

Limitation legislation was developed in the context of common law claims. Although it did not originally apply to claims in equity, it now encroaches to a significant extent on equitable principles.

2. EXISTING LEGISLATION

Under the existing Queensland legislation, some kinds of equitable claims are made expressly subject to the legislative scheme. For example, section 16(1) of the *Limitation of Actions Act 1974* (Qld) applies to equitable interests in land; section 20 applies to actions to redeem land against a mortgagee in possession; section 26 applies to actions to recover money secured by a mortgage or other charge; and section 27(2) applies to actions in respect of a non-fraudulent breach of trust.

Other equitable claims are made subject to the legislative scheme because they are analogous to a claim at common law. It has been observed that, although strict limitation periods are considered to be inappropriate to those remedies which had their origins in courts of equity:⁴⁴⁴

... a court of equity has a discretion to take account of the expiry of any statutory period of limitation when considering whether to grant an equitable remedy. It might, for example, be a relevant consideration that the plaintiff's common law remedy was time-barred, and that the application for an equitable remedy was an attempt to circumvent this problem.

However, if a claim for equitable relief is not analogous to a common law claim, the limitation legislation will not apply to it. The Act specifically excludes claims for specific performance of a contract or for an injunction or other kind of equitable relief, "save so far as any provision thereof may be applied by the court by analogy".⁴⁴⁵ For example, where a defendant received money on behalf of a plaintiff and was intended to account specifically for the proceeds, the action to recover the money was held not to be statute-barred, since the relationship between the parties was not

⁴⁴⁴ A McGee, *Limitation Periods* (2nd edition 1994) 17.

⁴⁴⁵ *Limitation of Actions Act 1974* (Qld) s 10(6)(b).

analogous to that between a debtor and a creditor.⁴⁴⁶ In Canada⁴⁴⁷ and in New South Wales,⁴⁴⁸ where limitation legislation also applies to equitable claims by analogy with the common law, recent court decisions have refused to apply the legislation to equitable claims for breach of fiduciary duty. In the New South Wales Court of Appeal, Kirby P expressed the view that:⁴⁴⁹

... it is a mistake of law to assume that an equitable claim, based on an equitable cause of action, not for damages but for equitable compensation, is to be dealt with under ... the *Limitation Act*. It is not. It raises separate and different questions.

Further, under the existing Queensland legislation, there is no limitation period for an action by a beneficiary of a trust for fraudulent breach of trust by the trustee, or for recovery of trust property in the possession of the trustee or previously received by the trustee and converted to the trustee's use.⁴⁵⁰

3. OTHER JURISDICTIONS

Recent developments in other jurisdictions have revealed a trend towards including equitable claims in legislative limitation schemes.

(a) Australia

(i) The Australian Capital Territory

In the Australian Capital Territory, equitable claims are generally subject to limitation legislation. The *Limitation Act 1985* (ACT) applies to "an action on any cause of action".⁴⁵¹ Although there are some exceptions,⁴⁵²

⁴⁴⁶ *Cohen v Cohen* (1929) 42 CLR 91.

⁴⁴⁷ *M (K) v M (H)* (1992) 96 DLR (4th) 289.

⁴⁴⁸ *Williams v Minister, Aboriginal Land Rights Act 1983 and Another* (1994) 35 NSWLR 497.

⁴⁴⁹ *Id.*, 509.

⁴⁵⁰ *Limitation of Actions Act 1974* (Qld) s 27(1).

⁴⁵¹ *Limitation Act 1985* (ACT) s 11(1).

⁴⁵² The Act does not apply to actions for which a limitation period is imposed by other legislation [s 4(a)], or to a cause of action to recover land or an estate or interest in land or to enforce an equitable estate or interest in land [s 5(a)] or to an action in relation to goods that are stolen property unless the person against whom the action is commenced is a purchaser of the goods in good faith or a person claiming the goods through such a purchaser [s 5(b)].

there is no equivalent of the Queensland provision which exempts claims for specific performance, injunctions and other equitable claims which have no analogy at common law.

(ii) Western Australia

The Law Reform Commission of Western Australia, influenced by the desirability of having a single set of limitation principles which applies to every kind of claim and by the extent to which limitation law already applies to equitable claims, recommended that equitable claims should generally be subject to its proposed legislative scheme.⁴⁵³ The Commission queried the appropriateness of preserving a separate rule dealing with fraudulent breach of trust or the recovery of trust property. It concluded that the issue should be left to the exercise of judicial discretion.⁴⁵⁴

If there is a claim by a beneficiary against a trustee for a fraudulent breach of trust of which the trustee was aware, or to which the trustee was party, and the discovery period and the ultimate period have both expired, the fact that the breach of trust was fraudulent, and the trustee's involvement, can be taken into account by the court in exercising its discretion whether or not to disregard the running of the limitation period. The fact that the claim was one for the recovery of trust property, or the proceeds of such property, could also be taken into account.

(b) New Zealand

The New Zealand Law Commission concluded that the advantages of a general limitations regime would apply to equitable claims as well as to others. It expressed the view that, since equitable relief may be subject to limitation periods by analogy, its recommendation "would not involve any fundamental change to, or unduly limit the effectiveness of equitable remedies".⁴⁵⁵ It described attempts to keep equity and its remedies separate from the common law and its remedies as "unhelpful".⁴⁵⁶

⁴⁵³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 323-324. However, the Commission recommended special provisions in relation to actions to recover land, actions relating to mortgages and actions for the recovery of tax.

⁴⁵⁴ *Id.*, 329.

⁴⁵⁵ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 112. In reaching this conclusion, the Commission seems to have assumed that claims for breach of fiduciary duty were already subject to limitation periods by analogy. See Report No 6 at 17.

⁴⁵⁶ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 112.

The New Zealand Commission took into account a submission which argued that, as a matter of principle, equitable remedies should not generally be included in the legislative scheme. The respondent had pointed to the variety of policies underlying each remedy available in equity and suggested that the inclusion of equitable remedies would itself involve a major reform of equity - a task more suited to a specific review of equitable remedies. The Commission was not persuaded to change its view.⁴⁵⁷

However, the Commission recommended that claims against trustees for fraudulent breach of trust, and for conversion of trust property should not be subject to any long stop or ultimate limitation period.⁴⁵⁸

(c) Canada

(i) Alberta

One member of the Alberta Law Reform Institute argued that equitable claims should not be subject to general limitation legislation. The basis of the argument was that:⁴⁵⁹

to apply fixed limitation periods to claims based in equity that are excepted from the present Alberta Act would be to effect a fundamental policy change that goes further than [the Institute] should recommend.

Referring to the role of limitation legislation in balancing the rights of potential plaintiffs against the rights of potential defendants, the member stated that the effect of subjecting equitable claims to the legislation would be that:⁴⁶⁰

[The claimant's] right to litigate is denied for no good reason. The repose deserved by the defendant in equity is fully served by the defence of laches.⁴⁶¹ Equity does not arbitrarily end rights by mere delay. Thus, 'balancing' in this context gives the defendant in equity a windfall immunity at the expense of the claimant in equity whose property is unjustly retained by the defendant.

Nonetheless, the majority of the Alberta Law Reform Institute

⁴⁵⁷ Ibid.

⁴⁵⁸ Id, 102.

⁴⁵⁹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 36.

⁴⁶⁰ Ibid.

⁴⁶¹ See pp 111-112 below for a discussion of relevant equitable defences.

recommended that its proposed limitation scheme apply generally to all claims, whether the claim originated at law or in equity.⁴⁶² Their view was that:⁴⁶³

We do not see any fundamental difference between, for example, a breach of promises made under contract, and a breach of conditions imposed by trust. The discovery limitations period we propose is based on the discovery limitations principle that comes from equity ... It will give trust beneficiaries a reasonable period of time within which to pursue their claims. True, our recommendations impose a fixed period of 2 years from discovery on the application of this principle. We do not think that this will unduly burden trust beneficiaries any more than it will persons entitled to a remedy for other reasons. The ultimate limitation period we recommend will give trustees the same protection that it gives to other potential defendants.

The recommendation of the majority was implemented in the limitation legislation recently enacted in Alberta.⁴⁶⁴

There is no specific reference in the legislation to fraudulent breach of trust. However, there is provision for suspension of the ultimate limitation period during any period of time that the defendant fraudulently conceals certain matters.⁴⁶⁵

(ii) Ontario

The proposed Ontario legislation also applied to equitable claims.⁴⁶⁶ Although the proposed legislation did not refer specifically to fraudulent breach of trust, the ultimate limitation period was expressed not to apply if the person against whom the claim was made had wilfully concealed certain facts from the person making the claim or had wilfully misled the person as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.⁴⁶⁷

(iii) Other

In a number of other Canadian jurisdictions, limitation legislation

⁴⁶² Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 3.

⁴⁶³ *Id.*, 37.

⁴⁶⁴ *Limitations Act 1996* (Alta) ss 1-2. The Act has not yet come into operation.

⁴⁶⁵ *Id.*, s 4(1).

⁴⁶⁶ *Limitations (General) Bill 1992* (Ont) cl 1, cl 2.

⁴⁶⁷ *Id.*, cl 15(7)(b).

applies to equitable claims by virtue of a provision which imposes a limitation period on any action which the limitation legislation or any other Act fails to deal with specifically.⁴⁶⁸

(d) England

In England, the Law Commission noted the trend towards subjecting claims for equitable relief to a statutory limitation regime.⁴⁶⁹ It expressed the view that common law and equitable remedies should be assimilated as far as possible and that, in general, if the legislation applies to common law remedies for a cause of action, there is no good reason why it should not apply to equitable remedies.⁴⁷⁰ The Law Commission observed that this approach would have the added advantage of avoiding the need for courts to decide the extent to which statutory limitation periods should be applied by analogy. It provisionally proposed that, with some qualifications, claims for equitable remedies should also be subject to its proposed scheme.⁴⁷¹

In relation to claims for fraudulent breach of trust, the Law Commission provisionally adopted the view that a separate provision was not necessary. It considered that the initial limitation period, commencing on the date of discovery, would offer sufficient protection for beneficiaries.⁴⁷²

The date of discoverability “swallows up” any need for a separate approach to fraudulent breaches of trust, as regards the initial limitation period.

It also considered that those cases where the beneficiary’s failure to discover the relevant facts was caused by the fraud of the trustee would be adequately catered for by its proposal to override the long stop period in cases of deliberate concealment by the defendant.⁴⁷³

4. THE DISCUSSION PAPER

⁴⁶⁸ See for example *Limitation of Actions Act 1978* (Sask) s 3(1)(j); *Limitation of Actions Act 1987* (Man) s 2(1)(n); *Statute of Limitations 1988* (PEI) s 2(1)(g); *Limitation of Actions Act 1973* (NB) s 9; *Limitation Act 1979* (BC) s 3(4).

⁴⁶⁹ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 380.

⁴⁷⁰ Id, 379.

⁴⁷¹ Id, 380.

⁴⁷² Id, 357.

⁴⁷³ Id, 358.

In the Discussion Paper,⁴⁷⁴ the Commission generally adopted the approach of simplifying limitation legislation to the greatest possible extent by subjecting claims to a limitation period of general application. The Commission referred to a submission which it received in response to its Information Paper.⁴⁷⁵ The respondent observed:⁴⁷⁶

In a State where law and equity have been administered concurrently for more than 100 years, it is difficult to understand why different principles are applied to equitable as contrasted with common law or statutory causes of action, particularly where the same wrongful conduct may give rise to a cause of action either at law or in equity. Thus, for example, it is difficult to see why a ... limitation period should apply to an action for conversion of money by a person in a fiduciary position, but the same limitation period does not apply (except by analogy, in the court's discretion) if the claim is framed as a claim for breach of trust or breach of fiduciary duty. Conduct which constitutes fraud or duress at common law may also constitute undue influence or unconscionable conduct in equity, and it is not immediately apparent why different limitation periods should apply.

However, the Commission was of the view, in relation to fraudulent breach of trust, that it would be undesirable to place any time limit on the recovery of trust property which had been wrongfully obtained. It considered that exempting claims of this kind from its proposed legislative scheme would not create a risk of exposing a defendant to open-ended liability, since undue delay on the part of a plaintiff would be subject to equitable defences.⁴⁷⁷ Accordingly, the Commission's preliminary recommendation was that there should be no limitation period for claims for fraudulent breach of trust.⁴⁷⁸

In the light of this preliminary recommendation, the Commission expressed some reservations about the appropriateness of subjecting equitable claims generally to the proposed legislative scheme. The Commission had concerns that, if equitable claims generally were to be made subject to the scheme, the distinction between a claim for fraudulent breach of trust and some other forms of equitable claim - for example, breach of fiduciary duty or unconscionable conduct - may become blurred and that, as a result, there would be scope for argument about the nature of a claim and whether or not the legislation applied.

⁴⁷⁴ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁴⁷⁵ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁴⁷⁶ Submission 3 (IP).

⁴⁷⁷ See Chapter 11 of this Report for an explanation of delay as a defence to an equitable claim.

⁴⁷⁸ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 124.

However, the Commission acknowledged that, on the other hand, it could also be argued that to exclude equitable claims generally from the limitation scheme might equally create a risk of blurring the distinction between equitable and common law actions, as claims which should be founded on common law causes of action such as contract or tort might instead be brought as claims for equitable relief in order to avoid the imposition of a limitation period.

Consequently, the Commission decided not to make a preliminary recommendation on this issue. Rather, the Commission specifically sought submissions on whether equitable claims should generally be subject to the proposed legislative scheme.⁴⁷⁹

5. SUBMISSIONS

None of the submissions received by the Commission in response to the Discussion Paper were opposed to the suggestion that equitable claims should be made subject to the proposed limitations scheme. Only four respondents directly addressed the issue.⁴⁸⁰

One submission questioned why certain equitable claims should be treated differently from common law actions which are potentially of equivalent gravity. The respondent noted that, while the equitable jurisdiction of the courts was developed to overcome the sometimes harsh results of the application of the common law, mitigation of those harsh effects could still be achieved, even if equitable claims were made subject to limitation legislation, by the exercise of judicial discretion to extend the limitation period.⁴⁸¹ Another respondent observed that, given the court structure and court procedures common to claims for both common law and equitable remedies, there is little, if any, present justification for maintaining the distinction between the two.⁴⁸²

Other reasons advanced by the same respondent for including equitable claims in the scheme were that:

- existing limitation legislation already covers some kinds of equitable

⁴⁷⁹ Id, 85.

⁴⁸⁰ Submissions 12, 14, 18, 20.

⁴⁸¹ Submission 12.

⁴⁸² Submission 20.

claims;

- to do so would substantially simplify limitation legislation;
- a number of claims might properly be based in either common law or equity, with otherwise unjustifiably different limitation consequences.

One respondent qualified its support for the inclusion of equitable claims by suggesting that, in considering whether to extend the limitation period, a court should be required to take into account whether the claim was brought in law or equity.⁴⁸³

This approach would assist in the creation of more universally applicable limitations law, whilst retaining the flexibility which is required by Equity and is fundamental to the consideration of equitable claims, such as an action by a woman claiming for the distribution of property and assets accumulated during the course of a de facto relationship. In the case of an equitable claim made after the period of limitation had expired, in determining whether to exercise the discretion to extend, under our proposal the court would entertain the same substantive analysis that is now entertained in the consideration of any equitable claim.

Three respondents also referred to claims for fraudulent breach of trust.⁴⁸⁴ Two of those three submissions supported the Commission's preliminary recommendation that there should be no limitation period for such claims.⁴⁸⁵

6. THE COMMISSION'S VIEW

After careful consideration, the Commission has formed the view that equitable claims should generally be subject to its proposed legislative scheme. The Commission agrees that it is illogical that the limitation period for a claim should depend on whether the plaintiff is seeking an equitable or common law remedy. That the historical basis for exempting equitable claims from limitation legislation is no longer relevant is demonstrated by the extent to which the existing provisions already apply. Bringing the remaining equitable claims within the scheme would remove the uncertainty which attaches to the application of the existing legislation by analogy with common law claims.

The flexibility which is a feature of the equitable jurisdiction would still be

⁴⁸³ Submission 18.

⁴⁸⁴ Submissions 12, 14, 18.

⁴⁸⁵ Submissions 14, 18.

retained, however. Firstly, the limitation period would not commence until the plaintiff had discovered the facts relevant to bringing proceedings. Indeed, the “discoverability” approach to limitation legislation is derived from equitable principles.⁴⁸⁶ Secondly, in appropriate circumstances, a plaintiff would be able to apply to the court to exercise its discretion to extend a limitation period which had expired.⁴⁸⁷

Further, the Commission now considers that, contrary to the preliminary view which it expressed in the Discussion Paper, claims for fraudulent breach of trust should not be specifically excluded from the operation of the legislation. This change of view does not mean that the Commission accepts that a trustee who abuses his or her position should be given a technical ground of immunity for the breach of trust. However, the Commission believes that a plaintiff beneficiary should be expected, as is any other plaintiff, to bring proceedings within a reasonable time of discovering the relevant facts. In the view of the Commission, these issues can be resolved without creating an additional exception to the scheme.

The Commission’s scheme ensures that a defendant whose conduct has prevented a plaintiff from discovering information necessary to bring the claim is not able to rely on that conduct to deny the plaintiff’s right to bring an action, since the discovery limitation period commences only when the plaintiff is or, in the circumstances, ought to be aware of the relevant information. Consequently, a plaintiff beneficiary would be entitled to a period of three years from the date of discoverability of a fraudulent breach of trust in which to commence proceedings. A plaintiff who failed to commence proceedings within the discovery limitation period or who did not discover the relevant information until after the expiration of the alternative period would be able to apply to the court to exercise its discretion to extend the limitation period. The factors which the court must take into account in determining such an application include the following:⁴⁸⁸

- the reasons why the plaintiff seeks to make a claim at this time;
- the extent to which, having regard to the time when the action is brought, there is or is likely to be prejudice to the defendant;
- the nature of the plaintiff’s injury;
- the conduct of the defendant which resulted in the harm of which the

⁴⁸⁶ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 1.

⁴⁸⁷ See Chapter 9 of this Report for the Commission’s recommendations in relation to judicial discretion to extend the limitation period.

⁴⁸⁸ See p 99 above.

plaintiff complains;

- the conduct of the defendant after the injury occurred, including:
 - (a) the extent, if any, to which the defendant resisted or co-operated with attempts by the plaintiff to ascertain facts which were or might be relevant to the plaintiff's cause of action against the defendant; and
 - (b) any other conduct of the defendant which contributed to the plaintiff's timing in bringing the action.

In the view of the Commission, reliance on the exercise of judicial discretion adequately protects the interests of plaintiff beneficiaries, while not detracting from the simplicity of its recommended scheme.

The Commission is not persuaded that it is necessary or desirable to include as a specific factor to be taken into consideration in the exercise of the court's discretion to extend the limitation period whether the claim was brought in law or equity. Under the recommendations made by the Commission in Chapter 9 of this Report, a court is required to consider "all the circumstances of the case".⁴⁸⁹ This would allow the court, if it considered it relevant, to take into account the equitable nature of a claim. Otherwise, the Commission considers the factors identified in Chapter 9 to be sufficiently broad to allow a fair evaluation of the merits of an extension application, whether the claim is brought in law or equity.

7. RECOMMENDATIONS

The Commission makes the following recommendations:

- **The proposed legislative scheme should apply generally to equitable claims as well as to common law claims.**
- **Claims for fraudulent breach of trust should not be specifically excluded from the operation of the scheme.**

⁴⁸⁹

Ibid.

CHAPTER 11

EQUITABLE DEFENCES

1. INTRODUCTION

Initially, equitable claims were not subject to limitation law. However, this did not mean that a potential defendant would be exposed indefinitely to the risk of litigation. Courts of equitable jurisdiction developed doctrines designed to “effect a balance of justice between parties based upon their conduct, and the effect of that conduct on others”.⁴⁹⁰

2. LACHES AND ACQUIESCENCE

Two of the grounds on which a person seeking equitable relief could be denied a remedy were the doctrines of laches and acquiescence.⁴⁹¹ While these two equitable defences are often interrelated, they are nonetheless separate and distinct.⁴⁹²

Under the doctrine of laches:⁴⁹³

... a plaintiff seeking an equitable remedy must come to court quickly once he knows that his rights are being infringed. The basis of this principle has been said to be the prejudice caused to the defendant by the plaintiff's failure to act quickly. One important consequence of this is that it is impossible to set any fixed time limit for the operation of the principle - everything must depend on the damage caused in the particular case.

The Law Reform Commission of Western Australia noted that:⁴⁹⁴

When a defence of laches is raised, it is important to consider the length of the delay and the nature of the acts done during the period of delay which may affect either party. In general, the longer the delay, the easier it will be to infer acquiescence, and the more likely it will be that the defendant has suffered prejudice.

⁴⁹⁰ T Prime and GP Scanlan, *The Modern Law of Limitation* (1993) 220.

⁴⁹¹ For a detailed discussion of these doctrines see *Orr v Ford* (1989) 167 CLR 316 per Deane J at 337-341.

⁴⁹² PM McDermott, *Equitable Damages* (1994) 63.

⁴⁹³ A McGee, *Limitation Periods* (2nd edition 1994) 36.

⁴⁹⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 299-300.

The doctrine of acquiescence is available as a defence to an equitable claim.⁴⁹⁵

... where the plaintiff has shown himself indifferent to the violation of his rights. The plaintiff in such circumstances has waived his rights by his conduct, and is estopped from enforcing them. Though acquiescence may be inferred from a plaintiff's delay in instituting an action, it differs from laches in that it may be established by means other than by delay in instituting proceedings. Thus, acquiescence may be established in any case where a plaintiff, by his conduct, evinces an intention to seek no redress in respect of the violation of his rights.

3. EXISTING LEGISLATION

The current Queensland legislation preserves the effect of equitable defences. The *Limitation of Actions Act 1974* (Qld) provides.⁴⁹⁶

Nothing in this Act affects the equitable jurisdiction of a court to refuse relief on the ground of acquiescence or otherwise.

4. OTHER JURISDICTIONS

The Alberta Law Reform Institute recommended that a court exercising equitable jurisdiction should have a discretion to deny equitable relief, even though the applicable limitation period under the proposed legislation had not expired.⁴⁹⁷ The recommendation was implemented in the recently enacted legislation.⁴⁹⁸ The Alberta provision is to the same effect as the existing Queensland legislation.

The Law Reform Commission of Western Australia expressed the view that such a provision would perform a useful function in retaining important equitable doctrines without prejudicing the general scheme, and recommended that a similar provision should be adopted in Western Australia.⁴⁹⁹

⁴⁹⁵ T Prime and GP Scanlan, *The Modern Law of Limitation* (1993) 221.

⁴⁹⁶ *Limitation of Actions Act 1974* (Qld) s 43.

⁴⁹⁷ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 36.

⁴⁹⁸ *Limitations Act 1996* (Alta) s 10. The Act is not yet in operation.

⁴⁹⁹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 330.

In England, the Law Commission observed:⁵⁰⁰

... laches has historically performed a useful role in relation to equitable remedies and one might take the view that there is no compelling practical reason to remove this traditional weapon in the discretionary armoury of the court. It ensures that judges have a continuing flexibility to achieve finely-tuned justice in relation to equitable remedies. It may also be thought difficult to separate acquiescence from laches.

5. THE DISCUSSION PAPER

In the Discussion Paper,⁵⁰¹ the Commission agreed that, in relation to equitable claims that fall within the proposed legislation, retention of the equitable defences would not prejudice the scheme. The Commission expressed the view that it would be desirable to maintain the flexibility provided by allowing a court of equitable jurisdiction to dismiss such claims on the basis of the equitable defences, even though the relevant limitation period had not expired.⁵⁰² The Commission's preliminary recommendation was that the proposed legislation should not affect the ability of a court of equitable jurisdiction to refuse relief on equitable grounds.

6. SUBMISSIONS

Three submissions addressed the issue of the co-existence of equitable defences with limitation legislation.⁵⁰³ All supported the Commission's preliminary recommendation. However, one respondent qualified its support.⁵⁰⁴

We harbour concerns that the general availability of equitable defences creates uncertainty in the law, detracts from plaintiffs (and indeed defendants) capacity to understand their legal rights and obligations and is unduly prejudicial to plaintiffs who have, prima facie, brought claims within the time limitation.

⁵⁰⁰ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 383.

⁵⁰¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁵⁰² Id, 87.

⁵⁰³ Submissions 14, 18, 20.

⁵⁰⁴ Submission 18.

Nonetheless, the respondent's concerns were overridden by its recognition of the need for flexibility, and it agreed with the preliminary recommendation.

7. THE COMMISSION'S VIEW

In Chapter 10 of this Report, the Commission has recommended that equitable claims should generally be subject to its proposed legislative scheme. However, this does not mean that equitable defences are no longer relevant.

Clearly, there will be less reliance on the doctrine of laches if claims must be brought within a three year discoverability period. However, the basis of the doctrine lies in the conduct of the parties and the balance of justice in granting or refusing the remedy sought.⁵⁰⁵ Circumstances may therefore arise in which a plaintiff who is seeking a remedy such as an interim injunction or specific performance would be required by a court of equitable jurisdiction to act within a lesser period of time.

Similarly, although the doctrines of laches and acquiescence may be interrelated, acquiescence may occur without delay on the part of the plaintiff. There may be other factors which indicate, inside the three year discovery period, that the plaintiff has waived his or her rights and should therefore be precluded from seeking an equitable remedy.

8. RECOMMENDATION

The Commission recommends that the proposed legislative scheme should not affect the ability of a court of equitable jurisdiction to refuse relief on equitable grounds.

⁵⁰⁵

T Prime and GP Scanlan, *The Modern Law of Limitation* (1993) 220.

CHAPTER 12

EXTENSION OF THE LIMITATION PERIOD

There are some situations where a plaintiff is so disadvantaged by a particular circumstance that he or she is regarded as being under a legal disability. Existing limitation legislation recognises that plaintiffs in such situations should be automatically entitled to an extension of the limitation period without the need to make an application for the exercise of judicial discretion.

These situations, and the implications of a discovery-based system, are discussed below.

1. MINORITY

Although an action may be commenced by or on behalf of a person under the legal age of majority,⁵⁰⁶ there is a presumption that a minor is not competent to make reasoned judgments about decisions relating to the claim.⁵⁰⁷ In many jurisdictions limitation legislation makes provision for delaying the commencement of the limitation period until the plaintiff has attained the age of majority. The *Limitation of Actions Act 1974* (Qld) provides that, subject to certain exceptions, an action by a plaintiff who was under the age of eighteen when the cause of action accrued may be brought within six years of the plaintiff's eighteenth birthday. However, an action to recover damages for personal injury or death may not be brought more than three years after the plaintiff turns eighteen.⁵⁰⁸

The effect of delaying the commencement of the limitation period until the plaintiff has attained his or her majority is that a potential defendant is at risk of being sued for a very long period. For example, in Queensland, an action alleging that the plaintiff's injuries were caused at birth by the negligence of a

⁵⁰⁶ In Queensland the age of majority is eighteen years: *Age of Majority Act 1974* (Qld) s 5(1)(a); *Law Reform Act 1995* (Qld) s 17. (The *Age of Majority Act 1974* (Qld) was repealed by the *Statute Law Revision Act (No 2) 1995* (Qld). However, its effect was preserved by the latter Act's application to it of s 20A of the *Acts Interpretation Act 1954* (Qld).)

⁵⁰⁷ The action is usually taken through a "next friend" (probably a parent or guardian): see Rules of the Supreme Court O 3 r 14; District Courts Rules r 26; Magistrates Courts Rules r 29(1). If a minor sues without a next friend, the proceedings are irregular only, not null and void. Unless the defendant objects the proceedings can continue. The matter can proceed to judgment, but a minor who sues without a next friend is not bound by the judgment and may therefore institute further proceedings which would otherwise be met by a plea of *res judicata*. See BC Cairns, *Australian Civil Procedure* (4th edition 1996) 350-351.

⁵⁰⁸ *Limitation of Actions Act 1974* (Qld) s 29.

medical practitioner may be brought up to twenty-one years after the birth. There is likely to be further delay before the matter comes to trial. It is almost inevitable that in such a situation the quality of the available evidence will have deteriorated to some extent by the time the claim is heard. The policy of the Australian Medical Association is that practitioners should retain treatment records for a minimum of ten years after a patient who is a minor attains the age of majority.⁵⁰⁹ This would mean that a doctor who delivered a baby or treated a very young child would be obliged to keep records for almost thirty years. Apart from the administrative burden thus placed on practitioners, there is the problem for potential plaintiffs of accessing records of those practitioners who have moved or retired. Moreover, at a time when medical indemnity fees are escalating⁵¹⁰ and there is concern that doctors will be unwilling to enter or remain in certain fields of practice, the length of time for which potential liability can continue is likely to add to the problem.

(a) The “custody of a parent” rule

In some jurisdictions, the commencement of the limitation period is postponed only if the plaintiff is not in the custody of a parent. The onus of proof is on the plaintiff to prove the absence of parental custody.⁵¹¹

The basis for this rule was explained by the Law Reform Commission of Western Australia:⁵¹²

Parents are ordinarily the legal guardians of their minor children. Most minors live with and are in the care of their parents, guardians or other carers. There are of course cases where this is not so, since there are many people under 18 who are living independently. However, the fact remains that in most cases a minor has some adult who can be expected to look after his interests and should be able to ensure that, if circumstances arise under which the minor has a cause of action against another, the necessary steps are taken to bring legal proceedings.

Both the New Zealand Law Commission and the Alberta Institute of Law

⁵⁰⁹ Australian Medical Association, *Handbook of Resolutions* (April 1997) 8 (Resolution 47 of 1993).

⁵¹⁰ In 1996 the indemnity fee for an obstetrician, neurosurgeon, or orthopaedic surgeon increased from \$10,500 to \$19,000 and for a general practitioner who practises obstetrics the fee increased from \$2,600 to \$6,875: AMAQ, *AMAQ News* (July 1996) 1.

⁵¹¹ See for example *Limitation Act 1974* (Tas) s 26(6), but note that this provision applies only to personal injury actions.

⁵¹² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 399.

Research and Reform rejected this approach.⁵¹³ In recommending that the limitation period should continue to be suspended during the minority of the plaintiff, the New Zealand Commission expressed the view that:⁵¹⁴

This is an area where the law has traditionally been protective, and it is not possible to generalise about the reasonableness or responsibility of parents' or guardians' actions to protect the interests of children and young persons (or to distinguish easily or effectively between those that may have been reasonable and those that may not).

The Alberta Institute commented:⁵¹⁵

We are familiar with too many cases in which a parent ... or a guardian, as the case may be, has permitted a limitation period to expire without bringing a claim, to the serious prejudice of a person under disability.

Despite this view, the Alberta legislation introduced in 1996 retained the rule⁵¹⁶ unless "an action is brought by a claimant against a parent or guardian of the claimant and the cause of action arose when the claimant was a minor", in which case "the operation of the limitation periods provided by [the] Act is suspended during the period of time that the person was a minor".⁵¹⁷

This exception overcame a major objection to the application of the rule in the situation where a child's injury has been caused by a parent, which would be of particular relevance in a claim for child sexual abuse. However, it did not provide for the situation where the parent is not the potential defendant, but may have reason for not wanting the proceedings to be brought - for example, where an alleged abuser is some other relative or close friend. Subsequent amendment of the Alberta legislation has extended the exception to an action against "any other person for a cause of action based on conduct of a sexual nature including, without limitation, sexual assault".⁵¹⁸

In England, the Law Commission identified the reasons for repealing a previous provision restricting the extension of time to those who could prove that they were not, at the relevant time, in the custody of a parent. Those

⁵¹³ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 85-86.

⁵¹⁴ *Id.*, 86.

⁵¹⁵ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 292-293.

⁵¹⁶ *Limitations Act 1996* (Alta) s 1(i)(i). The Act is not yet in operation.

⁵¹⁷ *Id.*, s 5(2)(a).

⁵¹⁸ *Id.*, s 5(2)(b).

reasons included that:⁵¹⁹

- the rule could not operate properly when the parent was the tortfeasor;
- there was no legal duty on parents to bring proceedings on behalf of their children;
- there was a risk of injustice to those minors whose parents did not initiate proceedings on their behalf;
- a right of action against a parent for failing to commence proceedings would be a poor substitute for the child's own claim for damages against the original tortfeasor.

The Commission observed:⁵²⁰

The crucial policy question is whether it is fair to penalise any person under a disability for the inactivity of their representative.

However, the Commission did not make any preliminary recommendation on the issue.

(b) A new approach

The Law Reform Commission of Western Australia has expressed the view that extension of the limitation period in all cases of disability cannot be justified. It observed:⁵²¹

The interests of defendants and of the public in the prompt commencement of litigation justify imposing a responsibility on the parents or guardians of a child in their custody who has a legal claim to commence an action within the ordinary limitation period.

The Western Australian Commission adopted a new approach, which it believed would deal fairly with minors without creating long limitation periods.⁵²² It recommended in relation to minors that:⁵²³

⁵¹⁹ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 298.

⁵²⁰ *Id.*, 301.

⁵²¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 399.

⁵²² *Id.*, 398.

⁵²³ *Id.*, 24, 400.

- (1) if the plaintiff proves he or she was not in the custody of a parent or guardian, neither the discovery period nor the ultimate period should commence until minority ceases;
- (2) in the absence of such proof, both the discovery and ultimate limitation periods should apply in the ordinary way, except that for the purposes of the discovery period it would be the knowledge of the parent or guardian, and not the minor, which would be relevant;
- (3) exceptional cases where the minor's interests are not adequately protected can be dealt with by the exercise of judicial discretion.

The Western Australian Commission also recommended that if, subsequent to the injury but before attaining adulthood, the minor ceases to be in the custody of a parent or guardian:⁵²⁴

- (1) if the discovery period has already commenced, it should be suspended until the minor reaches adulthood;
- (2) if the discovery period has not commenced, it should commence when the minor reaches adulthood;
- (3) the ultimate period should be suspended, and should recommence when the minor reaches adulthood.

(c) The Discussion Paper

In the Discussion Paper,⁵²⁵ this Commission rejected the "custody of a parent" approach and expressed the view that the limitation period should not run against a plaintiff who is a minor.⁵²⁶

The Commission explained that, in the context of its proposed discovery-based limitation scheme, suspension of the limitation period during the plaintiff's minority would give rise to the following situations.

If the plaintiff at the time of attaining majority knew or, in the circumstances,

⁵²⁴ Ibid.

⁵²⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁵²⁶ Id, 91.

ought to have known the information necessary to bring the claim,⁵²⁷ the limitation period would commence when the plaintiff turned eighteen, and would run for three years from that date.

However, if the plaintiff was not and, in the circumstances, could not have been expected to be aware of the relevant information at the time of attaining majority, the limitation period would be the lesser of:

- three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known the relevant information; or
- fifteen years⁵²⁸ after the date on which the plaintiff attained majority.

The Commission's preliminary recommendation was that the operation of the limitation scheme proposed by the Commission should be suspended during the minority of the plaintiff.⁵²⁹

(d) Submissions

Four of the submissions received by the Commission in response to the Discussion Paper directly addressed the question of the effect of the minority of a plaintiff on limitation legislation.⁵³⁰ All supported the Commission's preliminary recommendation. One respondent observed:⁵³¹

It is essential that any proposed legislation recognise that when a minor is injured the injury is to the minor and not to a parent or other guardian. Accordingly any acts or omissions on the part of the parent or guardian should not under any circumstances be imputed to the minor as this would result in a two fold prejudice i.e. the prejudice occasioned by the initial injury and the additional prejudice of any act or omission on the part of the parent or guardian in failing to protect the minor's interests.

A fifth submission appears to have misunderstood the effect of the Commission's recommendation. The respondent observed, in relation to the

⁵²⁷ See pp 85-86 above for the Commission's recommendations with respect to the facts which the plaintiff must know before the discovery limitation period is triggered.

⁵²⁸ However, in this Report the Commission has recommended a ten year alternative limitation period. See pp 69-70, 86 above.

⁵²⁹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 92.

⁵³⁰ Submissions 10, 14, 18, 20.

⁵³¹ Submission 10.

Commission's proposed discovery-based scheme:⁵³²

If the current proposal were enacted, in cases of injuries to children (and I speak particularly of brain injuries to infants during birth) the limitation period could be as long as 33 years.

(e) The Commission's view

Birth related brain injuries are usually detected and their effects identified well before the child turns eighteen. In the view of the Commission, its proposals would not change the existing law in such a situation. The limitation period under the Commission's proposed scheme would be, as it is now, three years from the child's eighteenth birthday. If, as a result of the injury, the child would be regarded as a person under a disability when he or she attained majority, the limitation period under the Commission's proposed scheme would be, as it is now, postponed indefinitely for the duration of the disability.⁵³³

It would be only in those rare situations where the plaintiff did not become aware of the information necessary to commence proceedings until after his or her eighteenth birthday that the Commission's proposals would change the existing law. In such a case, the limitation period would be three years from the date of discovery. However, the plaintiff would not be able to commence proceedings after the expiration of the alternative period, which, under the Commission's original proposals, was fifteen years, but which, in this Report, has been reduced to ten years from when the plaintiff turned eighteen.⁵³⁴

The Commission acknowledges the length of time for which, if the limitation period is suspended during a person's minority, it may be possible for the person to commence proceedings relating to a claim which arose when the person was a minor.

However, the Commission is mindful of the injustice which may be caused to a plaintiff if the limitation period is allowed to run during the plaintiff's minority. In the view of the Commission it would be dangerous to assume that all children have a responsible adult who is ready, willing and able to act on their behalf. Parents may not be aware that their child has a cause of action, or may not be able to afford to commence proceedings. In some cases there may be a conflict between the interests of the child and those of the parents. The Commission therefore considers that any possible prejudice

⁵³² Submission 19.

⁵³³ See pp 121-128, 140 below.

⁵³⁴ See pp 69-70, 86 above.

to potential defendants which results from suspension of the limitation period is outweighed by the risk that a minor plaintiff might be deprived of the right to seek compensation because proceedings are not initiated on the minor's behalf within the limitation period.

Accordingly, the Commission is not in favour of adopting the "custody of a parent" rule. It agrees with the conclusion reached by the New Zealand Law Commission that people who are under the age of majority:⁵³⁵

... are not necessarily incapable of conducting their own affairs, or in a position where no other person is protecting their interest. On the other hand, they are not necessarily protected by the existence of parents or guardians or other care givers.

2. DISABILITY

The *Limitation of Actions Act 1974* (Qld) provides that, if a potential plaintiff was under a disability on the date on which a right of action accrued, the action may generally be brought within six years from the time when the plaintiff ceased to be under a disability or died, whichever event occurred first.⁵³⁶ The six year period is reduced to three years if the action is a claim for damages for personal injury.⁵³⁷

The Act further provides that:⁵³⁸

... a person shall be taken to be under a disability while the person is ... of unsound mind or a convict who, after conviction, is undergoing a sentence of imprisonment.

The term "of unsound mind" is not defined although, in three specific instances, a person is presumed conclusively to be of unsound mind:⁵³⁹

- (a) while the person is a patient within the meaning of the *Mental Health Act 1974*;
- (b) while the person is in strict custody pursuant to an order of the court or

⁵³⁵ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 85-86.

⁵³⁶ *Limitation of Actions Act 1974* (Qld) s 29(1).

⁵³⁷ *Id.* s 29(2)(c).

⁵³⁸ *Id.* s 5(2).

⁵³⁹ *Id.* s 5(3).

in safe custody pursuant to an order given by the Governor in the name of Her Majesty, under section 647 of the *Criminal Code*;

(c) while the person is detained in a hospital or security patients' hospital pursuant to an order made under Part 4 of the *Mental Health Act 1974*.

(a) Definition of disability

The emphasis in the present legislation is on incapacity caused by mental illness. However, there are other kinds of disability which may prevent a plaintiff from commencing proceedings.

(i) Other jurisdictions

The Law Reform Commission of Western Australia recommended a definition based on the criteria set out in the *Guardianship and Administration Act 1990* (WA) for the appointment of an administrator. An administrator appointed under that Act has legal authority to perform any function that the person whose affairs have been placed under administration could do if that person had full legal capacity, including the power to bring legal proceedings on the person's behalf should this prove necessary.⁵⁴⁰ The Western Australian Commission recommended that special disability provisions should apply to a plaintiff "who is unable by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his affairs".⁵⁴¹

The Alberta Law Reform Institute recommended the use of the expression "unable to make reasonable judgments in respect of matters relating to the claim". This definition of disability has two advantages. First, it does not discriminate between different kinds of disability. Second:⁵⁴²

In connecting the disability to the particular claim, the new definition recognizes, as does the common law, that a person may be competent for one purpose ... but not for another ... It opens the way to flexible interpretations appropriate to specific facts and circumstances ...

However, even this definition would exclude a physical disability which prevented a potential plaintiff from commencing proceedings if, for example, he or she is unable to communicate effectively.

⁵⁴⁰ *Guardianship and Administration Act 1990* (WA) ss 64(1), 71(2).

⁵⁴¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 24.

⁵⁴² Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 41.

(ii) The Discussion Paper

In the Discussion Paper, the Commission endorsed the approach of the Alberta Law Reform Institute. It expressed the view that the definition of disability should not attempt to focus on the cause of the disability, but rather should be linked to the plaintiff's capacity to make decisions about the particular claim.⁵⁴³ It also acknowledged that the definition should include lack of capacity to communicate decisions about the claim, an approach which was consistent with the views expressed by the Commission in its report on assisted and substituted decisions.⁵⁴⁴

The Commission's preliminary recommendation was that "disability" should be defined as "the lack of capacity to understand the nature and foresee the effects of decisions about a claim, or to communicate those decisions".⁵⁴⁵

(iii) Submissions

Five of the submissions received by the Commission in response to the Discussion Paper considered the definition of "disability" for the purposes of limitation legislation.⁵⁴⁶ Three of those submissions supported the Commission's preliminary recommendation.⁵⁴⁷

One of the other submissions expressed concern that, under the existing legislation, people suffering from conditions such as post traumatic stress disorder which are not regarded as mental illness under the *Mental Health Act 1974* (Qld) are currently denied access to legal redress because they are not considered to be suffering from a disability which would allow them a suspension of the limitation period.⁵⁴⁸ However, the preliminary recommendation made by the Commission removes the existing reliance on "labels" and focuses instead on the effect of the condition. If the condition affects the capacity of the potential plaintiff to make decisions and to understand their likely consequences, then the plaintiff will be considered to

⁵⁴³ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 94.

⁵⁴⁴ Queensland Law Reform Commission, Report No 49: *Assisted and Substituted Decisions* (June 1996).

⁵⁴⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 95.

⁵⁴⁶ Submissions 1, 10, 14, 18, 20.

⁵⁴⁷ Submissions 10, 14, 20.

⁵⁴⁸ Submission 1.

be under a disability.

The fifth submission expressed the view that the definition proposed by the Commission was not wide enough and should be expanded. The respondent noted:⁵⁴⁹

Even where the plaintiff is able to understand their claim, and foresee the effects of any decisions relating to the claim, an illness (disability) may be so debilitating that, in practice, it prevents them from proceeding with the claim. A woman diagnosed as suffering from obsessive compulsive disorder, for example, may not bring an action because, as a result of the psychiatric illness, she is unable to leave her home by reason of the continuous cleansing rituals she engages in.

The respondent suggested that “disability” should be defined as:

The lack of the physical or mental capacity to

- (a) understand the nature and foresee the effects of decisions about a claim; or
- (b) communicate or otherwise give effect to those decisions.

The Commission accepts this proposal.

(b) Time of disability

The existing extension provision applies only if the plaintiff was a person under a disability at the time the cause of action accrued.⁵⁵⁰ This restriction is based on the rule that, once a limitation period has commenced running, it cannot be stopped.⁵⁵¹ However, a plaintiff may be unable to commence an action within the applicable limitation period because of a disability which arose after the limitation period had started to run.

(i) Other jurisdictions

In a number of Australian jurisdictions, legislation has been enacted to prevent the obvious injustice which may arise in such a situation.⁵⁵² The Law

⁵⁴⁹ Submission 18.

⁵⁵⁰ *Limitation of Actions Act 1974* (Qld) s 29(1).

⁵⁵¹ *Rhodes v Smethurst* (1838) 4 M & W 42, 150 ER 1335.

⁵⁵² *Limitation Act 1985* (ACT) s 30(1); *Limitation Act 1969* (NSW) s 52(1); *Limitation Act 1981* (NT) s 36(1); *Limitation of Actions Act 1936* (SA) s 45(1).

Reform Commission of Western Australia has also recommended that subsequent disability should be taken into account in determining the applicable limitation period.⁵⁵³

The Alberta Law Reform Institute recommended that the proposed limitation periods should not operate while a person is under a disability, whether the disability existed when the cause of action accrued or arose at some later date.⁵⁵⁴ This recommendation was implemented in the recently enacted Alberta legislation.⁵⁵⁵

In England, the Law Commission also formed the provisional view that supervening disability should be recognised for the purposes of limitation legislation.⁵⁵⁶

(ii) The Discussion Paper

In the Discussion Paper, the Commission acknowledged that if a plaintiff is under a disability the limitation period should stop running, whether the disability existed at the time the cause of action accrued or whether it arose subsequently.⁵⁵⁷

(iii) Submissions

Three submissions considered this issue.⁵⁵⁸ All three endorsed the Commission's preliminary view that the operation of the limitation period should be suspended by disability, whether disability is present when the cause of action accrues or subsequently comes into existence. None of the submissions received by the Commission were opposed to the proposal.

The Commission's view on this issue therefore remains unchanged.

(c) Effect of suspending the limitation period

⁵⁵³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 24-25.

⁵⁵⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 41.

⁵⁵⁵ *Limitations Act 1996* (Alta) s 5(1). The Act is not yet in operation.

⁵⁵⁶ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 297.

⁵⁵⁷ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 96.

⁵⁵⁸ Submissions 10, 14, 18.

Consideration must be given to the effect of suspending the limitation period in the context of a discovery-based limitation scheme.

(i) Other jurisdictions

The Alberta Law Reform Institute concluded that both the discovery limitation period and the ultimate limitation period should be suspended by the plaintiff's disability.⁵⁵⁹

The discovery period is designed to give a claimant sufficient opportunity after discovery to conduct further investigations, to attempt to negotiate a settlement, and to bring a proceeding seeking a remedial order if necessary. As such, it is based on the assumption that a person who obtains the requisite knowledge has the ability to make reasonable judgments in decisions relating to a claim. This assumption does not fit an adult under disability who is deemed unable to make reasonable judgments in respect of matters relating to ... a claim.

The operation of the ultimate period is suspended notwithstanding that the ultimate period operates against a claimant even if he could not, after reasonable investigation, discover the requisite knowledge about his claim ... That is because the situation of a person under disability is significantly different from that of a person not under disability: while the person not under disability is able to make investigations and reasonable decisions, a person under disability is deemed not to have this capacity, no matter how much knowledge he may have obtained.

The Institute's recommendation was implemented in the recently enacted Alberta limitation legislation.⁵⁶⁰

The Law Reform Commission of Western Australia, on the other hand, recommended that the ultimate period should not be suspended by the disability of the plaintiff.⁵⁶¹

... it is not desirable to adopt the alternative adopted in most other jurisdictions under which the limitation period does not run while a person is affected by mental incapacity, with the result that the running of the limitation period may be delayed indefinitely. After a given number of years, the defendant should ordinarily be able to regard his liability as at an end. By the time this point is reached, it is unlikely that the issues between the parties can be fairly determined ...

The Western Australian Commission expressed the view that, in any situation where expiration of the ultimate limitation period caused injustice to

⁵⁵⁹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 78.

⁵⁶⁰ *Limitations Act 1996* (Alta) s 5(1). The Act is not yet in operation.

⁵⁶¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 401-402.

a plaintiff under a disability, it would be possible to ask the court to exercise its discretion in favour of an extension of the period.⁵⁶²

In England, the Law Commission expressed the preliminary view that it was inappropriate for any category of plaintiff to have the benefit of an unlimited period of time in which to commence proceedings.⁵⁶³

... where proceedings are brought after a substantial interval, serious injustice may be done to the defendants, who may not be able to defend their claim. Granting unlimited protection to a person under a disability risks precisely this injustice ...

(ii) The Discussion Paper

In the Discussion Paper, the Commission expressed the view that, although suspension of both the discovery limitation period and the alternative limitation period may cause the defendant to be at risk of indefinite liability, any hardship to the defendant would be outweighed by the injustice to the plaintiff of allowing the limitation period to expire while the plaintiff lacked capacity to commence proceedings.

The Commission was not persuaded that reliance on judicial discretion was an appropriate solution. It considered that a plaintiff who could establish the existence and duration of the disability should be entitled to have the limitation periods suspended.⁵⁶⁴

Accordingly, the Commission's preliminary recommendation was that both the three year limitation period commencing when the plaintiff knew or, in the circumstances, should have known the information necessary to make the claim and the alternative limitation period commencing on the date of the defendant's act or omission should be suspended during any period when the plaintiff is under a disability.⁵⁶⁵

(iii) Submissions

Four submissions commented on the Commission's preliminary recommendation.⁵⁶⁶ Three submissions endorsed the Commission's

⁵⁶² Id, 402.

⁵⁶³ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 302.

⁵⁶⁴ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 97.

⁵⁶⁵ Id, 98.

⁵⁶⁶ Submissions 10, 14, 18, 20.

approach.⁵⁶⁷ The fourth respondent agreed that the discovery period should be suspended but submitted that there should be no ultimate limitation period.⁵⁶⁸

Where a person is under an ongoing disability, the practical effect of the Commission's recommendation would be that, as happens now, the limitation period would be suspended indefinitely for the duration of the disability, so that, in reality, there would be no ultimate period.

The Commission's view on this issue therefore remains unchanged.

(d) Effect of decision-making order

Sometimes, when a person has a disability which affects the person's capacity to make legally effective decisions about his or her life, another person is appointed to make decisions on that person's behalf. If a decision-maker is appointed for a person who is a potential plaintiff in civil litigation, the question arises as to what effect the appointment of a decision-maker should have on the suspension of the limitation period.

(i) Other jurisdictions

The Alberta Law Reform Institute, while basing its definition of incapacity for the purposes of limitation legislation on the criteria set out in the Alberta legislation providing for the appointment of decision-makers for people with impaired decision-making capacity,⁵⁶⁹ recommended that the appointment of a decision-maker should not have any effect on the suspension of the limitation period for a person under a disability.⁵⁷⁰ This recommendation was implemented by the recently enacted Alberta limitation legislation, which defined "person under disability" to include "a dependent adult pursuant to the *Dependent Adults Act*".⁵⁷¹

However, the Law Reform Commission of Western Australia, consistently with its recommendation that the limitation period should not be suspended in favour of minors who are in the custody of a parent or a

⁵⁶⁷ Submissions 14, 18, 20.

⁵⁶⁸ Submission 10.

⁵⁶⁹ *Dependent Adults Act 1980* (Alta) s 25.

⁵⁷⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 78.

⁵⁷¹ *Limitations Act 1996* (Alta) s 1(i)(ii). The Act is not yet in operation. See also *Limitation Act 1974* (Tas) s 2(2)(b), s 2(3).

guardian,⁵⁷² recommended that:⁵⁷³

- If an administrator has been appointed under the *Guardianship and Administration Act 1990* (WA), there should be no extension of any applicable limitation period. The discovery period would commence when the damage became discoverable, but it would be the knowledge of the administrator which would be relevant for this purpose.
- Where a person becomes affected by mental incapacity after the commencement of the limitation period, the discovery period should stop running until such time as an administrator is appointed under the *Guardianship and Administration Act 1990* (WA), when it should recommence.

These recommendations were based on the view that:⁵⁷⁴

... if there is an administration order in force, the administrator can be expected to take decisions about the commencement of legal proceedings in the same way as a person of full age and capacity could do on his own behalf.

In England, the Law Commission recognised that, where another person is able to act on behalf of a person with a disability, there may be an argument for making an exception to the general rule that the limitation period is suspended while the plaintiff is under a disability, since the plaintiff may suffer no disadvantage by comparison to other plaintiffs. However, the Law Commission also acknowledged that, in the absence of a positive duty on the other person to take action on behalf of the plaintiff, there would be a risk that some people under a disability would be left unprotected because of the inactivity of their representative. Although the Law Commission did not make a preliminary recommendation on this issue, it questioned whether it would be fair to penalise a person under a disability because his or her representative failed to act.⁵⁷⁵

(iii) The Discussion Paper

In the Discussion Paper, the Commission noted that Queensland has no single piece of legislation equivalent to the *Dependent Adults Act* in Alberta or the *Guardianship and Administration Act* in Western Australia. The

⁵⁷² See pp 118-119 above.

⁵⁷³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 24-25, 402.

⁵⁷⁴ Id, 401.

⁵⁷⁵ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 297-301.

implementation of such legislation has been recommended by this Commission.⁵⁷⁶ However, the Commission identified a number of other provisions which allow for administration of a person's estate, and with it the right to undertake legal action on the person's behalf, to be given to the Public Trustee.⁵⁷⁷

Consistently with its preliminary recommendation in relation to the "custody of a parent" rule,⁵⁷⁸ the Commission expressed the view that a plaintiff who is under a disability should not be further disadvantaged by the barring of a potential remedy because a substitute decision-maker has failed to commence proceedings on the plaintiff's behalf.

The Commission's preliminary recommendation was therefore that the suspension of the limitation period in favour of a plaintiff who is under a disability should not be affected by the appointment of a substitute decision-maker.⁵⁷⁹

(iii) Submissions

Four submissions considered this issue.⁵⁸⁰ Three of these submissions agreed with the Commission's preliminary recommendation.⁵⁸¹

The Queensland Law Society Inc observed.⁵⁸²

Public policy should prefer that the previously disabled Plaintiff's action should lie against the wrong doing Defendant, rather than against a substitute decision-maker apparently and likely to have been acting in the best interests of the Plaintiff during the period of disability.

The fourth submission rejected the approach taken by the

⁵⁷⁶ Queensland Law Reform Commission, Report No 49: *Assisted and Substituted Decisions* (June 1996).

⁵⁷⁷ See for example *Mental Health Act 1974* (Qld) Schedule 5; *Public Trustee Act 1978* (Qld) ss 65, 67; *Intellectually Disabled Citizens Act 1985* (Qld) s 32. See also *Powers of Attorney Act 1998* (Qld).

⁵⁷⁸ See pp 116-121 above.

⁵⁷⁹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 99.

⁵⁸⁰ Submissions 10, 14, 18, 20.

⁵⁸¹ Submissions 10, 18, 20.

⁵⁸² Submission 20.

Commission:⁵⁸³

Once a person has been placed in the position of substitute decision-maker ... then it would seem unreasonable that a defendant's potential exposure to liability should be increased when there is someone in control of the Plaintiff's decision making powers ... in a position to commence proceedings.

However, the Commission remains of the view that suspension of the limitation period in favour of a person with a disability should not be affected by appointment of a decision-maker. Otherwise, the only course of action open to the plaintiff may be to commence proceedings against the decision-maker if the decision-maker has failed to do so on the plaintiff's behalf. In many cases, this would involve practical difficulties for the plaintiff and, in any event, would probably not be in the plaintiff's best interests if the decision-maker is, for example, a close relative.

(e) Successive disabilities

Section 29(2)(a) of the *Limitation of Actions Act 1974* (Qld) provides that, where a right of action that has accrued to a person under a disability accrues on the death of that person while still under a disability to another person under a disability, an additional extension of time shall not be allowed by reason of the disability of the second person.

Section 29(3)(a) further provides that postponement of the limitation period is not available if the right of action first accrues to a person who is not under a disability, through whom the person under a disability claims.

(i) The Discussion Paper

In the Discussion Paper, the Commission considered the effect of these provisions.

The Commission expressed the view that, although the provisions might be capable of operating harshly, such situations were likely to occur infrequently. Further, the Commission noted that the purpose of the provisions is to avoid the possibility of a limitation period which is extended almost indefinitely. The Commission concluded that the policy underlying the section should be retained and that, in cases where the operation of the section would cause significant injustice, an application should be made for the court to exercise its discretion to extend the limitation period.

Accordingly, the preliminary recommendation of the Commission was that the provisions relating to successive disabilities should be retained.⁵⁸⁴

(iii) Submissions

Three submissions addressed this issue.⁵⁸⁵ The respondents agreed with the Commission's preliminary recommendation.

The Commission's view on this issue therefore remains unchanged.

3. PRISONERS

Section 5(2) of the *Limitation of Actions Act 1974* (Qld) provides that a person shall be taken to be under a disability while "a convict who, after conviction, is undergoing a sentence of imprisonment".

However, section 91 of the *Public Trustee Act 1978* (Qld) provides that the Public Trustee is the manager of the estate of every prisoner to whom Part 7 of the *Public Trustee Act 1978* applies. Section 90 provides that Part 7 applies to:

- any prisoner who, after conviction of any indictable offence or offences, is undergoing a sentence of imprisonment for life or for a period of three years or upwards or for such term as, together with any other sentence or sentences imposed upon the prisoner, has rendered the prisoner liable to imprisonment for a period of three years or upwards; or
- a person subject to an indefinite sentence within the meaning of Part 10 of the *Penalties and Sentences Act 1992*; or
- a person directed to be detained pursuant to Part 4 of the *Criminal Law Amendment Act 1945*.

While the Public Trustee is the manager of a prisoner's estate, the prisoner cannot, without the consent in writing of the Public Trustee, bring an action of a property nature or for the recovery of any debt or damage.⁵⁸⁶ It is possible that this mechanism could have some impact on the ease with which a prisoner could bring an action.

⁵⁸⁴ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 117.

⁵⁸⁵ Submissions 14, 18, 20.

⁵⁸⁶ *Public Trustee Act 1978* (Qld) s 95(b).

(a) Other jurisdictions

The Northern Territory⁵⁸⁷ is the only other jurisdiction in Australia where imprisonment of the plaintiff is specifically included as a disability which will postpone the running of the limitation period. In New South Wales, a person is taken to be under a disability if the person is, for a continuous period of twenty-eight days or more, incapable of, or substantially impeded in, the management of the person's affairs in relation to the claim, by reason of lawful or unlawful restraint.⁵⁸⁸

The New Zealand Law Commission, which also recommended that "incapacity" should include restraint resulting in inability (or substantial impairment of ability) to manage affairs in relation to a claim, commented that:⁵⁸⁹

... our proposals are not intended to provide an automatic extension of a limitation period for persons in penal institutions. The onus is to be on a claimant that the relevant circumstances actually impeded management of his or her affairs. Ordinarily, where communication with those outside the institution is possible, this would be a difficult onus to discharge; but there might be extraordinary circumstances - perhaps some form of solitary confinement - where the onus would be able to be discharged.

The Law Reform Commission of Western Australia noted that under Western Australian law imprisonment does not prevent a person from bringing legal proceedings. It therefore recommended that there should be no specific provision in Western Australian limitation legislation relating to prisoners.⁵⁹⁰

(b) The Discussion Paper

In the Discussion Paper, the Commission raised the issue of whether prisoners should continue to be exempted from the operation of limitation legislation. The Commission did not express a preliminary view on the matter, but specifically sought submissions on the following questions:⁵⁹¹

⁵⁸⁷ *Limitations Act 1981* (NT) s 4(1).

⁵⁸⁸ *Limitation Act 1969* (NSW) s 11(3)(b)(ii).

⁵⁸⁹ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 87.

⁵⁹⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 387-388.

⁵⁹¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 116.

- Should the operation of limitation legislation continue to be suspended in favour of people who are in prison?
- If so, should all convicted prisoners be regarded as under a disability, or only those whose property is subject to management by the Public Trustee?
- Is there any reason to distinguish between a prisoner who has been convicted, and one who is awaiting trial?

(c) Submissions

Four submissions addressed this issue.⁵⁹² The Queensland Law Society Inc considered that.⁵⁹³

As a general principle, there is no reason why the limitation period otherwise applicable to a claim by a prisoner, should be suspended during the period of imprisonment. This is so having regard to the ready access to legal advice and representation which is now afforded to prisoners in Queensland.

The respondent conceded that the *Public Trustee Act* could raise a difficulty, and the submission included a number of suggestions for amending the requirement to obtain the written consent of the Public Trustee to commence proceedings. However, changes of this kind are outside the Commission's terms of reference. The respondent concluded that, if the operation of limitation legislation continued to suspend limitation periods in favour of prisoners, only those prisoners whose property is subject to management by the Public Trustee should be regarded as under a disability.

The other three respondents advocated strongly in favour of suspending the limitation period in favour of prisoners. They expressed the view that the significant physical and social restrictions placed upon prisoners meant that prisoners should not be classified in the same way as members of the general population.⁵⁹⁴ The Prisoners Legal Service made the following observations:⁵⁹⁵

- most civil actions by prisoners (where the cause of action arose during their incarceration) would be against the operator of the prison - for example,

⁵⁹² Submissions 10, 17, 18, 20.

⁵⁹³ Submission 20.

⁵⁹⁴ Submissions 10, 17, 18.

⁵⁹⁵ Submission 18.

personal injuries claims where a breach of the prison's duty of care to the prisoner is alleged;

- prisoners are therefore in the unique position of being in the custody of the defendant to their potential civil action, and of having their rights to access independent advice about their claim circumscribed by the other party to their action;
- a poorly educated, illiterate, intellectually disabled or non-English speaking prisoner may not become aware, whilst in prison, of the possibility of suing the prison for negligence in relation to an injury sustained while in prison;
- access to legal advice is limited;⁵⁹⁶
- in order to make a legal or other non-family phone call prisoners must make a request through a prison officer or counsellor. All calls are to be monitored by the prison and phone calls to legal representatives may be made only for the purpose of arranging a visit.⁵⁹⁷

The respondents were of the view that the suspension provisions should apply to all prisoners, whether or not their affairs were subject to management by the Public Trustee and whether they had been convicted or were on remand awaiting trial.

(d) The Commission's view

This Commission has been informed by a representative of the Queensland Corrective Services Commission that, although the provision restricting prisoners' access to legal advice by telephone applies to all categories of prisoners, the provision no longer accurately reflects current corrective services practice. For example, a system of self-managed pay phones has been installed in prisons. Prisoners are issued with a pin number which allows the prisoner to make as many calls as he or she can afford from a list of ten nominated numbers. Prisoners who have legal representation are therefore able to discuss their legal problems with their advisers by phone. Calls are recorded and randomly monitored, but to date there has been no objection from legal representatives about the monitoring of calls. There is

⁵⁹⁶ The respondent employs 1.5 solicitors, who visit correctional centres in the Brisbane metropolitan areas once per month and see 10 inmates. There are 4,500 prisoners in custody in Queensland, many of whom are located outside the Brisbane area. Legal Aid is not available for personal injuries claims, although visiting legal aid solicitors may be able to offer initial advice to prisoners who have already identified a potential claim and asked to see a duty lawyer.

⁵⁹⁷ *Corrective Services Regulation 1989* (Qld) s 12.

no monitoring of telephone calls of prisoners residing in hostels or on home detention. This Commission understands that the provision is presently being redrafted to reflect the above changes.⁵⁹⁸

However, access to telephone calls is only one aspect of the disadvantages which may face a prisoner who wishes to initiate civil proceedings. A prisoner who is serving a custodial sentence may, for example, have difficulty gathering the evidence necessary to bring the claim or ensuring that relevant evidence is preserved.

The Commission believes that prisoners who are being punished for committing an offence should not also be deprived of their right to seek redress for a civil wrong. Further, dependants of prisoners should not be disadvantaged because the prisoner is unable to commence proceedings to seek compensation to which the prisoner may be entitled.

Nonetheless, the Commission recognises that there is now a wider variety of correctional service models available than when the existing limitation legislation was enacted. A prisoner may be classified as high, medium or low security, or may be qualified for day release, home detention or parole. The length of the prisoner's sentence and the manner in which it is served will obviously be relevant to the prisoner's ability to obtain legal advice and to make a claim. The Commission is therefore concerned that suspension of the limitation period in favour of a person who is serving a custodial sentence should fairly reflect the extent to which the person is prevented from commencing proceedings.

The Commission has given consideration to two possible ways of extending the limitation period for prisoners.

One alternative would be to adopt a provision based on the wording of the New South Wales legislation, the effect of which is to suspend the limitation period during any continuous period of twenty-eight days or more, when the plaintiff is incapable of or substantially impeded in the management of his or her affairs relating to a claim, by reason of lawful or unlawful restraint.⁵⁹⁹ This approach would avoid difficulties in defining the relevant types of custody. It would also obviate the need to make specific recommendations in relation to prisoners whose affairs are under management by the Public Trustee or who are on remand, as these would be factors to be considered in determining whether the prisoner is or has been "incapable of or substantially impeded in" commencing proceedings within the relevant limitation period.

⁵⁹⁸ Telephone attendance with Mr K Olsen (19 May 1998).

⁵⁹⁹ See note 588 above.

The other alternative would be not to have a specific provision relating to prisoners, but to rely on the exercise of judicial discretion. This approach would have the added advantage of allowing the interests of the defendant to be weighed against those of the plaintiff where the defendant might be prejudiced if the plaintiff commenced proceedings after a lengthy period of imprisonment.

On balance, the Commission prefers the second option. It brings the claim within the general scheme proposed by the Commission without the need for a specific provision relating only to prisoners. It also allows judicial scrutiny of the balance between ensuring that the plaintiff is not unfairly denied an opportunity to seek compensation and avoiding undue prejudice to the defendant.

The Commission also considered whether, if it adopted this course, it would be necessary to include an additional factor, based on the New South Wales provision, in the list of criteria to be taken into account by the court in determining whether to exercise the discretion. However, the Commission came to the conclusion that the existing criteria (for example, the reason why the plaintiff is seeking to commence proceedings at this time; the conduct of the defendant giving rise to the claim - relevant in the situation of a claim against prison management) would be sufficiently broad to allow a fair assessment of the plaintiff's situation.

4. WAR

(a) Existing legislation

There is no specific provision in the *Limitation of Actions Act 1974* (Qld) allowing for suspension of the limitation period in the case of war.

(b) Other jurisdictions

Some other Australian jurisdictions provide for the suspension of the limitation period in the case of war.

In some jurisdictions, this is done by reference to the definition of disability. In New South Wales, for example, a person is taken to be under a disability if, for a continuous period of twenty-eight days or more, the person is incapable of, or substantially impeded in, the management of the person's affairs in relation to the claim, by reason of war or warlike operations,⁶⁰⁰ or by circumstances arising out of war or warlike operations.⁶⁰¹ There are similar provisions in the Australian Capital Territory.⁶⁰²

In Victoria, the legislation provides for the limitation period to be suspended for any time "during which it was not reasonably practicable for a person to commence any action by reason of any war or circumstances arising out of any war in which the Commonwealth of Australia is or was engaged".⁶⁰³ There is a similar provision in the Tasmanian Act.⁶⁰⁴ In both jurisdictions, the limitation period is not to be deemed to expire less than a year from the date when it became reasonably practicable to commence the action.

(c) The Discussion Paper

In the Discussion Paper,⁶⁰⁵ the Commission acknowledged that situations may arise in which potential plaintiffs are prevented from commencing civil proceedings within the relevant limitation period as a result of armed hostilities.

However, the preliminary view of the Commission was that none of the existing provisions in other Australian legislation is entirely satisfactory. The Commission did not agree that suspension of the limitation period should be achieved by linking war or warlike operations to the definition of "disability". Nor was the Commission persuaded that the limitation period should be able to be suspended only in circumstances arising out of any war "in which the Commonwealth of Australia is or was engaged". The Commission considered that it would be arguable that, for example, a member of the armed forces serving in a peace-keeping role in a foreign conflict would not be entitled to the benefit of such a provision.

⁶⁰⁰ *Limitation Act 1969* (NSW) s 11(3)(b)(iii).

⁶⁰¹ *Id.*, s 11(3)(b)(iv).

⁶⁰² *Limitation Act 1985* (ACT) s 8(3)(b)(ii), (iii).

⁶⁰³ *Limitation of Actions Act 1958* (Vic) s 23(2).

⁶⁰⁴ *Limitation Act 1974* (Tas) s 28.

⁶⁰⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 118-119.

The Commission expressed the view that it would be undesirable to attempt to provide specifically for the variety of situations which may occur. The Commission's preliminary recommendation was that there should not be a specific provision in relation to war or warlike operations, but that cases where commencement of proceedings within the limitation period has been prevented by war or circumstances arising out of war should be dealt with by the exercise of judicial discretion.

(d) Submissions

Four submissions considered this issue.⁶⁰⁶

Two of those submissions supported the preliminary recommendation. One respondent considered that resort to the exercise of the court's discretion to extend the limitation period in an appropriate case would provide the necessary balance between the interests of plaintiffs and defendants.⁶⁰⁷

On the other hand, one submission expressed the view that:⁶⁰⁸

... any limitation period should be suspended for the duration of any war or war like operations (or circumstances arising out of such activity) in which the Commonwealth of Australia is or was engaged such that it is not reasonably practicable for a plaintiff to commence proceedings.

However, in the view of the Commission, this proposal does not overcome the difficulty identified in relation to the existing legislation in Victoria and Tasmania that its application may be too restricted.⁶⁰⁹

The fourth respondent, the Queensland Law Society Inc, expressed the view that if the legislation included a specific exemption in favour of prisoners, a similar exemption should be available to plaintiffs involved in circumstances of war or war-like operations. It suggested that the exemption should be defined "in terms of the soldier's engagement in active duty, engagement overseas, or other engagement in circumstances where ready access to legal advice, representation and the Court system is unavailable". Alternatively, the respondent submitted that if no specific exemption were provided then "war and war-like operations" should be noted as a specific circumstance

⁶⁰⁶ Submissions 10, 14 18, 20.

⁶⁰⁷ Submission 14.

⁶⁰⁸ Submission 18.

⁶⁰⁹ See p 138 above.

warranting the exercise of judicial discretion.⁶¹⁰

(e) The Commission's view

The Commission is not persuaded to change its preliminary recommendation. Further, the Commission considers that the matters specified in Chapter 9 of this Report as factors to be taken into account in determining whether to exercise the judicial discretion to extend the limitation period are sufficiently broad to encompass the kinds of situation envisaged by the respondents, and that there is no need for specific reference to war or war-like operations.

5. RECOMMENDATIONS

The Commission makes the following recommendations in relation to extension of the limitation period:

Minority

- **Neither the discovery limitation period nor the alternative limitation period should run against a plaintiff who is a minor.**
- **The “custody of a parent” rule should not be adopted.**

Disability

- **“Disability” should be defined as:**
 - The lack of physical or mental capacity to**
 - (a) understand the nature and foresee the effects of decisions about a claim; or**
 - (b) communicate or otherwise give effect to those decisions.**
- **Both the discovery limitation period and the alternative limitation**

⁶¹⁰

Submission 20.

period should be suspended during any period when the plaintiff is under a disability.

- Suspension of the limitation period in favour of a plaintiff who is under a disability should not be affected by the appointment of a substitute decision-maker.

Successive disabilities

- The existing provisions relating to successive disabilities should be retained.

Prisoners

- There should not be a specific provision allowing for the suspension of the limitation period in favour of prisoners.

War

- There should not be a specific provision allowing for the suspension of the limitation period in the case of war.

CHAPTER 13

THE “STOLEN GENERATIONS”

1. THE REMOVAL POLICY AND ITS EFFECT

In all Australian jurisdictions, there existed for many years a policy of removing indigenous children from their families and placing them in institutions or foster homes. This policy was introduced in Queensland in the late nineteenth century and continued until the mid nineteen sixties. The Human Rights and Equal Opportunity Commission (HREOC), in the report of its national inquiry into the separation of indigenous children from their families, found that implementation of the policy involved:⁶¹¹

- deprivation of liberty by detaining Aboriginal and Torres Strait Islander children and confining them in institutions;
- abolition of parental rights by taking the children and making the children wards or by assuming custody and control;
- abuses of power in the removal process; and
- breach of guardianship obligations.

The effects of this policy on the “stolen” children, their parents and families, and wider indigenous communities were, in many cases, devastating. The HREOC report noted:⁶¹²

Because the objective was to absorb the children into white society, Aboriginality was not positively affirmed. Many children experienced contempt and denigration of their Aboriginality and that of their parents or denial of their Aboriginality. In line with the common objective, many children were told either that their families had rejected them or that their families were dead. Most often family members were unable to keep in touch with the child. This cut the child off from his or her roots and meant the child was at the mercy of institution staff or foster parents. Many were exploited and abused. Few who gave evidence to the Inquiry had been happy and secure. Those few had become closely attached to institution staff or found loving and supportive adoptive families.

... The Inquiry was told that the effects (of removal) damage the children who were forcibly removed, their parents and siblings and their communities. Subsequent generations continue to suffer the effects of parents and

⁶¹¹ Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: *Bringing them home* (April 1997) 252.

⁶¹² Id, 177-178.

grandparents having been forcibly removed, institutionalised, denied contact with their Aboriginality and in some cases traumatised and abused.

It is difficult to capture the complexity of the effects for each individual. Each individual will react differently, even to similar traumas. For the majority of witnesses to the Inquiry, the effects have been multiple and profoundly disabling. An evaluation ... should take into account the ongoing impacts and their compounding effects causing a cycle of damage from which it is difficult to escape unaided. Psychological and emotional damage renders many people less able to learn social skills and survival skills. Their ability to operate successfully in the world is impaired causing low educational achievement, unemployment and consequent poverty. These in turn cause their own emotional distress leading some to perpetrate violence, self-harm, substance abuse or anti-social behaviour.

2. LEGAL ACTION RESULTING FROM THE POLICY

It is only recently that the damage caused by the policy of enforced removal has begun to be recognised. The first legal action in Australia for compensation for the loss suffered as a result of separation and institutionalisation was not commenced until 1993.

It was brought by a woman who had been taken away from her Aboriginal mother shortly after her birth in 1942 and placed in an institution caring for Aboriginal children. In 1947, because of overcrowding at that institution and because she had fair skin, she was moved to a home for white children, where she was at first brought up to believe that she was an orphan of European background. She had no visitors and was lonely at the home. She was subjected to some acts of violence. Eventually, after she had run away a number of times, she was told that she had “mud in her veins”; in other words, that she was of Aboriginal descent. The revelation distressed her greatly, since she had been brought up to have a low opinion of Aboriginal people. During the 1960s, she developed various mental disorders, including acute anxiety and reactive depression. As a result of commencing university studies in 1985, she began in her own mind to associate her psychiatric and social problems with her removal to an environment which failed to offer her the love and support for her identity which she needed. In 1991 she was diagnosed as having a severe form of personality disorder attributable to the way she had been treated in the home.

She subsequently commenced actions at common law for negligence and wrongful imprisonment and in equity for breach of fiduciary duty.

Because of the length of time which had elapsed, the plaintiff had to overcome the hurdle of the relevant limitation legislation. Although she was

successful in having the limitation period extended,⁶¹³ the case gives rise to the question of the appropriate relationship between limitation law and claims brought by indigenous Australians for the injurious effects of being taken away from their families.

3. THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION REPORT

The HREOC report made a number of recommendations about an appropriate method of compensating indigenous people who have been affected by separation from their family and community as a result of the removal policy.

The report noted that, in civil litigation, limitation periods may deny a remedy to many victims of forcible removal and that, in any event, relying only on civil litigation would be likely to lead to great delay, inequity and inconsistency of outcome; that the civil process is daunting and expensive, thus deterring many of those affected; and that it would involve great expense for governments to defend the claims.⁶¹⁴ The report therefore proposed the establishment of a "statutory compensation mechanism to determine claims in accordance with procedures designed to ensure cultural appropriateness, minimum formality and expedition".⁶¹⁵

HREOC recommended the establishment of a national compensation fund,⁶¹⁶ which would make minimum lump sum reparation to indigenous people removed from their families by compulsion, duress or undue influence,⁶¹⁷ and monetary compensation assessed by reference to general civil standards to any person proving on the balance of probabilities that they had suffered particular harm or loss.⁶¹⁸ It also recommended that, because of the violation of human rights brought about by implementation of the removal policy and because of the long-term effects of that violation, there should be no

⁶¹³ *Williams v Minister, Aboriginal Land Rights Act 1983 and Another* (1994) 35 NSWLR 497.

⁶¹⁴ Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: *Bringing them home* (April 1997) 305.

⁶¹⁵ *Id.*, 309.

⁶¹⁶ *Ibid* (Recommendation 15).

⁶¹⁷ *Id.*, 312 (Recommendation 18).

⁶¹⁸ *Ibid* (Recommendation 19).

limitation period for claims made against the fund.⁶¹⁹

It further recommended that the proposed compensation scheme should be an alternative to the right to seek damages through the courts.⁶²⁰

4. THE DISCUSSION PAPER

In its Discussion Paper,⁶²¹ this Commission acknowledged the need to ensure that plaintiffs are not denied access to justice in claims of this kind.⁶²² The Commission expressed the view that this objective would be best achieved by the implementation of the recommendations made by the HREOC report. However, the Commission noted that such a recommendation would be outside its terms of reference.

The Commission also observed that it would not be desirable to attempt to exclude claims resulting from the removal policy from the ambit of its preliminary recommendations.

The reasons for the Commission's view were twofold. Firstly, the Commission believed that the wide variety of circumstances in which indigenous children were removed from their families would create considerable difficulty in formulating a definition of plaintiffs whose claim should be excluded. Secondly, the general thrust of the Commission's preliminary recommendations was to avoid, wherever possible, the need for particular provisions for specific claims.

The Commission considered that a claim by an indigenous plaintiff which is based on separation from the plaintiff's family and community would be adequately provided for by the general scheme proposed by the Commission.

The Commission explained that, under that scheme, the limitation period for a common law claim would be the lesser of three years from when the plaintiff had sufficient information to bring the claim or fifteen years from when the conduct giving rise to the claim occurred.⁶²³ The Commission noted that most

⁶¹⁹ Id, 310-311 (Recommendation 17(3)).

⁶²⁰ Id, 313 (Recommendation 20).

⁶²¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁶²² Id, 103.

⁶²³ Id, 102. In Chapter 8 of this Report the Commission has recommended that the alternative limitation period be reduced from fifteen years to ten.

claims would now be out of time, since it is almost thirty years since implementation of the policy was abandoned. However, the Commission referred to its recommendation that there should be a judicial discretion to extend the limitation period in exceptional cases. Factors to be taken into account in the exercise of that discretion included:

- the length of and reasons for delay on the part of the plaintiff;⁶²⁴
- the nature of the plaintiff's injury;
- the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable; and
- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable.

In the view of the Commission, claims by stolen children were clearly an example of circumstances in which a court should give consideration to the exercise of its discretion to extend the limitation period in the plaintiff's favour.

The Commission further noted that claims founded on a breach of fiduciary duty or some other equitable obligation may be automatically exempted from the effect of limitation periods if the Commission's final recommendation were to be that equitable claims should not be included in the scheme.⁶²⁵

The Commission's preliminary recommendation was that there should not be a specific provision in relation to claims brought by stolen children as a result of their removal from their families.

5. SUBMISSIONS

Six of the submissions received by the Commission in response to the

⁶²⁴ In this Report, the Commission has recommended that this wording be changed to "the reasons why the plaintiff is seeking to make the claim at this time". See pp 97, 99 above.

⁶²⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 104. Note, however, the Commission's recommendation in Chapter 10 of this Report that equitable claims should not be excluded from the scheme.

Discussion Paper referred to the issue of claims made by stolen children.⁶²⁶

Four respondents endorsed the Commission's preliminary recommendation,⁶²⁷ although the Department of Families, Youth and Community Care qualified its support:⁶²⁸

... it is considered that the resolution of past injustices dating back several decades or even into the last century is essentially a matter for political judgement. While it is acknowledged that the legal system can play a legitimate role in bringing to light for political scrutiny injustices which might not otherwise be addressed, the ultimate resolution of such issues is likely to entail a response from government which balances a broader range of considerations. Although the rationale for a general discretion in the courts to extend limitation periods is appreciated, consideration may need to be given to whether any additional guidance is required for the exercise of such discretion in cases relating to the practices of past decades, often in accordance with government policy and legislation at the time, which could have significant consequences for society and raise expectations that historical injustices in general will be remedied. This is not necessarily to suggest that such matters should not be remedied, but that the political process represents not only a more appropriate means of resolving the complex of issues involved, but the means by which such matters will ultimately have to be addressed.

One submission supported the exercise of judicial discretion in support of "lost children" claims, but in the context of the existing legislation rather than the scheme proposed by the Commission.⁶²⁹

However, one respondent disagreed with the Commission's preliminary recommendation. A community legal centre submitted that no limitation period should attach to claims by stolen children or, in the alternative, that where a court is asked to exercise its discretion to extend the limitation period, a particular factor for the court to take into consideration should be "whether the claim has been brought in relation to the stolen generations".⁶³⁰

This consideration will necessarily embody a general recognition of the desirability of awarding compensation, and of the substance of the recommendation made by HREOC.

The respondent drew an analogy between families whose children had been forcibly removed and relinquishing mothers who have not given a voluntary consent to the adoption of their child, and submitted that claims by those

⁶²⁶ Submissions 10, 12, 14, 18, 19, 20.

⁶²⁷ Submissions 10, 12, 14, 20.

⁶²⁸ Submission 12.

⁶²⁹ Submission 19.

⁶³⁰ Submission 18.

relinquishing mothers should not be subject to a limitation period.

6. THE COMMISSION'S VIEW

The Commission reiterates its concern that plaintiffs should not be denied access to justice in claims of this kind. It accepts that litigation may not necessarily be the most appropriate way of resolving the issues involved, but it remains of the view that a plaintiff who wishes to commence proceedings to obtain compensation for injuries suffered as a result of the removal policies should not be unfairly prevented from doing so.

The Commission believes that claims by stolen children, their families and relinquishing mothers are adequately provided for within its proposed general scheme. The criteria specified by the Commission for consideration in the exercise of judicial discretion to extend the limitation period are set out in Chapter 9 of this Report. In the view of the Commission, those criteria would allow a fair and balanced scrutiny of intended claims to determine whether they should proceed.

Accordingly, the Commission is not persuaded that claims by either stolen children or their families or by relinquishing mothers should be excluded from its proposed legislative scheme. It remains of the view that attempts to exclude certain claims will inevitably lead to difficulties in defining the claims which should be excluded, and that the existence of specific provisions dealing with particular kinds of claims will detract from the overall uniformity and simplicity of the scheme without conferring a significant benefit on potential plaintiffs.

7. RECOMMENDATION

The Commission recommends that claims by stolen children or their families as a result of removal policies or by relinquishing mothers should not be specifically excluded from the general scheme, but should be dealt with by the exercise of judicial discretion.

CHAPTER 14

SURVIVORS OF CHILDHOOD SEXUAL ABUSE

1. THE EFFECTS OF CHILDHOOD SEXUAL ABUSE

Although it is generally accepted that there are many incidents of childhood sexual abuse which remain undisclosed and unreported,⁶³¹ there is now a significant body of literature describing the nature of this kind of abuse and detailing the way in which the mental health of a child who has been sexually abused may be damaged by the abuse.

The majority of adults who sexually abuse children are related to or in a trusted relationship - for example a family friend, teacher or church leader - with the child.⁶³² A recent Australian survey indicated that the perpetrator was known to the child in more than half of the incidents reported in the survey - 60 per cent of females' experiences and 50 percent of males' experiences - and that, in more than half of these, the perpetrator was a relative or family friend.⁶³³ The same survey also found that unwanted sexual experiences most commonly occur between the ages of nine and thirteen.⁶³⁴

The age at which abuse takes place and the relationship between the child and the abuser create an inherent imbalance of power. Because of this imbalance in the relative positions of the abuser and the child, the abuser is generally able to conceal what is happening. There will be no witnesses, as the abuse will take place only when the abuser and the child are alone together.⁶³⁵ If the child is too young to understand the sexual character of the abuser's behaviour, the abuser may persuade the child that the conduct is a special secret between them, likely to be misunderstood and therefore not to

⁶³¹ PE Mullen et al, "Childhood Sexual Abuse and Mental Health in Adult Life", (1993) 163 *British Journal of Psychiatry* 721, 729; D Finkelhor, "The International Epidemiology of Child Sexual Abuse", (1994) 18 *Child Abuse and Neglect* 409, 412; LA Potter and RH Potter, "The Impact of Childhood Abuse Experience on Adult Survivors", (1995) 7 *Current Issues in Criminal Justice* 133; W Patton and M Mannison, "Unwanted sexual experiences during childhood: Australian continuum data", (1996) 21 *Children Australia* 5, 10; JM Fleming, "Prevalence of childhood sexual abuse in a community sample of Australian women", (1997) 166 *Medical Journal of Australia* 65, 67.

⁶³² RC Summit, "The Child Sexual Abuse Accommodation Syndrome", (1983) 7 *Child Abuse and Neglect* 177, 179.

⁶³³ Patton and Mannison, note 631 above, 9-10.

⁶³⁴ Id at 9. See also *Incest Survivors' Association Journal*, (Spring 1996) 29.

⁶³⁵ DG Sturgess, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985), 49 (Case 1).

be shared with anyone else.⁶³⁶ Secrecy is essential for the abuser to escape detection and to be able to continue the abuse. As the child grows older and becomes aware of the illicit nature of the abuser's acts, in order to ensure the child's compliance and silence the abuser may resort to emotional blackmail or threats of violence against the child or, in the case of incestuous abuse, against other members of the family - for example, younger siblings.⁶³⁷ In this situation, the child may come to feel responsible not only for allowing the abuse to occur but also for keeping the family safe and intact. A sexually abused child may also fail to report the abuse because of guilt, shame or fear of blame or disbelief.⁶³⁸

The consequences of childhood sexual abuse vary with the individual.⁶³⁹ Not all children who are sexually abused are prone to problems in adult life: some seem resilient to possible adverse effects of the abuse.⁶⁴⁰

However, a sexually abused child may demonstrate negative emotional effects from the time of the initial abuse.⁶⁴¹ The immediate effects of sexual abuse can be very damaging to the child. Common symptoms include anxiety, low self-esteem and depression, which may manifest itself as apathy, withdrawal, anger, loss of interest in normal activities and self-destructive behaviour.⁶⁴²

Often the child will internalise the emotional conflict, risking the development of a distorted and negative self-image.⁶⁴³ The child may "dissociate" while the abuse is taking place, so that the perception is not of involvement in the abuse but rather of looking on from a distance at the child suffering the

⁶³⁶ Id, 69.

⁶³⁷ Id, 49; Summit, note 632 above, 181; MG Salten, "Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy", (1984) 7 *Harvard Women's Law Journal* 189, 196; CW Napier, "Civil Incest Suits: Getting Beyond the Statute of Limitations", (1990) 68 *Washington University Law Quarterly* 995, 1002.

⁶³⁸ Summit, note 632 above, 181; RL Thomas, "Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action", (1991) 26 *Wake Forest Law Review* 1245, 1249.

⁶³⁹ AM Hagen, "Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse", (1991) 76 *Iowa Law Review* 355, 359; PE Mullen et al, "The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life", (1994) 165 *British Journal of Psychiatry* 35, 43, 45.

⁶⁴⁰ SE Romans and PE Mullen, "Childhood sexual abuse: concerns and consequences", (1997) 166 *Medical Journal of Australia* 59.

⁶⁴¹ Napier, note 637 above, 1003; Hagen, note 639 above, 359.

⁶⁴² D Finkelhor, *A Sourcebook on Child Sexual Abuse* (1986) 20-21; Summit, note 632 above, 185; Hagen, note 639 above, 359.

⁶⁴³ Salten, note 637 above, 198.

abuse.⁶⁴⁴ Other survival tactics include repressing the memory of the abuse so that, although the memory is retained, there is no conscious knowledge that it exists; or suppressing the trauma so that, although the abuse could be recalled, the child avoids doing so.⁶⁴⁵

If, as frequently happens, the abuse remains undetected, the child has to develop his or her own strategies for dealing with what is going on. Many sexually abused children exhibit symptoms which fit or partially satisfy the diagnostic criteria for post-traumatic stress disorder (PTSD),⁶⁴⁶ where memory of a psychologically unacceptable experience is partially or completely repressed due to lack of emotional resources to process the trauma.⁶⁴⁷ The symptoms of PTSD include anxiety, recurring nightmares and flashbacks, insomnia, depression, anger, guilt and mistrust. They also include long-term self-destructive behavioural patterns such as substance abuse, feelings of worthlessness, suicidal thoughts and emotional numbing.⁶⁴⁸

The effects of childhood sexual abuse may continue to develop into adulthood, and the full impact of the abuse may not be fully realised until many years after the abuse occurred. Alternatively, the symptoms of the abuse may lie dormant during a “latency” period which may last for “days or decades”, until the memory is triggered.⁶⁴⁹

The harmful consequences of the abuse may not be found primarily in the immediate aftermath of the actual abuse, but in the disruption to development of the ability to function optimally in intimate sexual relationships and social life.⁶⁵⁰ Studies have shown that adult survivors demonstrate more symptoms and dysfunctions than normal controls, with symptoms clustering in three areas: anxiety and its associated behaviours, depression and lowered self-

⁶⁴⁴ Summit, note 632 above, 185; J Mosher, “Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest”, (1994) 44 *University of Toronto Law Journal* 169, 178.

⁶⁴⁵ Mosher, note 644 above, 178.

⁶⁴⁶ McLeer et al, “Post-Traumatic Stress Disorder in Sexually Abused Children”, (1988) 27 *Journal of the American Academy of Child and Adolescent Psychiatry* 650, 652; Herman Russell and Trocki, “Long-Term Effects of Incestuous Abuse in Childhood”, (1986) 143 *American Journal of Psychiatry* (1986) 1293.

⁶⁴⁷ Thomas, note 638 above, 1252-1254.

⁶⁴⁸ FH Lindberg and LJ Distad, “Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest”, (1985) 9 *Child Abuse and Neglect* 329.

⁶⁴⁹ Id, 332.

⁶⁵⁰ Mullen et al, note 639 above, 45.

esteem, and social and sexual dysfunction.⁶⁵¹

An adult who was sexually abused as a child may react in one of the following ways:⁶⁵²

- not experience the symptoms of the abuse for a substantial number of years;
- experience the symptoms but fail to recall the abuse;
- remember the abuse, but fail to make the connection between it and subsequent symptoms, because of either denial of the effects of the abuse, or continuing self-blame or failure to identify the abusive conduct as wrongful;
- remember the abuse and make the connection between it and current symptoms but remain unable, because of the pain and suffering involved, to seek compensation from the abuser.

The effects of childhood sexual abuse mean that, in many cases, the person who has been abused is unable to commence legal action for compensation within the limitation period:⁶⁵³

... the effect of the abuse makes it very difficult for the victim to complain. While she knows she has been abused, recognises that she has psychological problems and that these stem, at least in part, from the abuse, she is psychologically unable to bring herself to complain. At least three reasons might contribute to this. First, even when they reach majority, victims often continue to blame themselves for the abuse. Such self-blame is a strong inhibitor to disclosure. Secondly, complaining of abuse, particularly where the abuser is part of the family, takes considerable courage and emotional strength. Yet, such strength is often lacking in victims of child sexual abuse. ... Thirdly, even where the abuse has ended that does not necessarily mean that the "relationship" between the abuser and abused has been terminated. ... [T]he "typical" victim is abused by someone she knows and trusts. In many of these cases, particularly where the abuser is a parent, the abused may remain dependent on the abuser until well after she reaches majority. In order to maintain this "support" and also to avoid splitting up the family, the victim may feel a strong pressure not to disclose the abuse.

2. EXISTING LEGISLATION

⁶⁵¹ McLeer et al, note 646 above, 650.

⁶⁵² Mosher, note 644 above, 181.

⁶⁵³ Mullis ACL, "Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods", (1997) 5 *Medical Law Review* 22, 26.

The *Limitation of Actions Act 1974* (Qld) contains a number of provisions for extending the limitation period.

For example, the limitation period for an action based on injury to a child does not commence until the child attains majority.⁶⁵⁴ However, the defensive strategies adopted by a child in order to survive sexual abuse may continue well into adulthood.⁶⁵⁵ Even if the commencement of the limitation period is delayed until the child attains majority, memories which have been repressed may not surface before the limitation period has expired.

The commencement of the limitation period may also be delayed if the action is based on fraud or if the right of action has been fraudulently concealed.⁶⁵⁶ A similar mechanism has been successfully used in New Zealand to assist a plaintiff who had been sexually abused as a child by an adult who fraudulently concealed the nature of the abuse.⁶⁵⁷ In that case it was held that:⁶⁵⁸

... sexual abuse of children is frequently accompanied by deceit as to the nature of the acts and leads to victims constructing psychological blocks or denials and underlying psychological and emotional damage may be neither recognised nor linked to the abuse. Where it is established that the very conduct of the defendant and accompanying deceit had the effect of preventing the victim from recognising the true nature of the abuse and the damage caused by it, it does not strain interpretation to hold that there has been fraudulent concealment of the right of action.

However, the operation of this section is dependent on whether the plaintiff, with reasonable diligence, could have discovered the fraud. This is a purely objective test, which may be applied to unfairly disadvantage a survivor of childhood abuse, whose behaviour, although explicable in the particular circumstances, may not be regarded as objectively reasonable.

There is also provision for extension of the limitation period in cases of latent personal injury.⁶⁵⁹ However, the application of this provision is also dependent on a purely objective test as to what a reasonable person knowing certain facts and having taken appropriate advice on those facts would have

⁶⁵⁴ *Limitation of Actions Act 1974* (Qld) s 29(1).

⁶⁵⁵ See notes 643-647 above.

⁶⁵⁶ *Limitation of Actions Act 1974* (Qld) s 38(1).

⁶⁵⁷ *S v G* [1995] 3 NZLR 681.

⁶⁵⁸ *Id.*, 688.

⁶⁵⁹ *Limitation of Actions Act 1974* (Qld) s 31.

done. This test may also disadvantage a potential plaintiff.⁶⁶⁰

Further, the fact that the plaintiff does not initiate proceedings within the limitation period may be due to factors other than delayed discovery or fraudulent concealment. For example, the plaintiff's healing process may not have progressed sufficiently to allow a claim for compensation to be made within the limitation period. A recent Australian survey of survivors of child abuse identified as significant reasons for not taking court action the existence of family complications, perceptions of the legal process and personal unacceptableness.⁶⁶¹

3. OTHER JURISDICTIONS

(a) Canada

Legislation which was introduced in Ontario suspended the limitation period in claims relating to assault or sexual assault during any time when the plaintiff was prevented from commencing the proceeding because of his or her physical, mental or psychological condition.⁶⁶² Under the Ontario proposals there would be no limitation period if one of the parties to a proceeding arising from a sexual assault had charge of the person assaulted, or was in a position of trust or authority, or was someone on whom the person assaulted was dependent, financially or otherwise.⁶⁶³

Although the proposed legislation in Ontario has not been enacted, three other Canadian provinces have implemented changes to their limitation legislation in relation to claims for childhood sexual abuse. British Columbia and Saskatchewan have abolished limitation periods in cases of misconduct of a sexual nature occurring while the plaintiff was a minor.⁶⁶⁴ The legislation in Prince Edward Island abolishes the limitation period in all cases of sexual misconduct and in all cases where the injury occurred in a relationship of dependency or intimacy.⁶⁶⁵

⁶⁶⁰ But see the decision of Byrne J in *Tiernan v Tiernan* (unrept, Supreme Court of Queensland, 22 April 1992) where an extension of time was granted under this provision.

⁶⁶¹ *Incest Survivors' Association Journal*, Spring 1996, 29.

⁶⁶² *Limitations Bill 1992* (Ont) cl 9(1), cl 15(7)(a)(i).

⁶⁶³ *Id.*, cl 16(h).

⁶⁶⁴ SBC 1992 c 44; SS 1993 Bill 15.

⁶⁶⁵ SEI 1992 c 63.

(b) Western Australia

The Law Reform Commission of Western Australia gave careful consideration to the question of whether a plaintiff who brought an action for sexual abuse by a person in a position of trust would be unfairly defeated by the application of the ordinary limitation rules which it proposed, or whether there should be special provision for child abuse cases.⁶⁶⁶ The Commission concluded that a special rule was not necessary because the discovery limitation period would not start to run until the plaintiff was in possession of all the relevant information and because, if the ultimate limitation period expired, the plaintiff would be able to apply to the court for an extension under the exercise of the court's discretion. It observed:⁶⁶⁷

It is true that plaintiffs may be under some slight disadvantage in that they will have to persuade the court to exercise its discretion in their favour, rather than being entitled to proceed as of right, but as against this, the discretion solution can deal fairly with the problems involved and avoids the need to create a rule special to a particular class of plaintiffs. A further advantage of the discretionary extension is that the court retains the flexibility to deal with cases which do not fit the paradigm, for example where the plaintiff has unreasonably delayed, or the defendant has been significantly prejudiced by loss of evidence.

(c) England

In England, the Law Commission expressed the view that:⁶⁶⁸

Minimising the number of exceptions to our core regime would assist in achieving a major aim of this review, that is, to reduce the categories and variances in limitations law and to promote uniformity and reduced technicality.

The Law Commission therefore provisionally proposed that claims for childhood sexual abuse should be subject to special rules only if the general scheme could not adequately provide for them.⁶⁶⁹

The Law Commission concluded that the application of a discoverability test to claims by sexual abuse victims would resolve many of the problems which

⁶⁶⁶ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 236.

⁶⁶⁷ *Id.*, 237.

⁶⁶⁸ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 333.

⁶⁶⁹ *Ibid.*

the accrual system can cause in this area.⁶⁷⁰ It acknowledged that, in the absence of a judicial discretion to extend the limitation period, the imposition of an ultimate limitation period or “long-stop” might lead to harsh results. However, it remained of the view that the benefits of a long-stop period would outweigh the disadvantages.⁶⁷¹

The Law Commission’s provisional recommendation was that the general scheme (in essence, three years from discoverability with a long-stop of thirty years from the date of abuse, with postponement for minority or adult disability) should apply to claims by victims of child sexual abuse.

4. THE DISCUSSION PAPER

In the Discussion Paper,⁶⁷² the Commission proposed that the general limitation period should be the lesser of:⁶⁷³

- three years from the date when the plaintiff knew or, in the circumstances, ought to have known the information necessary to bring the claim; or
- fifteen years after the date on which the conduct, act or omission giving rise to the claim occurred.⁶⁷⁴

The Commission also proposed that the operation of the general limitation period should be suspended during the minority of the plaintiff.⁶⁷⁵ The Commission observed that, in the context of a plaintiff who is bringing a claim which arose when the plaintiff was a minor, suspension of the limitation period during the plaintiff’s minority would give rise to the following situations.⁶⁷⁶

⁶⁷⁰ Id, 334.

⁶⁷¹ Id, 336.

⁶⁷² Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁶⁷³ Id, 60-61.

⁶⁷⁴ The Commission’s recommendation in this Report is that the alternative limitation period should be reduced to ten years. See pp 69-70, 86 above.

⁶⁷⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 92.

⁶⁷⁶ Id, 110-111.

If the plaintiff at the time of attaining majority knew or, in the circumstances, ought to have known the information necessary to bring the claim, the limitation period would commence when the plaintiff turned eighteen, and would run for three years from that date.

However, if the plaintiff was not and, in the circumstances, could not have been expected to be aware of the relevant information at the time of attaining majority, the limitation period would be the lesser of:

- three years after the date on which the plaintiff first knew, or in the circumstances ought to have known, the relevant information; or
- fifteen years after the date on which the plaintiff attained majority.⁶⁷⁷

The Commission also noted that, depending on the relationship between the plaintiff and the alleged abuser, the plaintiff may be able to bring an equitable claim for breach of fiduciary duty⁶⁷⁸ and that, in such a situation, whether or not the proposed limitation period would apply would depend on whether the Commission recommended that equitable claims should be made generally subject to the scheme.⁶⁷⁹

The Commission acknowledged that, while three years from the date of discovery is generally sufficient time to enable a plaintiff to commence proceedings, there may be situations in which it would be unreasonable to expect a plaintiff to initiate a claim of this kind within that period. It noted that failure to commence proceedings may be due to a number of other factors: for example, the plaintiff may not feel able to relive the experience or to face the stress of litigation, complications caused by family relationships, or embarrassment at having essentially private matters aired in public.⁶⁸⁰

However, the Commission also proposed that there should be a judicial

⁶⁷⁷ See note 674 above.

⁶⁷⁸ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 111. A number of cases have recognised the parental relationship as creating a fiduciary obligation. See for example *M (K) v M (H)* (1992) 96 DLR (4th) 289; see also M Bryan, "Parents as fiduciaries: A special place in equity", (1995) 3 *International Journal of Children's Rights* 227. Institutional carers and government welfare agencies may also owe a fiduciary duty to those they undertake to protect or serve. See for example *Williams v Minister, Aboriginal Land Rights Act 1983 and Another* (1994) 35 NSWLR 497.

⁶⁷⁹ Note, however, the Commission's recommendation in Chapter 10 of this Report that equitable claims should not be excluded from the scheme.

⁶⁸⁰ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 111.

discretion to extend the limitation period in exceptional cases.⁶⁸¹ Factors to be taken into account in the exercise of that discretion included:

- the length of and reasons for delay on the part of the plaintiff;⁶⁸²
- the nature of the plaintiff's injury;
- the conduct of the defendant which resulted in the harm of which the plaintiff complains;
- the conduct of the defendant after the cause of action arose, including:
 - (a) the extent, if any, to which the defendant took steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;⁶⁸³ and
 - (b) any other conduct of the defendant which contributed to the plaintiff's delay in bringing the action;
- the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
- the extent to which the plaintiff acted properly and reasonably in the circumstances once the injury became discoverable; and
- the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

⁶⁸¹ Id, Chapter 8.

⁶⁸² In this Report, the Commission has recommended that this wording be changed to "the reasons why the plaintiff seeks to make a claim at this time". See pp 97, 99 above.

⁶⁸³ In this Report, the Commission has recommended that this wording be changed to "the extent, if any, to which the defendant resisted or co-operated with attempts by the plaintiff to ascertain facts which were or might be relevant to the plaintiff's cause of action against the defendant". See pp 96, 99 above.

The Commission concluded that its preliminary recommendations, including the exercise of judicial discretion, would adequately provide for claims based on childhood abuse.⁶⁸⁴ Consistently with its general approach of, wherever possible, avoiding the need for special provisions to deal with particular circumstances, the Commission proposed that there should not be a specific provision in relation to claims for childhood sexual abuse.⁶⁸⁵

In coming to this conclusion, the Commission gave consideration to arguments that the underlying policy rationales for limitation legislation - fairness, certainty and public policy - do not apply to claims for childhood sexual abuse. The Commission observed:⁶⁸⁶

The argument in favour of fairness to the person against whom the claim is brought assumes that the person making the claim is in a position of superior knowledge to the alleged abuser. However, a person who committed abuse will have knowledge of it and should not be allowed to claim to be surprised or disadvantaged by the delay in commencing proceedings.

The argument in favour of certainty - the need for people to be able to order their affairs without the indefinite threat of being sued - may make sense where the dispute takes place in a commercial context, and where, after a certain length of time, there is a need for business to be able to carry on as usual. However, its relevance is questionable against an abuser who has succeeded in concealing the abuse as a result of threats, emotional blackmail or misrepresentation of the nature of the abusive conduct, and whose own actions have contributed to the inability of the abused person to commence proceedings within the limitation period.

The argument in favour of the public interest in the effective working of the court system and in the speedy resolution of disputes, and the concern that the difficulty of deciding disputes where the evidence has become stale will adversely affect the public perception of the judicial system and overtax the resources of the courts, ignores the fact that many jurisdictions do not have any time bar on the prosecution of criminal offences. In those jurisdictions courts have to deal with criminal cases which may be tried a considerable period of time after the commission of the alleged offence. Where a criminal prosecution and a civil compensation claim arise from the same abusive behaviour, there seems no logical explanation why a court should be able to hear the criminal case but not to decide the civil matter. The outcome of both criminal and civil trials will hinge largely on the credibility of the person claiming to have been abused and of the alleged abuser. It would appear that, in civil cases, the potential difficulty of assessing the credibility of the parties has become confused with evidentiary problems created by delay per se. [notes omitted]

While recognising that there will be many cases where the underlying policy

⁶⁸⁴ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 113.

⁶⁸⁵ *Id.*, 114.

⁶⁸⁶ *Id.*, 112-113. These policy rationales are explained in Chapter 2 of this Report.

reasons do not apply, the Commission expressed the view that there would be some situations where the underlying policy of limitation law would be relevant. It acknowledged that some cases, for example, would be brought not against the alleged perpetrator of the abuse, but against some other party such as the perpetrator's employer and that, in such a situation, the possibility of prejudice to the defendant as a result of evidentiary difficulties may need to be considered.

The Commission also noted that the need for flexibility to accommodate claims which arise in a wide variety of circumstances could create considerable difficulty in formulating a satisfactory definition of plaintiffs who should be excluded from the scheme.⁶⁸⁷

5. SUBMISSIONS

Six of the submissions received by the Commission in response to the Discussion Paper considered this issue.⁶⁸⁸

Four respondents supported the Commission's preliminary recommendation.⁶⁸⁹

The other two respondents submitted that there should be no limitation periods for abuse claims. The Australian Plaintiff Lawyers' Association argued that special provision should be made for such claims because:⁶⁹⁰

... childhood sexual abuse is unlike any other form of personal injury in that such abuse is the most intimate and profoundly prejudicial act which can be committed against an individual.

...

... claims by victims of childhood sexual abuse are not as frequent as claims for damages for personal injuries arising out of e.g. motor vehicle accidents, workplace accidents or through the general liability of occupiers. Accordingly the question of prejudice associated with lengthy delays in the bringing of such claims must be weighed against the profound and devastating effect of such injuries and the conduct of the abuser. The effects of such abuse can be of such profound and far reaching effect that they cannot be measured in the same terms vis-a-vis prejudice to the defendant as one would normally

⁶⁸⁷ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 113.

⁶⁸⁸ Submissions 7, 10, 12, 14, 18, 20.

⁶⁸⁹ Submissions 7, 12, 14, 20.

⁶⁹⁰ Submission 10.

consider in other types of personal injuries claims.

The respondent concluded:

... the evidence after the bringing of a claim after a lengthy lapse of time must ultimately be a question for the Court at trial when considering what weight is to be attached to evidence of events long before.

A community legal service submitted that there should be no limitation period where “the plaintiff is a victim of conduct which constitutes the basis of a criminal offence”.⁶⁹¹ The idea behind the submission was to include claims for not only childhood sexual abuse, but also for other sexual abuse or domestic violence. The respondent identified the following reasons why people bringing claims for childhood sexual abuse, other sexual abuse or domestic violence might not report the criminal conduct, seek legal advice or initiate a legal claim for some time after the abuse or violence:

- (i) the enormous psychological, emotional and physical damage they have suffered;
- (ii) they may feel intimidated for many years;
- (iii) they may suffer an enormous lack of confidence because of the abuse or violence;
- (iv) they may need time (often years) to heal themselves before they feel capable of taking any external action;
- (v) they may be unable to recognise that a cause of action exists - many victims do not discover the nexus between their injuries, loss or other damage and the abuse/violence until they commence, or indeed many years after they have commenced, therapy or counselling;
- (vi) they may feel fear/shame or guilt as a result of the conduct;
- (vii) the impact of the views of and degree of support from their family and other “family” considerations; and
- (viii) many women perceive the law enforcement regime, the Police Force, lawyers and the Legal System to be male dominated and oppressive. Further, in utilising these services women often feel that they are the person who has “done wrong” and that it is their own actions and behaviour that are under scrutiny.

⁶⁹¹

Submission 18.

The respondent further submitted that the exception of domestic violence claims from limitation legislation is essential for the just consideration of those claims in that:

- (a) It will assist the Family Court in its consideration of cross vested or other actions which relate to injuries suffered as a result of domestic violence;
- (b) Women are already substantially prejudiced in these claims because of the inherent power imbalance and, in addition, as a result of the violence, the woman may have suffered psychological injury, including memory loss;
- (c) The proposal is also consistent with the respondent's view that women bringing claims related to domestic violence should be able to rely on a history of the defendant's behaviour/criminal conduct rather than being required to rely on the precise details of separate incidents. This "history" may have had considerable impact upon the substance and quantum of the woman's claim; and
- (d) If claims arising out of domestic violence are not excused from any time limitation, then many claims based on particular incidents of violence, or the "history", will be statute barred. In many instances the very incidents in question, or the "history", may have had a profound effect on the woman's mental, physical and emotional capacity to bring the claim at an earlier time. Such a result would be unjust and inequitable.

6. THE COMMISSION'S VIEW

In the view of the Commission the proposal made in the above submission demonstrates the difficulties inherent in trying to define exclusions to the general scheme. The respondent's suggestion that there should be no limitation period where the plaintiff is the victim of conduct which constitutes a criminal offence is extremely wide.

There are many forms of conduct which constitute the basis of a criminal offence and also give rise to the right to bring civil proceedings. For example, unlawfully taking property which belongs to another person may constitute the offence of stealing. It may also allow the owner of the property to bring a civil action for trespass. A driver who causes a motor vehicle accident may have committed an offence, and may also be civilly liable in negligence.

In the Discussion Paper, the Commission acknowledged that adult survivors of childhood sexual abuse may, for reasons beyond their control, be prevented from commencing proceedings within the general limitation period. The Commission also accepts that similar considerations may well apply to victims of domestic violence. However, the Commission is not persuaded to change its preliminary recommendation that such claims can be adequately provided for by the exercise of judicial discretion.

7. RECOMMENDATION

The Commission recommends that claims for childhood sexual abuse or domestic violence should not be specifically excluded from the general scheme, but should be dealt with by the exercise of judicial discretion.

CHAPTER 15

FRAUD AND FRAUDULENT CONCEALMENT

1. EXISTING LEGISLATION

The existing legislation specifies two situations in which the limitation period will be extended as a result of fraudulent conduct by the defendant.⁶⁹² Those situations are where an action is based on fraud on the part of the defendant, or where the right of action is concealed by the fraud of the defendant. In both cases the limitation period is suspended until the plaintiff has, or with reasonable diligence could have, discovered the fraud.⁶⁹³

However, there are restrictions on the application of this provision.

First, to come within the scope of the provision as an action “based on fraud”, the action must be one where it is necessary to prove fraud as an element of the claim. An action for fraudulent breach of trust, for example, would be included, but an action in conversion would not, since fraud is not a necessary element of a conversion claim.⁶⁹⁴

Second, while there is general agreement that fraudulent concealment includes equitable fraud, it would appear that where the action is based on fraud, the limitation period will be suspended only if there has been fraud in the common law sense.⁶⁹⁵ The distinction is significant, since it makes it harder for a plaintiff to invoke the protection of the provision. The definition of common law fraud is a narrow one, decided at a time when courts appeared to be intent on restricting legal liability.⁶⁹⁶ Common law fraud has been described as “notoriously difficult to prove”.⁶⁹⁷ Traditionally, it has been regarded as involving an element of “moral turpitude”. A plaintiff must be

⁶⁹² “Defendant” includes the defendant’s agent, a person through whom the defendant claims and that person’s agent.

⁶⁹³ *Limitation of Actions Act 1974* (Qld) s 38(1).

⁶⁹⁴ See for example *Beaman v ARTS Ltd* [1949] 1 KB 550.

⁶⁹⁵ See for example *Beaman v ARTS Ltd* [1949] 1 KB 550; *Applegate v Moss* [1971] 1 QB 406. But note also the observation in MD Hinson & FW Redmond, *Limitation of Actions (Queensland)* at 238 that, in this context, fraud means actionable fraud, whether actionable at law or in equity.

⁶⁹⁶ DW Greig & JLR Davis, *The Law of Contract* (1987) 852.

⁶⁹⁷ JW Carter & DJ Harland, *Contract Law in Australia* (3rd edition 1996) 362.

able to prove that the defendant made a false representation knowingly, without belief in its truth, or recklessly, without caring whether it was true or false.⁶⁹⁸ In equity, on the other hand, many activities which “were not done with an intention to cheat or defraud” are regarded as fraudulent.⁶⁹⁹ In this wider equitable sense, fraud requires only proof of the “breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience”.⁷⁰⁰

2. THE DISCUSSION PAPER

In the Discussion Paper,⁷⁰¹ the Commission observed that the need for a provision suspending the limitation period in cases of fraud or fraudulent concealment would be significantly reduced by its recommendation that there be a discovery limitation period of general application which would not commence until the plaintiff knew or, in the circumstances, ought to have known the information necessary to bring the action.⁷⁰²

However, the Commission recognised that situations may arise where the plaintiff is not able to discover the relevant information before the alternative limitation period has expired.⁷⁰³ The Law Reform Commission of Western Australia observed, in relation to such situations:⁷⁰⁴

In the ordinary case, the justifiability of protecting the defendant from stale claims decrees that the action becomes barred at this point. However, the matter is different when it is the fraud of the defendant which prevents the

⁶⁹⁸ *Derry v Peek* (1889) 14 App Cas 337 per Lord Herschell at 374.

⁶⁹⁹ RP Meagher, WMC Gummow & JRF Leane, *Equity: Doctrines and Remedies* (3rd edition 1992) 335.

⁷⁰⁰ *Nocton v Lord Ashburton* [1914] AC 932 per Viscount Haldane LC at 954.

⁷⁰¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁷⁰² *Id.*, 121-122.

⁷⁰³ In the Discussion Paper, the Commission made the preliminary recommendation that there should be a limitation period of general application which should be the lesser of three years from the date when the plaintiff knew or, in the circumstances, ought to have known the relevant information, and fifteen years from the date of the act or omission of the defendant on which the claim is based: Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 60-61. However, in this Report, the Commission has recommended that the alternative limitation period should be reduced from fifteen years to ten. See pp 69-70, 86 above.

⁷⁰⁴ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 328.

plaintiff from discovering the claim before the ultimate period expires.

This Commission considered the question of whether cases involving fraud or fraudulent concealment on the part of the defendant should be totally exempted from limitation legislation. However, it was the preliminary view of the Commission that, regardless of the conduct of the defendant, a plaintiff should be required to act reasonably once he or she is in possession of the relevant information. The Commission therefore concluded that the discovery limitation period should apply.

Nonetheless, the Commission was concerned that a defendant whose conduct has prevented a plaintiff from discovering the necessary information should not be able to rely on that conduct to deny the plaintiff the right to bring an action. The Commission's preliminary recommendation was that where:⁷⁰⁵

- an action is based upon the fraud of the defendant or the defendant's agent or of a person through whom he or she claims or his or her agent; or
- the defendant or any other person named above fraudulently conceals:
 - (a) the fact that injury has occurred; or
 - (b) that the injury was caused or contributed to by the conduct of the defendant; or
- the defendant or any other person named above knowingly misleads the plaintiff as to the appropriateness of a proceeding as a means of remedying the injury

the alternative limitation period for a claim should be suspended.

3. OTHER JURISDICTIONS

(a) Canada

Initially, the Alberta Institute of Law Research and Reform did not consider that allegations of fraudulent concealment on the part of the defendant

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Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 122.

justified special consideration. It expressed the view that:⁷⁰⁶

If a limitations Act contains a provision depriving a defendant of a limitations defence if he has fraudulently concealed facts material to a claim, and if the limitation period applicable to that claim has expired, the claimant will have a powerful incentive to allege that facts material to his claim were fraudulently concealed by the defendant. ... In terms of the reasons for a limitations system, the defendant will be no less vulnerable to an allegation of fraudulent concealment of facts than he will be to an allegation of facts which, if true, would constitute the breach of a duty owed to the claimant. Indeed, because of the persistence of the fallacy of the meritorious claimant, coupled with the emotional response a claim of fraud often produces, the defendant may be more vulnerable. In short, the reasons for a limitations system, if sound, should not be rejected because of a claimant's allegation of fraudulent concealment.

However, despite this concern, the Institute recommended that the ultimate limitation period should be suspended for fraudulent concealment by the defendant of the fact that the injury had occurred.⁷⁰⁷ The recommendation was implemented in the recently enacted Alberta limitation legislation.⁷⁰⁸ The application of this section is narrower than that of the provision proposed in Ontario, which covered concealment not only of occurrence of the injury, but also of the fact that the injury was caused by the defendant or that a claim with respect to the injury would be appropriate.⁷⁰⁹

(b) New Zealand

The Law Commission in New Zealand agreed that, in some circumstances, the long stop or ultimate limitation period should be overridden if the conduct of the defendant prevented the plaintiff from discovering information relevant to the claim. However, the New Zealand Commission qualified its recommendation:⁷¹⁰

We would emphasise that the conduct must be deliberate and designed to conceal. We favour something more than a simple "fraud" exception because of the wide scope of "equitable fraud" and the risk of expansion of the exception at the expense of the primary object of the long stop.

⁷⁰⁶ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 294-295.

⁷⁰⁷ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 40.

⁷⁰⁸ *Limitations Act 1996* (Alta) s 4(1). The Act is not yet in operation.

⁷⁰⁹ *Limitations (General) Bill 1992* (Ont) cl 15(7)(b).

⁷¹⁰ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 101.

(c) Western Australia

The Law Reform Commission of Western Australia adopted a different approach. The Commission noted that its recommendations differed from the Alberta legislation and the Ontario proposals because they included a judicial discretion, not present in either of the Canadian schemes, to extend the limitation period in exceptional cases:⁷¹¹

The Commission's recommended discretion allows the court to recognise cases where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors, and the existence of fraudulent concealment would be an important issue in weighing these considerations.

The Commission concluded that, in view of its recommendation relating to judicial discretion, there would be no need for a separate rule dealing with fraudulent concealment.⁷¹²

(d) England

In England, limitation legislation was amended in 1980 and references to the equitable doctrine of concealed fraud were removed.⁷¹³ The amendments were a response to the liberal interpretation of fraudulent concealment by the courts.⁷¹⁴ The doctrine was replaced by the concept of deliberate concealment, which enables an extension of the limitation period if the defendant has concealed relevant facts, intending the plaintiff not to discover the truth or reckless as to whether the plaintiff discovered the truth or not.⁷¹⁵

The Law Commission has provisionally recommended that there should be no long stop or ultimate limitation period where the defendant has deliberately concealed from the plaintiff the facts relevant to its proposed

⁷¹¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 329.

⁷¹² *Ibid.*

⁷¹³ See for example *Sheldon v RHM Outhwaite Underwriting Agencies Ltd* [1996] AC 102 per Lord Browne-Wilkinson at 145.

⁷¹⁴ In *Tito v Waddell* [1977] Ch 106, Megarry V-C observed at 245 that "as the authorities stand, it can be said that in the ordinary use of language not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed', since any unconscionable failure to reveal is enough".

⁷¹⁵ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 147-148.

core regime, that is:⁷¹⁶

- (i) the facts constituting the cause of action;
- (ii) the identity of the defendant; and
- (iii) that the cause of action is significant.

However, the Law Commission was of the view that the long stop should apply where delay in the plaintiff's discovery of the relevant facts is not the result of the defendant's deliberate concealment. The Law Commission acknowledged that its recommendation would mean that an action based on fraud would not, of itself, override the long stop, though in some, if not many, cases an action based on fraud may have an element of deliberate concealment which would bring it within the exception to the limitation period.⁷¹⁷

4. SUBMISSIONS

Two of the submissions received by the Commission in response to its Information Paper⁷¹⁸ commented on the need to reform this provision because of its limited application and lack of flexibility.⁷¹⁹

Four of the submissions received in response to the Discussion Paper also commented on this issue.⁷²⁰ Three respondents agreed with the Commission's preliminary recommendation.⁷²¹ However, the Queensland Law Society Inc submitted that the three year discovery limitation period should also be suspended in the event of fraudulent concealment by a defendant. This submission was based on the respondent's view that:⁷²²

... the situation may be readily envisaged where a Defendant has disclosed

⁷¹⁶ Id, 307.

⁷¹⁷ Id, 305.

⁷¹⁸ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁷¹⁹ Submissions 3, 9 (IP).

⁷²⁰ Submissions 10, 14, 18, 20.

⁷²¹ Submissions 10, 14, 18.

⁷²² Submission 20.

information sufficient to see the limitation period commence to run, but has concealed other information which may have prompted a Plaintiff to commence proceedings.

The respondent considered that neither suspension of the alternative limitation period nor reliance on the judicial discretion to extend time would be sufficient to protect the interests of plaintiffs.

5. THE COMMISSION'S VIEW

After further consideration, the Commission has revised its preliminary recommendation. The Commission agrees with the Law Reform Commission of Western Australia that cases involving fraud or fraudulent concealment on the part of the defendant are adequately provided for in the general legislative scheme which it has recommended, and that, consequently, there is no need to create a specific exemption.

The Commission also believes that this approach avoids the difficulties, demonstrated by the variety of responses in other jurisdictions, involved in defining the scope of an appropriate exemption.

Under the Commission's general scheme, a plaintiff would have a period of ten years from the date on which the conduct, act or omission giving rise to the claim occurred in which to discover the defendant's fraud and to commence proceedings. A plaintiff who discovered the fraud after the expiration of the ten year alternative limitation period would still be able to apply to the court to exercise its discretion to extend the limitation period. The fraudulent conduct of the defendant or the defendant's concealment of information which would have enabled or prompted the plaintiff to make the claim would be relevant factors for the court to take into account in deciding whether to exercise its discretion to grant an extension. The factors to be considered by the court include:⁷²³

- the reasons why the plaintiff seeks to make a claim at this time;
- the nature of the plaintiff's injury;
- the position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question;
- the conduct of the defendant which resulted in the harm of which the

⁷²³

See p 99 above.

plaintiff complains;

- the conduct of the defendant after the injury occurred, including:
 - (a) the extent, if any, to which the defendant resisted or co-operated with attempts by the plaintiff to ascertain facts which were or might be relevant to the plaintiff's cause of action against the defendant; and
 - (b) any other conduct of the defendant which contributed to the plaintiff's timing in bringing the action.

The Commission believes that reliance on the exercise of judicial discretion allows the court sufficient flexibility to protect the interests of potential plaintiffs by extending the limitation period in an appropriate case without detracting from the simplicity of its general scheme.

6. RECOMMENDATION

The Commission recommends that claims which involve fraud on the part of the defendant or the defendant's agent or in which the defendant or the defendant's agent has concealed relevant information from the plaintiff should not be excluded from the general scheme recommended by the Commission, but should be dealt with by the exercise of judicial discretion.

CHAPTER 16

MISTAKE

1. EXISTING LEGISLATION

The existing legislation enables the limitation period in cases where the action is for relief from the consequences of mistake to be suspended until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it.⁷²⁴

2. THE DISCUSSION PAPER

In the Discussion Paper,⁷²⁵ the Commission considered whether the scope of the provision should be broadened.⁷²⁶ A respondent to the Commission's Information Paper⁷²⁷ had criticised the narrowness of the provision.⁷²⁸ The respondent noted that, in its present form, the legislation would enable a defendant to take advantage of a mistaken belief on the part of the plaintiff as to, for example, the identity of the person against whom proceedings should be commenced.⁷²⁹

Take ... the simple case of a plaintiff who commences proceedings against the wrong defendant - possibly, for example, a related company of the correct defendant.

In such a case, the limitation period would not be suspended under the existing legislation, since the action is not one "for relief from the consequences of mistake".

The respondent proposed that a postponement of the limitation period should be available where the plaintiff has failed to institute proceedings because of some mistake on the part of the plaintiff, provided that the plaintiff proves that

⁷²⁴ *Limitation of Actions Act 1974* (Qld) s 38(1)(c).

⁷²⁵ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁷²⁶ *Id.*, 124-125.

⁷²⁷ Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997).

⁷²⁸ Submission 3 (IP).

⁷²⁹ *Ibid.*

the defendant was aware of the mistake and knowingly stood by and failed to correct the mistake.

However, the Commission was not persuaded that the change proposed by the respondent would be necessary. The Commission expressed the view that, under its proposed scheme, the kind of mistake referred to in the submission would already be catered for by the Commission's preliminary recommendation that the limitation period should not commence until the plaintiff knew or, in the circumstances, ought to have known certain information, including the identity of the defendant and that, in exceptional cases, the court should have a residual discretion to extend the limitation period. The Commission's preliminary recommendation was that it was not necessary to extend the present scope of the circumstances in which the limitation period would be suspended.⁷³⁰

The Commission did not refer to the wider issue of whether it would be necessary to retain the existing provision in a discovery-based system.

3. OTHER JURISDICTIONS

In other jurisdictions where a discovery-based limitation system has been implemented or recommended, no specific provision has been made for mistake. The inference to be drawn from this omission is that the claim is to be treated as subject to the general legislative scheme, so that the plaintiff would have a specified period of time from discovery of the relevant information in which to commence proceedings, subject to the expiration of the ultimate or long stop period.

4. SUBMISSIONS

Two of the submissions received by the Commission in response to the Discussion Paper supported the Commission's preliminary recommendation.⁷³¹ None of the other respondents to the Discussion Paper addressed the issue.

5. THE COMMISSION'S VIEW

⁷³⁰ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 125.

⁷³¹ Submissions 14, 20.

In Chapter 8 of this Report, the Commission has recommended that there should be a limitation period of general application which is the lesser of three years from the date when the plaintiff knew or, in the circumstances, ought to have known that:⁷³²

- the injury had occurred;
- the injury was attributable to the conduct of some other person; and
- the injury, assuming liability on the part of some other person, warranted bringing a proceeding;

or

ten years after the date on which the conduct, act or omission giving rise to the claim occurred.

This recommendation necessitates consideration as to whether, in the context of a discovery-based limitation scheme, there is a need for a specific provision dealing with situations of mistake on the part of the plaintiff.

To a large extent, the justification for the inclusion of such a provision is removed when the discovery limitation period does not begin to run until the plaintiff knows or, in the circumstances, ought to know certain information relevant to making the claim. However, situations may arise where the plaintiff does not discover the mistake until after the expiration of the alternative ten year period, by which time an action would be statute-barred. The question arises as to whether, in such a situation, the alternative limitation period should be suspended.

This is an approach which has not been adopted in any of the other jurisdictions where there is, or consideration has been given to, a discovery-based limitation scheme. The view expressed by the Law Commission in England is that:⁷³³

... the arguments in favour of a long-stop are only overridden where the reason that the plaintiff does not discover the relevant facts is because of the defendant's deliberate concealment. Where, in contrast, the delay in the plaintiff's discovery of the relevant facts is not because of the defendant's deliberate concealment, we are of the view that the long-stop should apply. The fact that the action was for relief from the consequences of a mistake would not therefore override the long-stop.

⁷³² See pp 85-86 above.

⁷³³ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 305.

This Commission agrees that there should not be an automatic suspension of the alternative limitation period because of mistake on the part of the plaintiff. The Commission believes that the factors it has identified as relevant to the exercise of judicial discretion to extend the limitation period⁷³⁴ are sufficiently widely drawn to allow the court to protect the interests of the plaintiff in an appropriate case by granting an extension of time to commence proceedings.

6. RECOMMENDATION

The Commission recommends that the legislation should not include a specific provision suspending the limitation period in circumstances where there has been a mistake on the part of the plaintiff.

⁷³⁴

See p 99 above.

CHAPTER 17

CLAIMS FOR THE RECOVERY OF LAND

1. THE DOCTRINE OF ADVERSE POSSESSION

Situations may arise where a person who is not the rightful owner of land occupies the land without the permission of the rightful owner. This kind of occupation of land may be deliberate, for example by a squatter who is intentionally trespassing on the land, or it may be inadvertent, for example by a neighbouring landowner who unwittingly occupies the property.

The person wrongfully dispossessed of the land has a right to bring proceedings against the occupier to recover the land. However, in certain circumstances, limitation law operates after a period of time to deny the rightful owner the opportunity to bring such an action. When this happens, the occupier is able to continue in occupation undisturbed except by anyone who can prove a better legal right to possession of the land. This is known as the doctrine of adverse possession.

The doctrine of adverse possession is generally justified on the basis that it creates certainty in dealings with land.⁷³⁵

The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called into question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation.

To put it another way, it makes the title to land follow the physical occupation of the actual boundaries, rather than divorcing the “paper title” from reality.⁷³⁶

However, it has not been without criticism. “Squatters titles” have been described as “land-stealing”, savouring of remedies of self-help, and the morality of the doctrine of adverse possession has been questioned.⁷³⁷

Further, adverse possession constitutes a qualification of the concept of indefeasibility of registered title.⁷³⁸ On the other hand, it has been suggested

⁷³⁵ *Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 per Sir Thomas Plumer MR at 140, 37 ER 527 at 577. See also Megarry and Wade, *The Law of Real Property* (5th edition 1984) 1030 ff.

⁷³⁶ MJ Goodman, “Adverse Possession of Land - Morality and Motive”, (1970) 33 *The Modern Law Review* 281, 282.

⁷³⁷ *Id.*, 281.

⁷³⁸ See notes 747, 748 below.

that there may be situations where it would be unfair not to recognise possession of abandoned property over a long period, even if the true owner's interest is registered.⁷³⁹

2. EXISTING LEGISLATION

Under the existing Queensland legislation, an action to recover land may not generally be brought more than twelve years after the date when the cause of action accrued.⁷⁴⁰ If the plaintiff was under a disability when the cause of action accrued, the claim may be brought up to six years after the person ceases to be under a disability or dies, but may not be brought after thirty years from the accrual date.⁷⁴¹ The cause of action accrues when a plaintiff who was, by right, in possession of land, is dispossessed or discontinues possession.⁷⁴² However, the cause of action is deemed not to accrue unless there is a person in adverse possession of the land, in whose favour the period of limitation can run.⁷⁴³

The effect of the expiration of the limitation period is to extinguish the plaintiff owner's title to the land.⁷⁴⁴ This result is different from the effect of the expiration of the limitation period for most other claims, which is merely to bar the remedy provided by successful litigation and to leave the underlying right intact.⁷⁴⁵

The occupier may be entitled to apply to become the registered owner of the land.⁷⁴⁶ Generally, the registered owner of an interest in real property holds that interest subject to other registered interests affecting the property, but free from all other interests.⁷⁴⁷ The purpose of registration is:⁷⁴⁸

... to save persons dealing with registered proprietors from the trouble and

⁷³⁹ *The Laws of Australia* 5.10 [77].

⁷⁴⁰ *Limitation of Actions Act 1974* (Qld) s 13.

⁷⁴¹ *Id.* s 29(1), 29(2)(b).

⁷⁴² *Id.* s 14(1).

⁷⁴³ *Id.* s 19(1).

⁷⁴⁴ *Id.* s 24(1).

⁷⁴⁵ See pp 10-11 above.

⁷⁴⁶ *Land Title Act 1994* (Qld) s 99; *Property Law Act 1974* (Qld) s 99.

⁷⁴⁷ *Land Title Act 1994* (Qld) s 184.

⁷⁴⁸ *Gibbs v Messer* [1891] AC 248 per Lord Watson at 254.

expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

Since it can operate to defeat the title of a registered owner who has been dispossessed or who has discontinued possession, the doctrine of adverse possession is a qualification on the principle of title to land by registration.

However, title to registered land can be acquired by adverse possession only in accordance with specific legislative provisions which set out the procedure to be followed.

Under the *Land Title Act 1994* (Qld), the occupier may apply to the Registrar of Titles to be registered as the owner of the land. The Registrar has a statutory obligation to notify the registered owner that the application has been made,⁷⁴⁹ and the applicant must give public notice of it.⁷⁵⁰ The registered owner may then lodge a caveat over the land.⁷⁵¹ If a caveat is lodged and the Registrar is satisfied that the owner's title has not been extinguished by the expiration of the limitation period, the Registrar may refuse the application.⁷⁵² There is provision for a compromise which involves registration of the applicant as holder of a lesser interest in the land.⁷⁵³ If the Registrar is not satisfied that the owner's title has been extinguished, the Registrar may require the registered owner to commence proceedings in the Supreme Court within a specified time to recover the land.⁷⁵⁴ Failure to comply will cause the caveat to lapse.⁷⁵⁵ If no caveat is lodged or if the caveat has lapsed, and if the Registrar is satisfied that the applicant is an adverse possessor, the Registrar may register the applicant as owner of the land and cancel the registration of the previous owner.⁷⁵⁶

Adverse possession resulting from encroachment, whether intentional or otherwise, is dealt with by the *Property Law Act 1974* (Qld). That Act enables

⁷⁴⁹ *Land Title Act 1994* (Qld) s 103(1).

⁷⁵⁰ *Id.* ss 18(3), 103(2).

⁷⁵¹ *Id.* s 104.

⁷⁵² *Id.* s 107(1)(a).

⁷⁵³ *Id.* s 107(1)(b), 107(2), 107(3), 107(4).

⁷⁵⁴ *Id.* s 105(1).

⁷⁵⁵ *Id.* s 105(2). The other circumstances in which the caveat will lapse are specified in s 105(3). A lapsed caveat or a caveat which has been withdrawn may be revived, but only with the leave of the Supreme Court (s 106).

⁷⁵⁶ *Land Title Act 1994* (Qld) s 108.

a court, if it deems just, to order the land to be transferred to the encroaching owner, or to grant to the encroaching owner any estate or interest in the land.⁷⁵⁷ The legislation also includes a number of factors which the court may take into consideration in coming to its decision about whether to make such an order, including the situation and value of the land, the nature and extent of the encroachment, the character of the encroaching building (including a wall) and the circumstances in which the encroachment was made.⁷⁵⁸

3. OTHER JURISDICTIONS

Approaches to reform of limitation law in relation to actions for the recovery of land have varied widely, according to the system of land title in operation in various jurisdictions.

(a) Canada

(i) British Columbia

In British Columbia, the system of statutory registration of title to land does not allow for the title of a registered owner to be defeated on the basis of the length of an adverse possessor's occupation. The Law Reform Commission of British Columbia recognised that the rights of a registered owner had long prevailed over the acquisition of title by adverse possession.⁷⁵⁹

... should [the registered owner] have the right to recover possession indefinitely? If he did not have such a right, the policy behind the *Land Registry Act* would be defeated. The register could reflect an ownership that was virtually meaningless. Prospective purchasers could not, therefore, rely on the register and, to protect themselves, would have to investigate possession.

The Commission therefore recommended that there should be no time limit on actions to recover land where an owner has been dispossessed in such a way that the original dispossession would amount to trespass.⁷⁶⁰ The Commission's recommendation was

⁷⁵⁷ *Property Law Act 1974* (Qld) s 185(1)(b).

⁷⁵⁸ *Id.*, s 185(2).

⁷⁵⁹ Law Reform Commission of British Columbia, Project No 6: *Report on Limitations Part II - General* (1974) 50.

⁷⁶⁰ *Ibid.*

subsequently implemented.⁷⁶¹

(ii) Alberta

The Alberta Law Reform Institute initially proposed that limitation legislation should not apply to an order for the recovery of property.⁷⁶² The Institute identified a number of objectives which could be served by the doctrine of adverse possession but concluded, in the light of changing trends in land settlement and particularly of legislative developments concerning title to land, that the doctrine was no longer relevant to contemporary conditions in Alberta.⁷⁶³ However, the Institute subsequently decided that, although the substantive law governing adverse possession needed reform, it was inappropriate to attempt such reform in the context of a review of limitation law. It therefore recommended that claims for the recovery of land should not be subject to its proposed discovery period, but should be subject to the ultimate limitation period.⁷⁶⁴ This recommendation was implemented by the recently enacted Alberta limitation legislation.⁷⁶⁵

(b) New Zealand

The New Zealand Law Commission formed the view that the underlying purpose of the doctrine of adverse possession was “largely, if not completely spent”. It recommended that claims for the recovery of land should be excluded from limitation legislation in situations where the original dispossession amounted to trespass.⁷⁶⁶

(c) England

In England, the Law Commission, like the Alberta Institute, was of the view that it would be inappropriate to conduct a fundamental review of the system of adverse possession within the scope of an investigation of the law on

⁷⁶¹ *Limitation Act* RSBC 1979 s 12.

⁷⁶² Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 213.

⁷⁶³ *Id.*, 209-211.

⁷⁶⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 39.

⁷⁶⁵ *Limitations Act 1996* (Alta) s 3(4). The Act is not yet in operation.

⁷⁶⁶ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 120-122.

limitations. The Commission therefore concentrated on the issue of whether actions to recover land should be subject to the new general scheme which it proposed.⁷⁶⁷ It came to the conclusion that imposition of a discovery period could lead to a limitation period which was unacceptably short in some cases. The Commission also believed that a discoverability test would cause problems of uncertainty because it would be necessary to ascertain not only when the adverse possession began, but when the plaintiff knew or ought to have known that the defendant was in possession of the land.⁷⁶⁸

... in most contexts, the degree of uncertainty inherent in applying a discoverability test is a price worth paying for the fairness of the result. But in relation to adverse possession, and its effect on the ownership of land, we consider the need for certainty to override any considerations which might justify the application of a discoverability test.

The Law Commission provisionally recommended that actions to recover land should be subject to a long-stop limitation period commencing on the date of the adverse possession or, if later, the date on which the plaintiff's interest becomes an interest in possession.⁷⁶⁹

(d) Western Australia

The Law Reform Commission of Western Australia expressed the view that claims for the recovery of land should not be subject to the discovery limitation period:⁷⁷⁰

... the running of the limitation period for such actions affects substantive property rights, by depriving the former owner of his rights and conferring property rights on the adverse possessor. For this reason, the discoverability principle cannot be easily applied to actions for the recovery of land. For the sake of certainty, it is essential that the limitation period run from some certain point in time, and should expire at some certain point which is known in advance.

However, the Western Australian Commission also concluded that neither of the general periods should apply, and that claims for the recovery of land should continue to be subject to their own special rules.⁷⁷¹ It recommended that such claims be excepted from the general limitation principles which

⁷⁶⁷ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 361.

⁷⁶⁸ *Id.*, 362.

⁷⁶⁹ *Id.*, 364.

⁷⁷⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 343.

⁷⁷¹ *Ibid.*

under its recommendations would apply to most other actions.⁷⁷²

4. THE DISCUSSION PAPER

In its Discussion Paper,⁷⁷³ this Commission made the preliminary recommendation that there should be a limitation period of general application which is the lesser of:⁷⁷⁴

- three years from the date when the plaintiff knew or, in the circumstances, ought to have known information relevant to making the claim; or
- fifteen years⁷⁷⁵ from the date of the act or omission of the defendant which gives rise to the claim.

Because of the consequences of the expiration of the limitation period in an action for recovery of land, the Commission noted that it would be necessary to consider whether the new approach recommended by the Commission would be appropriate in this context, or whether such a claim should be the subject of a special rule.⁷⁷⁶

The Commission did not make a preliminary recommendation on these issues. Rather, the Commission specifically sought submissions on whether actions for the recovery of land should be subject to the general limitation period proposed by the Commission or whether there should continue to be special rules for such claims.

5. SUBMISSIONS

Only two submissions received in response to the Discussion Paper considered the issues raised by the Commission concerning the doctrine of

⁷⁷² Id, 344.

⁷⁷³ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁷⁷⁴ Id, 60-61.

⁷⁷⁵ In this Report, the Commission has recommended that the alternative limitation period be reduced from fifteen years to ten years. See pp 69-70, 86 above.

⁷⁷⁶ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 126.

adverse possession.⁷⁷⁷ One respondent, the Australian Finance Conference, is a national finance industry association representing over forty members. It holds the view that it would be inappropriate to apply the general limitation period proposed by the Commission to claims for the recovery of land which is in adverse possession:⁷⁷⁸

If a shorter 3 year discovery period were to apply to actions for recovery of land, it would be much easier to establish adverse possession and extinguish the title of the landowner. To shorten the limitation period in such a way may have negative impacts for our land title system and the concept of land ownership as we now know it. This is a result which should be avoided.

AFC believes it would be more appropriate to apply a limitation period of 15 years to this type of action. This would bring the limitation period into line with the ultimate limitation period in the general scheme and so achieve some internal legislative consistency.

This respondent also suggested that some special rules may be necessary to define the scope of adverse possession claims and to clarify when such claims commence. In particular, it considered that there would need to be some explanation of what constitutes adverse possession and the circumstances in which it applies.

The Queensland Law Society Inc also supported the view that special provisions should apply to claims for the recovery of land:⁷⁷⁹

This is so for reasons including the fact that the Torrens title system provides for effective warranties of title to land by the Crown. Land owners are, and should be able to repose greater confidence in the Crown's warranties concerning land, than warranties from individual persons in relation to other property or rights.

The "discovery"/three year limitation period is inappropriate to claims for recovery of land. To adopt the same would create in land owners an enhanced duty to monitor or perhaps safeguard their land. Such changes would also act to the likely detriment of the status of land as a security or investment.

The nature and status of land holding is not inconsistent with a general limitation period of fifteen years from the date of the act or omission of the Defendant giving rise to the claim.

The respondent also raised the issue of the limitation period for a claim for the recovery of land when the plaintiff is under a disability. At present, if the plaintiff was under a disability when the cause of action accrued, the claim

⁷⁷⁷ Submissions 16, 20.

⁷⁷⁸ Submission 16.

⁷⁷⁹ Submission 20.

may be brought up to six years after the person ceases to be under a disability or dies, but may not be brought after thirty years from the accrual date.⁷⁸⁰ The respondent proposed that the general limitation period of fifteen years,⁷⁸¹ suspended during the period of any disability, may be sufficient.

6. THE COMMISSION'S VIEW

The Commission agrees that a review of limitation law should not involve consideration of the substantive law of adverse possession. The Commission has therefore confined its comments to the application of its proposed general scheme to actions to recover land.

The Commission accepts that, because expiration of the limitation period in such claims has the effect of extinguishing the title of the former owner and conferring property rights on the person in adverse possession, the imposition of a three year discovery period would be inappropriate in this context.

However, the Commission believes that it would not cause significant injustice or inconvenience to subject claims for the recovery of land to its proposed alternative period. In this Report the Commission has recommended that, subject to the exercise of judicial discretion to extend the limitation period,⁷⁸² the general alternative limitation period should be ten years.⁷⁸³ At present, the limitation period for claims to recover land is twelve years. The application of the general period would therefore have the effect of reducing the limitation period by two years.

In the view of the Commission, a ten year limitation period would give claimants adequate time to commence proceedings. In those rare cases where exceptional circumstances exist to justify a longer period, the plaintiff would be able to apply to the court for an extension of time. The Commission's general scheme would also result in suspension of the alternative limitation period during any time when the plaintiff was under a disability.

The application of the general alternative period would have the added

⁷⁸⁰ *Limitation of Actions Act 1974* (Qld) s 29(1), s 29(2)(b).

⁷⁸¹ In this Report, the Commission has recommended that the alternative limitation period be reduced from fifteen years to ten. See pp 69-70, 86 above.

⁷⁸² See Chapter 9 of this Report.

⁷⁸³ See note 781 above.

advantage of avoiding the need for a special provision with a different limitation period, and therefore assist in ensuring the system is as simple and consistent as possible.

7. RECOMMENDATION

The Commission recommends, in relation to claims for the recovery of land, that the limitation period should be ten years from the date of adverse possession or, if later, from the date on which the plaintiff's interest became an interest in possession. The alternative limitation period should be suspended during any period when the plaintiff is under a disability. The three year discovery period should not apply.

CHAPTER 18

CLAIMS RELATING TO MORTGAGES

1. EXISTING LEGISLATION

The present Queensland legislation contains a number of provisions which concern actions relating to mortgages.

For example, an action may not be brought to redeem mortgaged land of which the mortgagee has been in possession for a period of twelve years.⁷⁸⁴ The following limitation periods also apply:

- for an action to recover money secured by a mortgage or other charge on real property - twelve years;⁷⁸⁵
- for an action to recover money secured by a mortgage or other charge on personalty - twelve years;⁷⁸⁶
- for a foreclosure action in respect of mortgaged personal property - twelve years from the date on which the right to foreclose accrued;⁷⁸⁷
- for an action to recover arrears of interest payable in respect of money:
 - secured by a mortgage or other charge; or
 - payable in respect of the proceeds of the sale of land;- six years from the date on which the interest became due;⁷⁸⁸
- for an action to recover damages in respect of such arrears - six years from the date on which the interest became due.⁷⁸⁹

⁷⁸⁴ *Limitation of Actions Act 1974* (Qld) s 20.

⁷⁸⁵ *Id.*, s 26(1).

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Id.*, s 26(2). However, if after the date on which the right to foreclose accrued, the mortgagee was in possession of the mortgaged property, the right to foreclose is deemed not to have accrued until the date on which the mortgagee's possession discontinued.

⁷⁸⁸ *Id.*, s 26(5).

⁷⁸⁹ *Ibid.*

The limitation period for a foreclosure action in respect of mortgaged land is determined by the provisions of the Act relating to actions to recover land.⁷⁹⁰

2. ISSUES RAISED BY THE EXISTING LEGISLATION

These provisions give rise to the question whether all actions relating to mortgages of personalty should be subject to statutory limitation periods. There is currently no statutory limitation period in Queensland for an action to redeem mortgaged personal property. New South Wales,⁷⁹¹ the Australian Capital Territory⁷⁹² and the Northern Territory⁷⁹³ are the only jurisdictions in Australia where limitation legislation applies to all actions relating to mortgaged personalty.

The other question which arises is whether actions relating to mortgages should be subject to the general legislative scheme proposed by the Commission, or whether special provision should be made for them.

3. OTHER JURISDICTIONS

(a) Canada and New Zealand

The Alberta Law Reform Institute recommended that there should be no exception from the general scheme in respect of mortgages, and that approach is reflected in the recently enacted legislation.⁷⁹⁴ However, the Ontario Bill retained special provisions for mortgages. It provided that there be no limitation period in respect of a proceeding by a debtor in possession of collateral to redeem it,⁷⁹⁵ or by a creditor in possession of collateral to realize on it.⁷⁹⁶

⁷⁹⁰ Id, s 26(4).

⁷⁹¹ *Limitation Act 1969* (NSW) ss 41-43.

⁷⁹² *Limitation Act 1985* (ACT) ss 23-25.

⁷⁹³ *Limitation Act 1981* (NT) ss 26-28.

⁷⁹⁴ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 39-40; *Limitations Act 1996* (Alta).

⁷⁹⁵ *Limitations Bill 1992* (Ont) cl 16(f).

⁷⁹⁶ Id, cl 16(g).

The New Zealand Law Commission, like the Alberta Law Reform Institute, has also recommended that the general limitation periods should apply.⁷⁹⁷

(b) Western Australia

The Law Reform Commission of Western Australia considered that the three year discovery period would not be appropriate with respect to mortgages of land.⁷⁹⁸

If the mortgagor has only three years from the date when payment first becomes due to exercise his right to redeem, this substantially cuts down the equitable right of redemption ... If the mortgagee must exercise remedies of recovery of possession or foreclosure within three years, as opposed to the 12 years given by the present law, the result will be that taking such steps to enforce the security will become much more common. This would not be in the interests of either mortgagors or of society generally. The Commission does not believe it would be right for it to make any recommendation that would increase reposessions and mortgagee sales, at a time when economic circumstances make such events all too common.

However, the Commission saw no reason why the ultimate limitation period should not apply. It therefore recommended that, in relation to mortgages of land, actions by a mortgagor to redeem, and actions by a mortgagee to recover possession, foreclose or recover principal money or interest on that money, should be subject to the ultimate period but not the discovery period.⁷⁹⁹ The effect of this recommendation would be to increase the limitation period for claims for interest from six to fifteen years and, in the other situations, from twelve to fifteen years. The Commission preferred this solution, rather than merely preserving the existing rules, because of its reluctance "to preserve another set of special rules unless there is no other satisfactory alternative".⁸⁰⁰

In relation to mortgaged personalty, the Western Australian Commission, consistently with its view that limitation periods should apply to all actions of equitable origin which are not presently subject to a statutory period, endorsed the New South Wales approach⁸⁰¹ and recommended that actions

⁷⁹⁷ New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (October 1988) 122-123.

⁷⁹⁸ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 366.

⁷⁹⁹ *Id.*, 367.

⁸⁰⁰ *Id.*, 366.

⁸⁰¹ See note 791 above.

relating to mortgaged personalty should be subject to limitation legislation.⁸⁰² The Commission considered that concerns about not encouraging the precipitate enforcement of security did not have the same force as they did in relation to mortgaged realty. It therefore recommended that there should be no special limitation rules for mortgages of personalty, and that actions in relation to such mortgages should be subject to the general discovery and ultimate periods.⁸⁰³

(c) England

In relation to mortgages of real property, the Law Commission came to a similar conclusion as that reached by the Western Australian Commission. The Law Commission expressed its concern that:⁸⁰⁴

... in practice the result of reducing to three years the limitation period for actions based on mortgages ... would be to increase pressure on mortgagees to take action to recover the debt far sooner than they otherwise would have done, and lead to an unacceptable increase in the number of repossessions.

The Law Commission also considered that a limitation period of only three years could be viewed as seriously cutting down the effectiveness of the mortgagor's equity of redemption. It therefore provisionally recommended that claims relating to mortgages of real property should be subject to the proposed scheme only to the extent of the ultimate or long-stop period, and that the discovery limitation period should not apply.⁸⁰⁵

4. THE DISCUSSION PAPER

This Commission did not make any preliminary recommendations on these issues in the Discussion Paper.⁸⁰⁶ Rather, the Commission specifically sought submissions on the following questions:⁸⁰⁷

⁸⁰² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 367.

⁸⁰³ *Id.*, 368.

⁸⁰⁴ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 367.

⁸⁰⁵ *Id.*, 368-369.

⁸⁰⁶ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁸⁰⁷ *Id.*, 130-131.

- Should actions for the redemption of mortgaged personalty be subject to limitation legislation?
- Should actions concerning
 - (a) mortgaged realty;
 - (b) mortgaged personaltybe subject to the general scheme proposed by the Commission?
- If not, what limitation period should apply?
- For the purposes of limitation legislation, should there be any distinction between legal mortgages and equitable mortgages?

5. SUBMISSIONS

Only three of the submissions received by the Commission in response to the Discussion Paper referred to these questions.⁸⁰⁸

A community legal service noted that, if claims relating to mortgages were made subject to general limitations law, in many cases the limitation period would be substantially reduced from any limitation period applicable under the current law. The respondent was concerned that, as a result, mortgagors would be afforded substantially less protection than is currently available under the existing legislation and, further, that reducing the limitation period would restrict the time in which parties could negotiate a solution, thereby encouraging mortgagees to institute legal proceedings to enforce their rights.⁸⁰⁹

Another respondent, the Australian Finance Conference, also supported the Western Australian Commission's view that claims relating to mortgaged land should not be subject to the proposed three year discovery period. In addition to those reasons put forward by the Western Australian Commission, the respondent observed:⁸¹⁰

Apart from the possibility of market disruption/volatility and possible economic hardship that mortgagors may experience if a three year limitation period were

⁸⁰⁸ Submissions 16, 18, 20.

⁸⁰⁹ Submission 18.

⁸¹⁰ Submission 16.

to apply to actions under mortgages, there are also negative consequences for mortgagees.

Mortgaged realty often involves large outlays, and our members would like the discretion that time allows to give the borrower the opportunity to remedy the default. In fact, it is preferable to have more time to enforce mortgages as this gives the mortgagee greater flexibility to adjust its actions depending on market changes, the state of the economy, the nature of the property and the financial status of the mortgagor.

In particular, the respondent considered a three year period inadequate for complicated commercial developments and rural properties:

For example, in the case of a retail centre still under construction at the time of payment default, a longer time frame would allow the financier to complete construction and have the property tenanted prior to sale, with the aim of making the property more saleable. In such circumstances, the additional flexibility of a longer time frame enables the mortgagee to act in a manner which will minimise its loss and maximise the return to the customer, so producing a result which is in the interests of all parties.

The respondent also agreed that actions for the redemption of mortgaged personalty should be included in the statutory limitations scheme. While noting that the existing situation caused few real problems in practice, the respondent saw merit in providing certainty by providing a general set of rules with few exceptions. It also considered it would be inappropriate to impose time limits on actions concerning real property while leaving actions for redemption of mortgaged personalty “at large”. The respondent was concerned that a mortgagor should have sufficient time to exercise his or her rights, since expiration of the limitation period extinguishes the mortgagor’s title to the property.⁸¹¹ However, it also accepted that there are significant differences between real property and personal property in terms of their market value and the community’s perception of their importance, and that it would be appropriate to recognise these differences in the context of limitation periods. The respondent therefore expressed the view that the general scheme proposed by the Commission should apply to actions concerning mortgaged personalty.

The Queensland Law Society Inc submitted that, for the purposes of limitation legislation, there ought to be no distinction between legal mortgages and equitable mortgages. The respondent observed that, although the available remedies may differ depending on registration of the mortgage, the common contractual issues governing the creation of the mortgage relationship cannot justify any distinction between the underlying rights.⁸¹²

⁸¹¹ *Limitation of Actions Act 1974* (Qld) s 24.

⁸¹² Submission 20.

6. THE COMMISSION'S VIEW

In the view of the Commission, the existing provisions relating to mortgages, which were adopted from earlier English legislation, are no longer applicable to contemporary circumstances, and should be reviewed.

The Commission agrees, for the reasons put forward by the Law Reform Commission of Western Australia and the English Law Commission and in the submissions to the Discussion Paper, that the three year discovery limitation period should not apply to claims relating to mortgaged interests in land.

The Commission further agrees that actions concerning the redemption of mortgaged personalty should be subject to the statutory scheme, and that the general limitation periods proposed by the Commission should apply to claims concerning mortgaged personalty.

In Chapter 10 of this Report, the Commission has recommended that equitable claims should generally be subject to the Commission's proposed legislative scheme. This recommendation would therefore include claims relating to equitable mortgages.

7. RECOMMENDATION

The Commission recommends that:

- **for claims concerning interests in land which are mortgaged, the limitation period should be ten years from the date on which the conduct, act or omission giving rise to the claim occurred;**
- **claims relating to the redemption of mortgaged personalty should be made subject to the legislative scheme;**
- **for claims relating to mortgaged personalty, the limitation period should be the lesser of:**
 - **three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:**

- (i) that the injury had occurred;**
- (ii) that the injury was attributable to the conduct of some other person;**
- (iii) that the injury, assuming liability on the part of some other person, warranted bringing a proceeding;**

or

- ten years after the date on which the conduct, act or omission giving rise to the claim occurred.**

CHAPTER 19

CONTRIBUTION CLAIMS

1. ACTIONS FOR CONTRIBUTION FOR LIABILITY IN TORT

In some cases, the injury complained of by the plaintiff may be the result of the allegedly wrongful conduct of two or more people. However, the plaintiff may elect to commence proceedings against only one defendant. Originally, if the plaintiff sued in tort,⁸¹³ the common law did not allow for one of the defendants to claim contribution from any other defendant if the plaintiff's action was successful.⁸¹⁴ As a result, one defendant sometimes had to bear the entire burden of the liability to the plaintiff.

However, this situation has now been changed by legislation. In Queensland, where damage is suffered as a result of a tort:⁸¹⁵

any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage ...

2. LIMITATION PERIODS IN CONTRIBUTION CLAIMS

The possibility of a contribution claim between tortfeasors raises the question of the limitation period which should apply to the claim. The existing Queensland legislation provides that in a contribution action the limitation period is the lesser of:⁸¹⁶

- a period of two years from the date on which the right of action for contribution accrued; or
- a period of four years from the date of expiration of the limitation period for the principal action.

⁸¹³ For example negligence, trespass, nuisance or defamation.

⁸¹⁴ *Merryweather v Nixan* (1799) 8 TR 186; see also JG Fleming, *The Law of Torts* (8th edition 1992) 259-260.

⁸¹⁵ *Law Reform Act 1995* (Qld) s 6(c). The relevant provisions were originally enacted in the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act 1952* (Qld) and were subsequently consolidated with a number of other Acts in the *Law Reform Act 1995* (Qld).

⁸¹⁶ *Limitation of Actions Act 1974* (Qld) s 40(1).

The cause of action in the contribution claim accrues on the date on which the principal claim is settled, or an arbitral award is made or a judgment in a civil action is given (whether or not in the case of a judgment the judgment is subsequently varied as to quantum of damages).⁸¹⁷

3. OTHER JURISDICTIONS

(a) Alberta

The general scheme of the Alberta legislation is that the limitation period for a claim will be the lesser of two alternative periods - the discovery period and the ultimate period.⁸¹⁸

The ultimate period for a contribution claim commences at the earlier of:⁸¹⁹

- the date when the claimant for contribution is made a defendant in the principal claim; or
- the date when the claimant for contribution incurs liability through settlement of the principal claim.

The Alberta legislation is based on the recommendations of the Alberta Law Reform Institute.⁸²⁰ Prior to making its recommendations, the Institute considered, but rejected, two alternative commencement dates for the ultimate limitation period.⁸²¹

- Accrual of principal cause of action

This is the earliest time at which the ultimate period could commence. However, in the view of the Institute, this option would be unduly harsh on a claimant for contribution if the original tort claim were brought near the end of the ultimate period applicable to that claim.

- Imposition of liability for principal claim

⁸¹⁷ Id, s 40(2).

⁸¹⁸ See pp 53-55 above.

⁸¹⁹ *Limitations Act 1996* (Alta) s 3(3)(e).

⁸²⁰ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989).

⁸²¹ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 164-169.

The Institute considered this option to be the most satisfactory from a theoretical standpoint, since it is the earliest time at which the cause of action in a contribution claim could accrue, there being no injury to the person seeking contribution until liability in the principal action has been imposed. However, the Institute was concerned that it would unnecessarily extend the operation of the ultimate period.

There is no specific provision in the legislation concerning the commencement of the discovery period, so that the general provision must apply. This would mean that the discovery period for a contribution claim will commence on the date that the claimant for contribution first knew or, in the circumstances, ought to have known:

- that the injury for which the claimant seeks a remedial order had occurred;
- that the injury was attributable to the conduct of the defendant; and
- that the injury warrants bringing a proceeding.

(b) Western Australia

The Law Reform Commission of Western Australia, in considering the Alberta legislation, reached the following conclusions:⁸²²

... since the discovery period runs from the date on which the plaintiff knew, or should have known, that he has suffered injury for which the defendant is responsible and which is sufficiently serious to warrant bringing proceedings, it would seem that in a contribution action this point must be the time when the tortfeasor's liability is finally confirmed, either by a court judgment ... or a settlement ...

and

In the case of a settlement, the result would be that the discovery period and the ultimate period would both begin to run from the same point, and so in practice the ultimate period would never be required.

The Western Australian Commission recommended that the discovery period should run from the time when the tortfeasor's liability is finally confirmed by judgment, settlement or arbitration award. It also recommended that, in cases where the tortfeasor's liability is the subject of court proceedings or an arbitration, the ultimate period should run from the time when the tortfeasor

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Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 296.

was made a defendant in respect of the principal claim. It made no recommendation in relation to the commencement of the ultimate limitation period for a contribution claim in respect of a principal claim which had been settled, because it considered that in such a situation the discovery period and the ultimate period would begin to run from the same point, and so in practice the ultimate period would never be required.⁸²³

(c) England

The preliminary proposals put forward by the English Law Commission involved two alternative limitation periods of general application - a discovery period and an ultimate or “long-stop” period.

The Law Commission noted that application of its general proposals in the context of a claim for contribution would result in the discovery limitation period commencing on the date on which the defendant discovered the facts relevant to his or her cause of action for contribution:⁸²⁴

Discoverability for these purposes will include knowledge of the fact that the defendant is liable to make payment to the plaintiff in the main action (whether in the form of damages or of an agreed settlement), and of the fact that the potential contributor is liable to contribute towards that sum.

The Law Commission acknowledged that, although in many cases the starting point for the discovery limitation period would co-incide with the date judgment is given or the amount of settlement is agreed in the main action, in some cases the start of the limitation period may be delayed because the defendant was not aware of some other relevant fact until some time after incurring liability to the plaintiff in the main action.

The Law Commission also considered the appropriate commencement date for the ultimate or “long-stop” limitation period. Under its general proposals, the long-stop period would commence on the date of the defendant’s act or omission.⁸²⁵ However, the Commission observed that, in a contribution claim, the liability of the defendant is triggered not so much by an act or omission of the defendant/contributor as by the judgment or settlement giving rise to the contribution claim. It therefore identified the date of the judgment or settlement giving rise to the contribution claim as analogous to the date of the defendant’s act or omission.⁸²⁶

⁸²³ Ibid.

⁸²⁴ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 353.

⁸²⁵ Id, 289.

⁸²⁶ Id, 354.

However, in the view of the Law Commission, this would not be an appropriate commencement date for the long-stop period since, in a situation which potentially gave rise to a chain of contribution actions arising out of the same facts, a fresh long-stop would arise with every new judgment or settlement.

To overcome this problem, the Law Commission proposed that there should be a single long-stop period running from the date of the judgment or settlement in the original action to which the contribution claims relate.⁸²⁷

4. THE DISCUSSION PAPER

In the Discussion Paper,⁸²⁸ this Commission considered two options in relation to the appropriate limitation period in a contribution claim.

The first option was retention of the existing provisions. However, in the view of the Commission, this option did not sit well with the general scheme of the Commission's preliminary recommendations. The Commission noted that, although based on the recommendations of the New South Wales Law Reform Commission,⁸²⁹ which considered that the four year period gave a person claiming contribution ample time to make enquiries and commence proceedings,⁸³⁰ the existing legislation makes no specific provision for ensuring that the person claiming contribution has had sufficient time to become aware of the information necessary to bring the claim. It also noted that the existing limitation period is based partly on the date of accrual of the cause of action, which was inconsistent with the general approach taken by the Commission in the Discussion Paper.

The second option was to adopt the framework of the Alberta provisions.

The Commission carefully considered the analysis of the Alberta legislation in the report of the Law Reform Commission of Western Australia.⁸³¹ However, the Commission was not entirely persuaded by that report's interpretation of

⁸²⁷ Id, 355.

⁸²⁸ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁸²⁹ New South Wales Law Reform Commission, Report No 3: *Report on the Limitation of Actions* (October 1967).

⁸³⁰ Id, 115-116.

⁸³¹ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 295-296.

the relevant provisions.

The Commission's first concern related to when the discovery limitation period should commence. The Law Reform Commission of Western Australia pinpointed the date of judgment, settlement or arbitration award in the principal action as the appropriate time. However, although the person seeking contribution would be aware at that time that he or she had suffered an injury (that is, liability to the plaintiff in the principal action), this would not necessarily mean that he or she would be in possession of all the relevant information.

The conclusion reached by the Law Commission in England⁸³² supports the Commission's view.

The Commission's second concern related to commencement of the ultimate limitation period for a contribution claim in respect of a principal claim which has been settled. Under the Alberta legislation, the ultimate period commences at the earlier of settlement of the principal claim or commencement of proceedings in the principal claim against the person claiming contribution. The Law Reform Commission of Western Australia considered the effect of this provision to be that, where the principal claim is settled, the discovery period and the ultimate period would begin to run from the same point.

This Commission agreed that that conclusion may be correct if the principal claim settled prior to the commencement of litigation. However, it commented that many claims do not settle until after litigation has commenced. For example:

A commences proceedings against B in 1987 in a lengthy and complex negligence case. The matter finally comes to trial in late 1991. The trial lasts for over six months and the judgment is reserved. In early 1993 A and B reach agreement on the terms of a settlement. B subsequently wishes to commence contribution proceedings against C.

Under the Alberta legislation, the earliest date when the discovery period could commence would be in 1993 when B knew of B's injury (that is, the liability to A which was incurred as a result of the settlement). However, the ultimate period would have commenced in 1987, when A initiated proceedings against B, not when the action was settled.

The Commission's preliminary recommendation was that, in a claim for contribution between tortfeasors, the limitation period should be the lesser

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See p 192 above.

of.⁸³³

- three years after the date when the person claiming contribution knew or, in the circumstances, ought to have known the information necessary to bring the claim; or
- fifteen years⁸³⁴ after the earlier of:
 - the date when the person claiming contribution was made a defendant in the principal action; or
 - the date when the person claiming contribution incurred liability through settlement of the principal claim.

5. SUBMISSIONS

Five of the submissions received by the Commission in response to the Discussion Paper gave consideration to the issues raised by the Commission.⁸³⁵

Four of those submissions supported the Commission's preliminary recommendation,⁸³⁶ although three respondents proposed some qualification to it.

The Institution of Engineers, Australia (Queensland Division) noted the effect of contribution claims in the context of a profession which provides services as part of a team for the delivery of a project.⁸³⁷

The system ... allows that each person who has contributed to the plaintiff's loss may be liable to the plaintiff for the entire amount of the loss suffered, irrespective of the person's share of the responsibility for the loss. ... Therefore, actions are taken against the member of the service team with the most assets and/or insurance cover, rather than the person or organisation mainly responsible for the problem (the "deep pocket" syndrome).

⁸³³ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 60-61.

⁸³⁴ In this Report, the Commission has recommended that the fifteen year alternative limitation period be reduced to ten years. See pp 69-70, 86 above.

⁸³⁵ Submissions 5, 14, 15, 18, 20.

⁸³⁶ Submissions 14, 15, 18, 20.

⁸³⁷ Submission 15.

...

A further effect of the joint and several liability system is the “greenmail” effect, where professionals tend to settle out of court, even where they may have good claims and defences against major claims of negligence and/or did not cause the damages claimed.

The respondent also noted that, although the problems associated with joint and several liability are overcome somewhat if there is legislation, such as presently exists in Queensland,⁸³⁸ allowing a defendant to claim contribution from others, this type of provision puts the onus on the defendant to gather evidence and bring an action against other contributing parties, which is a costly and time consuming exercise. The submission advocated the introduction of a system of proportionate liability, which would enable the court to make a finding as to the total damages suffered by the plaintiff and to make an apportioned award against those wrongdoers who are a party to the proceedings, with a notional allocation against absent wrongdoers. Consideration of such a proposal is outside the Commission’s terms of reference, and the Commission is therefore unable to comment on the merits or otherwise of the suggestion.

However, in the absence of a system of proportionality, the respondent supported the preliminary recommendation on the grounds that it would ease the burden on the defendant to an action, without affecting the rights of the plaintiff, and that it would provide consistency with the Commission’s other recommendations.

The Queensland Law Society Inc submitted that the three year discovery period for a contribution claim should not commence to run until the commencement of proceedings against the person to whom the contribution claim is open. The Society was concerned that delay in commencing proceedings against the person wishing to claim contribution could rob that person of a reasonable opportunity to commence proceedings within the three year period.⁸³⁹

A community legal service argued that, in view of the general uncertainty of litigation and the prolonged nature of some cases, a claimant should be accorded the greatest possible maximum time limit.⁸⁴⁰ The respondent proposed that the alternative limitation period should be fifteen years after the later of the date of settlement of the principal claim or the date when the person claiming contribution was made a defendant in the principal claim.

⁸³⁸ See note 815 above.

⁸³⁹ Submission 20.

⁸⁴⁰ Submission 18.

On the other hand, the Insurance Council of Australia Ltd submitted:⁸⁴¹

It should be borne in mind that, invariably, claims for contribution between tortfeasors are fought between insurers. Instances of the existing limitation provisions being in issue or defeating a claim for contribution are virtually unknown in the insurance industry. This, in our view, is sufficient evidence in itself of the appropriateness and workability of the existing limitation period for such claims.

6. THE COMMISSION'S VIEW

The Commission has given careful consideration to the points raised in the submissions.

The Commission notes the concerns of the Queensland Law Society Inc, but does not believe they are well founded. The Commission's preliminary recommendation was that the three year discovery limitation period for a contribution claim would not commence until the claimant for contribution had knowledge of the relevant facts. Those facts would include the fact that the claimant for contribution had incurred an injury. In the context of a contribution claim the relevant injury is liability in the principal claim. In other words, under the scheme proposed by the Commission, the discovery limitation period could not commence until the claimant for contribution was aware that he or she had been made liable in the principal claim, either through settlement of the principal claim or as a result of the judgment of a court or an arbitration award.

In relation to the submission that the commencement date of the alternative limitation period in a contribution claim should be the later of the date of settlement of the principal claim or the date when the person claiming contribution was made a defendant in the principal claim, the Commission is not persuaded to change its preliminary recommendation that the alternative limitation period should commence on the earlier of those two dates.

The Commission accepts that, as one respondent pointed out, the current contribution provision may adequately serve its purpose in the context of the existing legislation. However, the Commission has recommended that the existing legislation should be replaced by a scheme which is based on the concept of discoverability rather than on accrual of the cause of action as at present. If the Commission's major recommendation is accepted, then the existing contribution provision will no longer be appropriate.

The Commission believes that, in the interests of uniformity and simplicity,

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Submission 5.

the limitation period for a contribution claim should mirror, as closely as possible, the general limitation period. The Commission also believes that, in the context of a contribution claim, its general recommendation requires some further explanation.

(a) The discovery limitation period

In its preliminary recommendation, the Commission referred only to knowledge of the “information necessary to bring the claim”.⁸⁴² The Commission did not consider in any greater detail what “information” would have to be known in order to trigger the discovery limitation period for a contribution claim.

In this Report, the Commission has recommended that the discovery limitation period should be three years after the date on which the plaintiff first knew or, in the circumstances, ought to have known:⁸⁴³

- (i) that the injury had occurred;
- (ii) that the injury was attributable to the conduct of some other person;⁸⁴⁴
- (iii) that the injury, assuming liability on the part of some other person, warranted bringing a proceeding;

The problem with attempting to apply the general discovery limitation period to a contribution claim is that a contribution claim involves two separate “injuries” - the injury to the plaintiff in the principal claim, and the injury incurred by the claimant in the contribution claim as a result of liability in the principal claim. The existing wording of the general recommendation is incapable of differentiating clearly between these two concepts.

If the general discovery limitation period were to apply in the context of a contribution claim, the term “injury” in sub-paragraph (a)(i) above, would have to refer to the liability of the claimant for contribution to the plaintiff in the principal claim. The claimant for contribution cannot have suffered a relevant

⁸⁴² Queensland Law Reform Commission, Working Paper No 49: *Review of the Limitation of Actions Act 1974 (Qld)* (April 1997) 76.

⁸⁴³ See pp 85-86 above.

⁸⁴⁴ This recommendation is made by a majority of members of the Commission. The minority view is that the discovery limitation period should not commence until the plaintiff knew or, in the circumstances, ought to have known the identity of the defendant. See pp 75-77 above.

injury unless he or she has been made liable in the principal claim, either through a judgment, settlement or arbitration award.

However, in sub-paragraph (a)(ii) the term “injury” could not have the same meaning as in sub-paragraph (a)(i). In a contribution claim, the “injury” in sub-paragraph (a)(ii) would have to refer to the injury to the plaintiff in the principal claim. This is because the basis of a claim for contribution is not that the claimant’s injury (that is, liability to the plaintiff in the principal claim) is “attributable to some other person” but, rather, that the injury on which the principal claim is based is attributable not only to the claimant, but also to some other person against whom the claimant has an entitlement for contribution. Such a situation would occur, for example, where P, a passenger in a car driven by X, is injured in a collision between that car and another vehicle driven by Y, and both X and Y have acted negligently. If P successfully sued Y, Y may seek contribution from X. In these circumstances, Y’s liability to P - which would be independent of X’s negligent behaviour - would not be “attributable” to X, and therefore could not be the “injury” referred to in sub-paragraph (a)(ii).

Further, if the general discovery limitation period were to be applied without modification to contribution claims, it would be unclear whether, in sub-paragraph (a)(iii) above, the injury referred to would be the injury to the plaintiff in the principal claim or the liability to that plaintiff incurred by the claimant for contribution.

The Commission therefore considers that its general recommendation for the commencement of the discovery limitation period, in its original form, is not completely appropriate for contribution claims and should be redrafted to reflect the distinction between the two different “injuries”. In the view of the Commission, minor amendment of the wording of the criteria for triggering the discovery period will not detract from the overall uniformity and simplicity of its recommendations.

(b) The alternative limitation period

In this Report, the Commission has recommended that the alternative limitation period should expire ten years after the date on which the conduct, act or omission giving rise to the claim occurred.⁸⁴⁵

The Commission recognises that, under this recommendation, the alternative limitation period applicable to a contribution claim could begin before the right to claim contribution has accrued. This situation would arise if the alternative limitation period commenced when the person claiming contribution was

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See pp 85-86 above.

made a defendant in the original claim. At that point in time, the person claiming contribution would not have incurred any liability in the original claim, either through a judgment or settlement of the claim.

However, the Commission agrees with the Alberta Institute of Law Research and Reform that, as a practical matter, once the person is made a defendant to the original claim, the person will be on notice to find out whether his or her potential liability can be reduced by sharing it with anyone else who may have a duty to contribute.⁸⁴⁶ The person claiming contribution would therefore not be disadvantaged by the fact that the alternative limitation period for the contribution claim began to run before liability in the principal claim had actually been determined.

7. RECOMMENDATIONS

The Commission recommends that, in a claim for contribution between tortfeasors, the limitation period should be the lesser of:

- **three years after the date when the person claiming contribution knew or, in the circumstances, ought to have known:**
 - (i) that the claimant for contribution had incurred liability in the principal claim;**
 - (ii) that the injury on which the principal claim was based was, in part, attributable to the conduct of some other person;**
 - (iii) that the damages in the principal claim, assuming liability on the part of some other person, warranted making a claim for contribution;**
- or**
- **ten years after the earlier of:**
 - **the date when the person claiming contribution was made a defendant in the principal claim; or**

⁸⁴⁶

Alberta Institute for Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 167.

- the date when the person claiming contribution incurred liability through settlement of the principal claim.

CHAPTER 20

OTHER JOINT RIGHTS AND LIABILITIES

1. THE EXISTING LAW

It is necessary to consider the question of the effect of limitation legislation on joint rights and obligations in the context of both the common law and statutory provisions.

(a) Common law claims

The common law relating to joint rights and liabilities is complex and technical, and the effect of limitation law on the enforcement of joint obligations at common law is also somewhat obscure.

For example, a contract may be based on a joint promise made by two or more persons. Such a joint promise creates a single obligation incumbent upon both or all the promisors. Performance of the obligation by any one of the joint promisors will discharge them all from their obligations under the contract.⁸⁴⁷ Conversely, if one joint promisor successfully defends an action for breach of contract on the basis that the promise is unenforceable - for example, because of fraudulent misrepresentation or wrongful repudiation by the plaintiff⁸⁴⁸ - then the defence will operate to discharge them all.⁸⁴⁹

However, if one joint promisor successfully defends an action on a ground that applies only to that particular defendant, the defence will not assist the other defendants. Although there is no definitive authority on the issue, it has been suggested that this is the situation which occurs when one of the joint promisors is held not to be liable because of the operation of a statute of limitation.⁸⁵⁰ In other words, a plaintiff's action against a joint promisor who cannot rely on a statute of limitation may not be affected by the fact that the plaintiff's action against another joint promisor is statute-barred. However, the matter is not completely beyond doubt.

⁸⁴⁷ GL Williams, *Joint Obligations* (1949) 92-93; *Halsbury's Laws of Australia* vol 6, para 110-2950.

⁸⁴⁸ JW Carter and DJ Harland, *Contract Law in Australia* (3rd edition 1996) 345.

⁸⁴⁹ GL Williams, *Joint Obligations* (1949) 76.

⁸⁵⁰ *Id.*, 77.

(b) Statutory claims for enforcement of joint obligations

Some aspects of the common law with respect to enforcement of joint obligations have been replaced by statute. However, the law is still complex and, to some extent, uncertain.

For example, under the original common law rule, an action against joint tortfeasors was one and indivisible. Despite legislation which now provides that a plaintiff may bring separate actions against joint tortfeasors,⁸⁵¹ there has been considerable debate as to the extent to which a provision of this kind affects the nature of a joint obligation rather than merely facilitating the enforcement of the joint obligation.⁸⁵²

One consequence of the common law rule was that a release by the plaintiff of one joint tortfeasor would release all the others.⁸⁵³ However, the legislation contains no express reference to compromise by deed of release, so that, until recently, it remained open to question whether the legislation had replaced the common law rule in such a situation.⁸⁵⁴ The High Court of Australia has now held that a statutory provision allowing separate actions against joint tortfeasors must impliedly abolish this aspect of the rule.⁸⁵⁵

There is no equivalent decision as to whether or not, in light of the statutory right to bring separate actions, a limitation defence available to one joint tortfeasor would assist the remaining joint tortfeasors or whether this aspect of the rule has also been impliedly abolished by the legislation.

2. OTHER AUSTRALIAN LEGISLATION

The limitation legislation in New South Wales, the Australian Capital Territory and the Northern Territory contains two additional provisions relating to joint rights and liabilities.

Section 75 of the *Limitation Act 1969* (NSW), on which the provisions in the

⁸⁵¹ *Law Reform Act 1995* (Qld) s 6(a). See note 815 above.

⁸⁵² See for example *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 per Burchett and Ryan JJ.

⁸⁵³ *Duck v Mayeu* [1892] 2 QB 511.

⁸⁵⁴ ADM Hewitt, "Compromising with One Joint Tortfeasor", (1998) 72 *Australian Law Journal* 73.

⁸⁵⁵ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

Australian Capital Territory⁸⁵⁶ and the Northern Territory⁸⁵⁷ are modelled, states:

Where, were it not for this Act, two or more persons would have a cause of action jointly and, by this Act, an action on the cause of action is not maintainable by one or more of them, an action on the cause of action is nonetheless maintainable by the other or others of them and judgment may be given accordingly.

The effect of this provision is to ensure that, where there are joint plaintiffs, the expiration of the limitation period against one of them does not affect the right of the other plaintiff or plaintiffs to commence proceedings. A situation may arise where, for example, the limitation period for one joint plaintiff is still running, perhaps because that plaintiff has been under a disability such as minority,⁸⁵⁸ but another joint plaintiff's right of action is statute-barred because the limitation period against that plaintiff has expired.

Similarly, section 76 of the New South Wales Act provides for the situation where an action is statute-barred against one or more of, but not all, joint defendants.⁸⁵⁹

Where, were it not for this Act, two or more persons would be liable on a cause of action jointly and, by this Act, an action on the cause of action is not maintainable against one or more of them, an action on the cause of action is nonetheless maintainable against the other or others of them and judgment may be given accordingly.

3. THE DISCUSSION PAPER

In the Discussion Paper,⁸⁶⁰ the Commission observed that the law relating to the effect of limitation periods on joint rights and liabilities should be made simpler and more accessible. It expressed the view that the provisions in the New South Wales, Northern Territory and Australian Capital Territory limitation legislation achieved this result.⁸⁶¹

⁸⁵⁶ *Limitation Act 1985* (ACT) s 52.

⁸⁵⁷ *Limitation Act 1981* (NT) s 49.

⁸⁵⁸ See Chapter 12 of this Report for a discussion of the effect of disability on the operation of limitation legislation.

⁸⁵⁹ See also *Limitation Act 1985* (ACT) s 53; *Limitation Act 1981* (NT) s 50.

⁸⁶⁰ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁸⁶¹ *Id.*, 79.

Consistently with the recommendation of the Law Reform Commission of Western Australia that limitation legislation in that State should include provisions similar to those in New South Wales, the Northern Territory and Australian Capital Territory,⁸⁶² the Commission proposed that equivalent provisions should be included in Queensland limitation legislation.

4. SUBMISSIONS

Only one of the submissions received by the Commission addressed this issue. The Queensland Law Society Inc expressed the view that the inclusion of such provisions would greatly clarify the law.⁸⁶³

5. RECOMMENDATION

In the absence of any adverse comments in relation to its preliminary recommendation, the Commission has not changed its view.

The Commission recommends that provisions equivalent to sections 75 and 76 of the *Limitation Act 1969* (NSW) should be included in Queensland limitation legislation.

⁸⁶² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 297.

⁸⁶³ Submission 20.

CHAPTER 21

DEBTS REPAYABLE ON DEMAND

1. INTRODUCTION

At common law, where a date is set for repayment of a loan, the cause of action for failure to repay will accrue on the date specified for repayment. Similarly, if the loan contract specifies a condition for repayment, the cause of action will accrue on the happening of the condition. However, where the contract does not specify a particular date, and the repayment is not conditional upon demand, the cause of action will accrue when the loan is made.⁸⁶⁴

Where there is a loan of money *simpliciter* (ie with nothing at all said as to repayment), the money is repayable *instantly*. Where there is a loan of money and the borrower contracts to repay on demand, again the money is repayable *instantly*. Where there is a loan of money which is recorded or acknowledged by the parties to be a loan repayable on demand, again the money is repayable *instantly*.

The common law has always regarded the fact of indebtedness as a continuing detention by the debtor of the creditor's money ... Therefore if A lends money to B, then instantly B is detaining A's money. In order to prevent a cause of action for recovery arising in A instantaneously on paying the money, the parties must expressly contract out of that situation. The courts have long since settled it that a mere statement or agreement that the money is repayable on demand (or request or at call) is not sufficient to contract out of that situation where all else that is known of the terms of the contract is that A has paid money to B by way of loan.

...

... where there is a present debt between parties to a contract to repay money and the only terms as to repayment of the debt are to be spelled out of a promise to repay on demand, or out of a statement that the money is to be repaid or repayable on demand (or on request), an instantaneous cause of action, upon the very creation of the contract, arises in the lender.

2. EXISTING LEGISLATION

The existing legislation generally provides that the limitation period for a claim commences on the date on which the cause of action arose.⁸⁶⁵ In the situation of a debt repayable on demand this means that, under an accrual

⁸⁶⁴ *Ogilvie v Adams* [1981] VR 1041 per Fullagar J at 1043, 1049.

⁸⁶⁵ See for example *Limitation of Actions Act 1974* (Qld) s 10.

based system of limitation law, the limitation period commences at the time the loan is made. The limitation period is therefore six years from the date of the loan, whether or not a demand for payment has been made.⁸⁶⁶

The effect of the existing law is that, particularly in a domestic setting where money is lent to a friend or relative on the assumption that it will be repaid but no conditions are specified as to repayment, a lender may be unaware that the limitation period is running. In some cases, the limitation period may have expired before the lender demands repayment and the lender may find that his or her right of action to recover the debt has become statute-barred.

3. OTHER JURISDICTIONS

In England, the problem has been overcome in some situations by a provision to the effect that, where there is a written demand for payment, the cause of action to recover the debt will be deemed, for limitation purposes, to have accrued on the date of the demand.⁸⁶⁷

Neither the Alberta legislation nor the recommendations of the Law Reform Commission of Western Australia provides a specific discovery limitation period for a claim of this kind. The assumption appears to be that the problem may not arise under a discovery based limitation system, where the limitation period 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.⁸⁶⁸

In relation to the ultimate limitation period, the Alberta Law Reform Institute observed that "it makes no sense to consider [a defendant] as having breached a duty to pay a demand debt before a demand for payment was ever made".⁸⁶⁹ The Alberta legislation therefore provides for the ultimate period in a claim for repayment of a debt repayable on demand to commence "when a default in performance occurred after a demand for performance is made".⁸⁷⁰ The Alberta Law Reform Institute noted that the ultimate period would probably never run since, if the plaintiff demands payment and the

⁸⁶⁶ *Limitation of Actions Act 1974* (Qld) s 10(1)(a).

⁸⁶⁷ *Limitation Act 1980* (UK) s 6.

⁸⁶⁸ Alberta Institute of Law Research and Reform, Report for Discussion No 4: *Limitations* (September 1986) 162.

⁸⁶⁹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 71.

⁸⁷⁰ *Limitations Act 1996* (Alta) s 3(1)b), 3(3)(c). This Act is not yet in operation.

defendant refuses, the plaintiff will be aware of the loss or injury and the discovery period will begin to run.⁸⁷¹

The Law Reform Commission of Western Australia adopted the Alberta approach, and also recommended that the ultimate limitation period should commence when a default in performance occurs after a demand for payment is made.⁸⁷²

4. THE COMMISSION'S VIEW

In this Report, the approach adopted by the Commission has been to recommend, to the greatest extent possible, a uniform scheme of limitation legislation. The Commission has also recommended that the existing accrual based limitation legislation be replaced with a discovery-based system in which the limitation period is the lesser of three years from when the plaintiff knew or, in the circumstances, ought to have known certain information and ten years from when the act, conduct or omission giving rise to the claim occurred.⁸⁷³

As noted above, the recently introduced Alberta legislation and the recommendations of the Law Reform Commission of Western Australia do not make any specific provision for the discovery limitation period in a claim of this kind.⁸⁷⁴ This gives rise to the inference that the general discovery limitation period applies. There appears to be a further assumption that the discovery limitation period will commence when the lender demands payment and the debtor refuses to pay.⁸⁷⁵

However, this Commission is not convinced that the legal analysis behind this approach is correct. The discovery period will commence when the plaintiff knows or ought, in the circumstances, know the relevant information, including the fact that the plaintiff has suffered an injury. In the view of the Commission, the "injury" in the case of a debt repayable on demand is "the continuing detention by the debtor of the creditor's money"⁸⁷⁶ - in other words,

⁸⁷¹ Alberta Law Reform Institute, Report No 55: *Limitations* (December 1989) 71.

⁸⁷² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 177

⁸⁷³ See pp 85-86 above.

⁸⁷⁴ See p 206 above.

⁸⁷⁵ See note 871 above.

⁸⁷⁶ See p 205 above.

the debtor's failure to fulfil the obligation to repay the loan, whether or not a demand for payment has been made.⁸⁷⁷ Since the lender will ordinarily know from the time the loan is made that it has not been repaid, the discovery period will commence, in the absence of a specific provision, as soon as the money is lent. Application of the discovery-based scheme therefore leads to the same result as the existing system, and fails to prevent the injustice which the existing system can cause.

The Commission believes that, in order to overcome the problem, it would be necessary to specify that the discovery limitation period does not commence until the plaintiff knows or, in the circumstances, ought to know that there has been a default in performance of the obligation to repay after a demand for performance has been made.

This approach to the discovery limitation period would mean that, if the Alberta and Western Australian models were followed with respect to the alternative limitation period,⁸⁷⁸ the discovery and alternative limitation periods would start to run simultaneously, so that there would never be any call for the alternative period. In the view of the Commission there would be little point in making a recommendation to this effect.

The Commission therefore considers that a claim for a debt repayable on demand should be an exception to the general rule, and that there should be only one limitation period commencing when there has been a demand for repayment which has not been complied with.

5. RECOMMENDATION

The Commission recommends that, in a claim for repayment of a debt repayable on demand, there should be a limitation period of three years commencing when a default in performance has occurred after a demand for performance has been made.

⁸⁷⁷ The Commission has recommended that "injury" should be defined as "personal injury, property damage, economic loss or, in the absence of any of these, non-performance of an obligation or breach of a duty". See pp 67, 86 above.

⁸⁷⁸ See pp 206-207 above.

CHAPTER 22

TRANSITIONAL PROVISIONS

1. THE RELEVANCE OF TRANSITIONAL PROVISIONS

Since amendment of limitation legislation has the potential to affect the settled expectations of both plaintiffs and defendants, consideration of possible reforms to such legislation also necessarily involves consideration of the effect which should be given to any proposals for change which may be implemented.

There is a general presumption of statutory interpretation that newly enacted legislation does not have a retrospective effect. It has been said that:⁸⁷⁹

There can be no doubt that the general rule is that an ... enactment ... is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.

However, this presumption does not apply if the legislation is procedural rather than substantive.⁸⁸⁰

Although the issue is not entirely free of debate, current Australian authority is to the effect that limitation legislation should be classified as procedural.⁸⁸¹ This would mean that, in the absence of a specific provision to the contrary, changes to such legislation would operate retrospectively.

2. EXISTING LEGISLATION

The limitation legislation currently in force in Queensland contains a number of transitional provisions.

The *Limitation of Actions Act 1974* (Qld) presently provides that, apart from its extension provisions, it:

- does not generally enable a plaintiff to bring an action that would have been statute-barred under the previous legislation, which it

⁸⁷⁹ *Fisher v Hebburn Ltd* (1960) 105 CLR 188 per Fullagar J at 194.

⁸⁸⁰ *Maxwell v Murphy* (1957) 96 CLR 261.

⁸⁸¹ See Chapter 3 of this Report in relation to classification of limitation legislation. See also the dissenting opinions of Mason CJ and Deane J in *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

- replaced,⁸⁸²
does not affect an action commenced before it came into force.⁸⁸³

It also allows a plaintiff whose cause of action arose prior to the commencement of the legislation, but had not become statute-barred, the limitation period under the previous or present legislation, whichever is longer.⁸⁸⁴

The Act further states that, apart from the specific transitional provisions, it does not affect proceedings founded on a cause of action which arose before it came into operation.⁸⁸⁵

3. POLICY ISSUES

The question of whether newly enacted limitation legislation should be given a retrospective effect focuses attention on two competing considerations, described as follows by the New South Wales Law Reform Commission:⁸⁸⁶

Firstly, fairness requires that rights and duties already vested at the time of commencement of a statute should not be adversely affected by that statute. In particular, revival of a statute barred action is said to be unjust because it deprives a defendant of a defence which had already become effective. ... Secondly there is the argument that where the law is changed in response to a particular hardship or injustice, the objective of that change will be partially frustrated if it only applies to causes of action which accrue after its commencement. Thus the benefit of any amendments should be extended to all plaintiffs whether or not their actions were already barred by the amended legislation.

The Law Reform Commission of Western Australia has observed that it would be necessary to determine whether new limitation legislation should apply in the following situations:⁸⁸⁷

- Causes of action already running at the date on which the legislation

⁸⁸² *Limitation of Actions Act 1974* (Qld) s 8(1)(a).

⁸⁸³ *Id.*, s 8(1)(b).

⁸⁸⁴ *Id.*, s 8(2).

⁸⁸⁵ *Id.*, s 8(3).

⁸⁸⁶ New South Wales Law Reform Commission, Report No 50: *Limitation of Actions for Personal Injury Claims* (October 1986) 61-62.

⁸⁸⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 206.

comes into force.

- Causes of action statute-barred under the existing legislation.
- Actions commenced before the new legislation comes into force.
- Actions concluded prior to the commencement of the new legislation.

4. THE DISCUSSION PAPER

In the Discussion Paper,⁸⁸⁸ this Commission observed that adoption of its preliminary recommendations would reduce the limitation period for a cause of action which accrued prior to the commencement of the proposed legislation and for which the existing limitation period is longer than three years, provided that, at the time the cause of action arose, the plaintiff knew or, in the circumstances, ought to have known the information relevant to bringing the claim. The effect of this would be that some plaintiffs who had acted in reliance on the existing limitation periods may find their actions statute-barred by the implementation of the Commission's preliminary recommendation. On the other hand, defendants would be aware of the existing limitation periods, and would not be disadvantaged if plaintiffs were allowed the benefit of the existing legislation.

The Commission expressed the preliminary view, consistent with the terms of the existing Queensland legislation⁸⁸⁹ and the recommendations of the Western Australian Law Reform Commission,⁸⁹⁰ that a plaintiff whose cause of action arises prior to the commencement of the new limitation legislation, and is not at that time statute-barred, should be allowed to bring proceedings within either the existing or the new limitation period, whichever is longer. However, the Commission did not make any recommendation on the issue.⁸⁹¹

The Commission also noted that, under the preliminary recommendations made in the Discussion Paper, it would be possible for a cause of action which had expired under the existing law to be revived by the proposed new

⁸⁸⁸ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997).

⁸⁸⁹ *Limitation of Actions Act 1974 (Qld)* s 8(2).

⁸⁹⁰ See p 212 below.

⁸⁹¹ Queensland Law Reform Commission, Working Paper No 50: *Review of the Limitation of Actions Act 1974 (Qld)* (December 1997) 133-134.

discovery limitation period or by the exercise of judicial discretion.⁸⁹²

However, because of the proposed alternative limitation period, some causes of action which are presently out of time would remain statute-barred, unless the limitation period were judicially extended. The Commission did not express a preliminary view on this issue.

The Commission did not express any views on the remaining issues raised by the Law Reform Commission of Western Australia. Rather, the Commission sought submissions on the extent to which its preliminary recommendations, if implemented, should take effect retrospectively, in particular:

- whether the new legislation should apply to causes of action which have accrued at the time the new legislation comes into force;
- whether the new legislation should apply to causes of action which, when the new legislation comes into force, are statute-barred under the old legislation;
- whether the new legislation should apply to proceedings which are pending when the new legislation comes into force;
- whether the new legislation should apply to cases which had been resolved by judgment or compromise under the old legislation.

5. CAUSES OF ACTION ACCRUED WHEN THE LEGISLATION COMES INTO FORCE

(a) Other jurisdictions

The Law Reform Commission of Western Australia noted that, if previously accrued causes of action were not to be regulated by the proposed new law, the rights of parties would for many years have to be determined by reference to the old legislation rather than the new.⁸⁹³ This view is shared by the Law Commission in England.⁸⁹⁴

Both the Western Australian and English Commissions acknowledged that, in some cases, the limitation period under the proposed new legislation would

⁸⁹² Id, 134-135.

⁸⁹³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 209.

⁸⁹⁴ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 398-399.

be reduced, thus depriving plaintiffs of an existing right to bring an action.⁸⁹⁵ In order to ensure that plaintiffs would not be disadvantaged in such cases, the Western Australian Commission recommended that:

... in cases where a cause of action has accrued at the time the new Act comes into force, the action should be regarded as brought in time if it complies with the requirements of either the old or the new law.

The recent Alberta legislation provides that if, when the legislation comes into force, the claimant knew or, in the circumstances, ought to have known of a previously existing claim, the limitation period is the lesser of that which would have applied under the old legislation or two years from when the new legislation comes into force.⁸⁹⁶

(b) Submissions

Two respondents endorsed the Commission's preliminary view that a plaintiff whose cause of action arises prior to the commencement of the new legislation, and is not statute-barred when the new legislation comes into operation, should be allowed to bring proceedings within either the existing or the new limitation period, whichever is longer.⁸⁹⁷

The Queensland Law Society Inc commented that:⁸⁹⁸

The only alternative would be to provide for a substantial transitional period, during which all outstanding Plaintiff's claims liable to extinguishment by the new limitation periods, should be commenced. Such an obvious imposition on the Courts' structure ought to be avoided if at all possible.

Three other submissions which commented on various aspects of transitional arrangements did not specifically address this issue, although two respondents were opposed to the idea of new legislation having any retrospective operation.⁸⁹⁹

(c) The Commission's view

⁸⁹⁵ Id, 399; Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 210.

⁸⁹⁶ *Limitations Act 1996* (Alta) s 2(1.1). The Act is not yet in operation.

⁸⁹⁷ Submissions 10, 20.

⁸⁹⁸ Submission 20.

⁸⁹⁹ Submissions 5, 8.

The Commission remains of the view that a plaintiff whose cause of action arises prior to the commencement of the new limitation legislation, and is not at that time statute-barred, should be allowed to bring proceedings within either the existing or the new limitation period, whichever is longer. The Commission believes that a plaintiff who would have a longer limitation period under the new legislation should be entitled to the benefit of the extended period, while a plaintiff who has relied on the existing limitation period should not be prejudiced if the new limitation period is shorter than the existing one.

6. CAUSES OF ACTION STATUTE-BARRED UNDER THE EXISTING LEGISLATION

Currently, the general effect of the expiration of a limitation period is to bar the remedy which would otherwise be provided by successful court action, but not to extinguish the right upon which that court action would be founded.⁹⁰⁰ Consequently, without legislation to the contrary, changes to limitation law could operate retrospectively to revive a cause of action for which the limitation period under the existing legislation had expired. The question of whether new limitation legislation should be able to revive a cause of action which has become statute-barred under existing law highlights the competing policy considerations outlined by the New South Wales Law Reform Commission.⁹⁰¹

(a) Other jurisdictions

The Law Reform Commission of Western Australia observed:⁹⁰²

The limitation period having expired under the old legislation, defendants will have assumed that their liability is at an end, and may have destroyed records or taken various other steps based on the assumption that they are no longer at risk of being sued. On the other hand, ... the present provisions are inadequate and deny justice to many plaintiffs, not only in cases where they are not and cannot be expected to be aware of their rights before the limitation period expires, but also in other cases where it is not lack of awareness but some other factor that prevents them from bringing proceedings.

The solution put forward by the Law Reform Commission of Western Australia was that, for the purposes of the transitional provisions only, the

⁹⁰⁰ *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

⁹⁰¹ See note 886 above.

⁹⁰² Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 210.

new limitation legislation should make a distinction between claims for personal injury and all other types of claim:⁹⁰³

In personal injury cases, the arguments in favour of giving justice to plaintiffs have generally prevailed over the arguments based on disadvantage to defendants, because in such cases the law is generally being changed with the object of remedying specific hardships suffered by plaintiffs, and the change would be partly frustrated if it applied only where the plaintiff was not already barred by the previous law. In other cases, hardship to defendants who have arranged their affairs on the basis that their liability has ceased, and in cases involving title to property the effect on that title of the running of the period, have generally led to the conclusion that a limitation period which has once been barred by statute should not be revived.

The Western Australian Commission recommended that the provisions of the new legislation should apply to causes of action for personal injury, whether or not the action would be statute-barred under the existing law, but that the new scheme should not otherwise operate to revive a statute-barred cause of action.⁹⁰⁴

In England, the Law Commission considered inappropriate an approach which could suddenly deprive some defendants of an accrued limitation defence. The Commission proposed that the new legislation should not apply to any cause of action which had been barred by the expiry of the limitation period under previous legislation.⁹⁰⁵

(b) Submissions

One respondent submitted that any new legislation should apply in respect of statute- barred claims for personal injuries and that such claims should be revived under the provisions of the new legislation.⁹⁰⁶ Another respondent proposed that any legislation must be entirely retrospective in its operation to protect all plaintiffs and to prevent inconsistencies in the operation of limitation law.⁹⁰⁷

On the other hand, one respondent submitted that causes of action which are statute- barred under existing legislation ought not be able to be revived

⁹⁰³ Id, 211.

⁹⁰⁴ Ibid.

⁹⁰⁵ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 399.

⁹⁰⁶ Submission 10.

⁹⁰⁷ Submission 18.

under any new legislation.⁹⁰⁸

Two further submissions argued strongly that any new legislation should apply only to causes of action accruing after the date of enactment of the legislation, and that there should be no retrospectivity in the new legislation:⁹⁰⁹

In the insurance industry, particularly in “*long tail*” classes of business such as CTP (compulsory third party), product and public liability, and professional indemnity insurance, premiums are set having regard to a limited period of past potential exposure to liability. Any retrospectivity in limitations legislation would inevitably see a sharp and dramatic increase in premiums as insurers attempted to build into the premium potential exposure to claims which otherwise would have been absolutely barred.

(c) The Commission’s view

The Commission is mindful of the concerns expressed in some of the submissions about the retrospective operation of new legislation. It agrees with the principle that, generally, a claim which is statute-barred under existing legislation should not be able to be revived under new legislation.

However, the Commission also recognises that it may be possible, under the existing legislation, for a plaintiff to commence an action, notwithstanding the expiration of the relevant limitation period. In other words, at present not all claims brought after the expiration of the existing limitation period are absolutely statute-barred. Under the present legislation, a plaintiff is able, in certain circumstances, to make an application to the court to extend the limitation period even though that limitation period has expired.⁹¹⁰

The Commission is of the view that new legislation should not prevent commencement of proceedings which would have been capable of being brought under the existing legislation. Otherwise a potential plaintiff would be deprived of an existing entitlement.

At present a plaintiff may apply to have the limitation period extended if the plaintiff is claiming for damages for personal injuries. The Commission therefore believes that the new legislation should make specific provision for such claims.

However, many of the applications which are made under the existing

⁹⁰⁸ Submission 20.

⁹⁰⁹ Submissions 5, 8.

⁹¹⁰ See pp 33-35 above.

legislation for an extension of the limitation period are unsuccessful. Consequently, the Commission does not believe that the new legislation should enable automatic revival of a claim for which the limitation period under the existing legislation, although expired, might have been extended. The Commission is concerned that a provision of this kind would lead to disputes about whether the plaintiff would have been entitled to an extension under the existing legislation or whether the claim had in fact become statute-barred. Rather, the Commission believes that the question of whether or not the plaintiff is entitled to proceed with the claim should continue to be determined by the exercise of judicial discretion.

The question then arises as to whether an application for extension should be made under the existing or the new legislation. Under the existing legislation, the limitation period may be extended to a year after the date when the plaintiff became aware of certain information.⁹¹¹ However, there is no ultimate period after which proceedings may not be brought. If extension applications for claims where the limitation period had expired under the existing legislation were to continue to be made under that legislation, the effect would be that the existing legislation would continue to operate indefinitely alongside the new. The Commission does not regard this situation as desirable, particularly as the existing extension provisions are complex and have caused considerable difficulties of interpretation.⁹¹²

It is therefore the view of the Commission that the new legislation should provide that a plaintiff who is claiming damages for personal injury, but whose limitation period under the existing legislation has expired, may apply to the court under the new legislation for an extension of the limitation period.

7. ACTIONS THAT HAVE BEEN COMMENCED BEFORE THE NEW LEGISLATION COMES INTO FORCE

(a) Other jurisdictions

The Law Reform Commission of Western Australia noted that legislatures have generally been reluctant to allow new limitation provisions to apply to cases in which proceedings have already been commenced at the time the new provisions come into effect:⁹¹³

⁹¹¹ See pp 33-34 above.

⁹¹² See pp 37-38 above.

⁹¹³ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 213.

... the view generally taken is that, by choosing to commence proceedings under the old law, the plaintiff has chosen to abide by that law, and should not be given the alternative of any additional benefits resulting from the new provisions.

This is certainly true of the existing Queensland legislation, which is expressed not to have an effect on an action brought before its commencement, save as is provided in the extension provisions.⁹¹⁴ In Alberta, the recently enacted legislation is expressed to apply only to proceedings commenced after the Act comes into force, regardless of when the claim arose.⁹¹⁵ Similarly, in England, the Law Commission proposed that new legislation should not apply where proceedings had been commenced prior to the commencement of the new legislation.⁹¹⁶

The Western Australian Commission considered this approach to be too restrictive. It expressed the view that it should not make a difference whether or not a plaintiff has commenced proceedings before new limitation legislation comes into force. It recommended that, where a cause of action has accrued before the commencement of new limitation legislation, a plaintiff should have the benefit of either the old or the new limitation rules, whether or not proceedings are pending when the new legislation becomes operative.⁹¹⁷

(b) Submissions

Two respondents submitted that a plaintiff should be entitled to the benefit of the new legislation, whether or not proceedings had been commenced under the existing law.⁹¹⁸ However, one respondent submitted that new legislation ought not to apply to proceedings which are pending when the new legislation comes into force. Two respondents were opposed to new legislation having any retrospective operation.⁹¹⁹

⁹¹⁴ *Limitation of Actions Act 1974* (Qld) s 8(1)(b).

⁹¹⁵ *Limitations Act 1996* (Alta) s 2(1). The Act is not yet in operation.

⁹¹⁶ Law Commission, Consultation Paper No 151: *Limitation of Actions* (October 1997) 399.

⁹¹⁷ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 213.

⁹¹⁸ Submissions 10, 18.

⁹¹⁹ Submissions 5, 8.

(c) The Commission's view

In the view of the Commission, if, at the time the new legislation comes into operation, proceedings have been commenced within time under the existing legislation, the plaintiff will have no need of any benefit which may be conferred by the new legislation.

The plaintiff will need the benefit of the new legislation only if, at the time the new legislation comes into operation, proceedings have been commenced outside the existing limitation period and the defendant has raised a limitations defence. The Commission has already expressed the view that a plaintiff who wishes to seek damages for personal injury, but whose limitation period under the existing legislation has expired, should be able to apply under the new legislation for an extension of the limitation period. The Commission believes that a plaintiff who has commenced proceedings out of time under the existing legislation should not be in a worse situation than a plaintiff who does not commence an action for which the limitation period under the existing legislation has expired until after the commencement of the new legislation.

Accordingly, it is the view of the Commission that the new legislation should permit a plaintiff who is seeking damages for personal injury and who has commenced proceedings out of time under the existing legislation to apply to the court under the new legislation for an extension of time.

8. ACTIONS CONCLUDED PRIOR TO THE COMMENCEMENT OF THE NEW LEGISLATION

Once proceedings have been commenced, an action is generally concluded in one of two ways. Often the parties will agree to the terms of a settlement of their dispute. A settlement may be reached either before the trial begins or, after the trial has started, at any time before the judge delivers his or her decision. If the parties do not agree to settle, and if the action is continued, it will be concluded when final judgment is given.

(a) Other jurisdictions

The Law Reform Commission of Western Australia was of the view that the public interest in preserving the finality of judgments entered outweighed any injustice incurred by individual plaintiffs who may otherwise have been entitled to the benefit of a longer limitation period under new legislation. It therefore recommended that new legislation should not operate

retrospectively to cases which had already been resolved.⁹²⁰

The New South Wales Law Reform Commission, on the other hand, considered that, at least in the context of personal injury claims, a blanket rejection of retrospectivity in such a situation could operate unfairly as between statute-barred plaintiffs who commenced proceedings and those who did not, especially in the light of the often technical and complex reasons for a finding of limitation. The Commission recommended that, for a case which proceeded to judgment, the retrospective effect of changes to limitation law should be excluded only where judgment against the plaintiff was based on the substantive merits of the cause of action, apart from any matter of limitation. In relation to causes of action concluded by settlement, the Commission considered that a compromise may in some cases have been agreed because of an assessment of the likely impact of the existing limitation legislation. It recommended that there should be a judicial discretion to re-open a settlement in cases where it would be just and equitable to do so.⁹²¹

(b) Submissions

Two respondents specifically addressed this issue. One submission proposed that for both actions settled prior to the commencement of new legislation and actions in which judgment was handed down prior to the commencement of the legislation there should be a judicial discretion to review the outcome of the case where it would be just and equitable to do so.⁹²² The other submission expressed the view that:⁹²³

Public policy and interest must support the finality of judgements and settlements reached between parties under law applicable at the time.

Any new legislation should not operate retrospectively to cases which had previously been resolved, whether by way of judgement or by compromise.

(c) The Commission's view

The Commission is of the view that once an action has been concluded,

⁹²⁰ Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (January 1997) 214.

⁹²¹ New South Wales Law Reform Commission, Report No 50: *Limitation of Actions for Personal Injury Claims* (October 1986) 64-65. See also *Limitation Act 1969* (NSW) Sch 5 cl 5.

⁹²² Submission 10.

⁹²³ Submission 20.

either by settlement or judgment, the right of action merges in the settlement or judgment and cannot be revived. In any event, the Commission considers it undesirable to create uncertainty by allowing litigation which has already been concluded to be re-opened.

9. RECOMMENDATIONS

The Commission recommends that if a new scheme of limitation legislation is enacted the following transitional provisions should apply:

- **A plaintiff whose cause of action arises prior to the commencement of the new legislation, and is not at that time statute-barred, should be allowed to bring proceedings within either the existing or the new limitation period, whichever is longer.**
- **Causes of action which have become statute-barred under the existing legislation should not be automatically revived by the new legislation. However, plaintiffs should be entitled to apply to the court under the new legislation for an extension of the limitation period in personal injury claims.**
- **A plaintiff who has commenced statute-barred proceedings under the existing limitation period should not automatically be entitled to the benefit of the new legislation, but should be able to apply to the court under the new legislation for an extension of the limitation period in personal injury claims.**
- **The new legislation should not apply to actions concluded by settlement or judgment under the existing legislation.**

APPENDIX 1

LIST OF RESPONDENTS TO INFORMATION PAPER

Australia Pacific Professional Indemnity Insurance Company Ltd (APPIIL)
Australian Finance Conference
Australian Medical Association (Queensland Branch)
Australian Plaintiff Lawyers Association (APLA) Inc
Baxter, Mr Paul
Bunney, Ms Leanne
Davis, Professor J L R
Duncan, Mr K
Freeburn, Mr Paul
Insolvency Practitioners Association of Australia (Queensland Division)
Insurance Council of Australia Limited
Marfording, Ms A
Morris QC, Mr Anthony J H
O'Sullivan, Mr Gavin D
Queensland Asbestos Related Disease Support Society Inc
Queensland Law Society
Queensland Transport
Roma Community Legal Service Inc - Rural Women's Outreach Service
Royal Australian College of Medical Administrators (Queensland State Executive)
Speering, Mrs A
Surveyors Board of Queensland, The
Turnbull, Mr Douglas
Women's Legal Service Inc

APPENDIX 2

LIST OF RESPONDENTS TO DISCUSSION PAPER

Association of Private Practising Psychologists (Qld) Inc, The
Australian Dental Association (Qld Branch)
Australian Plaintiff Lawyers Association
Australian Finance Conference
Bell, Mr Peter
Building Services Authority
Casey, Mr B T
Department of Families Youth and Community Care
Feeney, Ms Patricia
Financial Counselling Services (Qld) Inc
Freeburn, Mr Paul
Institution of Engineers, Australia, The
Insurance Council of Australia Limited
Miles, The Hon Justice J A, Chief Justice of the Supreme Court of the ACT
Motor Accident Insurance Commission
Pincus, The Hon Mr Justice C W, Court of Appeal (Qld)
Prisoners Legal Service Inc
Queensland Law Society Inc
Queensland Council for Civil Liberties
Wilkie MB BS DPM, Dr William C
Women's Legal Service Inc

APPENDIX 3

COMPARATIVE TABLE

- Notes:**
- * Subject to the judicial discretion to extend the limitation period in the interests of justice, having regard to the factors relevant to the exercise of such discretion.
 - + If the child did not know (and it cannot be said ought to have known) by the time he/she reached 18 years that the assault had occurred and was attributable to the conduct of some other person which warranted bringing a proceeding, the limitation period would be the lesser of three years from the date of discovery or 10 years from when the child reached 18 years.

Factual Situation	Existing Limitation Period	Limitation Period under Commission Recommendation
Motor vehicle accident in which plaintiff is aware that he/she suffers personal injury	3 years from date of accident	3 years from date of accident
Motor vehicle accident in which plaintiff does not appear to have suffered injury	3 years from date of accident or within such extended period that the Court may allow under section 31 which must be within 1 year after the date on which the plaintiff became aware of a material fact of a decisive character relating to the right of action which was not within the means of knowledge of the plaintiff until a date after the commencement of the year last preceding expiration of the limitation period	3 years from when the plaintiff knew or ought to have known he/she suffered injury or 10 years from the date of the accident, whichever is the lesser, subject to the judicial discretion to extend the limitation period in the interests of justice, having regard to the factors relevant to the exercise of such discretion
Action for damages for assault by victim of childhood sexual abuse	3 years from when the child reached 18 years, subject to extension under section 31	3 years from when the child reached 18 years*+

Factual Situation	Existing Limitation Period	Limitation Period under Commission Recommendation
Action for damages for negligence for personal injury suffered by a 12 year old who is aware that he/she suffered injury attributable to the conduct of some other person	3 years from when the child reached 18 years, subject to extension under section 31	3 years from when the child reached 18 years*
Action for damages for negligence for personal injury when one year after the injury the plaintiff was affected by an illness which caused lack of mental capacity for a period of two years	3 years from date of injury	5 years from date of injury (3 years discovery period plus 2 years suspension of limitation period during disability)*
Action for damages for negligence for birth related brain injury which results in plaintiff remaining a person under disability after he/she reaches 18 years	No limitation period	No limitation period
Action for damages for defamation	6 years from the publication of the defamation	The lesser of 3 years from when the plaintiff knew or ought to have known of the publication of the defamation or 10 years from the publication of the defamation*
Action for damages for breach of contract	6 years from date of breach	The lesser of 3 years from when the plaintiff knew or ought to have known of the loss due to the breach of contract or 10 years from the date of breach*
Recovery of debt repayable on demand	6 years from the date of the loan	3 years after default in performance after demand for payment*
Recovery of debt due to be repaid on a particular date	6 years from the due date for repayment	3 years from the due date for repayment*

Factual Situation	Existing Limitation Period	Limitation Period under Commission Recommendation
Action to recover land	12 years from when the plaintiff was dispossessed of the land	10 years from when the plaintiff was dispossessed of the land*
Action to recover land where 5 years after the plaintiff was dispossessed of the land the plaintiff was affected by an illness which caused lack of mental capacity for a period of 4 years	12 years from when the plaintiff was dispossessed of the land	14 years from when the plaintiff was dispossessed of the land (as limitation period suspended for 4 years when the plaintiff was under a disability)*
Action to recover property from a trustee based on fraudulent breach of trust	No limitation period	The lesser of 3 years from when the plaintiff became aware of the breach of trust or 10 years from the date of the breach of trust*
Claim for contribution from a joint tortfeasor	The lesser of 2 years from date on which judgment is given in the principal action or it is settled and 4 years from expiry of the limitation period for the principal action	The lesser of 3 years from when liability in the principal claim occurred and when the person claiming contribution became aware that the injury on which the principal claim was based was, in part, attributable to some other person or 10 years after the earlier of when the claimant for contribution was made a defendant in the principal claim or when the claimant for contribution incurred liability through settlement of the principal claim*