THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 36 Part II

Limitation And Notice Of Actions

REPORT

JANUARY 1997

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on Limitation and Notice of Actions.

P G CREIGHTON
Member

14 January 1997

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ABBREVIATIONS

ACT Working Paper (1984)	Attorney General's Department *Proposals for the Reform and Modernization of the Laws of Limitation in the Australian Capital Territory: Working Paper* (1984)
Alberta Report for Discussion (1986)	Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No 4 1986)
Alberta Report (1989)	Alberta Law Reform Institute Limitations (Report No 55 1989)
Model Limitations Act (Alta)	Alberta Law Reform Institute *Limitations* (Report No 55 1989): Part II - Model Limitations Act (pp 5-12)
British Columbia Report (1974)	Law Reform Commission of British Columbia *Report on Limitations: Part 2 General* (LRC 15 1974)
British Columbia Report (1990)	Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (LRC 112 1990)
Discussion Paper (1992)	Law Reform Commission of Western Australia *Discussion Paper on Limitation and Notice of Actions* (project No 36 Part II 1992)
Edmund Davies Committee Report (1962)	*Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962 Cmnd 1829)
Ireland Report (1987)	Irish Law Reform *Commission Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21 1987)
New Brunswick Discussion Paper (1988)	Law Reform Branch, Office of the Attorney General, Province of New Brunswick *Limitations Act Discussion Paper* (1988)
Newfoundland Report (1986)	Newfoundland Law Reform Commission *Report on Limitation of Actions* (NLRC – R1 1986)
Newfoundland Working Paper (1985)	Newfoundland Law Reform Commission *Working Paper on Limitation of Actions* (NLRC - WP1 1985)
NSW Report (1967)	New South Wales Law Reform Commission *First Report on the Limitation of Actions* (LRC 3 1967)[1]

[1] References to paragraphs are references to Appendix C of the report.

NSW Report (1975)	New South Wales Law Reform Commission *Third Report on the Limitation of Actions - Special Protections* (LRC 21 1975)
NSW Report (1986)	New South Wales Law Reform Commission *Limitation of Actions for Personal Injury Claims*: *Report* (LRC 50 1986)
New Zealand Report (1988)	New Zealand Law Commission *Limitation Defences in Civil Proceedings* (Report No 6 1988)
Draft Limitation Defences Act (NZ)	New Zealand Law Commission *Limitation Defences in Civil Proceedings* (Report No 6 1988) ch XV - A (Draft) Limitation Defences Act (pp 146 - 179)
Ontario Report (1969)	Ontario Law Reform Commission *Report on Limitation of Actions* (1969)
Ontario Report (1991)	Ontario Limitations Act Consultation Group *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991)
Limitations Bill 1992 (Ont)	Bill 99: An Act to revise the Limitations Act, 2nd Session, 35th Legislature, Ontario, 41 Elizabeth II 1992 (1st Reading November 25th 1992)
Orr Committee Report (1977)	[UK] Law Reform Committee *Twenty-first Report (Final Report on Limitations of Actions)* (1977 Cmnd 6923)
Orr Committee Interim Report (1974)	[UK] Law Reform Committee *Twentieth Report* (*Interim Report on Limitation of Actions: In Personal Injury Claims)* (1974 Cmnd 5630)
Part I Report (1982)	Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions: Latent Disease and Injury* (Project No 36 Part I 1982)
Saskatchewan Report (1989)	Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989)
Scarman Committee Report (1984)	Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (1984 Cmnd 9390)
South Australia Report (1970)	Law Reform Committee of South Australia *Law Relating to Limitation of Time for Bringing Actions* (12th Report 1970)

Tasmania Report (1992)	Law Reform Commissioner of Tasmania *Limitation of Actions for Latent Personal Injuries* (Report No 69 1992)
The Laws of Australia	*The Laws of Australia: vol 5.10: Limitation of Actions* (by P R Handford)
Tucker Committee Report (1949)	*Report of the Committee on the Limitation of Actions* (1949 Cmd 7740)
Wright Committee Report (1936)	[UK] Law Revision Committee *Fifth Interim Report (Statutes of Limitation)* (1936 Cmd 5334)

The pronouns and adjectives "he", "him" and "his", as used in this report, are not intended to convey the masculine gender alone, but include also the female equivalents "she", "her" and "hers".

RECOMMENDATIONS

CHAPTER 7 - THE COMMISSION'S MAJOR RECOMMENDATIONS

Two general limitation periods

1. (1) All claims to which the *Limitation Act* applies (with the exception of the special cases dealt with in recommendations 26, 35 and 37 below) should be governed by two limitation periods, the discovery period and the ultimate period.

(2) If either the discovery period or the ultimate period has expired, and the plaintiff has not commenced legal proceedings, the defendant should be able to plead a defence of limitation.

(3) The discovery period should be three years after the date on which the plaintiff first knew, or in the circumstances ought to have known, that -

(a) the injury in respect of which he brings proceedings had occurred;
(b) the injury was attributable to conduct of the defendant; and
(c) the injury, assuming liability on the part of the defendant, warrants bringing proceedings.

(4) The ultimate period should be 15 years, running from the date on which the claim arose.

Paragraphs 7.20-7.25, 7.30-7.32,7.49-7.55

2. For the purposes of the discovery period, "injury" should be defined in broadly similar terms to the definition in the Alberta *Limitations Act 1996*, which provides that "injury" means personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of these, the breach of a duty, but-

(1) the definition should make clear when the discovery period will start to run in cases where there is more than one potential injury;

(2) it should be provided that "personal injury" includes all cases of trespass to the person, and that "breach of duty" includes a trespass to land or goods, and a conversion or detention of goods.

Paragraphs 7.26-7.29

3. For the purposes of the ultimate period -

(1) 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 should be regarded as arising when the conduct terminates or the last act or omission occurs;

(2) a claim based on a breach of duty should be regarded as arising when the conduct, act or omission occurs;

(3) a claim based on a demand obligation should be regarded as arising when a default in performance occurs after a demand for performance is made.

Paragraphs 7.33-7.34

Extension of the two general limitation periods

4. The court should be able to order that either the discovery period or the ultimate period may be extended in the interests of justice, but should only be able to make such an order 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 court should be able to take all the circumstances of the case into account, including the following -

(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, 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;

(5) the conduct of the defendant;

(6) The duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;

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

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

Paragraphs 7.35-7.48

Effect of the running of the period

5. The effect of the running of a period of limitation should continue to be to bar the remedy and not the right, and the major limitation periods should be drafted in the form of giving the defendant a defence once either the discovery period or the ultimate period has expired. However, the present rule that in actions for the recovery of land the running of the period extinguishes the claimant's rights should be retained, at least until that doctrine is fully examined in a separate reference.

Paragraphs 7.65-7.67

CHAPTER 8 - CONSEQUENTIAL RECOMMENDATIONS

Onus of proof

6. The issue of which party bears the onus of proof in relation to any particular limitation period should be made clear by express provisions, as follows -

(1) the plaintiff should bear the burden of proving that the action was commenced before the three-year discovery period had elapsed;

(2) the defendant should bear the burden of proving that the action was not commenced before the 15-year ultimate period had elapsed;

(3) the plaintiff should bear the burden of proving that the conditions necessary for the court to allow the action to proceed despite either limitation period having expired are met.

Paragraphs 8.5-8.10

Knowledge of others and the discovery period

7. Where the claimant is a principal and the knowledge in question has been acquired by his agent, the question whether the agent's knowledge should be regarded as that of the principal for the purposes of the discovery period should be determined by the ordinary law of agency.

Paragraphs 8.13-8.15

8. Where the claimant is a successor owner of property, in cases where the damage becomes discoverable before the successor owner acquires an interest in the property, the discovery period should begin only on the date the interest is acquired (unless the successor owner has the necessary knowledge before that date).

Paragraphs 8.30-8.31

Transitional provisions

9. The provisions of the new Act should have retrospective operation to the following extent -

(1) 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 fact that proceedings are pending when the new Act comes into force should make no difference.

(2) As respects causes of action for personal injury, the provisions of the new Act should apply whether or not the action was barred by the provisions of the

previous law, but in all other cases, the Act should not operate to revive a statute-barred cause of action.

(3) The new Act should not apply retrospectively to cases which have already been resolved, either by a court judgment or by settlement.

Paragraphs 8.37-8.47

CHAPTER 9 - VICTIMS OF CHILD SEXUAL ABUSE

10. The Commission's general recommendations will ensure that plaintiffs in sexual abuse cases are not unfairly defeated by the running of the limitation period, and there is therefore no need to enact provisions dealing specifically with sexual abuse, or sexual abuse by a person in a position of trust.

Paragraphs 9.41-9.47

CHAPTER 10 - PUBLIC AUTHORITIES

11. The special limitation period and notice requirements in section 47A of the *Limitation Act 1935* should be abolished, leaving the ordinary limitation rules to apply in actions against public authorities.

Paragraphs 10.18-10.25

CHAPTER 11 - PROFESSIONAL PERSONS

12. The limitation periods which apply in actions against professional persons (including builders) should be the same as those which apply in all other cases.

Paragraphs 11.12-11.21

CHAPTER 12 - COMMON LAW ACTIONS

Actions on a specialty

13. The two general limitation periods should apply to contracts under seal in exactly the same way as they apply to simple contracts.

Paragraphs 12.8-12.12

Defamation

14. Actions for slander actionable without proof of damage should no longer be subject to a shorter limitation period than other defamation actions.

Paragraphs 12.23-12.24

Successive conversions

15. Where the plaintiff has a cause of action for the conversion or detention of goods, and before he recovers possession of the goods there is a further conversion or detention, it should not be possible to bring an action for any subsequent conversion or detention, or to recover the proceeds of sale of the goods, once the limitation period for the initial conversion or detention has expired.

Paragraphs 12.36-12.37

Actions to enforce a judgment or arbitral award

16. Actions to enforce a judgment or an arbitral award should be governed by the two general limitation periods.

Paragraphs 12.38-12.47

Actions to enforce a recognisance

17. Actions to enforce a recognisance should be governed by the two general limitation periods.

Paragraphs 12.48-12.49

Actions for penalties, forfeitures and other sums recoverable under statute

18. All actions for penalties, forfeitures and other sums recoverable under statute should be governed by the two general limitation periods.

Paragraphs 12.50-12.57

Actions to recover arrears of interest

19. Actions to recover arrears of interest should be governed by the two general limitation periods.

Paragraphs 12.58-12.60

Contribution between tortfeasors

20. For the purposes of actions for contribution between tortfeasors -

(1) the discovery period should run from the time when the tortfeasor's liability is finally confirmed, either by a court judgment, or an arbitration award, or by a settlement (with or without admission of liability);

(2) 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 was made a defendant in respect of the compensation claim.

Paragraphs 12.61-12.66

Joint rights and liabilities

21. The new Limitation Act should incorporate provisions on joint rights and joint liabilities based on those in sections 75 and 76 of the New South Wales *Limitation Act 1969*.

Paragraphs 12.67-12.68

CHAPTER 13 - EQUITABLE CLAIMS

Application of general principles

22. The two general limitation periods should apply to all equitable claims, including those not at present governed by any limitation period.

Paragraphs 13.61-13.70

Fraudulent concealment; fraudulent breach of trust

23. There is no need for a separate rule dealing with fraudulent concealment, or with fraudulent breach of trust or the recovery of trust property.

Paragraphs 13.72-13.75

Laches and acquiescence

24. Nothing should preclude a court from barring the defendant's claim under the equitable doctrines of laches and acquiescence, notwithstanding that any limitation period applicable to the claim has not expired.

Paragraphs 13.76-13.78

CHAPTER 14 - ACTIONS RELATING TO LAND

General

25. The Commission should be given a reference to review the system of acquisition of title to property by adverse possession in Western Australia, with particular reference to Torrens title.

Paragraph 14.31

26. Actions for the recovery of land should be excepted from the two general limitation periods.

Paragraphs 14.32-14.35

27. The provisions of the *Limitation Act 1935* on actions for the recovery of land should be redrafted in modern form and made as simple to understand as possible, using as a model the provisions of the New South Wales *Limitation Act 1969*.

Paragraph 14.36

The new provisions in the Limitation Act

28. Provisions based on the sections of the New South Wales *Limitation Act* listed in the second column of the table on page 347 of this report should replace the existing provisions of the *Limitation Act 1935* listed in the third column of that table.

Paragraphs 14.39-14.49

29. There should be no change to the rule that no title by adverse possession may be obtained against the Crown.

Paragraph 14.50

30. The provisions of the Limitation Act on entailed interests should be repealed without replacement.

Paragraph 14.51

31. The new Act should incorporate provisions based on section 16 of the Queensland *Limitation of Actions Act 1974* dealing with trusts for sale.

Paragraph 14.52

32. The new Act should incorporate a provision based on the existing section 8, dealing with the position of administrators.

Paragraph 14.53

33. Actions for the recovery of arrears of rent, or for damages in respect of such arrears, should be governed by the two general limitation periods recommended by the Commission.

Paragraph 14.54

34. Section 31 of the *Limitation Act*, which provides that the receipt of rent payable by a tenant is to be deemed the receipt of the profits of the land for the purposes of the Act, should be repealed without replacement.

Paragraph 14.55

CHAPTER 15 - MORTGAGES

35. In the case of mortgages of land, actions by a mortgagor to redeem the property subject to the mortgage, and actions by a mortgagee to recover possession of the property, foreclose or recover principal money or interest on that money, should be subject to the ultimate period but not the discovery period.

Paragraphs 15.29-15.33

36. Actions for the redemption and foreclosure of mortgaged personalty, like all other actions relating to mortgages of personalty, should be subject to a statutory limitation period, but there should be no special limitation rules for such actions, which should accordingly be governed by the general discovery and ultimate periods.

Paragraphs 15.34-15.35

CHAPTER 16 - ACTIONS FOR THE RECOVERY OF TAX

37. The one year limitation period for actions for the recovery of money paid as tax presently provided for by section 37A of the *Limitation Act* should be retained, but it should be limited to cases in which the payment is recoverable on the ground of the invalidity of the legislation in question. It should be expressly provided that this period cannot be extended and applies notwithstanding any other laws which provide to the contrary.

38. It should be expressly provided that these provisions should not apply to an action for recovery of an amount that would have been recoverable as an overpayment if the purported tax had been valid, if some other legislative provision provides a longer limitation period for such a case. In the absence of a specific provision in other legislation, the general limitation periods recommended by the Commission in this report would apply.

Paragraphs 16.6-16.8

CHAPTER 17 - DISABILITY

Preliminary matters

39. Save for a few exceptional instances, the rules on disability should be the same for all kinds of claims covered by the Limitation Act.

Paragraph 17.29

40. Coverture should no longer be a ground of disability under the Limitation Act for any purpose.

Paragraph 17.31

41. All provisions which refer to absence beyond the seas of either party should be repealed without replacement.

Paragraph 17.32

42. Section 39 of the Limitation Act, which provides that the running of the limitation period is not delayed by the fact that the plaintiff is imprisoned at the time the cause of action accrues, should be repealed without replacement.

Paragraph 17.33

A new approach to disability

43. In the case of minors -

(1) if the plaintiff proves that he 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, the 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 discretionary provision recommended by the Commission.

44. If, subsequent to the injury but before attaining adulthood, the minor ceases to be in the custody of a parent or guardian -

(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.

Paragraphs 17.57-17.61

45. In a case where at the time of the injury the plaintiff was a person who is unable by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his affairs -

(1) If an administrator has been appointed to look after his estate under the *Guardianship and Administration Act 1990*, 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. The ultimate period would run from the date of the act or omission giving rise to the injury in the ordinary way.

(2) In all other cases, only the ultimate period and not the discovery period should apply.

46. 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*, when it

should recommence. If at the time when the administrator is appointed the discovery period has less than a year to run, then it should be extended to one year, so that the administrator is assured of having a minimum period of that length in which to determine whether or not to commence proceedings. The ultimate period should continue to run despite the onset of incapacity.

Paragraphs 17.62-17.65

47. The existing rule whereby an action for recovery of land may be brought at any time within six years after the disability ceases or the person under disability dies, whichever first happens, should be retained, but only for the disabilities which will be retained under the Commission's recommendations, that is, minority and mental incapacity. The rules that the plaintiff cannot have more than 30 years from the time that the right first accrued, and that no extra time can be allowed for a succession of disabilities, should also be retained.

Paragraph 17.69

Burden of proof

48. It should be expressly provided that the burden of establishing that the running of any limitation period has been suspended by reason of the plaintiff being under disability should be on the plaintiff.

Paragraphs 17.70-17.71

CHAPTER 18 - AGREEMENT, ACKNOWLEDGMENT AND PART PAYMENT

Agreement and connected matters

49. It should be expressly provided that it is possible to extend or reduce any limitation period by agreement. There should not be any requirement that such agreements be in writing.

Paragraphs 18.1-18.3

50. The limitation period should not be suspended during negotiations, or during any period during which the plaintiff's complaint is being considered by any alternative forum.

Paragraphs 18.4-18.7

Acknowledgment and part payment

51. There should be one set of rules on acknowledgment and part payment, which will apply to all cases in which those doctrines operate. Under those rules, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, the operation of all applicable limitation periods should begin anew at the time of the acknowledgment or part payment.

Paragraphs 18.32-18.34

52. The rules relating to acknowledgment and part payment should not be extended to unliquidated claims.

Paragraphs 18.36-18.41

53. The rules of acknowledgment and part payment should be stated to apply to all claims for the recovery, through the realisation of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to, a principal debt, rents, income, a share of estate property, and interest on any of the foregoing. In addition, it should be stated that these rules apply to actions to recover land, which under the Commission's recommendations are not subject to the two general limitation periods but to a specific limitation period.

Paragraphs 18.42-18.45

54. An acknowledgment should be effective in all cases even though it does not disclose a promise to pay.

Paragraph 18.46

55. It should be provided that -

(1) an acknowledgment should be in writing and signed by the maker;

(2) an acknowledgment or a part payment made by or to an agent should have the same effect as if made by or to the principal;

(3) where a claim is for the recovery of both a primary sum and interest on that sum, an acknowledgment of either obligation, or a part payment in respect of either obligation, should be an acknowledgment of, or a part payment in respect of, the other obligation;

(4) where there is a claim for the recovery of income falling due at any time, an acknowledgment or part payment of that claim is an acknowledgment or part payment of a claim to recover income falling due at a later time on the same account.

Paragraph 18.47

56. (1) A person should have the benefit of an acknowledgment or part payment only if it is made to him, or to a person through whom he claims;

(2) A person should be bound by an acknowledgment or part payment only if –

(a) he is a maker of it; or

(b) he is liable in respect of a claim -

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable in respect of the claim.

Paragraphs 18.48-18.50

57. Except in cases where the running of the limitation period extinguishes the plaintiff's rights, it should be possible for a claim to be revived by acknowledgment or part payment even after the limitation period has expired.

Paragraphs 18.51-18.54

The rule in *Seagram v Knight*

58. In order to eliminate the rule that the running of time is suspended in relation to a debtor who becomes the administrator of his creditor, the debtor-administrator should be made accountable to the estate for the amount of his debt, so that his position becomes the same as that of the debtor-executor.

Paragraphs 18.55-18.57

CHAPTER 19 - LIMITS OF APPLICATION

Actions not subject to the Limitation Act

59. The new Limitation Act should provide that nothing in the Act applies to an action for which a limitation period is fixed by another Act.

60. The new Limitation Act should expressly provide that it does not apply to –

(a) criminal proceedings;

(b) proceedings for certiorari, mandamus and prohibition;

(c) habeas corpus.

Paragraphs 19.14-19.17

Arbitrations

61. The new Limitation Act should provide that -

(1) it applies to arbitrations in the same way as to actions;

(2) the appropriate limitation period is that which under the Act applies to a cause of action in respect of the same matter;

(3) an arbitration is deemed to be commenced when one party serves on the other a notice requiring the other to appoint or agree to the appointment of an arbitrator or (where the arbitration agreement provides that the reference shall be to a named or designated person) requiring the other to submit the dispute to that person, notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue until an award is made.

Paragraphs 19.18-19.19

CHAPTER 20 - THE LIMITATION ACT AND PROCEDURAL RULES

The running of the limitation period

62. It should continue to be the issue of proceedings, rather than the service of proceedings on the defendant which stops time running.

Paragraphs 20.1-20.7

Cause of action affected by commencement of proceedings

63. It should be provided that a claim by way of set off or counterclaim is a separate action, and is, as against a person against whom the claim is made, brought on the only or earlier of such of the following dates as are applicable -

(1) the date on which he becomes a party to the principal action; and

(2) the date on which he becomes a party to the claim.

Paragraphs 20.8-20.12

The rule in *Weldon v Neal*

64. The new Limitation Act should contain a provision specifically abolishing the rule in *Weldon v Neal*, under which (except in cases in which amendment of a writ or pleading after the expiry of the limitation period is permitted by the *Rules of the Supreme Court*) a plaintiff is not allowed to amend a writ or pleading to introduce a

claim that had become barred by the running of the limitation period because it would prejudice the rights of the other party.

Paragraphs 20.15-20.20

CHAPTER 21 - ADMIRALTY ACTIONS

65. The new Limitation Act should specifically provide that it applies to admiralty claims. This would include claims for seamen's wages, which would be dealt with like any other action for breach of contract.

66. The provisions of the *Supreme Court Act 1935* dealing with ship collisions should be retained, but they should -

(1) be brought fully into line with section 396 of the Commonwealth *Navigation Act 1912* and similar provisions in State and Territory legislation by amending them to include the provision relating to claims in respect of salvage services found in that legislation;

(2) be relocated in the Limitation Act.

Paragraphs 21.18-21.21

CHAPTER 22 - WRONGFUL DEATH; SURVIVAL OF ACTIONS

Actions under the Fatal Accidents Act

67. Section 7 of the *Fatal Accidents Act 1959* should be repealed, and the provisions of the new Limitation Act should apply to fatal accident actions.

68. In such actions, the ultimate period should be measured from the act or omission which caused the death of the deceased, rather than from the death itself.

Paragraphs 22.12-22.14

Survival of actions for the benefit of a deceased estate

69. The ordinary limitation periods should apply where the action is being brought by the personal representative of a deceased person as the successor owner of a claim (as is the case at present). In such a case, the discovery period should begin at the earliest of the following times -

(1) when the deceased owner first acquired or ought to have acquired the necessary knowledge, if he acquired the knowledge more than three years before his death;

(2) when the personal representative was appointed, if he had the necessary knowledge at that time;

(3) when the personal representative first acquired or ought to have acquired the necessary knowledge, if he acquired the knowledge after his appointment.

Paragraphs 22.17-22.24

Survival of actions against a deceased estate

70. The special limitation period in section 4(3) of the *Law Reform Miscellaneous Provisions) Act 1943* should be abolished, with the result that the two general limitation periods will apply in cases where a cause of action has survived against a deceased estate.

Paragraphs 22.25-22.32

CHAPTER 23 - ACTIONS AGAINST THE CROWN AND LOCAL GOVERNMENT AUTHORITIES

Actions against the Crown

71. The special limitation period and notice requirements in section 6 of the *Crown Suits Act 1947* should be abolished, and the ordinary limitation periods should apply to such actions.

Paragraphs 23.4-23.8

Actions against local government authorities

72. The limitation periods which apply in actions against local government authorities should be the same as those which apply in actions against other defendants.

Paragraphs 23.9-23.15

PART I: GENERAL

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked to examine and report on the law relating to the limitation and notice of civil actions, and incidental matters.

1.2 The law of limitation of actions deals with the rules governing the period of time within which a person must commence civil proceedings. (This area of law does not deal with criminal proceedings,[1] and in any case the prosecution of serious criminal offences is generally not subject to any limitation period.[2]) The law prescribes various limitation periods for different causes of action. The period begins to run when the cause of action "accrues", that is to say, when it first becomes possible for the claim to be brought to court. In Western Australia, proceedings are commenced by the issue of a writ, an originating summons or an originating motion. Thus, the limitation period is set running by the accrual of the cause of action, and the plaintiff must commence proceedings by issuing a writ or other process before the period expires. If the period runs its course before the action is begun, the defendant can plead the defence of limitation.[3]

1.3 Notice requirements must be distinguished from limitation periods. Some statutes provide that not only must an action be brought within a stated number of years, but also that notice of the claim must be given to the defendant within a certain time (usually a fairly short

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1 The Limitation Acts do not include most criminal proceedings: *Attorney General (UK) v Bradlaugh* (1885) 14 QBD 667, Brett MR at 687; *Johannessen v Miller* (1977) 16 SASR 546; *Grzybowicz v Smiljanic* [1980] 1 NSWLR 627; *Meverley v Commane* (1987) 47 SASR 162. Criminal proceedings are specifically excluded in the Northern Territory and Queensland: *Limitation Act 1981* (NT) s 6(3)(b); *Limitation of Actions Act 1974* (Qld) s 6(3)(a).

2 Except where a limitation of time is expressly prescribed, a prosecution for an indictable offence may be commenced at any time: *Criminal Code* s 574(3)(c). The Code specifies limitation periods for offences involving corrupt and illegal practices at elections (s 103), for the offences in ss 51 (unlawful military activities), 52 (sedition) and 65 (riotous assembly), and for prosecutions for anything done in pursuance of the provisions of the Code with respect to the arrest of offenders or the seizure of goods (s 739). A prosecution for a simple offence must, unless otherwise provided, be commenced within 12 months after the offence was committed: *Criminal Code* s 574(2); *Justices Act 1902* s 51.

3 The running of a period of limitation does not generally extinguish the plaintiff's rights, but merely bars his remedy by giving the defendant a defence to the claim. The defendant may choose not to plead this defence. See paras 7.56-7.57 below.

time) after the cause of action arose. An example is a claim against a public authority in respect of an act done under a statute or in pursuance of a public duty. Under section 47A of the *Limitation Act 1935* the action must be brought within one year, unless the defendant consents or a court gives leave to the bringing of the action within six years; but the prospective plaintiff must notify the prospective defendant as soon as practicable after the cause of action accrues, giving specified information about the proposed action.[4]

1.4 It is sometimes suggested that limitation and notice rules are not necessary, and that legal claims should be determined on the strength of the cases of the respective parties, rather than being subject to the possibility of being defeated simply by the running of time.[5] However, all legal systems have found it necessary to have limitation rules, and with good reason.[6] The policy behind limitation rules is well expressed in the following passage from the report of the Ontario Law Reform Commission:

> "Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an 'Act of peace'."[7]

1.5 In its earlier work on limitation this Commission listed four reasons for having limitation periods:

> "(a) [T]o protect defendants from claims relating to incidents which occurred many years before and about which they, and their witnesses, may have little recollection and no longer have records;
> (b) that it is in the public interest for disputes to be resolved as quickly as possible and as close in point of time to the events upon which they are based so that the recollections of witnesses are still clear;
> (c) to enable a person to feel confident, after a certain period of time, that a potential dispute cannot then arise - to operate as an 'act of peace';

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4 This is one of a number of important examples of notice requirements found in provisions dealing with actions against government bodies. These provisions are dealt with in Chs 10 and 23 below.

5 See for example the argument of the Trades Union Congress in its submission to the Orr Committee: Orr Committee Interim Report (1974) para 26.

6 See generally Alberta Report for Discussion (1986) paras 1.25-1.47; New Zealand Report (1988) paras 100-110; Alberta Report (1989) 16-19.

7 Ontario Report (1969) 9.

(d) to enable a person to arrange his affairs on the basis that a claim can no longer be made against him after a certain time."[8]

A number of additional reasons could be listed, in particular the difficulty of assessing such factors as the reasonableness of conduct in the light of standards prevailing at an earlier point in time, and the increased cost and difficulty of obtaining liability insurance if liability is ongoing rather than being limited by the running of the limitation period.

2. PROGRESS OF THE REFERENCE

1.6 The Commission issued a Discussion Paper in February 1992, which canvassed all the above issues and raised a number of specific matters for comment. The paper was launched at a Law Society of Western Australia seminar attended by many members of the legal profession, and was widely distributed throughout Western Australia and elsewhere. The submissions received in response to the Discussion Paper are listed in Appendix I. The Commission is grateful to all the commentators for the time and trouble they took.

1.7 The Commission now submits this report containing its final recommendations. The recommendations in the report were developed during 1995 by the Commission as then constituted - Mr P G Creighton, Ms C J McLure and Dr P R Handford - and the report was substantively completed in early January 1996. However the Commission was unable to submit the report at that time because the terms of office of two of the members had come to an end on 31 December 1995.[9] Between 1 January and 21 October 1996 the Commission had only one member, and the report could therefore not be submitted. However, on 22 October 1996 the Attorney General appointed three new members of the Commission. Since then, the report has been revised and brought up to date, and the three new members - Mr R E Cock, Mr W S Martin and Professor R L Simmonds - endorse its recommendations. The report has been signed by the three members holding office as at the date of signature.

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8 Part I Report (1982) para 1.10, repeated in Discussion Paper (1992) para 1.6. See also *Brisbane South Regional Health Authority v Taylor* (1996) 70 ALJR 866, McHugh J at 870-872, citing para 1.6 of the Discussion Paper with approval in the context of a discussion of the rationales for the existence of limitation periods.

9 See the Commission's *Annual Report* 1995-1996 ch 1.

3. SCOPE OF THE INQUIRY

(a) The *Limitation Act 1935*

1.8 In Western Australia, the general rules on limitation of actions are set out in the *Limitation Act 1935*. However, these rules are not of modern origin. The Act merely restates, often word for word, the provisions of earlier laws which were either inherited from England[10] on the foundation of the State in 1829, or incorporated in Western Australian law by the adoption or copying of English statutes. In this way the *Limitation Act* reproduces the provisions of the *Limitation Act 1623*, the *Civil Procedure Act 183*3, the *Real Property Limitation Acts 1833* and 1874 and a number of other Acts.

1.9 In England, these statutory provisions were repealed by the *Limitation Act 1939*, which abolished the old rules and substituted modern provisions based on the recommendations of the 1936 report of the Law Revision Committee, chaired by Lord Wright.[11] Since 1936 there have been further reports and further amendments[12] and in 1980 a new Limitation Act replaced the 1939 statute.

1.10 The other Australian States and Territories also inherited or adopted the English statutes passed between 1623 and 1874. However, in nearly every case, they have now been replaced by modern legislation.[13] Queensland, Tasmania and Victoria have modern statutes based on the reformed English legislation of 1939.[14] The New South Wales Law Reform Commission Report of 1967[15] used the English Act as a basis but recommended further reforms. The New South Wales *Limitation Act 1969*, which resulted from that Commission's recommendations, was the model for the legislation in the Australian Capital Territory and the Northern Territory.[16] Apart from Western Australia, only South Australia retains limitation

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10 Most legislation on limitation of actions passed by the United Kingdom Parliament does not apply in Scotland. It is therefore referred to as English rather than United Kingdom legislation. Scotland has separate legislation of its own: see *Prescription and Limitation (Scotland) Act 1973* (UK), implementing the Report of the Scottish Law Commission *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15 1970).

11 Wright Committee Report (1936).

12 See paras 2.16-2.18 below.

13 See paras 2.20-2.34 below.

14 *Limitation of Actions Act 1974* (Qld); *Limitation Act 1974* (Tas); *Limitation of Actions Act 1958* (Vic).

15 NSW Report (1967).

16 *Limitation Act 1985* (ACT); *Limitation Act 1981* (NT).

legislation based on the old English provisions[17] and even then a number of the provisions of its Act are the result of modern reforms.[18]

1.11 The same process has taken place in other common law jurisdictions. So, for example, the New Zealand *Limitation Act 1950*[19] was based on the English Act of 1939. In Canada,[20] there are two jurisdictions, Newfoundland and Ontario, in which the legislation remains untouched by modern law reform, and so the present law closely resembles that in Western Australia.[21] The other Canadian jurisdictions have all taken some steps along the path of reform. The beginning of the reform process was the Uniform Limitation of Actions Act approved by the Conference of Commissioners on Uniformity of Legislation in Canada in 1931. Alberta, Manitoba, Prince Edward Island, Saskatchewan, Northwest Territories and the Yukon Territory adopted legislation based on the Uniform Act.[22] The Acts of Alberta and Manitoba also incorporated some more recent reforms.[23] Except in Alberta, the legislation in those jurisdictions remains in force. The New Brunswick Act[24] is also fairly similar to the Uniform Act. British Columbia has a more modern Act: in 1975 that province enacted limitation legislation[25] based on the recommendations of the Law Reform Commission of British Columbia,[26] which built on the work of the Wright Committee, the New South Wales Law Reform Commission and the Ontario Law Reform Commission.[27] In 1982, the Nova Scotia Act was also amended to incorporate some modern provisions.[28]

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17 *Limitation of Actions Act 1936* (SA).

18 Eg s 45 (disability), s 48 (general power to extend periods of limitation).

19 See paras 2.37-2.38 below.

20 See paras 2.39-2.43 below.

21 The *Limitations Act RSO 1990* c L-15, the *Limitation of Personal Actions Act RSN 1990* c L-15 and the *Limitation of Realty Actions Act RSN 1990* c L-16 are, like the legislation in Western Australia, derived chiefly from the old English statutes.

22 See *Limitation of Actions Act RSA 1980* c L-15; *Limitation of Actions Act RSM 1987* c L-150; *Statute of Limitations RSPEI 1988* c S-7; *Limitation of Actions Act RSS 1978* c L-15; *Limitation of Actions Ordinance RONWT 1974* c L-6; *Limitation of Actions Act RSYT 1986* c 104. In three of these jurisdictions the Acts provide that they shall be interpreted and construed so as to effect the general purposes of the Act in making uniform the law of the provinces that enact it: *Limitation of Actions Act RSM 1987* c L-150 s 60; *Statute of Limitations RSPEI 1988* c S-7 s 53; *Limitation of Actions Act RSS 1978* c L-15 s 52.

23 See SA 1966 c 49; SM 1966-67 c 32.

24 *Limitation of Actions Act RSNB 1973* c L-8.

25 See now *Limitation Act RSBC 1979* c 236.

26 British Columbia Report (1974).

27 Wright Committee Report (1936); NSW Report (1967); Ontario Report (1969).

28 See now *Limitation of Actions Act RSNS 1989* c 258. From this point onwards, references to Limitation Acts and other statutes contained in the Revised Statutes of the various provinces will be cited in the same fashion as other legislation referred to in this report, rather than adopting the official Canadian citations used in this and the previous footnotes in this paragraph. The official Canadian citations will however be used for references to amending Acts.

1.12 Thus while the limitation legislation of Western Australia remains rooted in the 19th century, over the last fifty years most other common law jurisdictions have adopted modern reforms which can in most cases be traced back to the pioneering work of the Wright Committee. However, even those reforms are now looking somewhat dated. Over the last few years, law reform bodies in three jurisdictions - New Zealand, Alberta and Ontario - have issued reports recommending far-reaching changes to limitations law.[29] In Alberta, these recommendations have now been implemented by the *Limitations Act 1996*,[30] which was assented to on 1 May 1996 and will come into force on proclamation, expected to take place early in 1997. In New Zealand the recommendations (set out in the report in the form of draft legislation[31]) have not yet been enacted.[32] In Ontario the recommendations have been adopted in a Bill[33] which was before the Ontario Parliament when it was prorogued late in 1994.[34] Together these reports, and the legislation or draft legislation in which their recommendations are set out, represent a new phase of thinking about limitation of actions legislation. No longer are law reform bodies looking to produce a traditional Act setting out a number of different limitation periods for different causes of action, all running from the time of accrual: instead, they are suggesting new concepts such as general limitation periods, the adoption of limitation periods which run not from accrual but from some other starting-point, and ultimate or "long stop" limitation periods beyond which no extension of the ordinary period is possible.[35] Compared with these jurisdictions, Western Australia is not one step but two steps behind.

(b) The problem of latent injury

1.13 A continual concern of law reform commissions and legislatures over the last thirty years has been the problem of latent injury. In *Cartledge v E Jopling & Sons Ltd* [36] in 1962, the English House of Lords held that, in cases involving diseases such as silicosis or

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29 New Zealand Report (1988); Alberta Report (1989); Ontario Report (1991).

30 *Limitations Act, SA 1996*, c L-15.1 (reproduced in Appendix II), hereafter cited as *Limitations Act 1996* (Alta).

31 *Draft Limitation Defences Act* (NZ) (reproduced in Appendix III).

32 However the Commission understands that there is a likelihood that the New Zealand recommendations may be implemented in the near future: information from Mr Robert Buchanan, Director of the New Zealand Law Commission, December 1996.

33 Limitations Bill 1992 (Ont) (reproduced in Appendix IV).

34 The Bill was given its first reading on 25 November 1992 and was still before Parliament in October 1994: letter from Hon Marion Boyd, then Attorney General of Ontario, 27 October 1994, on file at the Commission. On the calling of a general election in June 1995, the Bill lapsed. The election resulted in a change of government. No decision whether to reintroduce reforms to the *Limitations Act* has yet been made: information from Mr Allan Shipley, Ministry of the Attorney General, December 1996.

35 These new initiatives are dealt with in detail in Ch 6 below.

36 [1963] AC 758.

asbestosis (both forms of pneumoconiosis), the cause of action accrues as soon as some damage results from the inhalation of silica dust or asbestos particles, even though the damage is undetectable and the plaintiff is unaware of it. Since then nearly all jurisdictions have attempted to reform their limitation legislation to deal with the problem of latent personal injury.[37] Because the ordinary limitation period is likely to have run before the plaintiff is aware he has suffered injury, Limitation Acts generally allow the extension of the period on varying grounds. More recently, some jurisdictions have passed amending legislation to deal with the problem of latent property damage, as a result of problems experienced by building owners when a building is defectively constructed but the defect only becomes apparent much later, when the limitation period has expired.[38]

1.14 In Western Australia, the problems being experienced with asbestos-related diseases at Wittenoom and elsewhere caused the then Attorney General to request the Commission to give urgent consideration to the issue of latent personal injury and disease. The Commission submitted a report in 1982.[39] The recommendations in the report were not confined to asbestos-related diseases, but covered all latent disease and injury. The legislation which resulted from this report[40] was however restricted to asbestos-related diseases and did not implement the wider reforms recommended by the Commission. This means that, as compared with most other jurisdictions, the present legislation in Western Australia is very limited in the extent to which it deals with the problem of latent injury.

(c) Other current problems

1.15 Latent injury is only one of the issues arising in recent years which has caused concern about the operation of limitation legislation. Since the mid-1980s, some victims of sexual abuse have made attempts to bring civil actions against the person responsible for that abuse. Since the acts in question generally took place during childhood, and victims generally take a considerable period of time after reaching adulthood to come to terms with what has happened, such actions often come up against limitation problems. These problems are different from those involved in latent injury, since the plaintiffs difficulty is not simply a lack

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37 See Ch 5 below.

38 Ibid.

39 Part I Report (1982).

40 *Acts Amendment (Asbestos Related Diseases) Act 1983*, which amended the *Limitation Act 1935*, the *Crown Suits Act 1947*, the *Fatal Accidents Act 1959*, the *Law Reform (Miscellaneous Provisions) Act 1941* and the *Local Government Act 1960*: see paras 5.5-5.8 below.

of awareness of the injury: there are often other factors which have delayed the bringing of the action. Such issues have been of special concern in Western Australia in recent years, and as a result in May 1995 the previous Attorney General, the Hon Cheryl Edwardes MLA, asked the Commission for an interim report on limitation of actions and sexual abuse by a person in a position of trust. Accordingly, in June 1995 the Commission provided a memorandum of advice on this issue. The matters dealt with in this memorandum are covered in later chapters of this report.[41]

1.16 Other controversial topics that have arisen during the preparation of this report include cases involving Aboriginal issues, such as the former policy of taking children away from their natural parents and bringing them up in institutions.[42] A civil action by an Aboriginal person in respect of damage suffered in this way has been commenced in New South Wales.[43] Recent attempts by relatives of Aboriginal persons who have died in custody to claim compensation may also raise limitation issues.[44]

(d) Limitation provisions in other statutes

1.17 Limitation periods are not found only in the Limitation Act. Many other statutes contain limitation provisions applicable to particular causes of action. In Western Australia, the most important examples are claims involving ship collisions,[45] the survival of causes of action following death,[46] actions for wrongful death brought by relatives[47] and claims against the Crown.[48] Until 1996, claims against local government authorities could also be included in

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41 See particularly Chs 7-9 below.

42 See Aboriginal Legal Service of Western Australia *Telling Our Story* (1995); 180-181; letter from Ms Robyn Ayres, Aboriginal Legal Service of Western Australia, 1 November 1995, on file at the Commission.

43 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, in which the New South Wales Court of Appeal allowed an extension of time under the *Limitation Act 1969* (NSW): see para 7.27 below

44 See "De facto seeks payout over death in custody" *The Weekend Australian*, 16-17 September 1995; see also the letter referred to in n 42 above. In *Quayle v State of New South Wales* (1995) Aust Torts Rep 81-367 the mother and brothers of an Aboriginal who hanged himself in a police station cell successfully recovered compensation for psychiatric damage from the State of New South Wales. No limitation issues were involved.

45 *Supreme Court Act 1935* s 29.

46 *Law Reform (Miscellaneous Provisions) Act 1941* s 4(3).

47 *Fatal Accidents Act 1959* s 7.

48 *Crown Suits Act 1947* s 6. Claims against public authorities are dealt with by the *Limitation Act 1935* s 47A which is in similar terms to the *Crown Suits Act* s 6.

this list.[49] These are by no means the only examples. In 1985 the Law Society of Western Australia issued a list of limitation provisions in 107 Western Australian Acts.[50] This list was based on research originally undertaken by the Commission.

1.18 With the agreement of the then Attorney General, the Hon J M Berinson QC MLC, the Commission has confined its examination of limitation and notice periods in legislation other than the Limitation Act to those referred to in the previous paragraph: ship collisions, survival of causes of action, wrongful death actions, and claims against the Crown and local government authorities. In other Australian jurisdictions, where there are specific limitation periods covering such cases, they are generally set out in the Limitation Act itself. Chapters 21 to 23 of this report deal with these limitation periods.

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49 *Local Government Act .1960* s 660. The *Local Government Act 1995*, which came into operation on 1 July 1996, repealed the special limitation and notice periods in s 660 of the 1960 Act, leaving claims against local government authorities to be regulated by s 47 A of the *Limitation Act 1935*.

50 "Western Australian Statutes Containing Limitation Provisions" in Law Society of Western Australia *Causes of Action and Time Limitations* (1985).

Chapter 2

THE PRESENT LAW

1. THE LAW IN WESTERN AUSTRALIA

(a) Introduction

2.1 As the Commission said in Chapter 1,[1] though the general principles of the law relating to limitation of actions in Western Australia are set out in a statute of comparatively recent date, in reality they are principles of considerable antiquity, because the *Limitation Act 1935* does little more than reproduce the provisions of English legislation (long since repealed in England) passed between 1623 and 1893. Unlike England itself, and most other common law jurisdictions in Australia and elsewhere, which have modern provisions, the law in Western Australia has never been brought up to date by being exposed to the influence of modern thinking about limitations law and reform proposals developed in other States and countries.

(b) The old law in England

2.2 A number of English statutes of ancient origin subjected legal claims to time limits within which an action had to be brought, but these were fixed by reference to a particular date or event - so, for example, a plaintiff bringing a writ of right to recover freehold land had to show a disseisin by the defendant at some time after the year 1189, this being the year in which Richard I became King.[2] Beginning with the *Limitation of Prescription Act 1540*, statutes instead began to state limitation periods in terms of a fixed number of years. The most important of these statutes was the *Limitation Act* of 1623, which remained in force until 1939 and formed the basis for limitation statutes throughout the common law world.

2.3 This Act applied to a variety of personal actions, and set out a number of different limitation periods -

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1 See para 1.8 above.

2 The date was originally fixed at 1135, but in 1237 it was changed to 1154 and in 1275 it was changed again to 1189. No further change was made. Thus by 1540 what was originally a comparatively short period had lengthened to over three-hundred years: F Pollock and F W Maitland *The History of English Law* (2nd ed 1968) vol 2, 8l. The same happened in the case of other early actions, eg novel disseisin (date fixed at 1242), mort d'ancestor (date fixed at 1216): id 51.

Two years	•	actions for slander
Four years	•	actions of trespass to the person, assault, menace, battery, wounding and imprisonment
Six years	•	actions on the case (other than for slander)
	•	actions for account, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants
	•	actions of trespass, detinue, action sur trover, and replevin for taking away of goods or cattle
	•	actions of debt grounded upon any lending or contract without specialty
	•	actions of debt for arrears of rent actions of trespass to land

It also provided for an extension of time where the plaintiff was under the age of 21, a married woman ("feme covert"), mentally disabled ("non compos mentis"), imprisoned or "beyond the seas".

2.4 By 1934, when the law of limitation of actions was referred to the Wright Committee, the major statutory provisions were -

- The *Limitation Act 1623* (21 James I c 16),[3] summarised above, which set out most of the general limitation periods which applied in actions at common law. This had been amended by the *Administration of Justice Act 1705* (4 & 5 Anne c 3), the *Statute of Frauds Amendment Act 1828* (9 Geo IV c 14) and the *Mercantile Law Amendment Act 1856* (19 & 20 Vic c 97).

- The *Crown Suits Act 1769* (9 Geo III c 16) - sometimes called the *Nullum Tempus Act* - which dealt with limitation periods in actions against the Crown. This Act was amended by the *Crown Suits Act 1861* (24 & 25 Vic c 62).

- The *Civil Procedure Act 1833* (3 & 4 Will IV c 42), which prescribed limitation periods for certain actions of debt and for statutory penalties.

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[3] Regnal years are included here because the statutes are referred to by this means in the marginal notes to the *Limitation Act 1935*, and also in the Limitation Acts of some other jurisdictions.

- The *Real Property Limitation Acts 1833* (3 & 4 Will IV c 27) and 1874 (37 & 38 Vic c 57), which dealt with the law of limitation of actions to recover real property. The 1874 Act amended the 1833 Act, enacting new sections to be substituted in that Act in place of some of the existing sections.

- The *Trustee Act 1888* (51 & 52 Vic c 59), which dealt (inter alia) with limitation of actions against trustees.

- The *Public Authorities Protection Act 1893* (56 & 57 Vic c 61), which enacted special periods of limitation applicable in actions against public authorities.

2.5 In addition, there were areas not covered by statute, in particular certain suits in equity, which were governed only by the equitable doctrines of laches and acquiescence.

(c) Reception of English law in Western Australia

2.6 This was the law of limitation of actions which was inherited by Western Australia during the 19th century. On settlement in 1829, Western Australia received the *Limitation Act 1623* (as amended) and the *Crown Suits Act 1769*. Of the English Acts passed subsequently to 1829, the *Civil Procedure Act 1833* and the *Real Property Limitation Act 1833* were simply adopted by the *Imperial Acts Adoption Act 1837* (6 Will IV no 4). The *Mercantile Law Amendment Act 1856* was likewise adopted in 1860 (31 Vic no 8). The *Real Property Limitation Act 1874* was not adopted in this way, but its provisions were transcribed more or less verbatim by the Western Australian *Real Property Limitation Act 1878* (42 Vic no 6). The provisions of the *Trustee Act 1888* were reproduced in the Western Australian *Trustees Act 1900* (64 Vic no 17).

(d) The *Limitation Act 1935*

2.7 The Western Australian Parliament passed the *Limitation Act* in 1935. This however in no sense represented any reform of the law. The intention behind it was simply to consolidate all the statutory provisions in force in Western Australia,[4] and the Act was regarded merely as a supplementary measure to the *Supreme Court Act 1935*. It encountered some opposition in

[4] Western Australia Parliamentary Debates (1935) Vol 96 2398.

Parliament from the Hon Norbert Keenan, MLA for Nedlands, who objected to being asked to re-enact all these old provisions instead of just consolidating them, seeing it as a misuse of parliamentary time. He thought that much more was necessary:

> "Of all the laws that exist on the statute-book, there is no one law that requires reconsideration more than does this one...[F]or one single amendment, one of no great importance, this is brought down as a Bill for re-enactment, containing all these old musty provisions and anachronisms, which are governed by no real commonsense whatever."[5]

2.8 The fact that the Act was no more than a consolidating measure can be demonstrated by an analysis of its provisions.[6] After the introductory sections, sections 3 to 34 reproduce, with minor linguistic amendments only, the provisions of the English *Real Property Limitation Act 1833* as amended by the *Real Property Limitation Act 1874*.[7] Sections 35 to 46 then reproduce (though with some redrafting and simplifying) the effect of various other English statutes from the *Common Informers Act 1588* to the *Mercantile Law Amendment Act 1856*. The most important section in this group, section 38, is based on the *Limitation Act 1623*, as amended by later Acts. Section 47 is based on the provisions of the Western Australian *Trustees Act 1900*, which were taken from the English *Trustee Act 1888*.

2.9 The Act has been occasionally amended since 1935. Section 47A, dealing with actions against public authorities, was added in 1954,[8] partly based on the English *Public Authorities Protection Act 1893* (which the United Kingdom Parliament repealed in the same year[9]). Section 37A, dealing with actions to recover taxes, was added in 1978.[10] The latest amendments of any importance are those made by the *Acts Amendment (Asbestos Related Diseases) Act 1983*, which allow extension of the ordinary limitation period in certain restricted circumstances.[11]

2.10 In the context of the Act as a whole, these amendments are merely incidental. In essence the old unreformed 19th-century English law of limitation remains in force in Western Australia.

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5 Id 1970-1971.
6 For an analysis of the derivation of each section of the Act, see Discussion Paper (1992) Appendix I.
7 With the exception of ss 13, 15, 19, 29-33, 36-39 and 43 of the 1833 Act.
8 By the *Limitation Act Amendment Act 1954* s 4.
9 *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 1: see para 10.13 below.
10 By the *Limitation Act Amendment Act 1978* s 2.
11 See paras 5.5-5.8 below.

2. THE LAW ELSEWHERE: AN OUTLINE

2.11 The present situation in Western Australia is very different from that in England and most of the other Australian jurisdictions, and also countries such as New Zealand and Canada. Major reforms were adopted in England in 1939, and these reforms have generally been the inspiration for reforms adopted elsewhere.

(a) England

2.12 By 1934, it was generally admitted that the law on limitation of actions was in an unsatisfactory state. This was probably inevitable when the law consisted of a number of different statutes passed over a period of over 250 years - difficult to understand, often couched in archaic language, and sometimes contradictory. In the 1890s Sir Frederick Pollock, the editor of the Law Quarterly Review, had said, "Is it not time that this piecemeal legislation with regard to the limitations of time within which actions may be brought, should come to an end?",[12] and "There is no part of the law which ought to be made more perfectly clear, and seems by its nature to be better adapted for codification, than the rules as to the limitation of actions".[13] In 1929 he was still saying that "The Statutes of Limitation ought to be systematically revised as a whole".[14]

2.13 In 1934 the unsatisfactory state of the law of limitation of actions was officially recognised by the appointment of the Law Revision Committee, under the Chairmanship of Lord Wright, then Master of the Rolls, with terms of reference to review a number of areas of the common law including limitation of actions. The Committee was required:

> "To consider and report whether the Statutes and rules of law relating to the limitation of actions require amendment or unification, and in particular to consider the rules relating to acknowledgments, to part payments, the disabilities of plaintiffs, the circumstances affecting defendants which prevent the periods of limitation from beginning to run, and the scope of the rules as to concealed fraud."

2.14 The Committee submitted its report on limitation of actions in 1936.[15] The report analysed the existing law in detail and made many proposals for reform. Three years later the

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12 (1893) 9 LQR 107.
13 (1899) 15 LQR 225.
14 F Pollock *Torts* (13th ed 1929) 217.
15 Wright Committee Report (1936).

Limitation Act 1939 implemented these proposals.[16] All the old statutes were repealed and the law of limitation was restated in a simple modern form in a statute of 34 sections.

2.15 This statute proved to be a very satisfactory reform. The authors of *Preston and Newsom on Limitation of Actions*, first written when the Act was first passed, commented in the preface to the third edition published in 1953: "[T]he Act works simply and is a success".[17] This view was endorsed by the 1967 report of the New South Wales Law Reform Commission, which said that it "makes sound provision for the general law of limitation of actions".[18]

2.16 The 1939 Act was subsequently amended on a number of occasions. The amendments made by the *Law Reform (Limitation of Actions etc) Act 1954*, the *Limitation Act 1963* and the *Limitation Act 1975* [19] dealt with personal injury actions. The 1954 Act also removed the special limitation periods applicable in fatal accident actions and actions against public authorities, and the *Proceedings Against Estates Act 1970*[20] did likewise for survival actions - both having the effect of making the provisions of the 1939 Act more generally applicable.

2.17 Outside the area of personal injury, little amendment proved necessary. In 1971 the Law Reform Committee was asked to consider what changes should be made in the law relating to limitation of actions. It submitted its final report in 1977.[21] In general, the changes recommended were comparatively minor. The Committee's recommendations were implemented by the *Limitation Amendment Act 1980*, and the Limitation Acts of 1939 to 1980 were then consolidated by the *Limitation Act 1980*. There was some redrafting and reordering of sections, but in general the 1980 Act, when compared with the 1939 Act, did not bring about fundamental change.

2.18 Since 1980, the most important amendment has been that made by the *Latent Damage Act 1986*, which dealt with the problem of latent property damage, implementing the

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16 In one or two instances, the Act went further than the Report: see J Unger "*Limitation Act, 1939*" (1940) 4 MLR 45.

17 G H Newsom and L Abel-Smith *Preston and Newsom on Limitation of Actions* (3rd ed 1953) v.

18 NSW Report (1967) 8.

19 Accepting the recommendations of, respectively, the Tucker Committee Report (1949), the Edmund Davies Committee Report (1962) and the On Committee Interim Report (1974).

20 Accepting the recommendations of the Law Commission Report on *Proceedings against Estates* (Law Com No 19 1969).

21 On Committee Report (1977).

recommendations of another report by the Law Reform Committee.[22] However, the Act was also amended in 1985 to introduce special time limits for libel and slander[23] and in 1987 for actions involving defective products.[24]

2.19 In summary, therefore, the reforms originally inspired by the report of the Wright Committee in 1936 have provided the basis for limitations law in England for the past fifty years. However, England may now be on the threshold of further changes more fundamental than any introduced since 1939. The Law Commission, in its Sixth Programme of Law Reform issued in 1995, has recommended that there should be a comprehensive review of the law on limitation periods with a view to its simplification and rationalisation. The Commission points to the variety of different periods in the *Limitation Act 1980* - increased by the amendments of the past few years - and says that the law is still uneven, uncertain and unnecessarily complex. It believes that the law is in need of a comprehensive review which gives an opportunity to simplify, rationalise and update it.[25]

(b) Australia

2.20 Like Western Australia, the other Australian jurisdictions inherited the old English legislation on limitation of actions. Unlike Western Australia, in most jurisdictions these old statutes have now been superseded by modern Limitation Acts based, directly or indirectly, on the English 1939 reforms. Only in South Australia is the old English legislation, in some form, still in force.

(i) Victoria

2.21 Victoria inherited the old English legislation on limitation of actions. The pre-1850 statutes were received in Victoria in 1850 when Victoria separated from New South Wales, having already been received or adopted in New South Wales. They were eventually transcribed into Victorian statutes.[26] Later English legislation was also imitated in Victoria.[27]

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22 Scarman Committee Report (1984).

23 *Limitation Act 1980* (UK) s 4A, added by the *Administration of Justice Act 1985* (UK) s 57(2).

24 *Limitation Act 1980* (UK) s 11A, added by the *Consumer Protection Act 1987* (UK) s 6(6) and Sch 1.

25 Law Commission *Sixth Programme of Law Reform* (Law Com No 234 1995) 28.

26 *Real Property Statute 1864* (Vic); *Imperial Acts Application Act 1922* (Vic); *Supreme Court Act 1928* (Vic). For further details, see the chart on p 17 of the Discussion Paper (1992).

27 For example, the *Real Property Limitation Act 1874* (UK) was copied in Victoria by the *Real Property Act 1907* (Vic).

2.22 In 1949 the Victorian Statute Law Revision Committee produced a report which recommended the adoption of the English 1939 reforms.[28] This was implemented by the *Limitation of Actions Act 1955*. This Act, together with a minor amendment effected by the *Limitation of Actions (Extension) Act 1956*, was consolidated as part of the general consolidation of 1958, thus becoming the *Limitation of Actions Act 1958*. The 1958 Act is still in force. The Acts of 1955 and 1958 are clearly based on the English 1939 Act. The order of sections is almost identical, and many sections reproduce the English provisions word for word.

2.23 Until recently, post-1958 amendments have followed the path of reform in England. The *Limitation of Actions (Notice of Action) Act 1966* repealed the notice requirements in actions against public authorities,[29] and the *Limitation of Actions (Personal Injuries) Act 1972* introduced the reforms of the English *Limitation Act 1963* relating to personal injuries.[30] The most important amendment in recent years - and one which departed from the English model - was that introduced by the *Limitation of Actions (Personal Injury Claims) Act 1983*.[31] This replaced the legislation of 1972 with a provision giving the court a discretion to extend the limitation period in personal injury cases.[32]

(ii) Queensland

2.24 Like Victoria, Queensland, when it separated from New South Wales in 1859, received the old English legislation which had been received or adopted in New South Wales. In 1867 this legislation was transcribed into Queensland statutes.[33]

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28 Victorian Statute Law Revision Committee Report on the Limitation of Actions Bill (1949), and note also two further reports by this Committee, *Limitation of Actions* (1950) and Limitation of Actions Bill 1955 (1955).

29 Implementing the recommendations of the Victorian Statute Law Revision Committee *Report on Section 34 of the Limitation of Actions Act 1958* (1959).

30 Implementing the recommendations of the Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in respect of Personal Injuries and Death* (1972).

31 Implementing the recommendations of the Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981).

32 See paras 5.42-5.43 below.

33 The *Distress Replevin and Ejectment Act 1867* (Qld) copied the provisions of the *Real Property Limitation Act 1833* (UK), with a slight rearrangement of sections. The *Statute of Frauds and Limitations Act 1867* (Qld) incorporated provisions from the *Limitation Act 1623* (UK), the *Civil Procedure Act 1833* (UK) and the *Mercantile Law Amendment Act 1856* (UK), together with two more provisions from the *Real Property Limitation Act 1833* (UK).

2.25 The *Limitation Act 1960* adopted the English 1939 reforms, the *Law Reform (Limitation of Actions) Act 1956* having already adopted the reforms made by the English *Law Reform (Limitation of Actions etc) Act 1954* in the area of personal injury. As a result of the recommendations of the Queensland Law Reform Commission in 1972,[34] the *Limitation of Actions Act 1974* was passed to consolidate the law and to adopt the provisions of the English *Limitation Act 1963* relating to personal injury. It also took a step similar to that taken in England in 1954 by repealing special provisions relating to public authorities. The 1974 Act is still in force, though it has been amended in one or two minor respects. As with the Victorian Act, the order and text of the sections is almost identical to the English 1939 Act.

(iii) Tasmania

2.26 Tasmania inherited the English Act of 1623 and the other Acts passed prior to 1828. The later English legislation was reproduced in Tasmanian statutes passed between 1836 and 1935.[35]

2.27 Following a report of the Tasmanian Law Reform Committee in 1973,[36] the *Limitation Act 1974* abolished the old statutes and adopted the English reforms of 1939. Like the Acts of Victoria and Queensland, it is very close to the English Act in content, drafting and order of provisions. The Act incorporates some aspects of the English 1954 Act on personal injuries, and there are also some special provisions about extension of the limitation period. There have since been a number of minor amendments.[37]

(iv) New South Wales

2.28 The English statutes of 1623 and 1705 were received in New South Wales in 1828. The *Real Property Limitation Act 1833* was adopted by a statute of 1837[38] and the provisions

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34 Queensland Law Reform Commission *Report on a Bill to Amend and Consolidate the Law Relating to Limitation of Actions* (QLRC 14 1972).

35 The *Limitation of Actions Act 1836* (Tas) adopted the *Real Property Limitation Act 1833* (UK) and the *Civil Procedure Act 1833* (UK), the provisions of which were set out in a schedule. The *Limitation of Actions Act 1875* (Tas) reproduced the provisions of the *Real Property Limitation Act 1874* (UK), but in 1934, in the interests of consolidation, the 1875 Act was repealed and its provisions were added to the schedule of the 1836 Act. The *Mercantile Law Act 1935* (Tas) incorporated in Tasmanian law the provisions of the *Limitation Act 1623* (UK) and the *Mercantile Law Amendment Act 1856* (UK).

36 Tasmanian Law Reform Committee *Report on Limitation of Actions* (1973).

37 Note also the reforms relating to limitation periods in actions for personal injury recommended in the Tasmania Report (1992). This report has not yet been implemented.

38 8 Will IV No 3.

of the Civil Procedure Act were re-enacted by the *Supreme Court Act 1841*. However, in contrast to what happened in Victoria, Queensland and Tasmania, in New South Wales no attempt was ever made to set out these provisions in local legislation, and so the old English statutes remained in force. In the 1950s the Australian Law Journal more than once commented on the seriously unsatisfactory state of the law in New South Wales.[39]

2.29 The matter was eventually referred to the New South Wales Law Reform Commission, which reported in 1967.[40] The report recommended comprehensive reform, and the Bill drawn up by the Commission eventually became law as the *Limitation Act 1969*. Unlike the Victorian and Queensland Acts, the New South Wales Act is far more than a copying of the English legislation - very few provisions are taken verbatim from the English Act. As the Australian Law Journal said of the report giving rise to the Act:

> "What characterizes the Report is a willingness to re-examine not only the language of but also the assumptions underlying existing legislative expedients and form an independent judgment on the resolution of conflicting interests best suited to local conditions. "[41]

2.30 The most notable departure from the English example is in relation to the effect of the running of a period of limitation. The English legislation regards this as simply imposing a procedural bar. The New South Wales approach is to regard it as substantive, extinguishing the right, which cannot thereafter be relied on in any way.[42] Other important differences are the rather more complete coverage of causes of action related to mortgages[43] and the simpler provisions on acknowledgment and part payment.[44] There has also been much rethinking of the arrangement of the various sections.

2.31 The Act has been amended since 1969 on a number of occasions. The most important amendment, in 1990,[45] introduced new provisions giving a court discretion to extend the limitation period in personal injury cases. These replaced the original provisions of the 1969 Act which had been based on the English *Limitation Act 1963*.

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39 See (1952) 26 ALJ 375; (1958) 32 ALJ 169.

40 NSW Report (1967).

41 (1968) 41 ALJ 407.

42 Ss 63-68A: see paras 7.58-7.61 below. See also D Jackson "The Legal Effects of the Passing of Time" (1970) 7 Melb ULR 407 and 449.

43 Ss 40-46: see para 15.21 below.

44 S 54: see para 18.29 below.

45 *Limitation (Amendment) Act 1990* (NSW). This resulted from the NSW Report (1986).

(v) Northern Territory

2.32 Until 1981, the limitation legislation which applied in the Northern Territory was that which had been inherited from South Australia before 1911 - either received English legislation, or South Australian legislation adopting English statutes.[46] All these Acts were replaced by the *Limitation Act 1981*. The Act was modelled on the New South Wales Act, and copied many of its provisions and also the order in which they are set out. However, the Division of the New South Wales Act dealing with land, and the New South Wales innovation whereby the running of a period of limitation serves to extinguish the right and title, were both omitted.[47]

(vi) Australian Capital Territory

2.33 Until 1985, the state of the law of limitation of actions in the Australian Capital Territory was, if anything, worse than in Western Australia. Not only had no reform taken place, but no local limitation legislation had ever been enacted: the law in force consisted of the English *Limitation Act 1623*, the New South Wales Act of 1837 which adopted the English *Real Property Limitation Act 1833*[48] and various other New South Wales Acts.

2.34 In 1985, however, a new Limitation Ordinance was enacted.[49] In 1990 this was renamed the Limitation Act. This statute was generally based on the New South Wales Act, but had provisions dealing with latent personal injury and latent property damage which had no equivalents in the New South Wales Act.[50] The Australian Capital Territory, therefore,

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46 For the legislation in South Australia, see para 2.35 below.

47 Though fee simple grants had been the basis of land tenure before 1911 (during which time the Northern Territory was administered by South Australia), Commonwealth legislation has generally required grants of urban land to be in the form of perpetual leases. In more recent times legislation has allowed such leases to be converted to freehold tenure, and in 1980, after the grant of self-government, lessees were granted a freehold estate which was automatically brought under the Torrens system: *Crown Lands Amendment Act (No 3) 1980* (NT) s 8(1). This Act applied to most urban land in the Northern Territory. The title of the registered proprietor of land is not extinguished by adverse possession: *Real Property Act 1886* (NT) s 251. It is for these reasons that the *Limitation Act 1981* (NT) contains no provisions dealing with actions in relation to land. See A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) paras 19.15-19.16.

48 See para 2.4 above.

49 It was preceded by a Working Paper prepared by the Commonwealth Attorney General's Department: ACT Working Paper (1984).

50 *Limitation Act 1985* (ACT) ss 36 and 40: see paras 5.42 and 5.44 below.

instead of having the most antiquated limitation legislation in the whole of Australia, now has the most modern statute law.[51]

(vii) South Australia

2.35 South Australia is the only jurisdiction, apart from Western Australia, which retains the old law. All the leading English limitation statutes were received on the foundation of the State in 1836 - including not only the *Limitation Act 1623* but also the *Civil Procedure Act 1833* and the *Real Property Limitation Act 1833*. This legislation was collected together by the *Limitation of Actions and Suits Act 1861*, which was re-enacted, with a few amendments, by the *Limitation of Suits and Actions Act 1867*. The *Trustee Act 1893* adopted two limitation provisions from the English *Trustee Act 1888*, but the *Real Property Limitation Act 1874* was never adopted.

2.36 The 1867 and 1893 Acts were repealed and replaced by the *Limitation of Actions Act 1936*. This Act, however, does no more than consolidate the old provisions, with a few amendments. It therefore bears a close resemblance to the Western Australian Limitation Act. Sections 4 to 30 reproduce, virtually word for word, most of the provisions of the English *Real Property Limitation Act 1833*. Subsequent sections reproduce, in turn, the provisions of the *Trustee Act 1888*, the *Limitation Act 1623* and the *Administration of Justice Act 1705*. In a few respects the Act has a slightly more modern look than the Western Australian Act. A 1956 amendment followed the example of the English *Law Reform (Limitation of Actions etc) Act 1954* in reducing the limitation period for personal injury cases to three years.[52] The important provisions of section 48 give the court a power to extend the limitation period, not just in a personal injury case, but in relation to any cause of action, as the justice of the case may require. The provisions about persons under disability, which in the Western Australian Act appear in several places, in connection with different actions, are combined by section 45 to produce a provision having general effect.[53] Apart from the similar provision in the Northern Territory Act,[54] no other Australian jurisdiction has such a wide extension provision.

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51 The *Limitation Act 1985* (ACT), like the *Limitation Act 1981* (NT), contains no provisions on actions relating to land. Land in the Australian Capital Territory has developed under a consistent policy of leasehold tenure: see A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) paras 19.12-19.14; see also ACT Working Paper (1984) para 142.

52 *Limitation of Actions and Wrongs Acts Amendment Act 1956* (SA).

53 See paras 5.18 and 17.11 below. These two amendments implemented the recommendations of the South Australia Report (1970).

54 *Limitation Act 1981* (NT) s 44.

(c) New Zealand

2.37 In New Zealand, the path of reform has not differed appreciably from that in Australian jurisdictions such as Victoria, Queensland and Tasmania. The New Zealand *Limitation Act 1950* was clearly based on the English *Limitation Act 1939*. The Act repealed the old English Acts, which had formerly been received or adopted in New Zealand.

2.38 In 1988 the New Zealand Law Commission submitted a report recommending reform of the 1950 Act.[55] The report recommends the repeal of the Act and its replacement by a new Limitation Defences Act. This report is one of a number of recent law reform reports from different jurisdictions which reflect important new thinking about the fundamental concepts of limitations law, and it will be further dealt with in Chapter 6.[56] It has not yet been implemented.

(d) Canada

2.39 Canadian jurisdictions also inherited the English statutes passed from 1623 onwards, and so there was the same need for reform.[57] In some Canadian jurisdictions, reforms were initiated before the English reforms of 1939. The Conference of Commissioners on Uniformity of Legislation in Canada approved a *Uniform Limitation of Actions Act* in 1931, which was adopted in four Provinces (Alberta, Manitoba, Saskatchewan and Prince Edward Island) and the two Territories (Northwest Territories and Yukon Territory). The New Brunswick Act is also fairly similar to the *Uniform Act*.[58] There has, however, been some important reforming activity in recent years. Much of this was inspired by the reforms in England and Australian States such as New South Wales, but the latest series of reforms and proposed reforms owe no debt to other jurisdictions: they result from an innovative approach developed by the Alberta Law Reform Institute.

2.40 The report of the Ontario Law Reform Commission in 1969 noted that the Ontario *Limitations Act 1960* was basically a consolidation of the old English statutes as they applied in Ontario.[59] In the same way as the report of the Wright Committee in 1936, it listed the

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55 New Zealand Report (1988).
56 See paras 6.47-6.53 below.
57 See generally J D Falconbridge "The Disorder of the Statutes of Limitation" (1943) 21 Can BR 669.
58 See para 1.11 above.
59 Ontario Report (1969) 11.

defects of these old Acts, and also commented that the 1931 *Uniform Act* did not contain some of the better features of limitation of actions reform developed subsequently elsewhere.[60] The report acknowledged its indebtedness to the reports of the Wright Committee and the New South Wales Law Reform Commission. However, its recommendations were never adopted.[61]

2.41 In British Columbia, the *Statute of Limitations 1960* simply collected together the old English statutes applicable in the province. A report of the British Columbia Law Reform Commission in 1974[62] described this law as archaic, and made proposals for reform which owed much, as the Commission acknowledged, to the work already done in England, New South Wales and Ontario. In contrast to the fate of the recommendations of the Ontario Law Reform Commission, these proposals were speedily adopted by the British Columbia *Limitation Act 1975*.[63] Until recently, this legislation was the most advanced limitation legislation in force in any Canadian jurisdiction.

2.42 There have been some developments in other jurisdictions. The Limitation Acts in Manitoba and Nova Scotia have both been amended to adopt modern reforms permitting extension of the limitation period in certain cases,[64] and some modern provisions were also added to the Alberta Act.[65] The Newfoundland Law Reform Commission has recommended the replacement of the old English Acts by a modern Act based on reforms in other jurisdictions,[66] and the Saskatchewan Law Reform Commission has also recommended the adoption of modern reforms.[67] Further reform proposals have been made in a Discussion Paper published in New Brunswick.[68] In addition, the Uniform Law Conference of Canada produced a draft Uniform Limitations Act in 1982, but to date no jurisdiction has adopted it.

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60 Id 12-13.

61 The current Ontario Act merely reproduces the Act of 1960, with minor changes: *Limitations Act 1990* (Ont). A Limitations Bill (Bill 160: 3rd Sess, 32nd Legislature) was introduced into the Ontario Parliament in 1983 but was "allowed to die on the order paper": Saskatchewan Report (1989) 3. It departed from the Ontario Report (1969) in a number of respects, instead adopting the later proposals of the British Columbia Report (1974), referred to in para 2.41 below.

62 British Columbia Report (1974).

63 See now *Limitation Act 1979* (BC).

64 SM 1966-67 c 32 (see Ontario Report (1969) Appendix E); SNS 1982 c 33.

65 By SA 1966 c 49 (see Ontario Report (1969) Appendix D).

66 Newfoundland Report (1986) (summarised in (1987) 13 CLB 922); see also Newfoundland Working Paper (1985).

67 Saskatchewan Report (1989).

68 New Brunswick Discussion Paper (1988).

2.43 During the last few years, important reports in Alberta and Ontario have outlined proposals for further change, and in Alberta these proposals have now become law. Previous reform proposals in all the jurisdictions under examination can ultimately be traced back to the pioneering work of the Wright Committee in England in 1936, but the recent reports go much further and represent a new stage in the evolution of limitations law.[69] Pride of place must be given to the 1989 report of the Alberta Law Reform Institute,[70] which recommended a new Limitations Act based chiefly on the principle that limitation periods should run from the date of discoverability of the loss, rather than from the accrual of the cause of action - a "limitations strategy" based on equitable principles rather than those of the common law. The report included a model Act setting out its recommendations in statutory form.[71] The Model Act, with a few minor alterations, has now been enacted as the *Limitations Act 1996*, which is expected to come into force early in 1997. Similar proposals were endorsed in Ontario in 1991,[72] and a Bill to implement these reforms was introduced into the Ontario Parliament in 1992.[73]

3. DEFECTS OF THE PRESENT WESTERN AUSTRALIAN LAW

2.44 It is clear from the foregoing survey that the *Limitation Act 1935*, when compared with the modern Limitation Acts in other jurisdictions, is very out of date and suffers from a number of defects. Particular defects are dealt with in later chapters of this report, but there are some major defects of general importance.

(a) Archaic drafting style

2.45 An important general defect of the Act is the archaic style in which it is drafted. Being, for the most part, simply a reproduction of statutes dating from the early 19th century or earlier, its provisions are long, complex, couched in archaic language and difficult to understand. Section 7, dealing with the accrual of the right of action as respects future interests in land, is a good example:

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69 They are further discussed at paras 6.3-6.4, 6.6-6.22 below.

70 Alberta Report (1989); see also Alberta Report for Discussion (1986).

71 *Model Limitations Act* (Alta).

72 Ontario Report (1991).

73 Limitations Bill 1992 (Ont). The Bill was still before Parliament when it was prorogued late in 1994. No decision has yet been taken as to whether it will be reintroduced: see para 1.12 n 34 above.

" A right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent:

Provided that if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer.

Provided also that if the right of any such person to make such entry or distress, or to bring any such action, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action to recover such land or rent."[74]

(b) Use of out of date concepts

(i) Section 38(1)

2.46 The Limitation Act makes many references to obsolete legal concepts. Section 38(1), which deals with the limitation periods applicable to common law actions, is a particularly

[74] The Discussion Paper (1992) para 2.42 set out the provisions of ss 5 and 7 of the *Limitation Act 1935* on the accrual of rights of action in the case of present and future interests in land and the equivalent provisions in the *Limitation Act 1969* (NSW) (ss 28, 30 and 31). The provisions of the New South Wales Act, like equivalent provisions in the modern Acts in other jurisdictions, were intended to reproduce the old provisions without any change of substance, but drafted in modern form. The New South Wales provisions are much easier to understand.

good example, since it is essentially nothing more than a restatement of the provisions of the English *Limitation Act of 1623*.[75] The section provides that:

> "Subject to the preceding sections of this Act and as hereinafter provided, actions, suits, or other proceedings as herein set out shall and may be commenced within the time herein expressed after the cause of such actions, suits, or other proceedings respectively:-
>
> (a) (i) Actions for penalties, damages, or sums given by any enactment to the party grieved;
>
> (ii) Actions for slander, when the words are actionable per se:
>
> Two years.
>
> (b) Actions for trespass to the person, menace, assault, battery, wounding, or imprisonment:
>
> Four years.
>
> (c) (i) Actions of debt upon any award where the submission is not by specialty;
>
> (ii) Actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors and servants;
>
> (iii) Actions of account other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants;
>
> (iv) Actions in the nature of actions for trespass quare clausum fregit, trespass to goods, detinue, or trover;
>
> (v) All other actions founded on any simple contract, including a contract implied in law;
>
> (vi) All other actions founded on tort; and
>
> (vii) All other actions in the nature of actions on the case:
>
> Six years.
>
> (d) Actions of debt for rent upon a covenant in an indenture of demise:
>
> Twelve years.

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75 For a detailed analysis of s 38, see J F Young "*The Limitation Act 1935*, in Relation to (i) The Distinction between Actions in Contract and Tort, and (ii) Statutory Causes of Action" in Law Society of Western Australia *Get Tortwise* (1990).

(e) (i) Subject to sections four and thirty-two of this Act, and to paragraph (d) of this subsection, actions of covenant or of debt upon any bond or other specialty; and

(ii) actions in the nature of actions of debt or *scire facias* upon any recognisance:

Twenty years."

* *Reliance on categories based on the forms of action*

2.47 As is evident on reading it, section 38(1) is almost impossible to understand without a detailed knowledge of the forms of action, which dominated English civil procedure between the 12th and the 19th centuries, but were abolished over a hundred years ago. There could be no better demonstration of the truth of F W Maitland's famous remark that "[t]he forms of action we have buried, but they still rule us from their graves".[76] At one time, no action could be commenced in the common law courts unless the plaintiff had first obtained the appropriate writ, and subsequent procedural steps also depended on the form of action chosen, since the rules relating to such matters as enforcing the appearance of the defendant, the pleadings, the method of trial and the enforcement of judgments depended on the choice of writ. A factor which made all this even more complex was that from the 13th century onwards no new writs were allowed to be created, except in cases similar to the old ones, and so between the 13th century and the 19th century all development of the law had to take place within the confines of the existing writs.

2.48 The *Limitation Act 1623*, on which section 38(1) is based, naturally stated the rules about limitation of actions in terms of the various writs. Thus there are provisions dealing with trespass to the person and trespass quare clausum fregit (trespass to land); actions of debt, covenant and account (the older "personal actions" which cover some, but not all, aspects of what today would be called the law of contract and quasi-contract or restitution); actions for detinue and trover, which are ways of recovering personal property or a sum of money in lieu thereof (the latter so called because it was necessary to allege a fictitious finding, "trouver" being French for "to find"); and actions on the case which lay for indirect harm, as opposed to trespass which was appropriate when the harm was directly inflicted.[77]

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76 F W Maitland *The Forms of Action at Common Law* (1909) 2.

77 If a person throws a log into the highway and it hits another, the harm is directly inflicted and trespass lies, but if the other trips over it the harm is indirectly inflicted and the appropriate action is case: *Reynolds v Clarke* (1725) 1 Str 634, 93 ER 747, Fortescue J at 636. It is likely that the distinction between

These divisions were logical enough to English lawyers in the 17th century, but are irrational and well-nigh incomprehensible to lawyers in Western Australia today.

* *Incorporation of obsolete actions*

2.49 In most cases, the forms of action referred to in section 38 do at least have modern equivalents in the law of tort and contract, but in a few instances the actions referred to have been obsolete for a considerable period of time. The outstanding example is actions for menace. These, which were actions for threatening words, have been obsolete since the Middle Ages.[78] It has been clear for many years that they were not a form of trespass supplementary to assault[79] (which is restricted to acts, rather than words, causing an apprehension of harm[80]) but instead were actionable only on proof of special damage (usually financial loss)[81] and were therefore a precursor of the tort of intimidation. This may not have been apparent in 1623 when the ancestor of section 38 was originally drafted.[82] Nevertheless, it is surely time that actions for menace disappeared from the Limitation Act.

* *Perpetuation of out of date distinctions*

2.50 Section 38 perpetuates distinctions which are no longer important in the law today. For example, it is hard to see why there should be separate provisions for actions of account concerning merchandise between "merchant and merchant, their factors and servants" and other actions of account, especially when the limitation period is six years in each case.

2.51 The most important distinction preserved by section 38 is that between trespass and case, already referred to.[83] Actions of trespass are made subject to a shorter limitation period

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trespass and case was originally a procedural accident, and that the rationalisation along the lines of the direct/ indirect harm distinction was not complete until after *Scott v Shepherd* (1773) 2 Wm Bl 892, 96 ER 525: see S F C Milsom *Historical Foundations of the Common Law* (2nd ed 1981) ch 11; M J Prichard "Trespass, Case and the Rule in *Williams v Holland*" [1964] CLJ 234; M J Prichard *Scott v Shepherd* (1773) *and the Emergence of the Tort of Negligence* (Selden Society Lecture 1976).

78 See P R Handford "Tort Liability for Threatening or Insulting Words" (1976) 54 Can BR 563, 571-573.

79 Contra, G L Williams "Assault and Words" [1957] Crim LR 219, 224, but see P R Handford "Tort Liability for Threatening or Insulting Words" (1976) 54 Can BR 563, 571-573

80 *R v Meade and Belt* (1823) 1 Lew 184, 168 ER 1006.

81 See *Anon* (1468) YB 7 Edw IV 24, p1 31, Danby J; W Blackstone *Commentaries* (15th ed 1809) vol 3, 119-120.

82 Thus J Hawkins *Pleas of the Crown* (3rd ed 1739) vol 1, 134, who says "It seems agreed at this day, that no words whatsoever can amount to an assault", prefaces this statement with the words "Notwithstanding the many ancient opinions to the contrary".

83 See para 2.48 above.

than other actions founded on tort and other actions in the nature of an action on the case. This could lead to some interesting questions. In the context of intentional harm to the person, if the principle of *Wilkinson v Downton*[84] (that a wilful act calculated to cause, and actually causing, physical harm is actionable) covers harm caused directly as well as indirectly,[85] it may provide a remedy in a case where trespass would lie but for the fact that the limitation period has expired. In the context of negligent harm to the person, Australian authorities support the proposition that an action in trespass is available as an alternative to an action in negligence where the harm is directly caused.[86] In relation to limitation this matters little,[87] since the limitation period in trespass is shorter than in negligence. However, if it had been the other way round the question would have been most important. In England, as the result of a 1954 amendment[88] to section 2(1) of the *Limitation Act 1939*, the limitation period for all actions for personal injury caused by negligence, nuisance or breach of duty is three years, in contrast to the general limitation period of six years for all common law actions imposed by section 2(1) of the 1939 Act. In *Letang v Cooper*,[89] the defendant negligently drove his car over the legs of the plaintiff while she was sunbathing on the grass car park of a hotel. She did not commence proceedings until more than three years later, and because the limitation period in negligence had by then elapsed she attempted as an alternative to sue in negligent trespass. The Court of Appeal held that the expression "breach of duty" was wide enough to include trespass, and so the three-year period applied to actions in trespass as well as actions in negligence.[90] Lord Denning MR and Diplock LJ both rejected the proposition that an action for negligent trespass is available as an alternative to an action in negligence.[91] The court clearly felt that distinctions between trespass and case were outmoded in the context of limitation of actions.

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84 [1897] 2 QB 57.

85 See P R Handford "*Wilkinson v Downton* and Acts Calculated to Cause Physical Harm" (1985) 16 UWAL Rev 31, 34-38.

86 *Williams v Milotin* (1957) 97 CLR 465; *McHale v Watson* (1964) 111 CLR 384; *Venning v Chin* (1974) 10 SASR 299.
See eg F A Trindade "Some Curiosities of Negligent Trespass to the Person - A Comparative Study" (1971) 20 ICLQ 706.

87 Provided that the plaintiff brings an action in negligence and not in trespass. In *Williams v Milotin* (1957) 97 CLR 465, the High Court, dealing with similar provisions in the *Limitation of Actions Act 1936* (SA) (ss 35-36), held that a plaintiff who had sued in negligence had the benefit of the longer period. If, however, he had sued in trespass, the shorter period would have applied and he would have been unable to amend his claim.

88 *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 2(1).

89 [1965] 1 QB 232.

90 For similar decisions see *Kruber v Grzesiak* [1963] VR 621; *Long, v Hepworth* [1968] 1 WLR 1299. *Stubbings v Webb* [1993] AC 498 (discussed in paras 9.13-9.15 below) takes a different view.

91 [1965] 1 QB 232, Lord Denning MR at 240, Diplock LJ at 243-244.

2.52 Another distinction perpetuated by section 38 is that between actions for slander actionable per se (which must be brought within two years) and other actions for slander and all actions for libel, which are subject to a limitation period of six years.[92] The distinction between slander actionable per se and slander requiring proof of damage is complex and often irrational,[93] and it seems very odd that the more serious form of slander has the shorter limitation period.

* *Failure to reflect modern distinctions*

2.53 Not only does section 38 perpetuate obsolete distinctions: it fails to reflect distinctions which are fundamental to the law of obligations today. In this area the primary distinction is between contract and tort, and the importance of this in limitations law is underlined by the fundamental principles that in contract the cause of action accrues on breach of contract,[94] whereas in tort, in cases where damage is an essential ingredient of the cause of action, time only begins to run when damage is suffered.[95] However, it is now recognised that it is not possible to classify all forms of obligations as either contract or tort. The law of obligations consists of three major branches, not two: contract, tort and restitution.[96] Limitation periods for restitutionary actions are most inadequately covered by the provision in section 38 which refers to "all other actions founded on any simple contract, including a contract implied in law".[97] This is not the only respect in which section 38 seems inadequate to modern eyes. Some of the causes of action referred to, such as actions to enforce a recognisance or to recover sums given by a statute, are very difficult to classify.

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92 Note however that under *The Newspaper Libel and Registration Act 1884 Amendment Act 1888* s 5, actions in defamation against newspapers are subject to a special one-year limitation period: see para 12.26 below.

93 See eg J G Fleming *The Law of Torts* (8th ed 1992) 544-553.

94 See para 4.7 below.

95 See para 4.13 below.

96 See R Goff and G Jones *The Law of Restitution* (4th ed 1993) 3-5; P Birks *An Introduction to the Law of Restitution* (1989) 1-8. Even this threefold division may not solve all the problems: see A S Burrows "Contract, Tort and Restitution - A Satisfactory Division or Not? (1983) 99 LQR 217.

97 *Limitation Act 1935* s 38(1)(c)(v): see para 4.9 below. The theory that quasi-contractual claims depend on an implied contract was affirmed by *Sinclair v Brougham* [1914] AC 398, but repudiated in the later case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32: see R Goff and G Jones *The Law of Restitution* (4th ed 1993) 5-11. In Australia, the High Court abandoned the implied contract theory in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221: see K Mason and J W Carter *Restitution Law in Australia* (1995) para 102

* *Practical difficulties*

2.54 That the antiquated provisions of section 38 cause practical difficulties was confirmed by *State Government Insurance Commission v Teal*.[98] The plaintiff, as the defendant's compulsory insurer under the *Motor Vehicle (Third Party Insurance) Act 1943*, paid compensation to the victims of the defendant's drunken driving and then sought to recover those payments from the defendant in an action under section 7(5) of the Act. Commissioner Williams QC had to determine whether this action was -

* an action for a penalty, damages or other sum given by an enactment to a party grieved under section 38(1)(a)(i) (in which case a two year limitation period applied);

* an action founded on a simple contract under section 38(1)(c)(v) (which is subject to a six year limitation period);

* an action in the nature of an action on the case under section 38(1)(c)(vii) (which is also subject to a six-year limitation period); or

* an action of debt on a bond or other specialty under section 38(1)(e)(i) (for which the limitation period is 20 years).

The plaintiff had paid out the sums in question three years after the accident, and the proceedings against the defendant were commenced almost five years later. The defendant argued that section 38(1)(a)(i) or alternatively section 38(1)(c)(v) or (vii) applied, so that the applicable limitation period was two years or alternatively six years. He further argued that the cause of action arose at the time of the accident and not when the claims were settled. Commissioner Williams QC held that the plaintiff's action was in substance an action for an indemnity in respect of a liquidated sum, the right to which was given by the Act and one which could have been brought as the common law action of debt. It was not an action on the policy, but one expressly conferred by the Act, and was therefore an action for debt on the statute, which is an action on a specialty. Section 38(1)(e)(i) therefore applied and the limitation period was 20 years. The plaintiffs cause of action was subject to the equitable rule

98 (1990) 2 WAR 105.

applicable to contractual indemnities that the time started to run when the facts and the extent of the liability of the person to be indemnified are to be ascertained or established.[99] Commissioner Williams concluded that:

> "[T]he reasoning process necessary to reach a conclusion to the question whether s 38(1)(e)(i) applies, involving a consideration of forms of action abolished more than a century ago, highlights the need for a thoroughgoing review and redrafting of the *Limitation Act 1935*."[100]

(ii) Other obsolete concepts

2.55 Section 38 is not the only section of the *Limitation Act* which remains rooted in history. Other obsolete concepts can be found in other sections, such as sections 21 to 23 which deal with the rights of a tenant in tail. Entailed interests were always rare in Australia, where economic conditions were very different from those in England centuries ago and landowners had little interest in keeping land in the family or a particular branch of it by using entails.[101] Section 23 of the *Property Law Act 1969* abolished entailed interests and converted all existing entailed interests into fee simple estates. Yet provisions on entailed interests are still to be found in the *Limitation Act*.

2.56 A further example of obsolete law surviving in the *Limitation Act* is the reference in section 14 to coparcenary, a form of joint tenancy under which, when a person had died leaving no son to be his heir, but two or more daughters, the daughters inherited his real property jointly. Coparcenary was abolished in England in 1925[102] and was "virtually obsolete" in Western Australia by 1950.[103] It is now almost completely nonexistent because of the abolition of estates tail.[104] Another outdated rule is referred to in section 47(1)(b), which speaks of a married woman's entitlement to property "in possession to her separate use, with or without a restraint upon anticipation". This device, invented by equity to protect the separate property of married women in days when the common law regarded all a wife's

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99 *Country and District Properties Ltd v C Jenner & Son Ltd* [1976] 2 Lloyd's Rep 728.

100 (1990) 2 WAR 105 at 118-119.

101 See A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) para 2.21.

102 As a result of the abolition of the rule that land descended to the heir by the *Administration of Estates Act 1925* (UK) s 45.

103 P R Adams *The Law of Real Property and Conveyancing in Western Australia* (1950) 28.

104 See the Commission's Report on *Joint Tenancy and Tenancy in Common* (Project No 78 1994) para 2.1 n 2.

property as belonging to her husband,[105] was finally abolished in Western Australia by the *Property Law Act 1949*.[106]

(c) Conclusion

2.57 The New South Wales Law Reform Commission summed up the law in that jurisdiction prior to reform in words that are just as applicable to the current position in Western Australia:

> "[T]he statutes are cast in a language explicable only by reference to court procedures, and forms of landholding, and institutions, which otherwise are rarely of any but antiquarian interest to the practising lawyer, or to the citizen, of today."[107]

2.58 In the Commission's view, the Limitation Act as a whole needs comprehensive reform. This cannot be achieved merely by amending the existing Act. What is required is a new Act, one which takes into account the reformed Acts in other jurisdictions and the latest thinking about the concepts of limitations law developed by law reform commissions and similar bodies in Australia and elsewhere. Failing to reform the Limitation Act would mean that Western Australia will be almost alone in retaining a limitation law with its roots in the early 19th century or earlier - something that will surely disadvantage litigants in Western Australia.

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105 See L Holcombe *Wives & Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (1983) 41-42, 203, 223-225.

106 S 31. See also para 13.26 below.

107 NSW Report (1967) para 7.

PART II: POSSIBLE APPROACHES TO REFORM

Chapter 3

INTRODUCTION

1. THE WRIGHT COMMITTEE REPORT

3.1 The pioneering work of the Wright Committee in its 1936 report not only inspired the reform of the English law of limitation of actions by the *Limitation Act 1939* but paved the way for all subsequent reform inquiries over the next fifty years. The Committee pointed out that the limitation rules then in force in England were based on the principle of a fixed period of limitation running from a fixed date - the fixed date being the time at which the cause of action "accrued", a matter generally determined by common law rules applicable to each particular cause of action. It asked whether it might be desirable to adopt a more flexible system, and reviewed two alternative bases for a system of limitation rules.

3.2 The first alternative was "to preserve the present position, so far as it relates to the moment when time is to begin to run, but to give the court a general discretion to extend the time in appropriate cases". [1] The Committee recognised the "obvious advantages" of giving the courts a discretion of this kind: it would eliminate cases of hardship and enable shorter general limitation periods to be prescribed. However, it saw formidable objections:

> "The exercise of such a discretion would no doubt present difficult problems to the court, and it is not easy to foresee how it would operate. In so far as it came to be exercised along well-defined principles, its chief merit - flexibility - would tend to disappear. On the other hand if it remained more or less impossible to predict from one case to another how the discretion of the court was going to be exercised, the fundamental benefit conferred by statutes of limitation, namely the elimination of uncertainty, would be prejudiced."[2]

It concluded that the disadvantage of uncertainty made it impossible to recommend a provision giving the court a general discretion to extend the limitation period.

3.3 The second alternative examined by the Committee was "to provide that the statute shall run from the time when the plaintiff knows, or but for his own default might have

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1 Wright Committee Report (1936) para 7. The Committee cited examples of statutory provisions involving maritime collisions and workers' compensation which operated on this basis: *Maritime Conventions Act 1911* (UK) s 8; *Workmen's Compensation Act 1925* (UK) s 14(1).

2 Wright Committee Report (1936) para 7.

known, of the existence of his claim".[3] This, as it pointed out, would in effect be an extension of the equitable principles already applying in cases where the existence of a claim was concealed by fraud or mistake.[4] Again, the Committee could see advantages in such a provision, in that it would give relief in cases where the plaintiff was not aware and could not have been aware of the claim until it was barred by the statute, so confining the operation of the statutes of limitation to cases where the claimant had been dilatory in prosecuting his claim, which would be in accordance with equitable principles. However, these benefits were outweighed by the disadvantages of the proposal:

> "On the other hand, the hard cases referred to above must be comparatively rare, so far as the general statutes are concerned; ...and it has to be remembered that the purpose of the statutes goes further than the prevention of dilatoriness; they aim at putting a certain end to litigation and at preventing the resurrection of old claims, whether there has been delay or not. The result of the suggested provision would be to introduce an uncertain element into the operation of the Acts, which would be particularly unfortunate where the title to property was concerned."[5]

3.4 The Committee therefore rejected these alternatives, and opted for the retention of the traditional approach.

2. THE PRESENT LAW

3.5 The English *Limitation Act 1939* which implemented the Wright Committee's recommendations was based on the traditional approach, and all subsequent limitation legislation enacted in England, Australia, New Zealand and Canada has had as its basis the idea of fixed periods running from the point of accrual. However, after fifty years' experience with legislation based on this approach, it is clear that it does not solve all the problems, and in particular that it does not adequately address the difficulties of latent personal injury and latent property damage.

3.6 At the present day, therefore, the Limitation Acts in most jurisdictions adopt a combination of approaches. While their starting point continues to be the enumeration of a number of fixed periods running from a certain point in time, namely the date on which the cause of action accrued, they also adopt other expedients. They commonly provide that

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3 Again, the Committee were able to point to an existing example of this kind of provision: a liability to pay an indemnity under the *Land Registration Act 1925* (UK) s 83(11).

4 See paras 13.49-13.51 below.

5 Wright Committee Report (1936) para 7.

limitation periods, at least in some cases, may be extended, using one or more of the following devices -

(1) waiving the limitation period in certain circumstances;

(2) delaying the commencement of the limitation period until the point of discoverability, that is to say the time at which the plaintiff became aware, or should reasonably have become aware, of the existence of the claim (the second alternative examined by the Wright Committee);

(3) giving the court a discretion to disregard limitation periods in appropriate cases (the Wright Committee's other alternative).[6]

Another technique sometimes used in combination with such provisions is the "long stop" provision - one which prescribes an ultimate limitation period on the expiry of which the claim is barred whether the plaintiff has become aware of its existence or not.

3.7 Few of these techniques are in evidence in Western Australia. The *Limitation Act 1935* is based almost entirely on the principle of fixed periods of limitation. Only in the rather limited context of asbestos-related diseases is it possible to delay the running of the period until the point where the plaintiff knew or reasonably could have known of the contraction of the disease.[7] The concept of discretion to disregard a limitation period is totally alien to the Limitation Act, although there are limitation provisions in some other Acts in which it is resorted to.[8] The only long stop provision in the Limitation Act is section 18, which provides that in an action to recover land or rent 30 years is the maximum allowance for disabilities.

3. SOME ALTERNATIVES

3.8 In recent years, law reform bodies reviewing the law of limitation of actions have begun to develop more radical ideas in which the concept of accrual as the basis for the

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6 In some instances the courts have been able to produce a not dissimilar result by reinterpreting the accrual rule so that the limitation period runs from the point of discoverability: see paras 4.15-4.28 below.

7 *Limitation Act 1935* s 38A: see paras 5.5-5.8 below.

8 *Fatal Accidents Act 1959* s 7(2)(d) (see para 22.4 below); *Law Reform (Miscellaneous Provisions) Act 1941* s 4(3)(b) (see para 22.25 below); *Crown Suits Act 1947* s 6(3)(b) (see para 23.4 below). By way of exception to the statement in the text, s 47A(3)(b) of the *Limitation Act 1935* (see para 10.4 below) makes use of the concept of discretion.

running of limitation periods is abandoned in favour of alternative commencement points. Two alternatives in particular have been advocated -

(1) *The discoverability approach*

Under this approach, limitation periods run from the point at which the plaintiff discovered, or could with reasonable diligence have discovered, the existence of the cause of action. This is put forward not just as a basis for extending the ordinary limitation period running from accrual, but as the commencement point for the primary limitation period (as envisaged by the Wright Committee). Adoption of this approach would ensure that the limitation period never commences before the plaintiff is or should reasonably have been aware of the existence of the right of action. In some cases, this coincides with the point of accrual, but in others the cause of action accrues earlier and does not depend on the plaintiff's knowledge.

The discoverability approach is the basis of reforms enacted in Alberta in 1996 and adopted in a Bill introduced into the Ontario Parliament in 1992.[9]

(2) *The act or omission approach*

This alternative envisages that limitation periods will run from the date of the act or omission which caused harm to the plaintiff. Under this approach, it is possible that the limitation period will begin at an earlier point than under the other approaches. Though in some cases a cause of action will accrue when the act or omission takes place, in others the cause of action will not accrue until some later point, such as when damage is suffered as a result. The damage may not become discoverable for some time after that.

The act or omission approach is the basis of reforms recommended by the New Zealand Law Commission in 1988, and has also been adopted by reports in New Brunswick and Ontario.[10]

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9 See paras 6.3-6.4, 6.6-6.22 below.

10 See paras 6.47-6.57 below.

3.9 Proposals for limitation legislation based on either of these alternatives also need to adopt some of the devices found in existing Limitation Acts. A limitation scheme based on discoverability generally needs to incorporate some sort of long stop provision. Adoption of the act or omission principle as the starting point of the limitation period generally requires a wide-ranging provision under which the ordinary limitation period may be extended, and a long stop provision to place a limit on the scope of permitted extensions.

4. THE COMMISSION'S APPROACH

3.10 The Commission, in carrying out its task of reviewing the *Limitation Act*, has to decide whether that Act should continue to be founded on the traditional concept of a fixed period or fixed periods of limitation running from the time when the cause of action accrues, or whether some alternative basis would be preferable. Accordingly, in this Part of the report it reviews the three alternatives bases for a limitations system, and the implications of adopting each of them.

3.11 Some criteria for judging these alternatives were listed by the Orr Committee, which considered the same question in 1977. In its report it said:

> "The ideal *terminus a quo* [that is, the start of the limitation period] would be an event which satisfied three conditions:-
>
> (a) it would be sufficiently near in time to the incidents giving rise to the claim to ensure that proceedings were instituted before the relevant evidence became either unobtainable or too stale to be reliable;
> (b) it would be unmistakeable and readily ascertainable;
> (c) its occurrence would necessarily become known forthwith to the plaintiff.
>
> It is obvious that in practice no *terminus* can satisfy all these conditions in every case."[11]

The Commission is likewise aware that none of the alternatives is likely to provide a perfect solution.

3.12 In the light of the considerations discussed in this Part of the report, in Part III the Commission outlines the basic principles which should form the foundations of a new Western Australian Limitation Act. In Parts IV and V it discusses the application of these

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11 Orr Committee Report (1977) paras 2.1-2.2.

basic principles to particular plaintiffs and defendants and to various kinds of claim, common law and equitable.

Chapter 4

THE ACCRUAL RULE

1. INTRODUCTION

4.1 Limitation Acts of the traditional type use the technique of listing the different kinds of claim and setting out limitation periods of various lengths applicable to them. The limitation periods commence running at the date on which the cause of action accrues, that is, in the words of Lindley LJ, "the earliest time at which an action could be brought".[1] The cause of action does not accrue until every element of the cause of action is present.[2] When a cause of action accrues in any particular case is generally determined not by provisions in the Act, but by rules of common law.

4.2 Limitation Acts of this kind date back to the English *Limitation Act 1623*, which was at one time in force in all Australian and Canadian jurisdictions and New Zealand, either through reception or by being copied into local statute law.[3] The Limitation Acts in force in all these jurisdictions at the present time remain based on the accrual principle. The 1623 Act is in essence still in force in Western Australia, having been reproduced in section 38 of the *Limitation Act 1935*.[4]

2. FIXED PERIODS RUNNING FROM ACCRUAL

4.3 Limitation Acts based on the accrual principle contain a large number of different limitation provisions of various lengths, each applying to different causes of action. The Western Australian Act is a good example. Having been virtually untouched by modern reforming initiatives, and thus remaining very close to the English statutes on which it was based, it contains a large number of individual limitation periods of different lengths, widely distributed throughout the Act. Scattered almost at random among the provisions setting out limitation periods are provisions about accrual, provisions setting out grounds on which the

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1 *Reeves v Butcher* [1891] 2 QB 509 at 511.

2 "Cause of action" means every fact which it will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court: *Read v Brown* (1888) 22 QBD 128, Lord Esher MR at 131; *Coburn v Colledge* [1897] 1 QB 702, Lord Esher MR at 706. See also *Cooke v Gill* (1873) LR 8 CP 107, Brett J at 116; *Board of Trade v Cayzer, lrvine & Co Ltd* [1927] AC 610, Viscount Dunedin at 617; *Trower & Sons Ltd v Ripstein* [1944] AC 254, Lord Wright at 263; *Smith v Browne* [1974] VR 842, Kaye J at 847; *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462, Lord Mackay of Clashfern at 464-465.

3 See paras 2.6, 2.20-2.36 above.

4 See para 2.46 above.

running of the period may be postponed, and various other matters. Finding the appropriate limitation provision is almost impossible unless the searcher has a good knowledge of the Act - and, if the provision in question is contained in section 38, a good knowledge of the ancient forms of action.

4.4 A full list of the limitation provisions in the Act, disinterred from their resting-places among the other provisions and classified according to length, is as follows -

Twenty years

- Actions of covenant or of debt upon any bond or other specialty: section 38(1)(e)(i).
- Actions in the nature of actions of debt or scire facias upon any recognisance: section 38(1)(e)(ii).

Twelve years

- Actions to recover any land or rent: section 4.
- Actions to redeem a mortgage: section 29.
- Actions to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, or any legacy: section 32(1).
- Actions to recover the estate or any share of the estate of a person dying intestate: section 33.
- Actions of debt for rent upon a covenant in an indenture of demise: section 38(1)(d).

Six years

- Actions to recover arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or damages in respect of such arrears of rent or interest: section 34.
- Actions of debt upon any award where the submission is not by specialty: section 38(1)(c)(i).
- Actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors and servants: section 38(1)(c)(ii).

- Actions of account other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants: section 38(1)(c)(iii).
- Actions in the nature of actions for trespass quare clausum fregit, trespass to goods, detinue or trover: section 38(1)(c)(iv).
- All other actions founded on any simple contract, including a contract implied in law: section 38(1)(c)(v).
- All other actions founded on tort: section 38(1)(c)(vi).
- All other actions in the nature of actions on the case: section 38(1)(c)(vii).
- Actions to recover arrears of interest in respect of any sum of money, whether payable under a covenant or otherwise, or damages in respect of such arrears: section 38(1) proviso.

Four years

- Actions for trespass to the person, menace, assault, battery, wounding or imprisonment: section 38(1)(b).

Two years

- Actions for forfeiture upon any statute penal whereby the forfeiture or benefit is limited to the Crown: section 37(1).
- Actions for penalties, damages or sums given by any enactment to the party grieved: section 38(1)(a)(i).
- Actions for slander actionable per se: section 38(1)(a)(ii).

One year

- Actions for forfeiture upon any statute penal whereby the forfeiture or benefit is limited to the Crown and any person who prosecutes in that behalf: section 37(2).
- Actions for forfeiture upon any statute penal whereby the forfeiture or benefit is limited to any person who prosecutes in that behalf: section 37(3).
- Actions to recover money paid as taxes, fees etc: section 37 A.
- Actions against any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public

duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority: section 47 A.

4.5 Modern Limitation Acts have managed to cut down the number of provisions, and state most causes of action in modern terms, thus virtually eliminating reliance on the forms of action; but most Acts still contain a large number of different limitation periods.

3. WHEN A CAUSE OF ACTION ACCRUES

4.6 The question when a cause of action accrues is not one which admits of any general answer, but must be determined with reference to each different kind of action. The rules determining when a cause of action accrues are both numerous and complex. They are generally not found in the Limitation Act, but in case law.[5] The following summary of the rules relating to the accrual of particular causes of action sufficiently illustrates the complex nature of these rules.

(a) Actions for breach of contract

4.7 Breach of contract is normally redressable by an action for damages, but rescission and various other remedies may also be available.[6] The limitation period for all actions founded on a simple contract is six years.[7] The general principle is that the cause of action accrues at the date of breach of contract.[8] It is not necessary to show that the breach caused the plaintiff to suffer damage, and the action will be barred six years after the breach even if damage has been suffered by the plaintiff at any time within six years of the action being

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5 Exceptionally, in the case of actions relating to land, the Limitation Act makes provision for the accrual of the cause of action in cases involving present interests (ss 5(a)-(c)), future interests (ss 5(d), 7), forfeiture and breach of condition (ss 5(e), 6), tenancies (ss 9-11) and interests under a trust (s 25).

6 The rules stated in the text apply both to actions for damages and to rescission for breach. In some cases of breach of contract, equitable remedies such as specific performance, injunction, rescission and rectification may be available. In some cases, limitation periods applying to common law claims are applied by analogy to equitable claims; in other cases, there may be no applicable limitation period and the equitable doctrine of laches may apply: see paras 13.1-13.8 below.

7 *Limitation Act 1935* s 38(1)(c)(v). The same limitation period applies in all other Australian jurisdictions except the Northern Territory: *Limitation Act 1985* (ACT) s 11(1); *Limitation Act 1969* (NSW) s 14(1)(a); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); *Limitation of Actions Act 1936* (SA) s 35(a); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(1)(a). In the Northern Territory the limitation period is three years: *Limitation Act 1981* (NT) s 12(1)(a).

8 *Gould v Johnson* (1702) 2 Salk 422, 91 ER 367; *Battley v Faulkner* (1820) 3 B & Ald 288, 106 ER 668; *Howell v Young* (1826) 5 B & C 259, 108 ER 97; *East India Co v Oditchurn Paul* (1849) 7 Moo PC 85, 13 ER 811; *Gibbs v Guild* (1882) 9 QBD 59; *Lynn v Bamber* [1930] 2 KB 72; *Bagot v Stevens, Scanlan & Co Ltd* [1966] 1 QB 197; *Simms Jones Ltd v Protochem Trading NZ Ltd* [1993] 3 NZLR 369.

brought.[9] When breach occurs depends on the nature of the breach and the terms of the contract. Where the breach consists of a positive act which the defendant promised not to do, the breach occurs on the date of the act. More often, the breach consists of failure to perform as promised. Where the contract specifies that performance will take place at a particular time, the breach takes place at the time the performance was promised.[10] Where the contract provides that performance is due on the happening of a particular contingency, the breach takes place when the contingency occurs.[11] Where the defendant has promised to perform at an unspecified time, the breach occurs when the contract ceases to be effectively capable of performance, that is, after the latest time when it could be performed.[12] In the case of failure to perform a continuing obligation, every daily breach gives rise to a separate cause of action.[13]

4.8 There are also rules governing when a cause of action accrues in relation to particular kinds of contract, such as contracts of loan, negotiable instruments, contracts of sale of goods, credit contracts, contracts for work and services, contracts of guarantee and indemnity and so on.[14] For example, in a contract of loan, if a time or condition for repayment is specified, the cause of action accrues at the expiration of the time specified or on the happening of the condition[15] but if no time is specified time runs from the date of the loan.[16] Where a loan is repayable by instalments, every failure to pay a due instalment gives rise to a separate cause of action. If the contract provides that on default the whole debt is recoverable, time runs as to the whole debt from the date of the first default in payment.[17] In a contract for work or services, the cause of action accrues when the work or services are performed, unless there is a contrary agreement.[18] If the contractor fails to complete performance, the cause of action accrues when completion or full performance of the services was due, unless before that time

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9 *Battley v Faulkner* (1820) 3 B & Ald 288, 106 ER 668; *Howell v Young* (1826) 5 B & C 259, 108 ER 97, Bayley J at 265; *Ward v Lewis* (1896) 22 VLR 410; *Lynn v Bamber* [1930] 2 KB 72, MCCardie J at 74.

10 *Re McHenry* [1894] 3 Ch 290.

11 *Waters v Earl of Thanet* (1842) 2 QB 757, 114 ER 295.

12 *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* (a firm) [1979] Ch 384.

13 *Shaw v Shaw* [1954] 2 QB 429; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* (a firm) [1979] Ch 384; *Sheldon v McBeath* (1993) Aust Torts Rep 81-209.

14 See *The Laws of Australia* paras 21-26.

15 *Re McHenry* [1894] 3 Ch 290.

16 *Garden v Bruce* (1868) LR 3 CP 300; *Reeves v Butcher* [1891] 2 QB 509; *Re Brown's Estate* [1893] 2 Ch 300; *Ogilvie v Adams* [1981] VR 1041. In England this rule has now been altered by statute: time does not begin to run until the date on which a written demand for payment is made: *Limitation Act 1980* (UK) s 6, implementing the recommendations of the Orr Committee Report (1977) paras 3.19-3.26. See *Boot v Boot* [1996] TLR 284.

17 *Hemp v Garland* (1843) 4 QB 519, 114 ER 994; *Reeves v Butcher* [1891] 2 QB 509; *Falzon v Adelaide Development Co Ltd* [1936] SASR 93.

18 *Emery v Day* (1834) 1 Cr M & R 245, 149 ER 1071.

the contractor commits an anticipatory breach of contract which the other party accepts as repudiating the contract. If the services are not performed according to the standard contracted for, time begins to run at the date of breach and not when damage is suffered.[19] Where defects become apparent after completion of the job, a cause of action for breach of a warranty to rectify defects accrues at the end of a reasonable time after the contractor is asked to make good the defects.[20]

(b) Actions based on restitutionary principles

4.9 The law of restitution - that is, claims based on the theory of unjust enrichment - covers a variety of actions, including various common law claims such as those previously classified as quasi-contractual (actions for money had and received, money paid, quantum meruit and quantum valebat) and a variety of equitable claims, both personal and proprietary.[21] Because the ordinary limitation period for actions in contract also covers contracts implied in law,[22] in most cases actions in quasi-contract must be brought within six years of the accrual of the cause of action. The plaintiff s cause of action will normally accrue when he pays money to the defendant or the defendant's use, or when he supplied goods or services,[23] but accrual is ultimately dependent upon the precise nature of the obligation to make restitution and special rules apply in certain cases.[24] In cases involving fraud or mistake,

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19 *Bagot v Stevens, Scanlan & Co Ltd* [1966] 1 QB 197.

20 *Swan Pools Ltd v Baker* (1980) 25 SASR 103.

21 H M McLean "Limitation of Actions in Restitution" [1989] CLJ 472, 487-488 lists the following equitable restitionary remedies: rescission for misrepresentation or mistake, relief from undue influence or unconscionable bargains, subrogation, contribution, the liability of fiduciaries, recovery from those acting in breach of confidence, and the personal action under *Re Diplock* [1948] Ch 465, in addition to proprietary claims enforced by resulting and constructive trusts, tracing remedies and equitable liens. In these cases, either limitation periods appropriate to common law actions apply by analogy, or the equitable doctrine of laches applies: see R Goff and G Jones *The Law of Restitution* (4th ed 1993) 765-780.

22 *Limitation Act 1935* s 38(1)(c)(v). The position is the same in South Australia, Tasmania and Victoria: *Limitation of Actions Act 1935* (SA) s 35(a); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(l)(a). Even without these words, the provision would be sufficient to cover quasi-contractual actions: in *Re Diplock* [1948] Ch 465 it was held that the words "actions founded on simple contract" in the *Limitation Act 1939* (UK) s 2(1)(a) covered quasi-contractual actions. In South Australia, however, it is now expressly provided that an action for recovery of money based on restitutionary grounds must be commenced within six years after the cause of action arose: *Limitation of Actions Act 1936* (SA) s 38(1). The legislation in New South Wales, the Northern Territory and Queensland refers expressly to actions in quasi-contract: *Limitation Act 1969* (NSW) s 14(1)(a); *Limitation Act 1981* (NT) s 12(1)(a); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); and in the Northern Territory the limitation period is three years, not six. In the Australian Capital Territory the general six-year limitation period applies to quasi-contractual actions: *Limitation Act 1985* (ACT) s 11(1).

23 *Baker v Courage & Co Ltd* [1901] 1 KB 56; *Maskell v Homer* [1915] 3 KB 106; *Brueton v Woodward* [1941] 1 KB 680.

24 Thus an action to recover money had and received to the plaintiff's use under an unenforceable contract accrues not when payment is made but when the defendant refuses to perform: *Crombie v Crombie*

in most Australian jurisdictions provisions in the Limitation Act ensure that time runs only from the point when the fraud or mistake is or could reasonably have been discovered,[25] but in Western Australia the fraud provision[26] applies only to equitable actions for the recovery of land and there is no statutory provision dealing with mistake.[27] Common law claims continue to be governed by the accrual rules referred to above.[28]

(c) Actions for breach of trust

4.10 Further accrual rules govern actions for breach of trust.[29] The cause of action accrues on the date of commission of the breach of trust, and not the date when the beneficiary suffers loss.[30] If the breach consists of the payment of money or delivery of property to a person who is not entitled to it, time runs from the date of payment or delivery. If trust funds are lent without proper security, time runs from the date of the loan, and not the date of the later discovery that the security is inadequate.[31] Where a beneficiary has a future interest in the trust property, the cause of action accrues on the date the interest falls into possession.[32] Where a breach remains unremedied, each distinct breach gives rise to a separate cause of action.[33]

[1903] SASR 147. A cause of action based on total failure of consideration accrues at the date of the failure of consideration: *Guardian Ocean Cargoes Ltd v Banco Do Brasil* (*No 3*) [1992] 2 Lloyd's Rep 193.

25 *Limitation Act 1985* (ACT) ss 33(1), 34(1); *Limitation Act 1974* (NSW) ss 55(1), 56(1); *Limitation Act 1981* (NT) ss 42(1), 43(1); *Limitation of Actions Act 1958* (Qld) s 38(1); *Limitation Act 1974* (Tas) s 32(1); *Limitation of Actions Act 1958* (Vic) s 27. In South Australia, the position as regards fraud is the same as in Western Australia: *Limitation of Actions Act 1936* (SA) s 25. There is no statutory provision on mistake similar to those listed above, but *Limitation of Actions Act 1936* (SA) s 38(1) provides that an action for recovery of money paid under a mistake (either of law or of fact) or otherwise based on restitutionary grounds must be commenced within six years after the cause of action arose. See also paras 13.53-13.57 below.

26 *Limitation Act 1935* s 27.

27 See paras 13.49-13.51 below.

28 So, for example, an action to recover money paid under a mistake of fact as money had and received runs from the date of payment: *Baker v Courage & Co Ltd* [1901] 1 KB 56.

29 For limitation periods governing breaches of trust, see paras 13.24-13.38 below.

30 *Want v Campain* (1893) 9 TLR 254; *Re Somerset* [1894] 1 Ch 231; *Thorne v Heard* [1894] 1 Ch 599 (but see A McGee *Limitation Periods* (2nd ed 1994) 247); *Collings v Wade* [1896] 1 IR 340; *Re Dive* [1909] 1 Ch 328, Warrington J at 335-336; *Short v Short* [1961] NZLR 516.

31 *Buckland v Ibbotson* (1902) 28 VLR 688.

32 This rule is statutory in most Australian jurisdictions: see *Limitation Act 1985* (ACT) s 28; *Limitation Act 1969* (NSW) s 49; *Limitation Act 1981* (NT) s 34; *Limitation of Actions Act 1974* (Qld) s 27(2A); *Limitation Act 1974* (Tas) s 24(3); *Limitation of Actions Act 1958* (Vic) s 21(2). There is no equivalent provision in Western Australia. See *Collings v Wade* [1896] 1 IR 340; *How v Earl Winterton* [1896] 2 Ch 626; *Re Blow* [1914] 1 Ch 233, Swinfen Eady LJ at 246; *Re Pauling's Settlement Trusts* [1964] Ch 303; *Armitage v Nourse* [1995] N PC 110; *Rasmussen v Rasmussen* [1995] 1 VR 613.

33 *Ward v Lewis* (1896) 22 VLR 410; *Matthews v Trustees Executors & Agency Co Ltd* (1898) 24 VLR 643; *Buckland v Ibbotson* (1902) 28 VLR 688. There is no doctrine of continuing breach.

(d) Actions in tort

4.11 An action for damages is the standard remedy for tort, although injunctions may be used in certain cases.[34] In Western Australia, the limitation period is generally six years, although in some cases a shorter period applies.[35] Most other Australian jurisdictions also adopt a six year period,[36] but some have a three-year period for personal injury actions.[37] When the cause of action accrues generally depends on whether or not the suffering of damage is an integral part of the cause of action.

4.12 Where a tort is actionable without proof of damage, the cause of action accrues when the wrongful act is done. So, for example, in trespass to the person the cause of action accrues at the time of the commission of the act of trespass.[38] Trespass to land and trespass to goods are committed when there is a direct physical act which interferes with the plaintiff's possession. In conversion the cause of action accrues at the time of the wrongful dealing,[39] even if the plaintiff waives the tort and sues in quasi-contract for money had and received,[40] but in the case of conversion of a cheque time begins to run when the bank debits the drawer's account.[41] However, in detinue, the cause of action accrues at the time of wrongful detention,[42] and if on the facts there is both a conversion and a detinue there will be two causes of action accruing at different times.[43] In libel, time runs from the date of publication,[44]

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34 Eg nuisance, intimidation, inducing breach of contract. In such cases, the common law limitation period will usually be applied by analogy: see paras 13.3-13.5 below.

35 A six year period applies to actions for trespass quare clausum fregit (ie. trespass to land), trespass to goods, detinue or trover (ie. conversion): *Limitation Act 1935* s 38(1)(c)(iv), all other actions founded on tort: s 38(1)(c)(vi), and all other actions in the nature of actions on the case: s 38(1)(c)(vii). A two year period applies to actions for slander, when the words are actionable per se: s 38(1)(a)(ii), and a four year period to actions for trespass to the person, menace, assault, battery, wounding and imprisonment: s 38(1)(b).

36 *Limitation Act 1985* (ACT) s 11(1); *Limitation Act 1969* (NSW) s 14(1)(b); *Limitation of Actions Act 1958* (Qld) s 10(1)(a); *Limitation of Actions Act 1936* (SA) s 35(c); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(1)(a). In the Northern Territory the period is three years: *Limitation Act 1981* (NT) s 12(1)(b). In South Australia a two-year period applies to all actions for slander: *Limitation of Actions Act 1936* (SA) s 37.

37 *Limitation Act 1969* (NSW) s 18A(2); *Limitation of Actions Act 1974* (Qld) s 11; *Limitation of Actions Act 1936* (SA) s 36(1); *Limitation Act 1974* (Tas) s 5(1).

38 *Dawson v Commonwealth* (1994) 12 WAR 29.

39 *Granger v George* (1826) 5 B & C 149, 108 ER 56; *Hiort v London & North Western Ry Co* (1879) 4 Ex D 188; *Perpetual Trustees & National Executors of Tasmania Ltd v Perkins* (1989) Aust Torts Rep 80-295.

40 *Denys v Shuckburgh* (1840) 4 Y & C Ex 42, 160 ER 912.

41 *Associated Midland Corporation Ltd v Bank of New South Wales* [1983] 1 NSWLR 533.

42 *Philpott v Kelley* (1853) 3 Ad & E 106, 111 ER 353; *Miller v Dell* [1891] 1 QB 468.

43 *John F Goulding Pty Ltd v Victorian Rys Comrs* (1932) 48 CLR 157.

44 *Grappelli v Derek Block (Holdings) Ltd* [1981] 1 WLR 822.

and slander actionable without proof of damage runs from the uttering of the slander, but if slander is actionable only on proof of damage time begins to run when the damage occurs.[45]

4.13 Where a tort is actionable only on proof of damage, time runs from the point at which the damage is suffered. This rule applies, for example, in negligence,[46] nuisance,[47] malicious prosecution[48] and also to infringement of a patent.[49] In most jurisdictions, deceit does not accrue until the fraud is or could with reasonable diligence have been discovered,[50] but this does not apply under the current provisions of the Limitation Act in Western Australia.[51]

4.14 Special rules apply in the case of continuing torts, such as false imprisonment and some cases of trespass to land, where the cause of action is regarded as continuously accruing to the plaintiff so long as the tort continues. The plaintiff can sue for all damage suffered within the limitation period.[52] This situation must be distinguished from one where the tort creates a state of affairs which causes more than one incident of damage, for example where support to land is wrongfully withdrawn: here there is an independent cause of action every time damage occurs.[53]

(e) Negligence

4.15 The statement that in negligence the cause of action is not complete until damage is suffered as a result of the breach of duty, and that time begins to run at that point,[54] conceals

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45 *Saunders v Edwards* (1662) 1 Sid 95, 82 ER 991.

46 *Davie v New Merton Board Mills Ltd* [1959] AC 604.

47 *Green v Walkley* (1901) 27 VLR 503. However, this rule will not apply in the exceptional cases where nuisance is actionable without proof of damage, as in the case of nuisance to servitudes (*Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343) and encroachments (*Fay v Prentice* (1845) 1 CB 828, 135 ER 769).

48 *O'Connor v Isaacs* [1956] 2 QB 288, Diplock J at 325.

49 *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462.

50 See *Peco Arts Ltd v Hazlitt Gallery Ltd* [1983] 1 WLR 1315.

51 See para 13.50 below.

52 *Coventry v Apsley* (1691) 2 Salk 420, 91 ER 366; *O'Connor v Isaacs* [1956] 2 QB 288 (false imprisonment); *Berry v Stone Manganese & Marine Ltd* [1972] 1 Lloyd's Rep 182 (negligence); *Bilambil-Terranora Pty Ltd v Tweed Shire Council* [l980] 1 NSWLR 465 (trespass to land). See also *Marchant v Capital & Counties Plc* (1983) 267 EG 843 (issue as to maintenance of party wall arose under arbitration award).

53 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127; *Crumbie v Wallsend Local Board* [1891] 1 QB 503; *Arbuckle v Shire of Boroondara* (1896) 22 VLR 513; *Vinnicombe v MacGregor* (1902) 28 VLR 144; *Tunnicliffe & Hampson Ltd v West Leigh Colliery Co Ltd* [1905] 2 Ch 390; *Dermer v Minister for Water Supply, Sewerage and Drainage* (1941) 43 WALR 85; *Thynne v Petrie* [1975] Qd R 260 (nuisance). See also *Glasson v Fuller* [1922] SASR 148, dealing with liability under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, now repudiated by the Australian High Court: see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

54 See para 4.13 above.

the complexities of the accrual rule in negligence cases. The operation of the accrual rule in property damage and economic loss cases has produced a result very different from that in cases involving personal injury.

(i) Personal injury cases

4.16 In most cases of personal injury, determining the time at which damage is suffered is straightforward. In the case of physical injuries received in a road accident, for example, it is usually clear that damage was suffered at the time of impact, the plaintiff will be immediately aware of the existence of the damage, and it is logical for the limitation period to start running from that point. However, in many cases the fact that injury has been suffered is not immediately apparent, and determining the date of accrual is very difficult. This applies in many cases of latent personal injury, and also to cases involving the infliction of disease. In cases of asbestosis, mesothelioma, silicosis and the like, the injury is caused by the inhalation of minute particles of fibre or dust, but only becomes apparent many years afterwards. To take another example, AIDS is caused by contact with contaminated blood or other bodily fluids, but some years may elapse before a person who is HIV positive begins to experience signs of illness. In such cases the law says that damage is suffered at the point of initial onset, even though at that point in time he can have no knowledge of it.[55] In the words of Lord Pearce in *Cartledge v E Jopling & Sons Ltd*,[56] "it is impossible to hold that a man who has no knowledge of the secret onset of pneumoconiosis and suffers no present inconvenience from it cannot have suffered any actionable harm".[57] The problem, then, is that in cases of latent disease or injury, because the cause of action accrues at the point of initial onset, the limitation period may well have run its course before the plaintiff is, or could reasonably be expected to be, aware of the existence of damage giving an entitlement to sue.

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55 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, Lord Reid at 772. See J Stapleton "The Gist of Negligence: Part I: Minimum Actionable Damage" (1988) 104 LQR 213.

56 [1963] AC 758 at 778.

57 See also eg *Church v Ministry of Defence* 'The Times' 7 March 1984; *Gordon v James Hardie & Co Pty Ltd* (No 1) (1987) Aust Torts Rep 80-132.

(ii) Defective buildings

4.17 Similar problems have been experienced in cases involving latent damage suffered as a result of defective building, but the result achieved by the courts has been very different.[58] These problems have existed since the law first recognised that builders and other professionals who play a part in the design and construction of buildings, and local authorities who have statutory powers of inspection of foundations and so forth, can be liable for negligence as a result of which the building is built defectively, causing loss to the owner.[59] Early authorities held that such damage amounted to damage to property,[60] but it is now accepted that it is better analysed as economic loss.[61] Once they had recognised the true nature of the damage suffered, the English courts rejected any idea that there can be liability for such loss,[62] but this is a minority view. Courts in New Zealand[63] and Canada[64] have consistently maintained that builders and the like owe a duty of care in such circumstances, even to subsequent owners, and the Australian High Court has now adopted the same attitude.[65]

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58 See Discussion Paper paras 7.10-7.28; C J Rossiter and M Stone "Latent Defects in Buildings - When Does the Cause of Action Arise?" (1985) 59 ALJ 606; N J Mullany "Limitation of Actions and Latent Damage - An Australian Perspective" (1991) 54 MLR 216, 223-238.

59 See *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; *Anns v Merton London Borough Council* [1978] AC 728; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

60 Eg *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, Lord Denning MR at 396, Sachs LJ at 403-404; *Anns v Merton London Borough Council* [1978] AC 728, Lord Wilberforce at 759; *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554; *Ketteman v Hansel Properties Ltd* [1987] AC 189.

61 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, Mason J at 466, Deane J at 503-504; *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034; *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment (UK) v Thomas Bates & Son Ltd* [1991] 1 AC 499.

62 *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment (UK) v Thomas Bates & Son Ltd* [1991] 1 AC 499; see also *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 WLR 498; N J Mullany "Limitation of Actions - Where Are We Now? " [1993] LMCLQ 34.

63 *Bevan Investments Ltd v Blackhall & Struthers* (*No 2*) [1973] 2 NZLR 45; *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150; *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Young v Tomlinson* [1979] 2 NZLR 441; *Brown v Heathcote County Council* [1986] 1 NZLR 76, affirmed by the Privy Council [1987] 1 NZLR 720; *Stieller v Porirua City Council* [1986] 1 NZLR 84; *Craig v East Coast Bays City Council* [1986] 1 NZLR 99; *Williams v Mount Eden Borough Council* (1986) 1 NZBLC 102, 544; *Askin v Knox* [1989] I NZLR 248, Cooke P (for the Court) at 254-256; *Lester v White* [1992] 2 NZLR 483; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed by the Privy Council [1996] 1 NZLR 513.

64 *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; *Consumer Glass Co Ltd v Foundation Co of Canada Ltd* (1985) 20 DLR (4th) 126; *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481;.*Winnipeg Condominium Corporation No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193. See also *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289.

65 *Bryan v Maloney* (1995) 182 CLR 609; followed in *Zumpano v Montagnese* (unreported) Supreme Court of Victoria, 3 May 1995, 5160 of 1994

4.18 For some years, it was the generally accepted view that in such cases a cause of action for defective building accrued on the occurrence of physical damage, whether or not it was reasonably discoverable. This was the view adopted by the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)*,[66] in accordance with general principle and by analogy with the decision in *Cartledge v E Jopling & Sons Ltd*,[67] which it held was not confined to personal injury cases but was of general application. The court drew a distinction between a defect in property and damage to the property resulting from the defect.[68] *Pirelli* overruled an earlier English case which had suggested that in such circumstances time began to run from the point at which the plaintiff discovered, or could reasonably have discovered, the damage,[69] and cast some doubt on the ruling of the House of Lords in *Anns v Merton London Borough Council*[70] that in cases involving the liability of local authorities for negligent exercise of statutory powers relating to inspection of buildings time began to run when the state of the building was such that there was imminent danger to health and safety. The question when time begins to run in the cases discussed in this paragraph is no longer important in England, because the House of Lords has now held that no liability exists in such cases.[71]

4.19 In Australia, *Pirelli* was followed in the Federal Court and several State Supreme Courts, including the Supreme Court of Western Australia.[72] However, as a result of recent

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66 [1983] 2 AC 1.

67 [1963] AC 758: see para 4.16 above.

68 *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1, Lord Fraser of Tullybelton at 16.

69 *Sparham-Souter v Town & Country Developments (Essex) Ltd* [1976] QB 858. In two other cases, *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 and *Higgins v Arfon Borough Council* [1975] 1 WLR 524, it had been held that time ran from the date the defective work was done.

70 [1978] AC 728. See also *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554.

71 *Murphy v Brentwood Urban District Council* [1991] 1 AC 398; *Department of the Environment (UK) v Thomas Bates & Son Ltd* [1991] 1 AC 499. *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1 was explained as a decision turning on the principles of negligent misstatement. Since these decisions, the House of Lords has held that in some circumstances a contracting party may be able to enforce a contractual right against the builder or vendor for the benefit of others who have suffered from the defective performance: *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85.

72 *Wickham v City of Gosnells* (1984) 55 LGRA 102, Commissioner Heenan at 117-118. For cases from other jurisdictions see *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268, Hutley JA at 290, Glass JA at 315-316; *Burgchard v Holroyd Municipal Council* [1984] 2 NSWLR 164, Roden J at 173; *Holden v Goodridge* (1985) 55 LGRA 231, Lee J at 235-236; *Miell v Hatjopoulos* (1985) 2 BCL 258, Legoe J at 262; *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1985) 61 ALR 504, Pincus J at 507; *Hawkins v Clayton* (1986) 5 NSWLR 109, Kirby P at 117, Glass JA at 123-124; *Gillespie v Elliott* [1987] 2 Qd R 509, Macrossan J at 519; *Scanlan v American Cigarette Co (Overseas) Pty Ltd* (*No 1*) [1987] VR 261, Nicholson J at 268; *Elanora Country Club Ltd v V J Summersby & Pearce & Sons (Excavations) Pty Ltd* (1988) 4 BCL 309, Grove J at 314; *Page v Castlemaine City Council* (1988) 66 LGRA 296, Gobbo J

developments, the effect of *Pirelli* is now substantially diminished, and there must be considerable doubt whether it still represents Australian law. In *Hawkins v Clayton*[73] Deane J distinguished cases of economic loss caused by latent defects in buildings from cases of physical injury to person or property or present economic loss which is directly sustained in the sense that it does not merely reflect diminution in value or other consequential damage which occurs only when a latent defect becomes manifest. In the former case the loss was sustained only when the defect was actually discovered. In the latter case damage was sustained when inflicted or first suffered and the cause of action accrued at that time.[74] Mason and Wilson JJ, though dissenting on another ground, concurred generally with Deane J.[75] Deane J's statement, though only an obiter dictum, thus commanded the support of a majority of the court. Deane J's view was accepted by the Appeal Division of the Victorian Supreme Court in *Pullen v Gutteridge Haskins & Davey Pty Ltd*[76] as establishing that in cases of pure economic loss due to a latent defect time begins to run when the latent defect becomes manifest. That this is so is clearly assumed by the majority judgment of Mason CJ, Deane and Gaudron JJ in the recent High Court decision in *Bryan v Maloney*.[77] (For the purposes of the decision, both parties accepted that the damage was sustained by the plaintiff when the inadequacy of the footings became manifest. The decision deals with the duty of care owed by builders to subsequent purchasers, and does not concern limitation periods.) Though there is as yet no direct High Court authority, it seems likely that when a suitable opportunity arises the High Court will follow the approach taken in the most recent cases.

4.20 In Western Australia, the issue has not yet been conclusively settled. However, there are two cases in which Western Australian courts have indicated that they are prepared to follow the lead taken in other States. In 1994, in *Pigram v State Housing Commission*,[78] where the plaintiff issued a writ claiming damages for latent defects in a house she had purchased ten years previously, Sadleir DCJ in the District Court followed Deane J's dictum in *Hawkins v Clayton* and the decision of the Victorian Appeal Division in *Pullen v Gutteridge* in ruling that the cause of action arose when the defects became known or

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at 303; *Calmao Pty Ltd v Stradbroke Waters Co-owners Co-operative Society Ltd* (1989) 21 FCR 28;, Pincus J at 32; *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 226.

73 (1988) 164 CLR 539.

74 Id at 587-588. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, Deane J at 503-505; *Hawkins v Clayton* (1986) 5 NSWLR 109, McHugh JA at 143-144.

75 *Hawkins v Clayton* (1988) 164 CLR 539 at 543. Gaudron J at 601 left the point open. Brennan J at 561 preferred the view in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1.

76 [1993] 1 VR 27 at 66-71.

77 (1995) 182 CLR 609 at 627. However, Brennan J (dissenting) at 643 adhered to the view that "it is artificial to classify defects in a building as pure economic loss".

78 (1994) 10 SR(WA) 371.

manifest, or were actually discovered or discoverable by reasonable diligence. More recently, in May 1996, Master Bredmeyer adopted the same view. In *Ogino v Cameron Chisholm & Nicol Pty Ltd*,[79] the plaintiff, who acquired an interest in the Burswood Hotel in 1990 and became sole owner in 1995, brought an action for negligence against the architects responsible for preparing the plans of the hotel, alleging that the apertures in the balustrades were wider than permitted by the Uniform Building By-laws, and therefore dangerous. The hotel had been completed in 1984, but this problem had been identified only in 1994 when an engineer employed by the company which had leased the hotel saw a child playing on a balcony in a dangerous manner. The defects had subsequently been remedied at a cost of $335,000. The defendants applied for summary judgment, contending that the limitation period had expired in 1990. Master Bredmeyer refused to grant this application. On the basis of *Hawkins v Clayton* and *Pullen v Gutteridge*, he considered that the cause of action arose when the defective state of the balconies became known or manifest. Applying this principle to the facts, he said that though the dimensions of the balconies were apparent from the time of completion onwards, it was arguable that the ordinary reasonable hotel owner would not have known of the failure to comply with the by-laws, and that the defective state of the balconies only became known or manifest when the problem was discovered in 1994. If the case proceeds to trial, there will no doubt be a ruling on the date by which the defect became known or manifest.[80]

4.21 What these developments show is that, in building cases, because of the problems involved in any other approach, the law is accepting that damage is suffered, and the limitation period should commence, when the damage becomes discoverable. The result is very different from the accrual approach as applied in personal injury cases.

(iii) Professional advice

4.22 Similar issues have arisen in cases involving economic loss suffered through reliance on professional advisers. Again, the loss may not become apparent until many years after advice was given or work done. There has been conflict in the authorities as to whether the

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79 (Unreported) SC WA, 3 May 1996, CIV 1065 of 1996.

80 See also *Watson v Shire of Esperance* (unreported) District Court of Western Australia, 15 November 1995, 6475 of 1994, another defective building case, where the defendant did not dispute the plaintiff's contention that the cause of action arose when the damage manifested itself. Recent cases in other jurisdictions in which these matters are discussed or referred to include *Butler v Gaudron* (unreported) CA NSW 17 November 1994, CA 40462 of 1994 and *Price Higgins & Fidge v Drysdale* [1996] 1 VR 346.

cause of action in such cases accrues immediately when the work is done or at some later point when loss is suffered through reliance on the advice.[81] The leading Australian decision, *Wardley Australia Ltd v Western Australia*,[82] deals with the accrual of a cause of action for misleading or deceptive conduct under section 52 of the Commonwealth *Trade Practices Act 1974*.[83] The High Court held that under this provision, as under the common law,[84] a plaintiff can recover compensation only for actual loss or damage, as distinct from potential or likely damage. Where, as a result of misleading or deceptive conduct, the plaintiff entered into an indemnity which was later called upon, the cause of action accrued not at the time of entry into the obligation, but at the time of fulfilment of the contingency.[85] The High Court approved earlier Australian decisions which had reached a similar conclusion[86] and disapproved authorities which had held that loss was sustained on entry into an agreement as a result of a negligent misrepresentation.[87] The court considered a line of English decisions which had held that actual loss was suffered immediately on entering into an agreement as a result of negligent advice,[88] but was not prepared to agree with them.[89] An exceptional

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81 See Discussion Paper paras 7.29-7.33; N J Mullany "Limitation of Actions and Latent Damage - An Australian Perspective" (1991) 54 MLR 216, 238-242; N J Mullany "Limitation of Actions - Where Are We Now?" [1993] LMCLQ 34, 43-47.

82 (1992) 175 CLR 514.

83 Under s 82(2), an action for loss or damage which results from a contravention of Parts IV or V of the Trade Practices Act may be commenced within three years of the date when the cause of action accrued. For cases adopting the *Wardley* principle, see *Qanstruct Pty Ltd v Bongiorno Ltd* (1993) 113 ALR 667; *State of New South Wales v McCloy Hutcherson Pty Ltd* (1993) 116 ALR 363; *Karedis Enterprises Pty Ltd v Antoniou* (1995) ATPR 41-427; *Grundy v Lewis* (1995) 133 ALR 400.

84 The majority saw the cases on the measure of damages at common law as an appropriate guide: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, Mason, CJ, Dawson, Gaudron and McHugh JJ at 525-526. See also *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, Mason CJ, Wilson and Dawson JJ at 14. The other judges in *Wardley* were not prepared to take the analogy this far: see (1992) 175 CLR 514, Deane J at 543-545, Toohey J at 553-555.

85 For cases applying the High Court decision in *Wardley*, see *Juldiver Pty Ltd v Nelumbo Ply Ltd* (1993) ATPR (Digest) 46-097; *Francis v Whatson* [1994] 2 Qd R 584; *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35; *CAJ Investments Pty Ltd v Lourandos* (unreported) Federal Court of Australia (Full Court), 23 February 1996, NG 760 of 1995; *MGICA (1992) Ltd v Kenny & Good Pty Ltd* (1996) 140 ALR 313.

86 *SWF Hoists & Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR 41-045; *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1. See also *South Australia v Johnson* (1982) 42 ALR 161, the Court at 169; *Vulic v Bilinsky* [1983] 2 NSWLR 472; *Dorfler v Australia & New Zealand Banking Group Ltd* (1991) 103 ALR 699; *Crisp v Blake* (1992) Aust Torts Rep 81-158.

87 *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1985) 61 ALR 504; *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 226. See also Ward v Lewis (1896) 22 VLR 410; *Gillespie v Elliott* [1987] 2 Qd R 509; *Deputy Commissioner of Taxation v Zimmerlie* [1988] 2 Qd R 500; *Doundoulakis v Antony Sdrinis & Co* [1989] VR 781; *Elliot & Tuthill (Mortgagees) v Oscleen Pty Ltd (in liq)* (unreported) NSW Supreme Court, 27 April 1992, 17015 of 1990.

88 *Forster v Outred & Co* [1982] 1 WLR 86; *Melton v Walker & Stanger* (1981) 125 SJ 861; *Baker v Ollard & Bentley (a firm)* (1982) 126 SJ 593; *D W Moore & Co Ltd v Ferrier* [1988] 1 WLR 267; *Islander Trucking Ltd (in liq) v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826; *Bell v Peter Browne & Co* [1990] 2 QB 495. See also *Sullivan v Layton Lougher & Co* (1995) 49 EG 127.

89 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, Mason CJ, Dawson, Gaudron and McHugh JJ at 529-531.

English decision which held that loss or damage was not inevitably suffered immediately on entering into a contract as a result of a misrepresentation [90] was approved.[91]

Once again, the professional negligence cases show that the difficulties involved in viewing the cause of action as arising when the work is done have induced the courts to adopt an approach which is much more consistent with the discoverability principle. The English decisions have perhaps been affected by the contemporary English view that, with the exception of liability for negligent statements under *Hedley Byrne & Co Ltd v Heller & Partners*,[92] there is no liability in negligence for pure economic loss.[93]

(iv) Recent developments in other jurisdictions

4.23 Developments in Canada and New Zealand may well foreshadow the path that the law will take in Australia. As regards latent building defects, the Supreme Court of Canada in *City of Kamloops v Nielsen*[94] and the New Zealand Court of Appeal in *Invercargill City Council v Hamlin*[95] have each held that the cause of action accrues only when the damage becomes discoverable. In contrast to *Bryan v Maloney*, the question when the cause of action accrued was clearly in issue in each case. The decision in *Invercargill City Council v Hamlin* has now been upheld by the Privy Council,[96] which affirmed the proposition that the loss suffered was economic loss which occurred when the market value of the property became depreciated as a result of the defect, and so the cause of action arose when the defect became reasonably discoverable. The decision appears to cast some doubt on the *Pirelli* approach.[97]

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90 *UBAF Ltd v European American Banking Corporation* [1984] QB 713. See also *First National Commercial Bank plc v Humberts (a firm)* [1995] 2 All ER 673.

91 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, Mason CJ, Dawson, Gaudron and McHugh JJ at 527-528.

92 *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465.

93 *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment (UK) v Thomas Bates & Son Ltd* [1991] 1 AC 499. For recent cases in which defendants have been held liable for economic loss under *Hedley Byrne* principles, see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (insurance underwriters); *White v Jones* [1995] 2 AC 207 (solicitor).

94 (1984) 10 DLR (4th) 641.

95 [1994] 3 NZLR 513.

96 [1996] 1 NZLR 513.

97 "Their Lordships refer to *Pirelli* as an unfortunate decision not only because that is how the House itself regarded the decision - Lord Fraser described the result as unreasonable and contrary to principle - but also because it has been subjected to a barrage of judicial and academic criticism ever since": id, Lord Lloyd of Berwick at 525.

4.24 In Canada, the Supreme Court, building on the foundation of *Kamloops*, has elevated discoverability to a principle of general application. In *Central Trust Co v Rafuse*,[98] a case concerning the tort liability of a solicitor to a client for negligent advice, Le Dain J, giving the judgment of the court, said:

> "I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence."[99]

In the subsequent case of *KM v HM*,[100] the Supreme Court affirmed the general discoverability principle and applied it to a case involving sexual abuse. The court decided that the limitation period did not begin to run until the victim began therapy and came to understand that her psychological problems were caused by her father's actions many years previously.

4.25 Though in *Invercargill City Council v Hamlin* the Privy Council expressly limited its decision to the problem caused by latent defects in buildings,[101] the New Zealand courts have gone further and now recognise a similar general principle to that affirmed by the Supreme Court of Canada. In *G D Searle & Co v Gunn*,[102] the plaintiff was rendered infertile by a defective intrauterine device. She only became aware that the IUD could cause, and had caused, her such harm nine years afterwards. A Master struck out her claim, on the ground that it was statute-barred, but this decision was reversed by Gallen J[103] and his decision has now been upheld by the New Zealand Court of Appeal. Gallen J was "prepared to accept that the accrual of a cause of action for personal injuries in New Zealand to the extent to which it is possible to bring such a claim before the Courts, depends upon knowledge of the existence of the cause of action".[104] He was influenced by the Australian and Canadian authorities, by

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98 (1986) 31 DLR (4th) 481.
99 (1986) 31 DLR (4th) 481 at 535-536.
100 (1992) 96 DLR (4th) 289.
101 [1996] 1 NZLR 513, Lord Lloyd of Berwick at 523, 526.
102 [1996] 2 NZLR 129.
103 Sub nom *G v G D Searle & Co* [1995] 1 NZLR 341.
104 Id at 350.

the decision of the New Zealand Court of Appeal in *Invercargill City Council v Hamlin,*[105] and also by the first instance decision in *S v G,*[106] a case on sexual abuse, in which Blanchard J had held that the cause of action accrued when the plaintiff realised the causal connection between the damage she had suffered and the behaviour of the defendant. Blanchard J had specifically refused to apply the principle of *Cartledge v E Jopling & Sons Ltd* in such circumstances.[107]

4.26 Subsequently to Gallen J's decision in *G D Searle & Co v Gunn*, the Court of Appeal in *S v C,* in large measure affirmed the decision of Blanchard J.[108] The court held that where damage was an element of the cause of action, as in negligence, the reasonable discoverability of the link between psychological and emotional harm and past sexual abuse might be employed to determine the accrual of the cause of action. In cases where damage was not an element, such as a cause of action for assault and battery, the reasonable discoverability approach might be applied to the recognition of the lack of true consent to the conduct.[109] The Court of Appeal followed its own decision in *Invercargill City Council v Hamlin* and Gallen J's decision in *G D Searle & Co v Gunn*.

4.27 By the time the Court of Appeal came to give judgment in the Gunn case, it had the advantage not only of its own decision in *S v G* but also of the decision of the Privy Council in *Invercargill City Council v Hamlin.*[110] It took the opportunity to state definitively that the

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105 [1994] 3 NZLR 513.

106 Sub nom *G v S* (unreported) New Zealand High Court (Auckland), 22 June 1994, CP 576/93.

107 See also *McKenzie v Attorney General* [1992] 2 NZLR 14, a case involving asbestos-related cancer, where the question of when a cause of action accrued was left open; *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632, an action for distress caused by exposure to asbestos and fear of developing asbestosis, in which, according to Barker J at 638, "[a]ll counsel acknowledged that the limitation period for a personal injury claim based on negligence would run from the day on which any injury or loss came to the attention of the plaintiff". *In T v H* [1995] 3 NZLR 37, Cooke P (dissenting) at 42-43 agreed with the application by *KM v HM* of the reasonable discoverability principle in sexual abuse cases. He went on to suggest that in cases where the victim was aware of the damage suffered, but was unable to make a claim for some other reason (in this case because of fear of harm at the hands of her abuser) actionable damage should be regarded as not having been suffered until the victim had emerged from the effects of the abuse and was able to make a claim. However the majority held that the plaintiff's claim was for assault and battery and arose at the time the acts were done: see Hardie Boys J at 52-53, Tipping J at 59. Note also *Broadcasting Corporation of New Zealand v Progeni International Ltd* [1990] 1 NZLR 109, applying the principle of *UBAF Ltd v European American Banking Corporation* [1984] QB 713 to an action for negligent advice; *Rabadan v Gale* [1996] 3 NZLR 220, an action against a solicitor in contract and tort.

108 [1995] 3 NZLR 681.

109 However on the facts the Court of Appeal refused to extend the limitation period under the provisions of s 4(7) of the *Limitation Act 1950* (NZ): see para 9.23 below.

110 [1996] 1 NZLR 513.

New Zealand courts had now rejected the principle of *Cartledge v E Jopling & Sons Ltd.* Henry J, delivering the judgment of the court, said:

> "This Court [in *S v G*] has therefore already taken what could be described as the *Hamlin* principle one step further and applied it to a personal injury claim of a specific kind. Although it was submitted that *S v G* is distinguishable on the basis that it could be said that the wrongful conduct itself was the reason for the link between the abuse and the psychological and emotional damage not being recognised, there can be no logical justification for confining the principle to such a situation. It is still a question of what is meant in s 4 by 'the date on which the cause of action accrued'. The phrase must be given a consistent meaning which is applicable to differing factual situations.
>
> In our view the time has now come to state definitively that *Cartledge* does not represent New Zealand law. It has now been superseded in the United Kingdom by legislation, and its authority as well as that of *Pirelli* has been cast into some doubt by *Hamlin*... The problem of latent defects in buildings did not really surface in this country until such cases as *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 and *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234. The law in that regard is now settled. The corresponding problem of what may be described as latent injury or latent disease has only comparatively recently been called into question in this Court… It should now be resolved in a similar way. To hold that a plaintiff who has not discovered that a bodily injury is attributable to the wrongful action of another, and who could not reasonably have discovered that fact, is barred from suit if the injury in fact occurred outside the statutory period is effectively to deny a person the right of action. We do not see that consequence as being required by the legislation. We would therefore hold that for the purposes of s 4(7) of the *Limitation Act 1950*, a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant."[111]

4.28 Similar developments have taken place in the United States,[112] where legislative extension of the ordinary limitation period has been infrequent. Originally, the limitation period was calculated from the time when the tort was committed or the injury occurred, rather than the time when it became capable of being discovered. However, over the past fifty years, and particularly during the 1980s, there has been a move towards the adoption of a discoverability rule,[113] and now almost all the states whose courts have addressed the issue have some form of discoverability rule.[114] This rule, which originated in the medical malpractice area, has spread across a miscellany of other tort actions including defective

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111 [1996] 2 NZLR 129 at 132-133.

112 This paragraph relies principally on research undertaken by the Irish Law Reform Commission: see Ireland Report (1987) 28-34.

113 The leading case is *Urie v Thompson* (1949) 337 US 163.

114 R W Creswell "Statutes of Limitation: Counterproductive Complexities" (1985) 37 Mercer L Rev 1 at 29.

building cases.[115] By 1982, 36 states had adopted date of discovery rules either by statute or by judicial determination.[116] The formulas adopted vary: some are limited to personal injury actions[117] and some also include property damage.[118] The decisions have tended to address the issue in a specific context, for example legal or medical malpractice, products liability, negligence in the construction or improvement of buildings and exposure to toxic substances. They have not generally sought to articulate a new rule governing the whole field of tortious liability. The adoption of the discoverability principle has been qualified by the legislative adoption of "repose statutes" (that is, legislation enacting long stop provisions) which place an outer time limit, usually ranging between five and twelve years, on particular claims.[119]

4. SOME PROBLEMS

(a) Concurrent liability in contract and tort

4.29 In most Australian Limitation Acts the limitation period both in contract and in tort is six years, but in contract time runs from the date of breach of contract whereas in the tort of negligence the cause of action only accrues when damage is suffered.[120] A contracting party who is negligent in the performance of the contract can generally be sued either in contract, or in tort, or in both contract and tort, at the plaintiff's option, and the difference as to the

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115 See eg *Chrischilles v Griswold* (1967) 150 NW 2d 94 (Iowa); *Neel v Magana, Olney, Levy, Cathcart & Gelfand* (1971) 491 P 2d 421 (Cal); *Johnson v Caldwell* (1983) 123 NW 2d 785 (Mich). For other cases see W P Keeton (ed) *Prosser and Keeton on the Law of Torts* (1984) 166-168.

116 D W Feinberg "Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations" (1982) 8 Columbia Journal of Environmental Law 161, 170 n 55.

117 Eg Connecticut, Kansas, Missouri, North Carolina, South Carolina, Vermont.

118 Eg Nebraska.

119 All jurisdictions except Arizona, Iowa, Kansas and Vermont have enacted statutes of repose applying to the design and construction of buildings: S C Randall "Comment: Due Process Challenges to Statutes of Repose" (1986) 40 SW LJ 997, 1000 n 13; see also W H Knapp and B C Lee "Application of Special Statutes of Limitations Concerning design and Construction" (1979) 23 St Louis ULJ 351. 25 jurisdictions have repose statutes in the medical malpractice area: E A Ward "Note: *Austin v Litvak*, Colorado's Statute of Repose for Medical Malpractice claims: An Uneasy Sleep" (1985) 62 Denver U L Rev 825, 827. About one third of the states have at one time adopted products liability statutes of repose: Randall, op cit, 1001 n 18. Statutes of repose have been challenged on constitutional grounds (for example, that they offend against guarantees of equal protection, due process and access to the courts) with varying success: see A R Turner "The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability" (1981) 46 J Air L & Comm 449; L F Sisson and J B Kelley "Statutes of Limitation for the Design and Building Professions - Will They Survive Constitutional Attack? (1982) 49 Ins Couns J 243; Anon "Note: The Fairness and Constitutionality of Limitations for Toxic Tort Suits" (1983) 96 Harv L Rev 1683; D F Rubin "Note: Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose" (1984) 18 Suffolk U L Rev 757: J H Hicks "Note: The Constitutionality of Statutes of Repose: Federalism Reigns" (1985) 38 Vand L Rev 327; S C Randall "Comment: Due Process Challenges to Statutes of Repose" (1986) 40 SW LJ 997.

120 See paras 4.7 and 4.13 above.

running of the limitation period may be a key factor in the plaintiff preferring to bring a tort action.[121]

4.30 Some years ago a series of cases suggested that professional persons such as solicitors and architects were liable only in contract and not in tort,[122] but these cases, "though based on prior authority, were supported by only a slender citation of cases, none of great weight; and the jurisprudential basis of the doctrine so adopted cannot be said to have been explored in any depth,"[123] and they were inconsistent with older decisions of high authority.[124] From the mid-1970s the courts have reaffirmed the proposition that liability in contract and in tort can coexist,[125] and this view is now supported by a consistent line of authority in England,[126] Australia,[127] Canada[128] and New Zealand.[129] Given the fact that these two forms of liability have a common origin in cases involving undertakings,[130] any other conclusion would be difficult to justify.

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121 See eg W D C Poulton "Tort or Contract" (1966) 82 LQR 346; G H L Fridman "The Interaction of Tort and Contract' (1977) 93 LQR 422; F M B Reynolds "Tort Actions in Contractual Situations" (1985) 11 NZULR 215; K Mason "Contract and Tort: Looking Across the Boundary from the Side of Contract" (1987) 61 ALJ 228; J Swanton "The Convergence of Tort and Contract" (1989) 12 Syd LR 40.

122 *Groom v Cracker* [1939] 1 KB 194; *Clark v Kirby-Smith* [1964] Ch 506; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197.

123 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Goff of Chieveley at 185.

124 See *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, Lord Denning MR at 819, citing *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, Lord Radcliffe at 587; *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57; *Boorman v Brown* (1842) 3 QB 511, 114 ER 603, Tindal CJ at 525-526, on appeal (1844) 11 Cl & Fin 1, 8 ER 1003, Lord Campbell at 44; *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 956. *Nocton v Lord Ashburton* was later affirmed by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, which by deciding that there can in appropriate circumstances be liability in negligence for statements causing financial loss widens the area in which liability in contract and in tort can overlap.

125 The first cases to affirm this principle were *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 and *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554. Oliver J *in Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 provided a detailed justification of the basis on which concurrent liability rests.

126 See particularly *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384; *Henderson v Merrett Syndicates* [1995] 2 AC 145, Lord Goff of Chieveley at 184-194; *Holt v Payne Skillington (a Firm)* [1995] TLR 701. The judgment of Lord Scarman in *Tai Hing Cotton Mill v Lui Chong Hing Bank* [1986] AC 519, suggesting that there was no advantage in searching for a liability in tort where the parties were in a contractual relationship, threatened to undermine the concept of concurrent liability, but that doctrine has now been authoritatively restated by Lord Goff in *Henderson v Merrett Syndicates*.

127 *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd R 33*; Macpherson & Kelley v Kevin J Prunty & Associates* [1983] 1 VR 573

128 *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481.

129 *Rowlands v Collow* [1992] 1 NZLR 178.

130 See eg W L Prosser, "The Borderland of Tort and Contract" in W L Prosser *Selected Topics on the Law of Torts* (1953) 380; J H Baker *Introduction to English Legal History* (3rd ed 1990) 379-386,459-461. *Bukton v Townsend* (*The Humber Ferry Case*) (1348) YB 22 Lib Ass pl 41 f 94 (see also G O Sayles *Select Cases in the Court of King's Bench Vol VI* (Selden Society vol 82) 66) appears to be the common origin of both forms of liability.

4.31 Given that the doctrine of concurrent liability is firmly established, it remains the case that the cause of action in negligence is likely to accrue later than the cause of action for breach of contract, with the consequence that the limitation period for negligence may still be running after that for actions in contract has expired. This may be important for many defendants, particularly professional persons.[131] The effect of concurrent liability on the limitation period has been considered by law reform commissions in Canada. The Ontario Law Reform Commission in 1969 recommended that it should be solved by recognising that:

> "In cases which are based on breach of a duty to take care, whether that duty arises in tort, contract or by statute, time should run from the occurrence of damage."[132]

This would in effect give plaintiffs a longer limitation period for actions in contract, expiring at the same time as the limitation period for negligence actions. This would have important consequences where the plaintiff wished to recover damages which are only available in a contract action, such as expectation or reliance damages.

4.32 The alternative is for the limitation period, in all cases based on the breach of a duty of care, contractual or otherwise, to run from the date of the breach. This was the recommendation of the Law Reform Commission of British Columbia,[133] made in response to the problem that under the present law in that jurisdiction the long stop period runs from the date on which the cause of action "arose",[134] and the impact on that provision of case law development under which an action in negligence now generally accrues when the damage becomes discoverable.[135] This may be a more logical solution than that proposed in Ontario, and is likely to be preferred by defendants, but unless there are wide-ranging provisions under which the normal limitation period can be extended in appropriate circumstances, it would mean a return to the situation under which many deserving plaintiffs who have suffered latent injury would be denied a remedy through the expiry of the limitation period before they became aware of the existence of the right of action.

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131 See the discussion of the application of limitation rules to the liability of professionals, and of the Parliament of Western Australia Select Committee on Professional and Occupational Liability *Final Report* (1994), in Ch 11 below.

132 Ontario Report (1969) 93. For similar recommendations see Alberta Institute of Law Research and Reform *Working Paper: Limitation of Actions* (1977) 9; Newfoundland Working Paper (1985) 53 and Newfoundland Report (1986). See N Rafferty "The Impact of Concurrent Liability in Contract and Tortious Negligence upon the Running of Limitation Periods" (1983) 32 UNBLJ 189.

133 British Columbia Report (1990) 34-35.

134 *Limitation Act 1979* (BC) s 8.

135 See paras 4.15-4.28 above. A similar solution has been enacted in Alberta and proposed in Ontario: see para 6.15 below.

4.33 In the view of the Commission, the fact that the limitation periods for tort and contract commence at different points should not be dealt with by provisions of the kind proposed by the Canadian commissions, which graft a particular rule onto the existing accrual system. If these and other problems compel the conclusion that it is undesirable to retain the accrual system, it should be replaced by one of the alternatives discussed below.

(b) Classification problems

4.34 Attention has already been drawn to the large number of different limitation periods in the Western Australian Limitation Act and, as an example of the classification complications which may ensue, to *State Government Insurance Commission v Teal*,[136] where Commissioner Williams QC had to determine whether an action under section 7(5) of the *Motor Vehicle (Third Party Insurance) Act 1943* was an action for a penalty, damages or other sum given by an enactment to a party grieved under section 38(1)(a)(i), an action founded on a simple contract (including a contract implied in law) under section 38(1)(c)(v), an action in the nature of an action on the case under section 38(1)(c)(vii) or an action of debt upon a bond or other specialty under section 38(1)(e)(i). Commissioner Williams QC commented that the reasoning process necessary to reach the conclusion that section 38(1)(e)(i) applied, involving consideration of forms of action abolished more than a century ago, highlighted the need for a thoroughgoing review and redrafting of the Limitation Act.[137]

4.35 The particular problems of this State's Limitation Act are a result of the retention of ancient English legislation which has been replaced nearly everywhere else by new legislation based on the reforming endeavours of bodies such as the Wright Committee.[138] To some extent, modern Limitation Acts have simplified the problem by reducing the number of different periods, but such Acts still have a number of different limitation periods. Thus, for example, in some jurisdictions there is a shorter limitation period for personal injury cases than for other tort actions.[139] In some cases the issue for decision is whether or not the case falls into the personal injury category: this has arisen, for instance, in an action against a

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136 (1990) 2 WAR 105: see para 2.54 above.

137 Id at 118-119.

138 See paras 2.11-2.43 above.

139 Four Australian jurisdictions have a three year period for personal injury actions, but a six year period for other tort actions: see paras 4.11 above, 4.39 and 12.29 below. This is also the position in England: see *Limitation Act 1980* (UK) ss 2, 11.

doctor for financial loss caused by the negligent performance of an operation,[140] and in an action by a partnership for personal injury to a partner.[141] The first case was held not to be a personal injury action. In the second case, the opposite conclusion was reached. As long as limitation statutes retain different periods for different causes of action - or even different accrual rules for different causes of action, even though the length of the limitation period is the same - there will be some problems of this kind.

5. SOME POSSIBLE SOLUTIONS

4.36 Modern legislation in force in other jurisdictions, and legislative proposals developed by law reform commissions and similar bodies, have utilised two techniques for streamlining the law relating to limitation periods -

(1) reducing the number of limitation periods;

(2) developing the concept of a "catchall" limitation period.

(a) Reduction of the number of limitation periods

(i) England and Australia

4.37 In England, the Wright Committee in its 1936 Report considered the difficulties which arose from the existence of a large number of separate limitation provisions of different lengths, and said that these difficulties would disappear if they could be reduced to a single period. The Committee did not feel able to go as far as this, because in its opinion there were reasons why the limitation period should be shorter for some causes of action than for others.[142] However, it proposed the reduction of the number of different periods by abolishing the distinctions between different torts and establishing a single six-year period for all actions founded in tort or simple contract. This period would also apply to some other actions, such as

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140 *Pattison v Hobbs* 'The Times' 11 November 1985.

141 *Howe v David Brown Tractors (Retail) Ltd* [1991] 4 All ER 30.

142 "[D]ifficulties of evidence are less likely to arise where the action is upon a contract under seal than where it is upon a simple contract, which may not even be in writing. Again, the desirability of a speedy trial is probably more obvious in cases of actions for personal injuries and actions for slander than in other tort actions": Wright Committee Report (1936) para 5.

actions arising by virtue of statutory provisions not covered by a special limitation provision[143] an actions on a recognisance.[144]

4.38 The English *Limitation Act of 1939* implemented the Committee's recommendations" Section 2 provided:

> "(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say: -
>
> (a) actions founded on simple contract or on tort;
> (b) actions to enforce a recognisance;
> (c) actions to enforce an award, where the submission is not by instrument under seal;
> (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.
>
> (3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:
> Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.
>
> (4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
>
> (5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued:
> Provided that for the purposes of this subsection the expression 'penalty' shall not include a fine to which any person is liable on conviction of a criminal offence."[145]

4.39 Most Australian States and Territories adopted similar provisions,[146] as did New Zealand.[147] However, a majority of these jurisdictions later found it necessary to reduce the

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143 See paras 12.50-12.57 below.

144 See paras 12.48-12.49 below. A recognisance is an obligation entered into before a court conditional on the obligor or some other person doing some act such as appearing before the court to stand trial for a criminal offence, give evidence at a trial, or keep the peace.

145 The *Limitation Act 1980* (UK) repealed the 1939 Act. The equivalent provisions are now to be found in ss 2, 5, 7-9, 23 and 24 of the 1980 Act.

146 *Limitation Act 1969* (NSW) ss 14-18; *Limitation of Actions Act 1958* (Vic) s 5; *Limitation of Actions Act 1974* (Qld) s 10; *Limitation Act 1974* (Tas) s 4. See also *Limitation of Actions Act 1936* (SA) s 35, based

limitation period applicable to personal injury actions.[148] One Australian jurisdiction has adopted a three-year period for all common law actions in place of the six-year periods found elsewhere[149] and a three year period is also adopted in the Commonwealth *Trade Practices Act 1974*.[150]

4.40 In addition to the provisions relating to common law actions, all these Acts of course contained further limitation periods for other actions, including some actions of equitable origin such as actions for breach of trust, actions relating to the recovery of land, and actions of various kinds to enforce the obligations created by a mortgage. Thus, in spite of the efforts of the Wright Committee and other reforming bodies to reduce the number of limitation periods, a typical modern limitation statute still contains a large number of different limitation periods relating to different kinds of action. The number of different limitation periods is sometimes increased as a result of amending legislation. Thus, for example, the current English Act, the *Limitation Act 1980*, has been made more complex in recent years by the addition of new limitation periods for various special cases such as defamation, defective products and latent property damage.[151]

(ii) Canada

4.41 In Canada there has been a generally similar process of development. All the Canadian common law jurisdictions inherited the older English statutes, but some degree of

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on the *Limitation Act 1623* (UK) but modernised in much the same way; *Limitation Act 1981* (NT) ss 12-16, under which the standard limitation period is three years, not six.

147 *Limitation Act 1950* (NZ) s 4.

148 In England, the period was reduced to three years by the *Law Reform (Limitation of Actions etc) Act 1954* s 2(1), adopting the recommendations of the Tucker Committee Report (1949); see now *Limitation Act 1980* (UK) s 11. In New South Wales, Queensland, South Australia and Tasmania, there is a three year limitation period applying to personal injury actions: *Limitation Act 1969* (NSW) s 18A(2); *Limitation of Actions Act 1974* (Qld) s 11; *Limitation of Actions Act 1936* (SA) s 36(1); *Limitation Act 1974* (Tas) s 5(1). In New Zealand, before the abolition of tort actions for personal injury by the *Accident Compensation Act 1972* (NZ) s 5, a two-year period applied to such claims, but it was capable of extension to six years with the consent of the defendant or the leave of the court: *Limitation Act 1950* (NZ) s 4(7). See also paras 4.11 above and 12.29 below.

149 *Limitation Act 1981* (NT) s 12. "Three years is a considerably shorter period of limitation than is found in the limitation legislation of other jurisdictions. However...the policy of this government is to encourage litigants to commence their actions as soon as possible": Northern Territory Parliamentary Debates, 4 June 1981 (Mr P Everingham, Chief Minister).

150 Actions for damages for loss suffered as a result of a contravention of provisions in Parts IV or V may be commenced at any time within three years after the cause of action accrued: *Trade Practices Act 1974* (Cth) s 82(2). Actions under s 87 for other orders may be commenced within two years after the cause of action accrued, in the case of unconscionable conduct under s 52A, and within three years of that date in any other case: s 87(1CA).

151 *Limitation Act 1980* (UK) ss 4A (libel and slander) (added 1985); 11A (defective products) (added 1987); 14A (latent damage not involving personal injury) (added 1986): see para 2.18 above.

modernisation was achieved as a result of the *Uniform Limitation of Actions Act 1931*, which was adopted in four Provinces and the two Territories.[152] The *Uniform Act* established four general limitation periods, of one, two, six and ten years, and listed the various actions to which each period applied.[153] As regards the provisions on limitation periods for common law actions, the differences between the jurisdictions which adopted the *Uniform Act* and those that did not are generally not of great significance.[154]

4.42 More advanced reforms were introduced by the British Columbia legislature in 1975. The Limitation Act passed in that year endeavoured to simplify the law by reducing the number of different periods to three. Section 3 provides a comprehensive statement of all the limitation periods laid down by the Act, grouped according to whether the limitation period is two, six or ten years. It further lists actions to which no limitation period applies.

> "(1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action
>
> (a) subject to subsection (3)(k), for damages in respect of injury to person or property, including economic loss arising from the injury , whether based on contract, tort or statutory duty;
> (b) for trespass to property not included in paragraph (a);
> (c) for defamation;
> (d) for false imprisonment;
> (e) for malicious prosecution;
> (f) for tort under the *Privacy Act*;
> (g) under the *Family Compensation Act*;
> (h) for seduction;
> (i) under section 23.1 of the *Engineers Act*.
>
> (2) After the expiration of 10 years after the date on which the right to do so arose a person shall not bring an action
>
> (a) against the personal representatives of a deceased person for a share of the estate;
> (b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
> (c) against a trustee for the conversion of trust property to the trustee's own use;

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152 See para 1.11 above.

153 Ontario Report (1969) 27-29. The Uniform Act is set out in Appendix C of that report.

154 For the current provisions in jurisdictions which adopted the Uniform Act see eg *Limitation of Actions Act 1987* (Man) s 2; *Statute of Limitations 1988* (PEI) s 2; *Limitation of Actions Act 1978* (Sask) s 3; note also *Limitation of Actions Act 1980* (Alta) s 4 (now repealed by *Limitations Act 1996* (Alta) s 16). For similar provisions in jurisdictions which did not adopt the Uniform Act see *Limitation of Actions Act 1973* (NB) ss 2-8; *Limitation of Personal Actions Act 1990* (Nfd) s 2; *Limitation of Actions Act 1989* (NS) s 2; *Limitations Act 1990* (Ont) s 45.

(d) to recover trust property or property into which trust property can be traced against a trustee or any other person;
(e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;
(f) on a judgment for the payment of money or the return of personal property.

(3) A person is not governed by a limitation period and may at any time bring an action

(a) for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass;
(b) for possession of land by a life tenant or remainderman;
(c) on a judgment for the possession of land;
(d) by a debtor in possession of collateral to redeem that collateral;
(e) by a secured party in possession of collateral to realize on that collateral;
(f) by a landlord to recover possession of land from a tenant who is in default or over holding;
(g) relating to the enforcement of an injunction or a restraining order;
(h) to enforce an easement, restrictive covenant or profit a prendre;
(i) for a declaration as to personal status;
(j) for or declaration as to the title to property by any person in possession of that property;
(k) In tort or for negligence
(i) where the cause of action is based on misconduct of a sexual nature,
(ii) where the misconduct occurred while the person was a minor, and
(iii) whether or not the person's right to bring the action was at any time governed by a limitation period.

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

(5) Without limiting the generality of subsection (4) and notwithstanding subsections (1) and (3), after the expiration of 6 years after the date on which right to do so arose an action shall not be brought

(a) by a secured party not in possession of collateral to realize on that collateral;
(b) by a debtor not in possession of collateral to redeem that collateral;
(c) for damages for conversion or detention of goods;
(d) for the recovery of goods wrongfully taken or detained;
(e) by a tenant against a landlord for the possession of land, whether or not the tenant was dispossessed in circumstances amounting to trespass;
(f) for the possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility of reverter of a determinable estate."[155]

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155 *Limitation Act 1979* (BC) s 3, as amended by SBC 1992 c 44.

4.43 An essentially similar proposal has been made by the Saskatchewan Law Reform Commission. Under their recommendations there would be three limitation periods of two, six and ten years. All causes of action are assigned to one of these groups, and the six year period also applies to all other actions not specifically provided for.[156] The Commission emphasises the importance of adopting functional classifications, rather than adopting traditional distinctions such as that between contract and tort. It proposes that a two-year period apply to all actions based on contract or tort other than those specifically covered by some other limitation period.[157]

(b) A "catchall" limitation period

4.44 Limitation statutes of the traditional kind, such as the *Limitation Act 1935* or the English *Limitation Act 1939*, provide limitation periods for particular causes of action. A cause of action which does not come under any of the particular provisions would not be subject to any limitation period in the Limitation Act, and unless it were covered by a limitation provision in another statute would not be subject to any limitation period at all.

4.45 The Canadian Uniform Act was the first statute to incorporate a different kind of limitation provision, one which would apply to any cause of action not caught by any particular provision in the Limitation Act.[158] This has become known as a "catchall" provision.[159] Such a provision was adopted in all Canadian jurisdictions which adopted the Uniform Act. The former Alberta legislation, for example, at the end of the section setting out limitation periods in various common law actions, provided for the commencement of:

> "any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose."[160]

Another example can be found in section 3(4) of the British Columbia Act, quoted above.[161]

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156 Saskatchewan Report (1989) 9-10.

157 Id 10-13.

158 Canadian *Uniform Limitation of Actions Act 1931* s 3(1) (j).

159 See Ontario Report (1969) 61-63; British Columbia Report (1974) 43-44. The Ontario Report points out that the "catchall" provision was derived from United States legislation. The "catchall" provision has an additional significance in relation to equitable claims: see para 13.23 below. See also para 19.7 below.

160 *Limitation of Actions Act 1980* (Alta) s 4(1)(g), now repealed by *Limitations Act 1996* (Alta) s 16. For other examples in jurisdictions which adopted the Uniform Act (all still in force), see *Limitation of Actions Act 1987* (Man) s 2(1)(n); *Statute of Limitations 1988* (PEI) s 2(1)(g); *Limitation of Actions Act 1978* (Sask) s 3(1)(j). A further example can be found in New Brunswick: *Limitation of Actions Act 1973* (NB) s 9.

4.46 So far, only one Australian statute has adopted this device. This is the most recent of the Australian Acts, the Australian Capital Territory *Limitation Act 1985*. Section 11 of the Act sets out a general six-year limitation period which applies to any cause of action except one for which another limitation period is provided by the Act. The section provides:

> "(1) Subject to subsection (2), an action on any cause of action is not maintainable if brought after the expiration of a limitation period of 6 years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he or she claims.
>
> (2) Subsection (1) does not apply to a cause of action in respect of which another limitation period is provided by this Act."[162]

4.47 The existence of this provision makes it unnecessary for the Act to specify limitation periods for contract, tort and various other actions for which specific limitation periods are generally provided by other Limitation Acts, with the result that such cases are covered by the general six year period. The British Columbia Act also omits specific periods for any cause of action which is appropriately covered by the general period. The Acts based on the Uniform Act, which have a longer history than these two statutes, still set out six year periods for some specific cases.

(c) A single limitation period?

4.48 The end-point of the process of reducing the number of limitation periods, and using devices such as a catchall period to make it unnecessary to set out various different periods of the same length, should logically be the achievement of a single limitation period applying to all causes of action. No accrual-based Limitation Act has come anywhere near this goal. However, it is a focal point of proposals based on the discovery or act or omission alternatives, which will be considered in Chapter 6.

4.49 It is probably not true to say that retention of the accrual rule *necessitates* the adoption of a variety of different limitation periods, though it may perhaps strengthen the argument for

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161 Para 4.42.

162 S 4 provides that nothing in the Limitation Act applies to an action for which a limitation period is fixed by any other Act.

longer periods in certain instances.[163] Retention of the accrual rule may perhaps also strengthen the case for a longer standard limitation period: the usual limitation period in most Australian jurisdictions is six years, although in the Northern Territory a three year period has been adopted.[164] It will be seen that proposals for limitation legislation under which the standard period runs from a different point, such as when the damage becomes discoverable, generally adopt a shorter standard period.[165]

4.50 Even if a standard period is adopted for all or most claims, the appearance of uniformity thus presented tends to mask the real problems. This is particularly true of the distinction between claims in contract, which accrue at the date of breach, and claims in tort for negligence, which accrue when damage is suffered (which may be later than the date of breach). In many cases a plaintiff will have claims both in contract and in tort: the fact that the limitation period is the same in both cases conceals the fact that, measured from the date the wrong is committed, the limitation period for a tort action is in reality much longer. This is because the period may start running from a later point in time than that for a breach of contract. [166]

6. CONCLUSIONS

(a) Advantages

4.51 The system under which the limitation period commences when the cause of action accrues has a number of important advantages -

(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

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163 The argument that under an accrual-based system different periods are appropriate to different classes of action was advanced by the Wright Committee Report (1936) para 5 and the Ontario Report (1969) 30. However, the Alberta Report for Discussion (1986) paras 2.54-2.63 argues that there is no sound theoretical or practical foundation for the practice of assigning different fixed periods to different categories of claim. It rejects arguments that there is no usual discovery period; that some claims are of greater economic importance than others; that some claims are less likely to be disputed than others; and that evidence deteriorates quicker in some situations than others.

164 See para 4.39 above.

165 See para 6.35 below.

166 See para 4.29 above.

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.[167]

(2) It is logical, because the limitation period commences at the moment when the cause of action is complete.[168] 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.[169] This has helped to overcome the problem that arises in latent damage cases (which will be dealt with in Chapter 5): that the plaintiff may lose his right to sue before becoming aware of its existence.[170]

(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.

(b) Disadvantages

4.52 The advantages listed above must, however, be weighed against a number of important disadvantages inherent in the accrual rule -

(1) It is complex. Certainty is achieved only through the existence of a large number of complex rules.

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167 See para 4.52 below.

168 Compare the proposed rule that the limitation period should run from the date of the act or omission: see para 6.65 below.

169 See paras 4.23-4.27 above.

170 See paras 5.1-5.4 below.

(2) As already pointed out, there are cases where the accrual rules do not achieve the desired objective of certainty, in the sense that it is difficult to establish precisely when the cause of action accrued. This is particularly true in cases of latent personal injury or disease, for example AIDS and asbestosis cases.[171] It is also true of some other personal injury cases in which the injury would not normally be classified as latent. In cases of psychiatric damage (in older cases referred to as "nervous shock"), it may be impossible to say with any certainty when the initial trauma produces the secondary reaction which constitutes the "recognisable psychiatric illness" which must be shown to exist as a condition of liability,[172] and yet logically the limitation period must commence at this point.[173] Even where the accrual rules point to the time of discoverability of the damage as the starting point, this does not necessarily solve the evidential problem of determining exactly when the damage was discoverable on the facts of the particular case.

(3) 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. This often happens in a case in which a defendant is in breach of a duty of care and the parties are in a contractual relationship. The defendant can be sued both in contract and in tort, but whereas in contract the limitation period commences at the date of breach of contract, in negligence time only begins to run when damage is suffered.[174]

(4) Because there are separate accrual rules for each different cause of action, and because in many Limitation Acts there are different limitation periods for different causes of action, there may be problems involved in determining the category into which a particular case falls so that the applicable limitation rule can be identified.[175]

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171 See para 4.16 above.

172 *Hinz v Berry* [1970] 2 QB 40, Lord Denning MR at 42-43; *Mount lsa Mines Ltd v Pusey* (1970) 125 CLR 383, Windeyer J at 394; *McLoughlin v O'Brian* [1983] 1 AC 410, Lord Wilberforce at 431.

173 See N J Mullany and P R Handford *Tort Liability for Psychiatric Damage* (1993) 260-262.

174 See para 4.29 above.

175 See paras 4.34-4.35 above.

(5) The accrual rule produces unfair results when there are circumstances in which the plaintiff cannot reasonably be expected to commence an action even though it has accrued. The rule thus gives a satisfactory result only if the ordinary limitation periods are supported by extension provisions allowing a court to extend or disregard the normal rules in appropriate cases. Though in the light of case law developments such provisions may no longer be necessary in cases involving property damage or economic loss, proper extension provisions are essential if personal injury cases are to be resolved in a way that provides justice for plaintiffs.[176] In this respect, the present Western Australian Limitation Act is clearly unsatisfactory. Extension provisions are further considered in Chapter 5.

176 See paras 4.15-4.28 above.

Chapter 5

EXTENSION AND LONG STOP PROVISIONS

1. INTRODUCTION

5.1 There are some situations which are not satisfactorily dealt with by a limitations system which consists entirely of fixed limitation periods running from the time when the cause of action accrues, whatever the length of the period in question. This is because limitation rules of this kind take no account of whether the plaintiff has any knowledge that injury has been suffered as a result of the defendant's conduct. There will be many cases in which the plaintiff remains unaware of that injury for a considerable period of time, and in such instances it is often the case that the injury is simply not discoverable however much care might be exercised. This is the problem of latent injury or latent damage, or in the words of some Canadian commissions, the "hidden cause of action". [1]

5.2 The problem of latent injury first caused concern in personal injury cases, particularly those involving diseases such as pneumoconiosis in its various forms, including silicosis and asbestosis, and mesothelioma which have a long latency period. It may be thirty years or more before people who have contracted asbestosis or mesothelioma become aware that they have the disease.[2] The shortcomings of the traditional *Limitation Act* with fixed limitation periods running from accrual of the cause of action became apparent as a result of the decision of the House of Lords in England in *Cartledge v E Jopling & Sons Ltd*[3] in 1963. In this case the plaintiffs claimed damages from their employer for pneumoconiosis contracted through inhalation of silicate dust between 1939 and 1950. The proceedings were commenced in 1956 and alleged negligence and breach of statutory duty. It was held that the limitation period began to run when damage was first suffered, even though it did not become discoverable until much later, after the limitation period had expired, with the result that there was never any point in time at which the plaintiff could make an effective claim. As a result of the decision in *Cartledge v Jopling*, most jurisdictions enacted amendments to their *Limitation*

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1 See eg Newfoundland Working Paper (1985) 195; Saskatchewan Report (1989) 30.

2 See Part I Report (1982) paras 1.16-1.18. In *Footner v Broken Hill Associated Smelters Pty Ltd* (1983) 33 SASR 58 it was suggested that mesothelioma may an exceptional case, on the basis that appreciable injury does not occur until shortly before the disease becomes manifest. However In *Martindale v Burrows* (unreported) Supreme Court of Queensland, 3 July 1996, 1003 of 1996, Derrington J refused to follow this decision, holding that it did not follow that if the plaintiff's condition had developed into mesothelioma there was no relevant injury until the commencement of the mesothelioma.

3 [1963] AC 758.

Acts under which, by one means or another, the limitation period could be extended or disregarded to allow such plaintiffs to make a claim.

5.3 From the early 1970s, the problem of latent injury began to manifest itself in a different context - defective buildings. Many years might elapse before a building built defectively began to show signs of damage. The limitation problems arose when the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)*[4] adopting the reasoning in *Cartledge v Jopling*, held that the cause of action accrued on the occurrence of physical damage to the property, even though this was in the form of unobservable cracks of which the plaintiff could not have been aware. The limitation period might thus have expired long before the building owner could be expected to become aware of his loss. Again some jurisdictions enacted legislative provisions to deal with this problem. To some extent, it has also been addressed by the courts, which in recent years have begun to reinterpret the accrual rule: as a result, in some jurisdictions it is now clear that the cause of action does not accrue until the damage becomes discoverable.[5]

5.4 If insidious industrial diseases were the problem of the 1960s and 1970s, and latent property damage was the problem of the 1970s and 1980s, then it appears that sexual abuse cases may be the problem of the 1990s. It is almost certain that plaintiffs sexually abused as children will not be fully aware of the effect this has had on them until much later, and other factors, such as the time it takes to become independent of the control of the alleged abuser, also affect the ability of the plaintiff to bring an action. Similar problems are involved in other current cases in which plaintiffs wish to claim compensation for events which took place long ago, such as removal of Aboriginal children from their natural parents under the former policy of "assimilation", or Aboriginal deaths in custody and their effect on relatives.[6] Further difficulties may well be just around the corner. There are cases in which plaintiffs are bringing actions for trauma caused by the fear that they may have contracted fatal diseases such as cancer, AIDS or Creuzfeldt-Jakob disease,[7] and these may well raise limitation

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4 [1983] 2 AC 1.

5 See paras 4.19-4.28 above.

6 See para 1.16 above.

7 Eg *Commonwealth v Dinnison* (1995) 129 ALR 239; *Sandstrom v Commonwealth* (unreported) Federal Court of Australia, 4 March 1994, NG 564 of 1991; *Dingwall v Commonwealth* (unreported) Federal Court of Australia, 18 May 1994, NG 575 of 1991 ("cancerphobia" caused by fear of effects of radiation fallout from atomic bomb explosion); *Napolitano v CSR Ltd* (unreported) Supreme Court of Western Australia, 30 August 1994, 1450 of 1994; *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632 (fear of asbestos-related disease); *Fritz v Queensland Corrective Services Commission* (unreported) Supreme Court of Queensland, 24 April 1995, 556 of 1993; *Graham v Australian Red Cross Society* (unreported)

problems in the future. Legislation passed to deal with earlier problems of latent personal injury may well not be appropriate for the cases referred to in this paragraph. The difficulty of predicting the types of claims which might be brought in the future highlights the desirability of developing limitation rules, and the grounds for extending them, in terms capable of application to all causes of action, rather than to specific cases.

2. EXISTING EXTENSION PROVISIONS IN WESTERN AUSTRALIA

5.5 In Western Australia, the only provision in the *Limitation Act* under which ordinary limitation periods running from accrual can be extended is where a person is suffering from "a latent injury that is attributable to the inhalation of asbestos".[8] This provision was inserted in the Act by the *Acts Amendment (Asbestos Related Diseases) Act 1983*.[9] Under section 38A(6), where the plaintiff is suffering from an asbestos-related disease, the six-year limitation period fixed by section 38(i)(c) does not run from the time the cause of action accrued (which according to *Cartledge v Jopling* would be the first onset of the disease) but from the time when the person has knowledge of the relevant facts. What is meant by having "knowledge of the relevant facts" is explained by section 38A(7)-(9).[10] These provisions deal with the situation where the plaintiff did not have knowledge of the relevant facts before 1 January 1984. Other provisions give the legislation retrospective effect, by enabling persons who acquired knowledge of the relevant facts before that date to make a claim.[11]

Supreme Court of Tasmania, 31 January 1994, M 334 of 1993 and 3 June 1994, 613 of 1993 (fear or AIDS); *APQ v Commonwealth Serum Laboratories Ltd* (unreported) Supreme Court of Victoria, 2 February 1995, 8546 of 1993; *The Plaintiffs v United Kingdom Medical Research Council* (unreported) QBD, 19 July 1996 (fear of Creuzfeldt-Jakob disease). These and other cases are discussed in N J Mullany "Fear for the Future: Liability for Infliction of Psychiatric Disorder" in N J Mullany (ed) *Torts in the Nineties* (1996) 101-173 at 122-144. See also N J Mullany and PR Handford *Tort Liability for Psychiatric Damage* (1993) 22-23.

8 *Limitation Act 1935* s 38A.

9 See P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 UWA L Rev 63.

10 S 38A(7) provides that a person has knowledge of the relevant facts when he has knowledge of a number of matters, including that the injury in question was significant. (The English provision on which the section is based, *Limitation Act 1980* (UK) s 14, is quoted in para 5.36 below.) However, s 38A(8a), added by the *Workers' Compensation and Rehabilitation Amendment Act 1993* s44, provides that an injury which is a disability within the meaning of the *Workers' Compensation and Rehabilitation Act 1981* is not to be treated as significant unless either the parties have agreed, or a medical panel has determined, that the degree of disability is 30 per cent or more. In such cases, this provision will further delay the commencement of the limitation period: even though the injury is "significant", the period will not start running until there is confirmation of the necessary degree of disability.

11 S 38A(2)-(5): see para 8.36 below. The *Acts Amendment (Asbestos Related Diseases) Act 1983* also contained provisions amending the *Limitation Act 1935* s 47A (see para 10.4 n 6 below), the *Fatal Accidents Act 1959* (see para 22.5 below), the *Law Reform (Miscellaneous Provisions) Act 1941* (see para 22.18 below), the *Crown Suits Act 1947* (see para 23.4 below) and the *Local Government Act 1960* (see para 23.9 below.)

5.6 The 1983 amendments owe their origin to the fact that, as a result of the mining of Australian blue asbestos at Wittenoom between 1943 and 1966, by the late 1970s it had become clear that a considerable number of Wittenoom workers and others had contracted some form of asbestos-related disease, and attempts were being made to bring civil actions against those responsible.[12] However, the *Limitation Act* presented a considerable obstacle in the path of successful claims, because (unlike most other Australian jurisdictions) there was no way in which the ordinary limitation period could be extended or bypassed in cases involving latent diseases. Accordingly, the Coalition Government then in power asked the Commission to make proposals for the reform of the *Limitation Act* as it applied to latent disease and injury.[13] The Commission reported in October 1982[14] and recommended that in personal injury actions the limitation period should not apply where a court determined that it was just that it should not apply.[15] The Commission did not confine its recommendations to latent disease and injury, although it was clear that it would be in such cases that the suggested provisions would have their main application.

5.7 The Commission's recommendations were not implemented by the Coalition Government, which instead gave some consideration to the idea of an ex gratia compensation scheme limited to asbestos-related diseases. When the Labor Government assumed office in February 1983, it abandoned the idea of an ex gratia compensation scheme, but was not willing to adopt the Commission's recommendations without further study. Instead it decided to amend the *Limitation Act* and limitation provisions in related Acts, but only in relation to asbestos-related diseases. The *Acts Amendment (Asbestos Related Diseases) Act 1983* came into operation on 19 January 1984.

5.8 Although it may have addressed the immediate problem, this legislation is unsatisfactory in a great many respects. It can be criticised on the ground that it is extremely complex, and that its provisions are based on English legislation which has been regarded by

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12 See eg *Joosten v Midalco Pty Ltd* (unreported) Supreme Court of Western Australia, 9 October 1979, 1052 of 1979. The first cases in which plaintiffs were successful were *Barrow v CSR Ltd and Midalco Pty Ltd* (unreported) Supreme Court of Western Australia, 4 August 1988, 1148 and 1161 of 1987; *Simpson v Midalco Pty Ltd* (unreported) Supreme Court of Western Australia (Full Court), 7 December 1988, Appeal 110 of 1987; *Western Australia v Watson* [1990] WAR 248; *Neal v CSR Ltd and Midalco Pty Ltd* (unreported) Supreme Court of Western Australia (Full Court) 3 October 1990, Appeal 79 of 1990. See also *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

13 The Commission was asked "to examine and report on the law relating to the limitation and notice of actions as it applies to civil actions brought by or in respect of persons who contract a disease or suffer an injury which remains latent for a significant period of time".

14 Part I Report (1982).

15 See para 5.41 below.

most commentators as unsatisfactory;[16] but at a more fundamental level it is inadequate because instead of dealing with all kinds of latent personal injury, it is restricted to one particular kind of latent personal injury - asbestos-related diseases. Injuries as opposed to diseases, diseases which are not asbestos-related such as AIDS, and even other dust-related diseases such as silicosis[17] are not covered.[18] No other jurisdiction has legislation limited to one particular kind of latent disease.[19] In legislating to deal only with the problems of the 1960s and 1970s, Western Australia ensured that its *Limitation Act* remains singularly ill-equipped to cope with the problems of the 1980s and 1990s.

3. EXTENSION PROVISIONS IN OTHER JURISDICTIONS

(a) Introduction

5.9 Most jurisdictions have now enacted legislative provisions under which the ordinary limitation period can be extended, delayed or disregarded in particular cases. Provisions of this kind first made their appearance in the area of personal injury, but some Acts now have extension provisions applying to property damage and economic loss and others have more general provisions under which all, or nearly all, limitation periods may be capable of extension. Without exception, these provisions are much wider than those in Western Australia.

5.10 These extension provisions vary considerably in their scope and approach, but they can be classified into three categories -

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16 *Limitation Act 1980* (UK) s 14: see paras 5.22,5.37-5.38,5.40 below.

17 J Gordon "Latent Disease and the *Limitation Act* (WA) 1935-1978" (1987) 1 *Kalgoorlie Juridical Quarterly* 10 points out that silicosis is a hazard of gold mining, the other main form of mining in Western Australia.

18 See P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 UWA L Rev 63, 77-78.

19 In every jurisdiction where there are provisions under which the ordinary limitation period can be extended, those extension provisions either apply to all cases of personal injury, or cover all cases of personal injury and various other kinds of damage. New South Wales and Victoria have special provisions for latent injuries that are more liberal than those applying to other kinds of personal injury: see *Limitation Act 1969* (NSW) ss 60F-60J; *Limitation of Actions Act 1958* (Vic) s 5(lA), dealt with at para 5.42 below; but otherwise no distinctions are made between different kinds of cases. In cases involving asbestos-related diseases, whether or not the ordinary limitation period should be extended is resolved by applying the general extension provisions: see eg *Church v Ministry of Defence* The Times, 7 March 1984; *Baker v Australian Asbestos Insulations Ply Ltd* [1984] 3 NSWLR 595; *Gordon v James Hardie & Co Pty Ltd* (No 1) (1987) Aust Torts Rep 80-132; *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697; *Cuthill v State Electricity Commission of Victoria* [1981] VR 908; *Grove v Bestobell Industries Ply Ltd* [1980] Qd R 12; *Barker v Permanent Seamless Floors Pty Ltd* [1983] 2 Qd R 561; *Footner v Broken Hill Associated Smelters Pty Ltd* (1983) 33 SASR 58; *Martindale v Burrows* (unreported) Supreme Court of Queensland, 3 July 1996,1003 of 1996.

(1) provisions under which the ordinary limitation period may be waived or extended where the damage is not discoverable;

(2) provisions under which, in addition to the ordinary limitation period running from accrual, there is an alternative limitation period running from the date on which the damage becomes discoverable;

(3) provisions under which a court is given a discretion to extend or disregard the limitation period.

(b) Waiver or extension of limitation period where damage not discoverable

(i) The English Limitation Act 1963

5.11 The problem created by the decision in *Cartledge v E Jopling & Sons Ltd*[20] was referred to the Edmund Davies Committee, which reported in 1962.[21] The Committee recommended a reform under which a plaintiff in a personal injury case should be able to bring an action within 12 months of the earliest date on which the existence and cause of the injury could reasonably have been discovered. This recommendation was adopted by the English *Limitation Act 1963*. Similar provisions were adopted in Scotland in 1973.[22]

5.12 The 1963 Act, in its original form, provided that if -

(1) a material fact of a decisive character relating to the right of action was not within the means of knowledge of the plaintiff until a date not earlier than 12 months before the end of the limitation period, and not earlier than 12 months before the date on which the action was brought; and

(2) there was evidence to establish the cause of action apart from any defence founded on the expiration of a limitation period,

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20 [1963] AC 758: see para 5.2 above.

21 Edmund Davies Committee Report (1962).

22 *Prescription and Limitation (Scotland) Act 1973* (UK) ss 18, 22, adopting the recommendations of the Scottish Law Commission report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15 1970).

the court would allow the action to be brought notwithstanding the expiry of the limitation period.[23] The Act was amended in 1971 to allow the bringing of the action if the plaintiff did not have the necessary knowledge until a date not earlier than three years before the date on which the action was brought.[24] However, it did not prove entirely satisfactory, and was ultimately replaced in 1975 by a differently formulated provision.[25]

5.13 The Act specified what facts were material, when they were of a decisive character, and when they were within a person's means of knowledge.[26] It was confined to actions for negligence, nuisance or breach of duty in which the damages claimed consisted of or included damages for personal injuries.[27]

(ii) New South Wales, Victoria and Queensland

5.14 The English legislation of 1963 was adopted in New South Wales in 1969,[28] Victoria in 1972[29] and Queensland in 1974,[30] in each case applying only to actions for personal injury.[31] However, there were some important differences. The New South Wales provision redrafted and to some extent simplified the English wording,[32] and the Queensland legislation adopted that of New South Wales with virtually no changes. The Victorian provision differed from that of New South Wales in minor respects, for example, in not requiring the material fact to be of a decisive character. However, the most important change made by the Australian provisions was the introduction of a discretionary element. The New South Wales legislation, for example, provided that where it was established that a material fact of a decisive character relating to the right of action was not within the plaintiffs means of knowledge until a date after the commencement of the year preceding the expiration of the limitation period, and there was evidence to establish the cause of action (apart from a defence founded on limitation), "the court may order that the limitation period for the cause of action be extended

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23 *Limitation Act 1963* (UK) ss 1-2.

24 *Law Reform (Miscellaneous Provisions) Act 1971* (UK) s 1, implementing a recommendation of the Law Commission in its report on the *Limitation Act 1963* (Law Com No 35 1970).

25 See paras 5.20-5.21 below.

26 *Limitation Act 1963* (UK) s 7(3)-(5): see para 5.34 below.

27 Id s 1(2).

28 *Limitation Act 1969* (NSW) ss 57 (now renumbered as 57B)-58.

29 *Limitation of Actions (Personal Injuries) Act 1972* (Vic) s 3, adding s 23A to the *Limitation of Actions Act 1958*.

30 *Limitation of Actions Act 1974* (Qld) ss 30-31.

31 For discussion of these provisions see Part I Report (1982) paras 3.30-3.36, 3.44-3.45; *The Laws of Australia* paras 45-47.

32 See *Limitation Act 1969* (NSW) s 58(2). The revisions were recommended by the NSW Report (1967) paras 272-293.

so that it expires at the end of one year after that date".[33] The nature of this discretion has recently been discussed at length by the High Court of Australia.[34]

5.15 In New South Wales and Victoria, this legislation has now been replaced by extension provisions of a different kind,[35] though it remains applicable to claims which accrued before the new legislation came into force. In Queensland, the legislation is still in force.

(iii) Manitoba, South Australia and the Northern Territory

5.16 Legislation in Manitoba, South Australia and the Northern Territory adopts extension provisions based generally on the model of the English *Limitation Act* of 1963, but applying not just to personal injury cases but to all causes of action.[36] Like the Australian personal injury provisions just dealt with, the legislation makes it quite clear that even if the conditions for an extension are satisfied, the matter is still one for the discretion of the court.

5.17 The Manitoba provision, introduced in 1967,[37] provides:

> "Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between
>
> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
>
> (b) the date on which the application was made to the court for leave."[38]

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33 *Limitation Act* (NSW) s 58(2). In contrast, the English provision provided that if the requirements were satisfied, the court "shall grant leave": *Limitation Act 1963* (UK) s 2(2).

34 *Brisbane South Regional Health Authority v Taylor* (1996) 70 ALJR 866.

35 See paras 5.42-5.43 below.

36 Note also the not dissimilar provisions of the *Limitation Act 1980* (UK) s 32A, under which an action for defamation not brought within the three year limitation period prescribed by s 4A because all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the expiration of the period could, with the leave of the court, be brought within one year of the date on which the plaintiff knew all the relevant facts. Under an amendment to s 32A introduced by the *Defamation Act 1996* (UK) s 5, the limitation period for defamation is reduced to one year, subject to the discretion of the court to allow a late claim if equitable to do so, having regard to the prejudice to both sides and taking into account factors specified in the legislation.

37 By SM 1966-67 c 32 (see Ontario Report (1969) Appendix E). See now *Limitation of Actions Act 1987* (Man) ss 14-20.

38 *Limitation of Actions Act 1987* (Man) s 14(1).

5.18 A broadly similar provision was introduced in South Australia in 1972,[39] and this was reproduced in the Northern Territory in 1981.[40] The legislation in these two jurisdictions authorises the court to extend the limitation period to such an extent and upon such terms (if any) as it thinks fit (in the Northern Territory) or as the justice of the case may require (in South Australia) if satisfied:

> "(i) that facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff; or
>
> (ii) that the plaintiff's failure to institute the action within the period of limitation 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 those representations or that conduct and any other relevant circumstances,
>
> and that in all the circumstances of the case, it is just to grant the extension of time."[41]

Though there is no statutory list of factors to be taken into account in the exercise of the discretion, various criteria are well-recognised in the case law.[42]

(iv) Assessment

5.19 The major problem with the legislation falling into this first category is that the only ground for extending the limitation period is non-discoverability. In a sexual abuse case, for example, the plaintiff has to 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 the date in question.[43] It would be simpler if the legislation recognised that, in these and other cases, there were other reasons which excused delay in bringing an action.

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39 *Limitation of Actions Act 1935* (SA) s 48, inserted by the *Statutes Amendment (Miscellaneous Provisions) Act 1972* (SA) s 9, implementing the recommendations of the South Australia Report (1970) 3-4.

40 *Limitation Act 1981* (NT) s 44.

41 *Limitation Act 1981* (NT) s 44(3)(b); *Limitation of Actions Act 1936* (SA) s 48(3)(b). In cases involving defective building work, these provisions are now qualified by legislation imposing a ten-year period running from the date of completion: see para 5.66 below.

42 See Part I Report (1982) para 3.51; *The Laws of Australia* para 52.

43 See *Tiernan v Tiernan* (unreported) Supreme Court of Queensland, 13 April 1993, 39 of 1992, dealt with at para 9.26 below.

(c) Alternative limitation period running from discovery

(i) Discoverability plus discretion: the English Limitation Act 1975

5.20 It was not long before the provisions of the English 1963 Act were recognised as unsatisfactory, on a number of grounds - for example, there was much difficulty with the question of what knowledge in the injured person was required to start time running against him.[44] This led to the matter being referred to the Law Reform Committee[45] and ultimately to the repeal of the 1963 provisions and the enactment of new legislation by the *Limitation Act 1975* - now carried forward into the *Limitation Act 1980*.

5.21 Under this legislation, the limitation period in personal injury cases is three years from the date on which the cause of action accrued, or from the date of knowledge (if later) of the person injured.[46] There is a detailed definition of what constitutes the date of knowledge.[47] The plaintiff thus has a right to bring an action within three years of the date of knowledge. However, in cases where the plaintiff had knowledge before that date, there is a further provision which gives the court a discretion to override the limitation period and allow the action to proceed where it appears that it would be equitable to do so, having regard to the degree to which the date of knowledge provisions prejudice the plaintiff, and the degree to which any decision to exercise the discretion in the plaintiff's favour would prejudice the defendant. The court is to have regard to all the circumstances of the case and in particular to a number of listed factors -

(a) the length of, and the reasons for, the delay on the part of the plaintiff;
(b) the extent to which, having regard to the delay, the evidence adduced is or is likely to be less cogent than if the action had been brought within the time allowed by the date of knowledge provisions;
(c) the conduct of the defendant after the cause of action arose;
(d) the duration of any disability of the plaintiff arising after the date of accrual;
(e) the extent to which the plaintiff acted promptly and reasonably once he had the necessary knowledge;

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44 See para 5.35 below.
45 See Orr Committee Interim Report (1974).
46 *Limitation Act 1980* (UK) s 11. See also ss 12-13, dealing with the limitation period for actions under the *Fatal Accidents Act 1976* (UK).
47 Id s 14: see para 5.36 below.

(f) the steps taken by the plaintiff to ascertain advice.[48]

5.22 These provisions have not escaped criticism, in particular because of their complications, and because the new formula for determining the date of knowledge still appears to be unsatisfactory in a number of respects.[49] However, the Act does at least allow the possibility of extension on grounds other than non-discoverability.[50]

(ii) Scotland and Victoria

5.23 The 1975 English model is not one which has been widely adopted elsewhere, although provisions of the same kind were subsequently adopted in Scotland,[51] implementing a report of the Scottish Law Commission.[52] However, there are provisions in Victoria which, on analysis, also create a new limitation period running from the point of discoverability and then add a discretion-based extension. The general position in Victoria as regards personal injury actions is that the court has a discretion to extend the ordinary limitation period running from accrual.[53] However, in cases involving disease or disorder the Victorian Act provides that the cause of action is to be taken to have accrued on the date on which the plaintiff first knows that he has suffered these injuries, and that they were caused by the act or omission of some person.[54] In the result, the limitation period is extended to run from the date of discovery , and then the court has a discretion to extend it further. "Disease or disorder" is not confined to insidious industrial diseases, but extends to traumatic injury.[55]

(iii) Discoverability alone: Ireland and Western Australia

5.24 In other jurisdictions there are provisions which deal with cases where the damage suffered is not immediately apparent simply by delaying the running of the limitation period

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48 Id s 33.

49 See Part I Report (1982) paras 3.24-3.25; P J Davies "Limitations of the Law of Limitation" (1982) 98 LQR 249.

50 See *Stubbings v Webb* [1992] QB 197 (CA), [1993] AC 498 (HL), a case involving sexual abuse of a child, discussed further at para 9.13 below.

51 *Prescription and Limitation (Scotland) Act 1984* (UK). S 19A, giving the court a discretionary power to override time limits in personal injury cases, had already been added to the *Prescription and Limitation (Scotland) Act 1973* (UK) by the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* (UK) s 23.

52 Scottish Law Commission *Prescription and the Limitation of Actions: Report on Personal Injuries Actions and Private International Law Questions* (Scot Law Com No 74 1983).

53 *Limitation of Actions Act 1958* (Vic) s 23A: see para 5.42 below.

54 Id s 5(lA).

55 *Herschberg v Mula* (1993) Aust Torts Rep 81-256.

so that it begins to run at the point when the damage becomes discoverable. As is the case with the legislation just considered, the plaintiff has a right to bring the action if the writ is issued within a specified period measured from that point. However, these provisions do not incorporate the additional discretionary power found in the English *Limitation Act*.

5.25 In some cases, provisions of this kind govern the extension of the limitation period for personal injury actions. This is the case in Ireland, which in 1991 adopted provisions based on the English legislation but minus the discretion provisions.[56] Also falling into this category are the Western Australian provisions allowing extension of the limitation period for asbestos-related diseases.[57] The model for these provisions was the English 1975 legislation, but it appears that it was deemed inadvisable to incorporate the discretionary power to allow a further extension of the period.

5.26 However, the most important example in this category, the British Columbia *Limitation Act*, is not confined to personal injury but covers property damage and a number of other cases. Another important example, the English *Latent Damage Act 1986*, covers actions for negligence causing damage other than personal injury.

(iv) British Columbia

5.27 The British Columbia *Limitation Act* lays down three basic limitation periods of two, six and ten years, and lists the actions which fall into each of these categories.[58] It then provides that certain periods can be extended:

> "The running of time with respect to the limitation periods fixed by this Act for an action
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> (a) for personal injury;
> (b) for damage to property;
> (c) for professional negligence;
> (d) based on fraud or deceit;
> (e) in which material facts relating to the cause of action have been wilfully concealed;
> (f) for relief from the consequences of a mistake;
> (g) brought under the *Family Compensation Act*; or

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56 *Statute of Limitations (Amendment) Act 1991* (Ire), implementing the recommendations of the Ireland Report (1987).

57 *Limitation Act 1935* s 38A: see para 5.5 above.

58 *Limitation Act 1979* (BC) s 3, quoted in para 4.42 above.

(h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action."[59]

5.28 Though this provision covers a wide variety of actions, it is still limited by reference to particular causes of action and there will be actions where no extension is possible.[60]

5.29 The Canadian *Uniform Limitations Act 1982* contains a provision similar in all essential respects to the British Columbia provision except that it adds a long stop provision: no action can brought more than ten years after the date of the act or omission on which the action is based.[61] This Act has not as yet been adopted by any Canadian jurisdiction. However, the Newfoundland Law Reform Commission has recommended the adoption of a provision based on the *Uniform Act*,[62] and the Saskatchewan Law Reform Commission has proposed a provision generally similar to those of British Columbia and the *Uniform Act*, applying to actions which it would subject to a two-year limitation period.[63]

(v) England: the Latent Damage Act 1986

5.30 In England, following a report of the Law Reform Committee,[64] the *Latent Damage Act 1986* amended the *Limitation Act 1980* to provide that in actions for damage for negligence (other than those in which the damages consist of or include personal injury) there should be, in addition to the normal six-year limitation period running from the date of accrual, a secondary three-year period running from the date of discovery or reasonable

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59 Id s 6(3).

60 Eg actions for purely economic loss other than those against a negligent professional: see N J Mullany "Reform of the Law of Latent Damage" (1991) 54 *MLR* 349,363.

61 Canadian *Uniform Limitations Act 1982* s 13(2)-(3).

62 Newfoundland Working Paper (1985) 203-204 and Newfoundland Report (1986).

63 Actions for breach of contract, tort and a number of other cases: Saskatchewan Report (1989) 30-33.

64 Scarman Committee Report (1984).

discoverability of the damage.[65] Time will not run until the plaintiff has the knowledge required for bringing an action.[66] The requisite knowledge is knowledge of the material facts about the damage in respect of which damages are claimed, and of the other facts relevant to the current action.[67] The facts about damage which will be regarded as material are:

> "....such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."[68]

The "other facts" are defined in terms similar to those of the 1975 Act dealing with personal injury.[69] There are further provisions (not incorporated in the *Limitation Act 1980*) dealing with the accrual of a cause of action to successive owners.[70] A broadly similar scheme has been recommended in Scotland,[71] but the recommendations have not yet been implemented.[72]

5.31 The English *Limitation Act* provides one further example of legislation which deals with the problem of latent damage by providing a new limitation period running from the date of discoverability. These are the provisions on products liability, introduced in 1987.[73] The three year period which applies to actions under the *Consumer Protection Act 1987* in which the damages claimed consist of or include personal injury or damage to or loss of property runs either from accrual or from the date of knowledge if later.[74]

(vi) Assessment

5.32 The provisions in this category represent an important advance in that they provide an alternative starting point for the limitation period, thus accepting that it is appropriate in cases

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65 Id s 14A(3)-(5). For analyses of the Act see N J Mullany "Reform of the Law of Latent Damage" (1991) 54 *MLR* 349, 349-362; R Merkin *Richards Butler on Latent Damage* (1987); P Capper *The Latent Damage Act 1986: The Impact on the Professions and the Construction Industry* (1987).

66 Id s 14A(5).

67 Id s 14A(6).

68 Id s 14A(7).

69 Id s 14A(8), which is the equivalent of *Limitation Act 1980* (UK) s 14(1)(b)-(d), quoted in para 5.36 below.

70 *Latent Damage Act 1986* (UK) s 3: see para 8.25 below.

71 Scottish Law Commission *Report on Prescription and Limitation of Actions* (*Latent Damage and Other Related Issues*) (Scot Law Com No 122 1989).

72 Scotland, however, has an existing provision which deals with latent damage: under s 11(3) of the *Prescription and Limitation (Scotland) Act 1973* (UK), where the creditor (ie the plaintiff) is not aware, and could not with reasonable diligence have been aware, that injury, loss or damage had occurred, the obligation to make reparation is regarded as having become enforceable on the date the creditor first became, or could with reasonable diligence have become, so aware.

73 *Limitation Act 1980* (UK) s 11A, introduced by the *Consumer Protection Act 1987* (UK) s 6(6) and Sch 1.

74 Id s 11A(4).

involving latent damage for the limitation period to run from the point of discovery. However they suffer from the disadvantage that the running of the limitation period is only extended if the damage is not discoverable. There will be cases where the argument for permitting an extension of the limitation period is based on factors other than lack of discoverability, cases which provisions such as these cannot accommodate.[75] There are many reasons which may delay the bringing of an action, and lack of knowledge may be a comparatively insignificant factor, or one which is difficult to establish in cases which are nonetheless deserving.

(d) Knowledge provisions

5.33 The most important problem that has been experienced with legislative provisions of the two kinds so far considered is how to define when damage becomes discoverable. The definition needs to be workable and must make it easy to identify the point at which time begins to run. The legislative provisions which attempt to define this concept have gone through three successive stages of evolution.

(i) The English 1963 definition

5.34 The first model for the definition of discoverability was that used in the English *Limitation Act 1963*. Under this model, it was necessary to show that material facts of a decisive character relating to the right of action were not within the plaintiff's means of knowledge until after a certain date. Provisions in these terms were formerly employed in the English *Limitation Act 1963* and are still found in the legislation in Queensland, New South Wales, South Australia, the Northern Territory and Manitoba.[76] The Queensland Act, for example, provides:

> "For the purposes of this section and sections 31, 32, 33 and 34 -
>
> (a) the material facts relating to a right of action include the following:-

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75 In the area of sexual abuse, for example, to extend the limitation period it will be necessary to show that the damage was not discoverable: see *Gray v Reeves* (1992) 89 DLR (4th) 315, discussed at para 9.22 below.

76 *Limitation Act 1963* (UK) ss 1-2 (now repealed); *Limitation of Actions Act 1974* (Qld) ss 30-32; *Limitation Act 1969* (NSW) ss 58-60; *Limitation of Actions Act 1936* (SA) s 48; *Limitation Act 1981* (NT) s 44; *Limitation of Actions Act 1987* (Man) s 14. The former Victorian legislation differed slightly in that it did not require the material fact to be of a decisive character: *Limitation of Actions Act 1958* (Vic) s 23A, as enacted in 1972 and repealed in 1983. The British Columbia legislation does not employ the concepts of material facts and decisive character but does refer to facts which are within a person's means of knowledge: *Limitation Act 1979* (BC) s 6(3).

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
(ii) the identity of the person against whom the right of action lies;
(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
(iv) the nature and extent of the personal injury so caused; and
(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable man knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing-
(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
(ii) that the person whose means of knowledge is in question ought in his own interests and taking his circumstances into account to bring an action on the right of action;

(c) "appropriate advice", in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts, as the case may require;

(d) a fact is not within the means of knowledge of a person at a particular time if but only if:-
(i) he does not at that time know the fact; and
(ii) so far as the fact is capable of being ascertained by him, he has before that time taken all reasonable steps to ascertain the fact."[77]

Similar definitions are to be found in the legislation of most of the other jurisdictions referred to above.[78] Much case law has accumulated on the issue of what facts are material, when they are of a decisive character, and at what point they are within a plaintiff's means of knowledge.[79]

5.35 The legislation based on this model was the subject of criticism on a number of grounds, particularly the meaning of the provisions for determining the date of knowledge from which the additional period ran,[80] and there was a feeling that some meritorious

77 *Limitation of Actions Act 1974* (Qld) s 30.

78 See *Limitation Act 1963* (UK) s 7(3)-(5) (now repealed); *Limitation Act 1969* (NSW) s 57(1), now renumbered s 57B(1) and applying to causes of action which accrued before 1 September 1990; *Limitation of Actions Act 1987* (Man) s 20(1)-(4); see also *Limitation Act 1979* (BC) s 6(3)-(4). There are no definition provisions in the legislation in South Australia and the Northern Territory, but there is considerable case law expounding the meaning of the terms used: see *The Laws of Australia* para 52.

79 See *The Laws of Australia* para 46.

80 See in particular *Central Asbestos Co Ltd v Dodd* [1973] AC 518. Lord Reid said at 529: "I think this Act has a strong claim to the distinction of being the worst drafted Act on the statute book."

plaintiffs were still being unfairly time-barred.[81] In England, Victoria and New South Wales, these problems resulted in the matter being referred to law reform bodies,[82] and eventually to the replacement of the legislation by extension provisions of a different kind.

(ii) The English 1975 definition

5.36 The second model for defining discoverability is that of the English *Limitation Act 1975*, which replaced the 1963 English model just dealt with. Under the provisions of this Act, as re-enacted in the *Limitation Act 1980*, the applicable limitation period is three years from the date on which the cause of action accrued, or the date of knowledge (if later) of the person injured.[83] As to the definition of the date of knowledge, the legislation provided:

> "(1) In sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -
>
> (a) that the injury in question was significant; and
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
> (c) the identity of the defendant; and
> (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
>
> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
>
> (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -
>
> (a) from facts observable or ascertainable by him; or
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

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81 P J Davies "Limitations of the Law of Limitation" (1982) 98 *LQR* 249,250.

82 See Orr Committee Interim Report (1974); Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981); NSW Report (1986).

83 *Limitation Act 1980* (UK) s 11(4).

> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."[84]

These definitions have been reproduced in other legislation of the same kind, for example the English provisions on property damage introduced by the *Latent Damage Act 1986*[85] and the Western Australian legislation extending the limitation period for asbestos related diseases.[86]

5.37 Provisions based on the English 1975 model are no less complex than those based on the earlier 1963 model. They have been criticised on a number of grounds.[87] In its Part I Report,[88] the Commission summarised these criticisms as follows:

> "* It will not assist a plaintiff who has incorrectly been advised by a solicitor that he has, in law, no cause of action in respect of an injury or disease whereas it may assist a plaintiff whose solicitor fails to discover facts relating to a proposed claim when instructed to do so. Such a distinction could be drawn regardless of the respective merits of the plaintiffs' cases.
>
> * On the issue of whether reasonable steps have been taken to obtain advice it is not clear whether such matters as the plaintiff's fear of obtaining professional advice, his inability to pay an initial professional fee and his ignorance of where to seek advice are relevant. It is also not clear whether appropriate expert advice' would require a person to consult a solicitor, for example, rather than a trade union official or officer.
>
> * As the final limb of the section is limited to facts ascertainable *only* with the help of an expert, it is unclear whether a person is fixed with constructive knowledge of a fact which an expert who was consulted ought to have but did not discover, where the fact was ascertainable without expert advice.
>
> * Cases like *McCafferty v Metropolitan Police District Receiver*[89] show that in certain meritorious cases the section operates unfairly and that to cater for

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84 Id s 14; additions made by the *Consumer Protection Act 1987* (UK) s 6(6) and Sch 3 have not been included.

85 See para 5.30 above.

86 *Limitation Act 1935* s 38A(7)-(9): see paras 5.5 and 5.25 above.

87 See P J Davies "Limitations of the Law of Limitation" (1982) 98 *LQR* 249; N J Mullany "Reform of the Law of Latent Damage" (1991) 54 *MLR* 349,350-353.

88 Part I Report (1982) para 3.13.

89 [1977] 1 WLR 1073. In this case the plaintiff, after working in the ballistics section of the defendant's laboratory for two years, was diagnosed to be suffering from a hearing defect caused by acoustic trauma. However, because he regarded the symptom as merely an irritating nuisance the plaintiff did not take any legal action against the defendant. Though the plaintiff was not conscious of any change in his hearing between 1967 and 1973, in 1973 a routine audiogram snowed signs of severe acoustic trauma (which proved to be only temporary) and as a result his employment was prematurely terminated in October 1973. In an action brought by the plaintiff it was held that the defendant had been negligent in not providing sufficient acoustic protection. On the question of limitation the Court of Appeal held that the plaintiff did not come within s 2A of the *Limitation Act 1939* (UK) (added by the *Limitation Act 1975* (UK): the equivalent of s 11 of the *Limitation Act 1980* (UK)) because for more than three years he had

them it will always be necessary to provide for recourse to a judicial discretion to allow an action to be brought notwithstanding the expiration of the limitation period.

* Doubts exist concerning the meaning and effect of section 14(2) insofar as it is '....arguable that as against a defendant who does not dispute liability and who has sufficient assets (or insurance cover) to satisfy an award of damages it is almost every cough or sprain that will be sufficiently serious to justify an action'.[90] "

5.38 One English judge has summed up the English 1975 provisions in the following way:

"I was foolish enough....to think that at a third attempt Parliament had succeeded in reforming this branch of the law. Now it is apparent that a fourth attempt will be necessary , if the law on this topic is to be rationalised,"[91]

(iii) A new definition?

5.39 It is possible that the difficulties of the 1963 and 1975 models can now be forgotten, since recent law reform commission reports have put forward a new way of defining discoverability which appears to be much simpler and to be free from the criticisms which have been levelled at its predecessors - and this model has now been adopted in statute. The new Alberta *Limitations Act* provides that the claimant must bring proceedings within two years after:

"the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury 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 proceedings."[92]

This definition was developed by the Alberta Law Reform Institute as part of a standard limitation period running from the point of discovery, rather than one which extended the

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known that he had been injured. However, the court held that it was equitable in the circumstances for the limitation period to be extended under s 2D(1) (the equivalent of s 33(1) of the 1980 Act).

90 P J Davies "Limitations of the Law of Limitation" (1982) 98 *LQR* 249, 257.

91 *Chappell v Cooper* [1980] 1 WLR 958, Ormrod LJ at 967.

92 *Limitations Act 1996* (Alta) s 3(1)(a).

ordinary period running from some other point.[93] However, it appears that it is capable of being adapted for use in extension provisions of the kind presently under consideration. The New Zealand Law Commission has recommended a discovery-based extension provision incorporating the Alberta definition.[94]

(e) Court given discretion to extend limitation period

(i) The English Limitation Act 1975

5.40 As discussed above,[95] the English Act of 1975 introduced a new element into the legislation extending the limitation period in personal injury cases - a provision under which a court was given a discretion to override the limitation period where it appeared that it would be equitable to do so.[96] Case law has confirmed that this is a wide and unfettered discretion, not one restricted to exceptional cases.[97] However, it operates as an adjunct to extension provisions based on discoverability, and there has been some criticism of the provision on this ground.[98]

(ii) The Commission's 1982 recommendations

5.41 In 1982 this Commission reported on the law of limitation of actions with respect to latent disease and injury.[99] The report was requested as a matter of urgency because of the problems of persons who had contracted asbestos-related diseases; however the Commission's recommendations were not confined to such cases but covered all personal injury actions. The

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93 See paras 6.10-6.14 below.

94 See para 6.52 below.

95 Para 5.21.

96 This discretion is different from the limited discretion conferred on the court by the legislation in some Australian and Canadian jurisdictions based on the English 1963 legislation, which provided that if the necessary conditions were satisfied, the court "may" grant an extension of the limitation period: see paras 5.14-5.18 above.

97 See *Firman v Ellis* [1978] QB 886, Lord Denning MR at 905, Ormrod LJ at 910, Geoffrey Lane LJ at 915; *Thomson v Brown* [1981] 1 WLR 744, Lord Diplock at 752-753; see also *Simpson v Norwest Hoist Southern Ltd* (1980 1 WLR 968, Lawton LJ (for the Court) at 975; *Conry v Simpson* [1983] 3 All ER 369; *Donovan v Gwentoys Ltd* [1990] 1 WLR 472; *Halford v Brookes* [1991] 1 WLR 428, Russell LJ at 435; and see the general guidelines laid down in *Hartley v Birmingham City District Council* [1992] 1 WLR 968. The court must of course have regard to the factors set out in s 33(3); see para 5.21 above. The discretion is inapplicable to cases where the writ has been issued but not served or lawfully renewed, or where proceedings have lapsed and an attempt is made to revive them by issuing a further writ: see *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606; *Chappell v Cooper* [1980] 1 WLR 958; *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260.

98 P J Davies "Limitations of the Law of Limitation" (1982) 99 *LQR* 249, 260-265; see also D Morgan "Limitation and Discretion: Procedural Reform and Substantive Effect" (1982) 1 *CJQ* 109.

99 Part I Report (1982).

Commission recommended against the adoption of extension provisions of the kinds so far discussed. Instead it recommended a provision under which the limitation period for such actions should not apply where the court determined that it was just that it not apply.[100] The report outlined statutory criteria to assist the court in making this decision.[101] In essence the report proposed the adoption of something like the discretion provision of the English 1975 legislation, without the complex discoverability provisions which accompanied it, but the Commission placed emphasis on the broad principle of what is just in the circumstances, rather than on an exercise of judicial discretion.[102] The report made a deliberate attempt to avoid the complex drafting and other problems which had arisen under the English legislation. The Government did not adopt the Commission's recommendation, preferring instead to enact narrower legislation limited to asbestos-related diseases.[103]

(iii) Personal injury: Victoria, the Australian Capital Territory, New South Wales, Tasmania

5.42 In spite of the rejection of the Commission's recommendations in Western Australia, in the years since 1983 other Australian jurisdictions have introduced provisions which give courts a discretion to disregard the limitation period in personal injury cases, provisions which are formulated in terms very similar to the Commission's recommendation.[104]

(1) In 1983 Victoria repealed its earlier provisions based on the English Act of 1963 and introduced a provision under which, in any action for negligence, nuisance or breach of duty where the damages claimed consist of or include damages for personal injury, the court may, if it decides that it is just and reasonable to do so, order that the period within which an action may be brought may be extended for such period as it determines.[105] The court is to have regard to all the circumstances of the case, including a number of factors

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100 Id paras 4.22-4.24.

101 Id paras 4.25-4.32.

102 "The recommendation as formulated is designed to reduce the uncertainty and inconsistency which is said to arise out of the exercise of judicial discretion": id para 4.22.

103 *Acts Amendment (Asbestos Related Diseases) Act 1983*, dealt with at para 5.5 above.

104 In addition, the Law Reform Committee of South Australia in its *Report relating to Claims for Injuries from Toxic Substances and Radiation Effects* (87th Report 1985) 23-27 affirmed the Commission's recommendations and recommended that the court should have a discretion to extend the limitation period.

105 *Limitation of Actions Act 1958* (Vic) s 23A(1)-(2), added by the *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 5, implementing the recommendations of the Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981).

set out in the legislation.[106] The ordinary limitation period in Victoria is six years running from the date of accrual of the cause of action, but where the injury consists of a disease or disorder there is an alternative six-year limitation period running from the date on which the plaintiff becomes aware of the injuries.[107]

(2) In 1985, the Australian Capital Territory *Limitation Act* incorporated an almost exactly similar provision allowing the court, if it decides that it is just and reasonable to do so, to order that the limitation period be extended for such period as it determines.[108] Again there is a list of circumstances to which a court must have regard.[109] The only real difference from the Victorian provisions is that the Australian Capital Territory Act does not contain any alternative limitation period for disease or disorder running from the date of awareness. In the Australian Capital Territory, there is also a discretion-based provision applying to causes of action for latent damage to property or economic loss in respect of such damage.[110]

(3) In 1986 the New South Wales Law Reform Commission recommended that provisions very similar to those in Victoria and the Australian Capital Territory be adopted in New South Wales.[111] The *Limitation (Amendment) Act 1990* implemented those recommendations, but placed a time limit on extensions of the limitation period in cases of non-latent injury. The *Limitation Act* now provides that, as regards causes of action accruing on or after 1 September 1990, in an action founded on negligence, nuisance or breach of duty for damages for personal injury -

(a) The court may, if it decides that it is just and reasonable to do so, order that the limitation period (which, as from the above date, is ordinarily three years[112]) be extended for such period not exceeding five years as

106 Id s 23A(3).
107 Id s 5(lA).
108 *Limitation Act 1985* (ACT) s 36(1)-(2).
109 Id s 36(3).
110 See para 5.44 below.
111 NSW Report (1986).
112 *Limitation Act 1969* (NSW) s 18A.

it determines.[113] Again there is a list of factors, similar to those in the legislation of Victoria and the Australian Capital Territory, to be taken into consideration.[114]

(b) Where the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time, the court may extend the limitation period for such period as it determines,[115] provided it is satisfied that the plaintiff did not know that injury had been suffered, or was unaware of its nature or extent, or was unaware of the connection between the injury and the defendant's act or omission, and the application is made within three years of the plaintiff becoming aware of these matters.[116]

(4) In Tasmania, there is also a discretion to extend the limitation period in a personal injury case if the court thinks that in all the circumstances of the case it is just and reasonable to do so, but the period (ordinarily three years)[117] cannot be extended for more than a further three years.[118] However, a recent report of the Tasmanian Law Reform Commissioner recommends that the court should have a discretion to permit the extension of the limitation period without any time limits, and that there should be a statutory list of factors to be taken into account similar to those in Victoria and the Australian Capital Territory.[119] The report also recommends that the limitation period for personal injury actions be increased from three years to six.[120]

5.43 In all these provisions, the factors which must be taken into account by the court in deciding whether or not to extend the limitation period are much the same, being based on the English legislation of 1975. By way of example, the Victorian legislation provides that the court shall have regard to all the circumstances of the case, including the following:

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113 Id s 60C. The previous provisions (see para 5.14 above) continue to apply to causes of action accruing before 1 September 1990.

114 *Limitation Act 1969* (NSW) s 60E(1).

115 Id s 60G.

116 Id s 60I(1).

117 *Limitation Act 1974* (Tas) s 5(1).

118 Id s 5(3).

119 Tasmania Report (1992) 34-36.

120 Id 43-45.

"(a) The length of and reasons for the delay on the part of the plaintiff;

(b) The extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;

(c) 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;

(d) The duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action;

(e) The extent to which the plaintiff acted properly and reasonably once he knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages;

(f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."[121]

(iv) Property damage: the Australian Capital Territory

5.44 The Australian Capital Territory *Limitation Act 1985* deals with the problem of latent property damage by conferring a discretion on the court to override a defence of limitation if it is just and reasonable to do so. In the Australian Capital Territory, the personal injury and property damage provisions are thus both based on discretion. The Act provides:

"[W]here a person has a cause of action for latent damage to property or for economic loss in respect of such damage to property the court may -

(a) if the court considers it just and reasonable to do so;

(b) whether or not the limitation period applicable to that cause of action has expired; and

(c) whether or not an action for such damage or loss has been commenced,

extend the limitation period in respect of which an action on that cause of action may be brought for such further period not exceeding 15 years commencing on the day on which the act or omission that gave rise to the cause of action occurred as the court thinks fit."[122]

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121 *Limitation of Actions Act 1958* (Vic) s 23A(3).

122 *Limitation Act 1985* (ACT) s 40(1).

The court in exercising its discretion is to have regard to all the circumstances of the case, including the factors listed in the Act[123] which are generally similar to those which are to be taken into account in personal injury cases.[124]

(v) General provisions: Nova Scotia

5.45 The Nova Scotia *Limitation Act* provides the only example in existing legislation of a general extension provision based entirely on discretion. It provides that a court:

> "...may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person."[125]

The court is to have regard to all the circumstances of the case and in particular to a list of factors similar to those in the discretion-based personal injury provisions in English and Australian legislation.[126] There are some important limitations: the court cannot exercise jurisdiction where an action is commenced or notice is given more than four years after the limitation period expired.[127] The provision does not apply where the initial limitation period is ten years or more in length.[128]

(vi) Trade Practices Act proposal

5.46 The Australian Law Reform Commission has recently proposed that a discretion to extend the limitation period should be introduced into the Commonwealth *Trade Practices Act 1974*.[129] At present, the limitation period for actions for damages brought under the Parts

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123 Id s 40(2).
124 See para 5.43 above.
125 *Limitation of Actions Act 1989* (NS) s 3(2), added by SNS 1982 c 33 s 2.
126 Id s 3(4).
127 Id s 3(6).
128 Id s 3(7)(a).
129 Australian Law Reform Commission *Compliance with the Trade Practices Act 1974* (Report No 68 1994) paras 7.8-7.14.

IV and V of the Act is three years, running from the point when the claim accrues,[130] and the court has no discretion to extend the time limit.[131] The ALRC recommended that the *Trade Practices Act* should be amended to allow the court to extend the limitation period if the court considers it appropriate to do so. It was of the view that this was the best way of dealing with cases in which it was unclear when the cause of action accrued or when the application of the three year time limit would give rise to an injustice.

(vii) Assessment

5.47 In its earlier report the Commission reviewed the advantages and disadvantages of a judicial discretion to override a defence of limitation.[132] It said that the major objections were that -

* it would generate too much uncertainty, and that it was sometimes said that it might be difficult and expensive to insure against claims where the liability was essentially open-ended;

* it would lead to divergent approaches among judges in the exercise of that 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.

5.48 On the other hand, the Commission listed the following arguments in favour of a discretion-based provision -

* it was much simpler than the legislative provisions based on discoverability, as demonstrated by the English experience;[133]

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130 *Trade Practices Act 1974* (Cth) s 82(2). A cause of action accrues when actual loss or damage is suffered: *Ikin v Same & Lamborghini Tractors of Australia Pty Ltd* (1985) 7 ATPR 40-595.

131 *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) 10 ATPR 40-853, Pincus J at 49,196.

132 Part I Report (1982) paras 4.12-4.20.

133 See paras 5.22,5.37-5.38,5.40 above.

* it was a flexible alternative, allowing the judges to balance the numerous factors involved and the relative hardships to the plaintiff and the defendant to achieve a just result;[134]

* consistency is not necessarily sacrificed when judges are asked to exercise a discretion;[135]

* the argument that judicial discretion to override a limitation defence will lead to excessive delay is countered by the argument that it remains in the plaintiff s best interest to pursue his claim expeditiously.

5.49 The Commission concluded that the simplicity and flexibility of giving the courts a discretion to override a defence of limitation was a worthwhile reform if the vices of uncertainty and inconsistency could be eliminated, and it therefore recommended that the provision should be formulated as one under which the limitation period should not apply where the court determined that it was just that it not apply.[136] Since the Commission made its recommendation, experience with the discretion-based provisions in Victoria, the Australian Capital Territory and New South Wales has shown that the courts are able to use such provisions to do justice without producing uncertainty and inconsistency.[137]

(f) Conclusions

(i) Personal injury cases

5.50 It is in relation to personal injury cases that the shortcomings of a *Limitation Act* under which limitation periods run from the date of accrual are most glaringly exposed. Even if the limitation period is as long as six years,[138] the fact that in cases of latent injury or disease damage can be suffered, and the limitation period can commence running, when the damage

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134 "[U]ncertain justice is preferable to certain injustice": *Firman v Ellis* (1978] QB 886, Ormrod LJ at 911.

135 Id, Lord Denning MR at 905.

136 Part I Report (1982) paras 4.21-4.22.

137 The court is given a wide discretion, not limited to exceptional cases: see *Daroczy v B & J Engineering Pty Ltd (in liq)* (1986) 67 ACTR 3, adopting authorities on the *Limitation Act 1980* (UK) s 33, particularly *Firman v Ellis* [1978] QB 886; *Perry v Royal Women's Hospital* (unrep) Supreme Court of Victoria, 14 May 1991, 4187(1) of 1989; *Herschberg v Mula* (1993) Aust Torts Rep 81-256. For other cases see *The Laws of Australia* paras 48-50.

138 In some jurisdictions the limitation period in personal injury cases is three years: see paras 4.11 and 4.39 above, 12.29 below.

is undetected and undetectable by the plaintiff[139] means that in many cases the limitation period will expire before the plaintiff can reasonably be expected to become aware that he is affected and has a cause of action. Nearly all jurisdictions have dealt with this problem by legislation which makes it possible to extend, delay or disregard the normal limitation period in personal injury cases.[140] In Western Australia, by contrast, the extension provisions are limited to asbestos-related diseases, contrary to the recommendations of the Commission, which urged the importance of legislating for all forms of latent personal injury and disease.[141] The result is that there are many cases where it is not possible to extend the limitation period: AIDS and sexual abuse cases are prominent examples.[142] The seriousness of this problem was underlined in many submissions made to the Commission in response to its Discussion Paper.[143] A new Limitation Act cannot be fully effective unless it deals comprehensively with the problems arising in latent personal injury cases.

(ii) Other cases

5.51 Is there a similar argument for making it possible to extend the limitation period in cases involving other kinds of damage, particularly those dealing with defective building and professional negligence? As noted above, some jurisdictions have responded to the problems of such cases by enacting extension provisions. The Australian Capital Territory gives courts a discretion to extend the limitation period in cases where a person has a cause of action for latent property damage or economic loss.[144] The English legislation provides for a three-year period running from the date of knowledge in negligence actions not involving personal injury.[145] The Northern Territory and South Australia have extension provisions, based mainly on the discoverability principle, applying to all kinds of actions[146] and there is a similar

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139 See paras 5.1-5.4 above.

140 See paras 5.9-5.49 above.

141 Part I Report (1982) para 1.3.

142 See paras 5.8 above (AIDS), 9.12 below (sexual abuse). There are many other cases in which extension of the limitation period would not be possible in Western Australia, eg *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (action in respect of defective intrauterine device: see para 4.25 above); *Williams v Minister, Aboriginal Land Rights Act 198*3 (1994) 35 NSWLR 497 (action for damage caused by removing child from Aboriginal parents: see para 1.16 above).

143 Eg Law Society of Western Australia; Western Australian AIDS Council; Mr C Phillips (legal practitioner).

144 *Limitation Act 1985* (ACT) s 40: see para 5.44 above.

145 *Limitation Act 1980* (UK) s 14A: see para 5.30 above. Similar provisions are proposed in Scotland: see Scottish Law Commission *Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)* (Scot Law Com No 122 1989).

146 *Limitation Act 1981* (NT) s 44; *Limitation of Actions Act 1936* (SA) s 48: see para 5.18 above.

provision in Manitoba.[147] British Columbia allows time limits to be extended in a number of instances, including damage to property and professional negligence[148] Nova Scotia gives a court a generalised discretion to disregard the limitation period in any kind of action.[149] In addition, under the New Zealand proposals (which are based on the principle of a standard limitation period running from the date of the defendant's act or omission), where the damage is not immediately discoverable, the running of the limitation period would be delayed to commence at the point of discovery.[150]

5.52 It would appear that recent case law developments have reduced the need for such legislation. In jurisdictions where there is no legislation ameliorating the plaintiff's position, the courts have to a great extent solved the problem on their own. Both in defective building cases and in actions against professionals for negligence causing financial harm, the courts in Australia are moving towards the position that the cause of action accrues only at the point when the damage becomes discoverable.[151] This recent judicial activity has somewhat lessened the utility of the legislative provisions.

5.53 In Australia, the Australian Capital Territory legislation was introduced in 1985, and was very much influenced by the problems of *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm),*[152] according to which time would begin to run in defective building cases when damage was suffered, whether it was detectable or not: it was thought that this ruling would be applicable in Australia.[153] Ten years later, it appears that this is not so, and that the courts are likely to hold that the cause of action accrues only when the damage is discoverable. The South Australian legislation was introduced much earlier, in 1972, and that in the Northern Territory in 1981. It is not clear why it was thought advisable to extend it beyond personal injury cases.[154] The scope of this legislation has recently been limited in building cases by the imposition of a 10 year long stop provision.[155]

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147 *Limitation of Actions Act 1987* (Man) s 14(1): see para 5.17 above.

148 *Limitation Act 1979* (BC) s 6(3): see para 5.27 above.

149 *Limitation of Actions Act 1989* (NS) s 3(2): see para 5.45 above.

150 New Zealand Report (1988) para 180: see para 6.52 below.

151 See paras 4.19-4.22 above.

152 [1983] 2 AC 1.

153 See ACT Working Paper (1984) para 52.

154 The South Australia Report (1970) is silent on the point.

155 *Building Act 1993* (NT) ss 159-160; *Development Act 1993* (SA) s 73: see para 5.66 below. However, the Northern Territory Act, unlike the South Australian Act, appears not to limit the operation of the extension provision.

5.54 In England also, the legislation (introduced by the *Latent Damage Act 1986*) was a response to the problem presented by *Pirelli*. However, the subsequent case law development has proceeded in the opposite direction from that in Australia: it has denied the existence of a cause of action for economic loss caused by defective building, or in any other case except those involving reliance on negligent statements.[156] One result of this is that there are now very few cases in which the date of knowledge provisions of the English legislation can operate.[157]

5.55 The New Zealand courts have clearly affirmed the doctrine that in building cases damage is suffered only at the point of discoverability,[158] and have recently recognised discoverability as a principle of general application.[159] They have thus settled a controversy that was ongoing in 1988 when the New Zealand Law Commission recommended the introduction of a general extension provision,[160] and lessened the need for its introduction. The legislative response to the New Zealand Report was to introduce a *Building Act*, analogous to those now found in some Australian jurisdictions, providing for a ten year limitation period running from the point of completion.[161]

5.56 Canadian courts have gone even further than those in Australia and New Zealand: the Supreme Court has clearly endorsed the general principle that the cause of action in negligence accrues only when damage becomes discoverable.[162] The British Columbia legislation postponing the running of time in various cases including actions for damage to property and professional negligence would appear to achieve no more than the common law now does. This legislation was introduced in 1979, implementing a 1974 report of the Law Reform Commission of British Columbia, which in turn was influenced by a report to the

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156 See para 4.17 above.

157 See N J Mullany "Limitation of Actions - Where Are We Now?" [1993] *LMCLQ* 34, 50-52. Mullany also notes that the scope of s 14A of the *Limitation Act 1980* (UK) has been further restricted by cases holding that it does not apply to breaches of contractual duties to provide professional services: *Iron Trade Mutual Insurance Co Ltd v J K Buckenham Ltd* [1989] 2 Lloyd's Rep 85; *Societé Commerciale de Reassurance v ERAS (International) Ltd* [1992] 2 All ER82.

158 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed by the Privy Council [1996] 1 NZLR 513: see para 4.23 above.

159 See *G D Searle & Co v Gunn* [1996] 2 NZLR 129, discussed in para 4.25 above.

160 See New Zealand Report (1988) paras 69-83,99.

161 *Building Act 1991* (NZ) s 91. The impact of this Act is demonstrated by the decision in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed by the Privy Council [1996] 1 NZLR 513, in which the *Building Act* did not apply because the proceedings were commenced before it came into force. The plaintiff recovered for damage that aid not become discoverable until 17 years after the house was built.

162 *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481: see para 4.24 above.

1968 Annual Conference of Commissioners on Uniformity of Legislation in Canada.[163] The British Columbia Commission appears to assume that damage will be suffered at some point earlier than when it becomes discoverable. The legislation in Manitoba and Nova Scotia likewise dates back to a time before the recent case law developments.

5.57 Under legislation now enacted in Alberta and proposed in Ontario, to be discussed in Chapter 6, the standard limitation period would in all cases commence at the point of discovery.[164] It is of interest to note that the Alberta proposals were drawn up against the background of Alberta case law which had resisted the introduction of the discoverability principle.[165]

5.58 It is probably fair to conclude that case law developments have reduced the need for provisions extending the limitation period in cases involving damage other than personal injury, though such provisions continue to be necessary in personal injury cases. Though in all cases the ordinary limitation period runs from accrual, in cases not involving personal injury it seems that the cause of action accrues when it becomes discoverable, while in personal injury cases it accrues at the earlier point when damage is suffered. Though these rules enable most cases to be satisfactorily resolved, it would be preferable for all cases to be regulated by the same limitation principles.

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163 See British Columbia Report (1969) 73.

164 See paras 6.10-6.14 below.

165 The Alberta Report (1989) 26 notes:
"In Alberta, the Court of Appeal has resisted the introduction of the discoverability principle. In *Costigan v Ruzicka* [(1984) 13 DLR (4th) 368], a case decided nearly contemporaneously with the Supreme Court's decision in *Kamloops v Nielsen*, the Alberta Court of Appeal held to the principle that the limitation period runs from the accrual of the cause of action, regardless of whether the claimant could have discovered the existence of facts material to a cause of action, and regardless of the fact that this approach may 'often be harsh in its application'. In *Fidelity Trust Company v Weiler* [[1988] 6 WWR 428], a case decided after the judgment of the Supreme Court of Canada in *Central Trust v Rafuse*, the Alberta Court of Appeal concluded that the discoverability rule laid down in the *Kamloops* and *Central Trust* cases does not apply to actions in contract in Alberta. The Court distinguished *Central Trust*, saying that the fact that there was concurrent tort liability in that case was critical to the decision.
Generally, Alberta courts have interpreted the Supreme Court of Canada judgment in *Kamloops v Nielsen* narrowly on its facts, which relate to property damage, and on [sic] the law in British Columbia on [sic] which it originated. Some cases where the issue of the application of the discoverability principle might have been considered have been decided on other points."

4. LONG STOP PROVISIONS

(a) Provisions, existing and proposed

5.59 The concept of an ultimate limitation period is not new. Under the old English legislation, the limitation period for an action to recover land could be extended in cases of infancy or other disability of the plaintiff,[166] but notwithstanding any such extension an action to recover land could not be brought more than 40 years from the date on which the cause of action accrued[167] a period later reduced to 30 years.[168] The Western Australian *Limitation Act 1935* retains a similar provision.[169] The modern Acts in England,[170] New Zealand[171] and most Australian[172] and Canadian[173] jurisdictions have a similar provision. These provisions provide support to the security of old system titles to land, since a vendor of such land must generally show a chain of title commencing at least 30 years before the date of the contract.[174]

5.60 The New South Wales Law Reform Commission, in its 1967 Report which led to the modernisation of the law in New South Wales, thought that there was merit in a more general ultimate bar. It said:

> "We think, however, that quite apart from questions of title to land, a statute of limitations ought not to allow an indefinite time for the bringing of actions even if the disabilities and other matters dealt with in Part III of the Bill do exist. These disabilities and other grounds of postponement may well be outside the knowledge of the defendant and we think it right that, after a period of thirty years has elapsed, there should be no postponement of the statutory bar on any ground."[175]

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166 *Real Property Limitation Act 1833* (UK) s 16.

167 Id s 17.

168 *Real Property Limitation Act 1874* (UK) s 5.

169 *Limitation Act 1935* s 18: see para 17.6 below.

170 *Limitation Act 1939* (UK) s 22(1)(c); *Limitation Act 1980* (UK) s 28(4).

171 *Limitation Act 1950* (NZ) s 24(e).

172 *Limitation Act 1981* (NT) s 36(4); *Limitation of Actions Act 1974* (Qld) s 29(2)(b); *Limitation of Actions Act 1936* (SA) s 45(3); *Limitation Act 1974* (Tas) s 26(4); *Limitation of Actions Act 1958* (Vic) s 23(1)(c).

173 30 years: *Statute of Limitations 1988* (PEI) s 48(2); *Limitation of Actions Act 1978* (Sask) s 48(2); note also *Limitation of Actions Act 1980* (Alta) s 46(3) (now repealed by *Limitations Act 1996* (Alta) s 16). 40 years: *Limitation of Actions Act* 1973 (NB) s 63(2); *Limitation of Realty Actions Act 1990* (Nfd) s 16; *Limitation of Actions Act 1989* (NS) s 20. 20 years: *Limitations Act 1990* (Ont) s 37.

174 NSW Report (1967) para 240.

175 Id para 241.

Accordingly, section 51 of the New South Wales *Limitation Act 1969* provided that no action was maintainable if brought more than 30 years after the date from which the limitation period ran.[176]

5.61 In 1974, the British Columbia Law Reform Commission approved the concept of an ultimate bar as being in conformity with the purposes of limitations legislation,[177] and it was incorporated in the British Columbia Act passed in 1975.[178] It formed an important part of the innovative strategy of that Act, already referred to above[179] under which there were three basic limitation provisions, but many of the actions covered by those provisions were capable of extension on the discoverability principle. The long stop provision ensures that no cause of action could be extended more than thirty years after it arose. However, there are a number of exceptional cases in which the ultimate period is much shorter. An action in negligence against a hospital or hospital employee, and an action for professional negligence or malpractice against a medical practitioner, may not be brought more than six years after the date on which the right to do so arose.

5.62 More recently, long stop provisions have been adopted or proposed as an element in legislative schemes dealing with the problem of latent property damage. A provision added to the English *Limitation Act* by the *Latent Damage Act 1986* allows an action to be brought within six years of accrual, or within three years of the "date of knowledge",[180] but no action can be brought more than 15 years after the date of the act or omission in question.[181] Two notable features of this provision are the adoption of a period shorter than 30 years and the fact that it runs from the date of the act or omission rather than the date of accrual, which at least in some circumstances might be later than the date of the act or omission. It is specifically provided that it has no application to personal injury cases,[182] which are governed by separate provisions.[183] The Australian Capital Territory *Limitation Act 1985* gives the court

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176 Under a provision introduced in 1990, s 51 does not apply where the court makes an order extending the limitation period in a case involving latent personal injury, disease or impairment: *Limitation Act 1969* (NSW) s 51(2).

177 British Columbia Report (1974) 101.

178 See now *Limitation Act 1979* (BC) s 8.

179 See paras 4.42 and 5.27 above.

180 *Limitation Act 1980* (UK) s 14A: see para 5.30 above.

181 Id s 14B.

182 Id s 14B(1).

183 See paras 5.20-5.21 above. Note also s 11A of the Act, dealing with limitation periods for actions in respect of defective products. The ordinary limitation period is three years, running from the date on which the cause of action accrued, or the date of knowledge if later: s 11A(4); but no action may be brought more than ten years after the "relevant time" as defined by the *Consumer Protection Act 1987* (UK) s 4: s 11A(3).

a discretion to extend a cause of action for latent damage to property for economic loss in respect of such damage beyond the basic six year period, but the limitation period as extended must not exceed 15 years commencing on the day on which the act or omission that gave rise to the cause of action occurred.[184]

5.63 Manitoba has extension provisions of a more general nature, though again based on the discoverability principle.[185] Its Act also incorporates a long stop provision, under which the court may not grant leave to begin or continue an action more than 30 years after the act or omission in question.[186] Unlike the English situation, this does apply in cases of personal injury.

5.64 Long stop provisions have been proposed by a number of law reform commissions. The South Australian Law Reform Committee and the Saskatchewan Law Reform Commission have both proposed a 30 year ultimate period.[187] Long stop provisions are also an essential element of the reform proposals in Alberta, Ontario and New Zealand - in Alberta, now implemented by legislation - which abandon accrual as the basis of limitation periods. The Alberta legislation incorporates a ten year ultimate period, the New Zealand proposals a 15 year period, and the Ontario proposals a 30 year period in some cases and a ten year period in others. In each case, the period runs from the date of the defendant's act or omission.[188]

5.65 In a recent report, the Law Reform Commission of British Columbia has recommended some modifications to its 30-year ultimate limitation period.[189] It proposes that the period should be reduced from 30 years to ten, except for cases involving fraud, and that where an action is based on an act, omission or breach of legal duty, the ultimate limitation period should run from the date of the act, omission or breach. These recommendations are broadly in line with the developments in England, Manitoba and elsewhere referred to in previous paragraphs.

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184 *Limitation Act 1985* (ACT) s 40(1).

185 See para 5.17 above.

186 *Limitation of Actions Act 1987* (Man) s 14(4).

187 Law Reform Committee of South Australia *Report Relating to Claims for Injuries from Toxic Substances and Radiation Effects* (87th Report 1985) 27; Saskatchewan Report (1989) 47. Under the Saskatchewan proposals, it is not clear whether the ultimate limitation period runs from accrual or from the date of the act or omission.

188 See paras 6.10-6.11,6.15-6.17 below (Alberta), 6.48 and 6.53 below (New Zealand).

189 British Columbia Report (1990).

5.66 Three Australian jurisdictions have recently introduced legislation imposing a ten-year limitation period in actions (other than for personal injury or death) in respect of defective building work. The limitation period runs from the date of completion.[190] In two jurisdictions at least, this functions as a long stop provision. In Victoria, it means that even if the cause of action only accrues when the damage is reasonably discoverable[191] the limitation period expires ten years after completion. In South Australia, though the ordinary limitation period is capable of extension,[192] this no longer applies to defective building work, because the ten-year period cannot be extended.[193] However the Northern Territory legislation does not exclude the extension provision.

(b) Utility

(i) Is a long stop provision required in personal injury cases?

5.67 Long stop provisions are generally not favoured in personal injury cases. Even a 30-year long stop period might be too short to safeguard the interests of plaintiffs, especially in cases involving such diseases as asbestosis or mesothelioma, because such diseases have a very long latency period. Although defendants would be at risk of a claim for a very long period, the seriousness of the injury and the inability of the plaintiff to discover it until many years after exposure to the hazard require the law not to close off the possibility of bringing an action after some arbitrary period. This was the attitude taken by the Commission in its earlier report,[194] in which it agreed with the interim report of the Orr Committee that:

> "...the long stop period itself will either be too long to serve any very useful purpose in the majority of cases or too short to cover those cases with which we are particularly concerned, namely insidious diseases."[195]

5.68 A review of the provisions considered above reveals that the only Australian jurisdiction which has a long stop provision applying to personal injury cases is New South Wales, where in addition to the five-year limit on the extension of a personal injury claim[196]

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190 *Building Act 1993* (NT) ss 159-160; *Development Act 1993* (SA) s 73; *Building Act 1993* (Vic) s 134. There is a similar provision in New Zealand: *Building Act 1991* (NZ) s 91.

191 See *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27, discussed in para 4.19 above.

192 See para 5.18 above.

193 *Development Act 1993* (SA) s 73(1).

194 Part I Report (1982) para 4.7.

195 Orr Committee Interim Report (1974) para 37.

196 *Limitation Act 1969* (NSW) s 60C.

there is a 30 year ultimate bar applying to all claims.[197] However, the latter period does not apply to latent injury claims, which can be extended for an unlimited period.[198] The long stop provision in the Australian Capital Territory, and the similar English provision, apply only to claims not involving personal injury.[199] The policy of the legislation is clearly to place personal injury claims in a different category.

5.69 Exceptionally, some Canadian legislation does impose a long stop on personal injury claims. This is so in British Columbia and Manitoba,[200] and also under the proposals put forward in Saskatchewan.[201] The legislation enacted in Alberta and proposed in Ontario also involves long stop periods of general application which will include personal injury, but the New Zealand proposals, though again of general application, will in practice not include most personal injury cases.[202]

(ii) Is a long stop provision required in cases other than those involving personal injury?

5.70 The earliest jurisdictions to introduce a general long stop provision, New South Wales and British Columbia, had provisions under which no action could be brought more than 30 years after the cause of action arose.[203] Now most causes of action in negligence accrue at the point of discovery, these provisions have lost their original effect. In *Bera v Marr,*[204] the British Columbia Court of Appeal interpreted the British Columbia legislation to mean "the date upon which the cause of action was complete; the date upon which all the elements of the cause of action had come into existence".[205] The members of the Court could see the undesirability of allowing plaintiffs 30 years from the point of discoverability in which to bring actions, and suggested[206] that the words of the statute should be seen as referring to the

197 Id s 51(1).
198 Id s 51(2).
199 *Limitation Act 1985* (ACT) s 40; *Limitation Act 1980* (UK) s 14B.
200 *Limitation Act 1979* (BC) s 8 (30 years); *Limitation of Actions Act 1987* (Man) s 14(4) (30 years). In each case, these are provisions of general application which do not exclude personal injury. Under the more recent proposals in British Columbia, the cases in which the long stop period will be reduced to 10 years include personal injury: British Columbia Report (1990).
201 Saskatchewan Report (1989) 47 (30 years).
202 Because tort claims for personal injury caused by accident were abolished by the *Accident Compensation Act 1972* (NZ): see para 6.53 n 121 below.
203 *Limitation Act 1969* (NSW) s 51(1) ("thirty years running from the date from which the limitation period for that cause of action ...runs"; *Limitation Act 1979* (BC) s 8(1) ("no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose").
204 [1986] 3 WWR 442.
205 Id, Esson JA at 456.
206 Id, Esson JA at 457 and 469.

law as it had existed before cases such as *City of Kamloops v Nielsen*.[207] The New South Wales provision will presumably be interpreted in the same way when the issue arises for decision. Long stop provisions based on this model are therefore not useful.

5.71 More recent long stop provisions have instead run the long stop period from the date on which the act or omission that gave rise to the cause of action occurred. This is the case with the 15-year provisions applying to non-personal injury cases in the Australian Capital Territory[208] and England,[209] the 30-year general provision in Manitoba,[210] the ten year long stop period in Alberta,[211] and the proposed periods of 15 years in New Zealand[212] and 30 years (subject to a number of important exceptional cases where a ten year period would apply) in Ontario.[213] The recent legislation in New Zealand[214] and some Australian States[215] applying a 10 year limit in building cases, which provides for that period to run from the point of completion, has a similar intent. The Law Reform Commission of British Columbia has recommended an amendment to the law in that jurisdiction to reduce the period and make it run from the date of the act, omission or breach.[216]

5.72 Such a provision would protect the interests of defendants in not remaining subject to potential claims long after the events in question. Plaintiffs, however, would argue that if their right to make a claim expires before it is possible to discover the existence of damage, any rights the law gives them are illusory. Much depends on the period selected. In the Commission's view, ten years is too short a period to represent a satisfactory adjustment of the competing rights of the parties, at least in cases involving defective buildings, where the plaintiff can legitimately expect that the property he has paid for should last longer than ten years before it begins to fall down. The same might be said of professional negligence cases, where the client should be able to expect that the advice given will prevent him suffering loss either immediately or in the future. This is one reason why the Commission is opposed to the introduction of legislation of the kind now found in South Australia, the Northern Territory

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207 (1984) 10 DLR (4th) 641: see para 4.23 above.
208 *Limitation Act 1985* (ACT) s 40.
209 *Limitation Act 1980* (UK) s 14B.
210 *Limitation of Actions Act 1987* (Man) s 14(4).
211 *Limitations Act 1996* (Alta) s 3(1)(b).
212 New Zealand Report (1988) para 309.
213 Limitations Bill 1992 (Ont) cl 15(2).
214 *Building Act 1991* (NZ) s 91.
215 *Building Act 1993* (NT) ss 159-160; *Development Act 1993* (SA) s 73; *Building Act 1993* (Vic) s 134.
216 British Columbia Report (1990) 34-35: see para 5.65 above.

and Victoria.[217] 15 years may be a more satisfactory period, although the leading cases in Australia and New Zealand show that longer than this can elapse before a claim becomes discoverable,[218] even if these may perhaps be exceptional cases. It should be noted that many leading civil law systems have quite lengthy long stop periods.[219] France,[220] Germany,[221] Belgium,[222] Holland[223] and South Africa[224] all have a 30-year ultimate limitation period. In general, these periods run from the date of the act giving rise to the liability,[225] but in France the 30 year period does not begin to run until the damage is apparent.[226]

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217 Another reason is that the legislation deals with one particular kind of case. The Commission is opposed to the multiplication of particular limitation rules for particular cases: see paras 11.18-11.19 below.

218 *Bryan v Maloney* (1995) 182 CLR 609 (18 years); *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed by the Privy Council [1996] 1 NZLR 513 (17 years); note also *Dennis v Charnwood Borough Council* [1983] QB 409 (21 years).

219 See J A Jolowicz *Procedural Questions* (International Encyclopaedia of Comparative Law vol xi *Torts* ch 13) paras 61-68.

220 French Civil Code art 2262.

221 German Civil Code art 195.

222 Belgian Civil Code art 2262.

223 Dutch Civil Code art 2004.

224 *Prescription Act 1943* (South Africa) s 3(2)(e).

225 See eg German Civil Code art 198.

226 See the decision of the Cour de Cassation, 11 December 1918, Recueil Sirey 1921.1.161.

Chapter 6

ALTERNATIVES TO ACCRUAL

1. DISCOVERABILITY

(a) Introduction

6.1 Chapters 4 and 5 discussed the general principle which underlies the limitation statutes currently in force in all Australian jurisdictions, all Canadian jurisdictions except one, and in England and New Zealand - that limitation periods commence running on the accrual of the cause of action. As shown in those chapters, the difficult cases are those in which the plaintiff cannot reasonably be expected to be aware of the existence of a right to sue until the damage suffered becomes apparent. These have generally been dealt with either by the enactment of separate provisions in the *Limitation Act* under which the normal limitation period can be extended (in some cases, together with a long stop provision to place some ultimate limit on the scope of possible extension), or through judicial activity as a result of which the cause of action has been held not to accrue until the damage becomes discoverable.

6.2 One Canadian jurisdiction - Alberta - has now adopted a different kind of limitations strategy, one which abandons the system of fixed periods running from the date of accrual and instead adopts the principle that each and every claim is to be governed by two limitation periods: a limitation period of short duration running from the date of discoverability, together with a long stop provision. Instead of having separate limitation periods and extension provisions, such a scheme fuses the two together by providing that the standard period is to run from the point of discoverability. The standard period is balanced by a long stop period running from the point when the claim arose. A scheme of the same kind has been proposed in Ontario. The Commonwealth *Trade Practices Act 1974* has some similar provisions[1] as does the German Civil Code.[2]

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1 See para 6.5 below.

2 Under the provisions of the Code applying to actions in delict, the ordinary limitation period is three years, running from the date of discoverability, but this is subject to a general 30 year ultimate period running from the date of the act or omission: art 852.

(b) Schemes based on discoverability

(i) The Alberta legislation

6.3 The Alberta Law Reform Institute first put forward a limitations scheme based on discoverability in 1986,[3] and confirmed its recommendation in its final report submitted in 1989.[4] The recommended scheme has now been enacted as the *Limitations Act 1996*, which is expected to come into force early in 1997. Under this legislation, the "discovery period" will begin when the claimant either discovers or ought to have discovered specified knowledge about the claim, and will extend for two years.[5] The "ultimate period" will extend for ten years from the date on which the claim arose.[6] The running of either period will provide the defendant with a defence to the claim but will not extinguish it. These rules apply in all cases where a claimant seeks a remedial order in respect of a claim. Claims which were excluded from the old legislation, such as certain claims for breach of trust, are no longer excluded, on the basis that the Act should apply to legal and equitable claims alike.

(ii) The Ontario proposals

6.4 The scheme proposed in Ontario and set out in the Limitations Bill introduced into Parliament in 1992 is similar in nearly all essential respects to that now adopted in Alberta. There is a two-year period running from the point of discovery,[7] and an ultimate limitation period which is generally 30 years running from the date on which the act or omission took place,[8] but is ten years in certain special cases.[9] However the expiry of the ultimate limitation period would extinguish the claim.[10] Special rules are proposed for claims relating to assaults and sexual assaults: in such cases the limitation period would not run during any time in which the claimant is incapable of commencing the proceeding because of his or her physical, mental or psychological condition,[11] and a proceeding arising from a sexual assault would not be subject to any limitation period if one of the parties had charge of the person assaulted, or

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3 Alberta Report for Discussion (1986).
4 Alberta Report (1989).
5 *Limitations Act 1996* (Alta) s 3(1)(a).
6 Id s 3(1)(b).
7 Limitations Bill 1992 (Ont) c1 4.
8 Id c1 15.
9 The negligent act or omission of a health facility or a health facility employee; the malpractice or negligent act or omission of a health practitioner; a deficiency in the design, construction or general review of an improvement to real property carried out under a contract: id cl 15(3)-(4) and (6).
10 Id cl 15(12).
11 Id c1 9.

was in a position of trust or authority, or was someone on whom the person assaulted was dependent, financially or otherwise.[12]

(iii) The Trade Practices Act

6.5 Most actions for damages under the Commonwealth *Trade Practices Act 1974* are subject to a three year limitation period running from the date when the cause of action accrued.[13] However, in two particular instances, involving the liability of manufacturers and importers of goods under warranties[14] and for defective goods[15] the three year period is made to run from the point of discoverability. As regards warranties, the legislation provides that the limitation period runs from the time when the cause of action accrued, but this is deemed to have occurred on the day on which the consumer first became aware, or ought reasonably to have become aware, of particular facts - for example, in the case of an action in respect of goods which are of unmerchantable quality, that the goods were not of merchantable quality.[16] As regards actions in respect of defective goods, it is provided, in terms bearing a marked resemblance to the Alberta Act and the Ontario proposals, that:

> "(1) Subject to subsection (2), a person may commence a liability action at any time within 3 years after the time the person became aware, or ought reasonably to have become aware, of the alleged loss, the defect and the identity of the person who manufactured the action goods.[17]
>
> (2) A liability action must be commenced within 10 years of the supply by the manufacturer of the action goods."[18]

(c) Analysis of the Alberta scheme

6.6 In order that the special features of such schemes may be fully appreciated, the Alberta legislation is analysed in detail in the following paragraphs. The proposals in the Ontario Bill are referred to where there are major variations from the Alberta scheme.

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12 Id cl 16(h).
13 *Trade Practices Act 1974* (Cth) s 82(2): see para 4.39 above.
14 Id Part V Div 2A, added by the *Trade Practices Amendment Act 1978* (Cth) s 14.
15 Id Part VA, added by the *Trade Practices Amendment Act 1992* (Cth) s 4.
16 Id s 74J.
17 The term "action goods" is defined as the goods whose supply and defect is alleged in the action: id s 75AA. In the Commission's view, the saving of words effected by using this definition has not improved the drafting of the provision.
18 Id s 75AO.

(i) Introduction

6.7 The two reports of the Alberta Law Reform Institute begin by identifying two different "strategies for a limitations system". One is the "strategy at law", under which claims are assigned to different categories, different periods of limitation are used for the different categories, and the limitation periods commence at the accrual of the claim. The other is the "strategy in equity", that is, the doctrine of laches, under which a plaintiff who has not prosecuted a claim with due diligence after having notice of the facts giving rise to the claim will be refused a remedy. The two main elements of this doctrine are said to be that the limitation period is measured by judicial discretion and that the limitation period commences at the time of discovery.[19]

6.8 The strategy at law attempts to provide rules which operate with a high degree of certainty, but suffers from the disadvantages that the category into which a claim falls is often uncertain and may be the subject of dispute, that the law becomes excessively technical, and that in a significant minority of cases there is a substantial gap between the time of accrual of a claim and the time of its discovery, so that in many cases a claim expires before the claimant could reasonably discover enough information to conclude that a claim should be made - in other words, the problem of latent damage.

6.9 The alternative strategy, the strategy in equity, has the advantages of fairness to claimants, who will not be prejudiced by the expiry of a limitation period before they have had a reasonable opportunity to discover the existence of the claim, and of being readily comprehensible. As against this, the flexibility it gives is achieved at the cost of greater uncertainty than under the traditional system.

(ii) Major recommendation

6.10 The Alberta Law Reform Institute decided to recommend a new Act which relied to a much greater degree on the strategy in equity. The key provision in the *Limitations Act 1996*, which closely follows the *Model Limitations Act* drafted by the Institute,[20] provides:

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19 Alberta Report (1989) 19-23. See also Alberta Report for Discussion (1986) paras 2.1-2.105.

20 For the major variations between the Act recommended by the Institute and the Act as ultimately enacted, see paras 6.17 (length of ultimate period), 6.20 and 19.10 (claims excluded), 17.53 (disability) below.

" ...if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
   (i) that the injury 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 defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim."[21]

6.11 The Act works on the principle that all claims are subject to both the "discovery period" and the "ultimate period". The defendant is entitled to a limitation defence once one period or the other has expired. In most instances, both periods will commence running at the same time. For example, in a personal injury claim, if the injury is immediately apparent both periods will commence running immediately, and the limitation period will expire after two years when the discovery period has run its course, even though the ultimate period still has eight years to run. If the injury is latent, the discovery period will not commence until the injury becomes discoverable, but the ultimate period will commence at the time the injury is suffered, and the claim will be barred by the running of this period after ten years, even though the discovery period has not run its course or has not even commenced. In the case of an equitable claim, the Act retains the equitable principle under which a court can grant the defendant immunity from liability under the equitable doctrines of laches or acquiescence, even though the limitation period under the Act has not expired,[22] but otherwise the court has no discretion to lengthen or shorten an applicable limitation period.

(iii) The discovery period

6.12 The discovery period begins on the date when the claimant first knew, or in the circumstances ought to have known, that the injury had occurred, that it was attributable to

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21 *Limitations Act 1996* (Alta) s 3(1). For the Ontario equivalent, see Limitations Bill 1992 (Ont) cls 4-5 and 15. The test set out in cl 5 incorporates four elements, rather than three, but there is no substantive difference from Alberta.

22 *Limitations Act 1996* (Alta) s 10. There is no equivalent provision in the Limitations Bill 1992 (Ont). For laches and acquiescence, see paras 13.6-13.8 below.

conduct of the defendant, and that it warrants bringing a proceeding. "Injury" in this context is defined to mean personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of these, the breach of a duty.[23] The discovery period can begin at different points in relation to the same claim against the same defendant, for example in a case involving a car accident where the plaintiff is immediately aware of the jolt of the impact and a broken tail light, but only becomes aware some years later that he has suffered a serious spinal injury.[24] The discovery period may also begin at different times against different defendants: if, in the previous example, the defendant only learned, shortly after bringing his action against the other driver, that the accident had been caused by the failure of brakes negligently installed by a motor mechanic, the discovery period applicable to a claim against the mechanic would begin only at the point when the plaintiff discovered that his injury was in some degree attributable to the conduct of this defendant.[25] The distinguishing characteristic of the Alberta scheme is that, following in particular the example of South Australia,[26] the discovery period applies not just to some but to all claims. This is an attempt to eliminate problems of classification which arise under provisions where extension provisions apply to only a limited number of categories of claim.

6.13 The Alberta legislation defines the point when the claim becomes discoverable in much simpler terms than those used in previous legislation. The Alberta Law Reform Institute suggested that there were five types of knowledge which could be used in formulating a discovery rule -

(1) knowledge of the harm sustained;

(2) knowledge that the harm was attributable in some degree to conduct of another;

(3) knowledge of the identity of the person referred to in (2);

(4) knowledge that the harm (considered alone) was sufficiently serious to have justified bringing an action;

(5) knowledge that an action against the defendant would, as a matter of law, have a reasonable prospect of success.[27]

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23 *Limitations Act 1996* (Alta) s 1(f). The Limitations Bill 1992 (Ont) cl 5(1) refers to "injury, loss or damage".

24 Alberta Report for Discussion (1986) para 2.178.

25 Id para 2.179.

26 Id para 2.183, and see also para 2.141.

27 Id para 2.118.

After conducting an analysis of legislation in other jurisdictions from the standpoint of these criteria,[28] the Institute concluded that the knowledge which should be regarded as relevant for the purposes of formulating the discovery rule should be knowledge of types (1) to (4), but not (5). Only type (4) required a significant value judgment, giving the courts some latitude in determining when the period began in relation to a particular claim. It is significant that the definition in the English legislation of 1980,[29] as analysed in the Alberta Report, incorporates the same four elements, but the drafting of the Alberta provision is a good deal simpler.[30] The test is what the claimant knew or in the circumstances ought to have known, not what a fictional reasonable claimant ought to have discovered.[31] Particular rules define the point at which the period begins against a successor owner of a claim, a principal and a personal representative.[32]

6.14 The length of the discovery period is two years. The Alberta Law Reform Institute thought that it was necessary to select a period which gave the plaintiff enough time to attempt to settle the dispute and, if necessary, to bring the claim.[33] Three years would have been reasonable, but one year would have been too short.[34] In general, a limitation period running from discovery could be shorter than one running from accrual, because there was no need to allow time for the plaintiff to discover the existence of the claim.[35]

(iv) The ultimate period

6.15 The ten year ultimate period begins when the claim arose. In general, the point when the claim arose will be the same as the point of accrual, but in some important instances that rule is modified, so that for the purpose of the running of the ultimate period -

(1) 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

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28 Id paras 2.116-2.125. For example, the *Prescription and Limitation (Scotland) Act 1973* (UK) s 11(3) requires only knowledge of type (1); the Canadian *Uniform Limitations Act 1982* s 13(2) and the *Limitation of Actions Act 1936* (SA) s 48(3) require knowledge of types (1) to (5).

29 *Limitation Act 1980* (UK) s 14: see para 5.36 above.

30 Alberta Report for Discussion (1986) para 2.125.

31 *Limitations Act 1996* (Alta) s 3(1): see Report for Discussion (1986) paras 2.126-2.132.

32 *Limitations Act 1996* (Alta) s 3(2); see also Limitations Bill 1992 (Ont) cl 11.

33 Alberta Report for Discussion (1986) para 2.147.

34 Id paras 2.143-2.144.

35 Id para 2.147. For this reason, it is suggested, it is wrong to use the same period for both the accrual and the discovery rule, as is done for example in the *Limitation Act 1980* (UK) s 11 and the *Limitation Act 1979* (BC) s 6(3), discussed in paras 5.21 and 5.27 above: id paras 2.144-2.146.

omissions arises when the conduct terminates or the last act or omission occurs;

(2) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

(3) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made.[36]

The most important consequence of these provisions is that in a case where the defendant can be sued both in contract and in tort, the ultimate period for both actions commences at the date of the act or omission in question. This represents a deliberate alteration to the present common law position.[37] The rule relating to demand obligations has also been altered: at common law the limitation period would ordinarily start running when a loan is made.[38] The Ontario Bill contains similar provisions.[39]

6.16 These provisions operate only for the purpose of determining when the limitation period commences running. They are not intended to affect the general law as to when a cause of action is complete.[40]

6.17 Under the Alberta legislation the length of the ultimate period is ten years. The duration of the period has been changed several times during the development of the legislation. The Alberta Law Reform Institute originally contemplated a ten-year period,[41] but eventually decided that it would be too short and would operate unfairly against claimants, and so in its final report recommended a 15 year period.[42] The Bill as introduced into Parliament reduced the period to ten years.[43] According to the Institute, within the chosen period the vast majority of claims should have been either abandoned, settled or litigated or

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36 *Limitations Act 1996* (Alta) s 3(3)(a)-(c). Further special rules determine the point when the ultimate period commences in respect of *Fatal Accidents Act* and contribution claims: id s 3(3)(d)-(e).

37 See paras 4.29-4.33 above.

38 See para 4.8 above.

39 Limitations Bill 1992 (Ont) cl 15(2) ("No proceeding shall be commenced in respect of any claim after the thirtieth anniversary of the day on which the act or omission on which the claim is based took place"); cl 15(11)(a) (continuous act or omission); cl 15(11)(b) (series of acts or omissions); cl 15(11)(c) (demand obligation).

40 Alberta Report (1989) 69.

41 Alberta Report for Discussion (1986) paras 2.197-2.198.

42 Alberta Report (1989) 35.

43 A 12 year period was originally proposed, but this was reduced to ten years during caucus review: letter from Professor P J M Lown QC of the Alberta Law Reform Institute, dated 6 December 1996, on file at the Commission.

have become subject to a limitation defence under the discovery rule. In the words of its first report:

> "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. ...Insofar as alleged human transgressions are concerned, the slate should be cleaned at this time for the peace and repose of the collective society and its individual members. 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."[44]

6.18 In line with the recommendations of the Ontario Limitation Act Consultation Group, the Ontario Bill adopts a basic 30-year period, but shortens this to ten years in a number of special cases - cases involving health facilities, health practitioners, and improvements to real property carried out under a contract.[45] A 30-year period was adopted to ensure that justice was done in claims with long latency periods, such as industrial diseases, deficiencies in title to property, pollution and hazardous waste.[46] However, it was seen to be justifiable to create a much shorter period in special cases, if it was clearly in the public interest to do so having regard to changes in the standard of care and the difficulty of obtaining evidence of the earlier standard of care, the effect of potential liability in excess of ten years on obtaining liability insurance and on the cost of maintaining records, and the unlikelihood of meritorious claims arising after the expiry of a ten-year period.[47]

(v) Burden of proof

6.19 A particular feature of the Alberta Act is that it contains express provisions allocating the burden of proof, an issue traditionally left to the courts and one which sometimes results in controversy.[48] The claimant has the burden of proving that a remedial order was sought within the discovery period, and it is then up to the defendant to prove that the ultimate period has expired.[49]

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44 Alberta Report for Discussion (1986) para 2.197.

45 Limitations Bill 1992 (Ont) cl 15(3)-(4) and (6). In the case of an action for conversion against a purchaser who has bought in good faith, the period is two years: id cl 15(10).

46 Ontario Report (1991) 36.

47 Id 37-40.

48 See paras 8.1-8.4 below.

49 *Limitations Act 1996* (Alta) s 3(5). See also Limitations Bill 1992 (Ont) cl 5(2). There is no equivalent provision in cl 15.

(vi) Claims excluded

6.20 The Alberta Law Reform Institute made a basic distinction between three distinct processes in which a court may be engaged in a civil proceeding: remedial orders, declarations and enforcement orders. Remedial orders can be subdivided into those that are performance oriented (such as the remedy of specific performance) and those that are substitutionary (such as damages). In principle, limitation rules should apply only to remedial orders, since a declaration does no more than declare the legal position of the parties, and an enforcement order would not be issued unless the initial claim was brought within the prescribed limitation period. These distinctions have been adopted in the Alberta Act. However, the Act does prescribe a limitation period for one particular kind of enforcement order, namely a judgment to pay money, which is made subject to a ten-year limitation period running from the time when the claim arose,[50] to avoid defendants having to preserve evidence of payments for an unlimited period.[51] Moreover, there are a few remedial claims which are expressly excluded from the legislation.[52] Claims for judicial review of administrative action are excluded because their prime purpose is to test the legality of the exercise of statutory powers, and they are therefore declaratory in effect rather than remedial. They are also akin to appeals: time limits governing appeals from inferior courts would not come within the scope of the *Limitation Act*, and judicial review claims in effect involve appeals from non-judicial, rather than judicial, authorities.[53] Claims for habeas corpus are also excluded, because it would be offensive to impose a limitation period on an important remedy involving civil liberties.[54] Finally, actions by an aboriginal people against the Crown based on a breach of fiduciary duty alleged to be owed by the Crown to those people remain governed by the previous law,[55] in order to avoid a landslide of claims before the Act comes into force.[56] This exclusion was not part of the Alberta Law Reform Institute's original proposals, but was added to the Bill during its passage through Parliament.[57]

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50 *Limitations Act 1996* (Alta) s 11. There is no equivalent provision in the Limitations Bill 1992 (Ont).

51 Alberta Report for Discussion (1986) para 3.25.

52 *Limitations Act 1996* (Alta) s 1j) (definition of "remedial order"). See also Limitations Bill 1992 (Ont) cl 16.

53 Alberta Report for Discussion (1986) paras 3.54-3.57.

54 Id para 3.62.

55 *Limitations Act 1996* (Alta) s 13.

56 Letter from Professor P J M Lown QC of the Alberta Law Reform Institute dated 6 December 1996 on file at the Commission.

57 Ibid.

6.21 Under the Alberta Act, claims seeking a remedial order for possession of real property are subject only to the ultimate period,[58] thus preserving for such actions a limitation period of the kind found in most Limitation Acts.[59] The Ontario Bill excludes entirely proceedings to which the property provisions of the Ontario *Limitations Act* apply.[60] In each jurisdiction, the recommendations anticipate possible reform of the law relating to limitation of actions as respects real property.[61]

(vii) Conclusion

6.22 The clarity and simplicity of the Alberta legislation is impressive. One set of rules applies to all claims. According to the Alberta Law Reform Institute, the new Act is much fairer to claimants because all claims are subject to a discovery rule; but this also benefits defendants, because in many cases claimants have to bring claims sooner than under the present system if they have acquired the necessary knowledge.[62] Adopting a discovery rule plus a comparatively short limitation period may be more advantageous than lengthening the limitation period to do justice to particular claimants. The result of this new approach is an Act nine pages and 17 sections long, instead of the 22 pages and 61 sections of its predecessor.

(d) Discussion

(i) Application of the scheme to particular cases

6.23 It is in tort cases that the application of the Alberta legislative scheme is most easily appreciated. In a tort such as negligence, even though at common law damage is an essential ingredient of the cause of action, the ultimate period will commence running at the date of breach of duty. However, the discovery period will not begin until the claimant knew, or ought to have known, that he has suffered injury (whether personal injury, property damage or economic loss). The plaintiff will not lose his right to sue until two years after the claim became discoverable, or ten years after it arose, whichever happens first. The same principles

58 *Limitations Act 1996* (Alta) s 3(4).
59 *Eg Limitation Act 1935* (WA) s 4, imposing a 12-year period for actions to recover land or rent.
60 Limitations Bill 1992 (Ont) cl 2(a).
61 Alberta Report (1989) 39; Ontario Report (1991) 49.
62 Alberta Report (1989) 35.

apply to other torts. Specific provisions govern wrongful death and contribution claims.[63] Actions for trespass to the person might be regarded as involving "personal injury" for the purposes of determining when the ultimate period starts to run, though it may be debatable whether assault or false imprisonment could be characterised as personal injury, and there might also be problems in regarding trespass to land or goods as "property damage". However, virtually all tort actions would be covered by the rule that in the absence of any other kind of injury as defined, the limitation period begins to run from the date of breach of duty. There might still be some doubt about detinue: it is possible that it might be regarded as a claim based on a demand obligation, though according to the Alberta Law Reform Institute this will usually involve a promise to pay a debt on demand.[64] If so, the ultimate period will only begin to run when there is a default in performance after a demand is made. On such issues, as on a number of others discussed in this section, the Alberta Reports are silent.

6.24 In an action for damages for breach of contract, it would seem that the ultimate period would commence at the date of breach, on the basis that the action is a claim based on a breach of duty. The discovery period will generally begin at that point, because non-performance of an obligation is an injury for the purposes of this rule. However, it is possible for personal injury or property damage to result from a breach of contract, and for such damage not to be immediately apparent. If this is the case, it appears that the discovery period applicable to such damage will not begin to run until the claimant knows or in his circumstances ought to know of it.[65] Other contract remedies are probably governed by a different principle. It would seem that an action for the contract price, for example, is a claim based on a demand obligation, and the ultimate period will not start running until there has been a demand and a subsequent default. Claims for specific performance and rescission are presumably based on a breach of duty, and so the ultimate period would commence running at that point. Quasi-contractual and other restitutionary actions would presumably be classified either as demand obligations or as claims based on a breach of duty, as would actions for account. Likewise, there is no express guidance on how various other claims normally dealt with by limitation legislation, such as actions on a recognisance, actions to enforce arbitral awards, actions to recover penalties or forfeitures, actions to recover sums recoverable under statutes and actions to recover arrears of interest would be dealt with.[66]

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63 *Limitations Act 1996* (Alta) s 3(3)(d) and (e).

64 Alberta Report for Discussion (1986) para 2.204.

65 See the discussion of tort cases in Alberta Report for Discussion (1986) paras 2.178-2.179, referred to at para 6.12 above.

66 For these actions, see paras 12.46-12.60 below.

6.25 In Alberta, actions to recover land are covered by the ultimate period but not the discovery period.[67] The issue of when such an action accrues is normally dealt with by legislative provisions, such as those in the previous Alberta limitation statute,[68] but since the new Act repeals these provisions the question must now be the subject of some uncertainty: presumably the courts will adopt common law rules analogous to the former provisions. In Ontario, actions to recover land are not covered by the proposed legislation[69] and the existing law will continue to apply to all aspects of such claims. No doubt the same applies to actions involving leaseholds. Actions for arrears of rent, however, would presumably be classified as claims based on a demand obligation, and so the ultimate period would commence once there is a demand and a subsequent default. It would appear that the discovery rule would also apply in such a case. Some claims involving mortgages, such as actions by a mortgagee for the recovery of principal money or interest thereon, are presumably demand obligations, and so the ultimate period would run from the point of subsequent default. Actions by the mortgagor to redeem, and actions by the mortgagee for possession or foreclosure, might also be so classified, although the position is by no means clear.[70]

6.26 It is clear that actions for breach of trust are intended to be covered by the Alberta legislation.[71] They are presumably actions based on a breach of duty, and the ultimate period will run from this point in the same way that it does under the existing accrual rule.[72] However, actions to recover trust property may be classified as claims based on a demand obligation, in which case the ultimate period will run from the subsequent default. Actions involving deceased estates, it appears, would also be governed by a variety of different rules. An action by a beneficiary claiming land under a will is likely to be dealt with in the same way as other actions involving land, which were dealt with in the previous paragraph, but at least some actions claiming personal estate might be classed as claims based on a demand obligation. A creditor's claim would certainly be so characterised.

6.27 A number of the propositions advanced in the above paragraphs must of necessity be speculative, because the reports from Alberta and Ontario provide no direct guidance as to

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67 *Limitations Act 1996* (Alta) s 3(4).
68 *Limitation of Actions Act 1980* (Alta) ss 19-30.
69 Limitations Bill 1992 (Ont) s 2(a).
70 See para 15.29 below.
71 See Alberta Report (1989) 36-37.
72 See para 4.10 above.

how the general principles set out in the Alberta Act and the Ontario Bill would be applied to particular claims dealt with by existing *Limitation Act* provisions.[73]

(ii) Particular problems: a comparison with the accrual rule

* *Concurrent liability in contract and tort*

6.28 It has been demonstrated that, under the accrual scheme, even though the limitation period in contract and in tort may be exactly the same, in tort time is likely to start running at the point when damage is suffered, whereas in contract the limitation period will commence earlier, at the time of the breach of contract. In effect, therefore, the limitation period in tort is longer. For this reason, the fact that a defendant can be sued in tort as well as in contract is often advantageous to plaintiffs.[74]

6.29 The Alberta legislation deals with this issue by providing that for the purposes of the ultimate period a claim based on breach of a duty would arise when the conduct, act or omission occurred.[75] Thus the limitation period applicable to a negligence action commences when there is a breach of a duty of care, even though damage is necessary before the cause of action is complete, and in a case where there is overlapping liability the limitation periods for contract and for tort would begin at the same time. This, of course, assumes that the injury suffered is immediately apparent. If it is not, the discovery rule applies in exactly the same way to both claims.

6.30 The Ontario Bill brings about a similar result without the need for a special rule. The ultimate period is defined as running from the day on which the act or omission on which the claim is based took place.[76]

* *Classification problems*

6.31 The Alberta Law Reform Institute claims that one of the virtues of the Alberta scheme is that classification disputes will be reduced to a minimum, and that cases will be resolved

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73 In Chs 12 and 13 below, the Commission discusses how the issues raised in paras 6.23-6.27 will be dealt with under its recommendations.

74 See paras 4.29-4.33 above.

75 *Limitations Act 1996* (Alta) s 3(3)(b).

76 Limitations Bill 1992 (Ont) cl 15(2).

according to factual issues such as whether or not the discovery period has run its course, rather than turning on issues of how a particular case should be classified or when the claim accrued.[77]

6.32 It is certainly true that the opportunities for dispute over such matters as classification and accrual are substantially reduced under the Alberta legislation, but they are not eliminated completely.[78] Classification problems can still arise in the following instances -

(1) in determining whether or not a claim is an equitable claim, so that the court can apply the laches principle and in its discretion give a defendant immunity from liability even though the limitation period has not expired;[79]

(2) in classifying a claim as one based on a breach of duty, or on a demand obligation, or as one resulting from a continuing course of conduct, for the purposes of applying the rules about the ultimate period;[80]

(3) in classifying a claim as one for possession of real property, the effect of which is that only the ultimate period applies, and not the discovery period;[81]

(4) in applying other exclusionary rules which place declaratory and enforcement orders outside the Act;[82]

(5) in applying the rules relating to acknowledgment and part payment, since these rules only apply to a "claim", which is defined as a claim for the recovery, through the realisation of a security interest or otherwise, of an accrued liquidated pecuniary sum, including but not limited to a principal debt, rents, income, a share of estate property, and interest on any of the foregoing.[83]

Under the Ontario Bill, there is an additional problem of classification. It may be necessary to decide whether a claim is one based on the negligent act or omission of a health facility or

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77 Alberta Report for Discussion (1986) para 2.184; Alberta Report (1989) 24-25.
78 As the Alberta Law Reform Institute admits: Alberta Report for Discussion (1986) para 2.167.
79 See para 6.11 above.
80 See para 6.15 above.
81 See para 6.21 above.
82 See para 6.20 above.
83 *Limitations Act 1996* (Alta) s 8(1): see paras 18.35-18.45 below.

health facility employee, or on the malpractice or negligent act or omission of a health practitioner, or involves an improvement to real property carried out under a contract. In each of these cases, the ultimate period is much shorter than in any other case.[84]

(iii) Consequences of adopting proposals based on the Alberta scheme

6.33 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.

(iv) Advantages

6.34 The Alberta alternative would appear to have a number of advantages over the traditional system. The Alberta Report claims that, when compared with the "strategy at law" on which most limitation legislation is based (that is, the accrual-based system), the "strategy in equity" on which its scheme is based has the following advantages -

(1) It is fair, in that it guards against the denial of a claim until the claimant has had a reasonable opportunity to determine that he is probably entitled to a judicial remedy and to request that remedy.

(2) It is comprehensible, in that it can be readily understood by litigants. Litigation will not be technical: the application of the rules will depend on judicial determination of questions of fact which are relevant to the litigants.[85]

6.35 Other advantages which could be claimed for this system are that -

(3) It allows the adoption of one standard period (plus a long stop provision).

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84 See para 6.18 above.

85 Alberta Report (1989) 23.

(4) The standard period can be shorter than under the traditional system.[86]

(5) There is less need to discriminate between different causes of action than in an accrual-based system.

(6) Consequently, there are fewer classification problems.[87]

(7) Cases will not turn on issues such as classification or the application of the relevant accrual rule.

6.36 Given recent developments in negligence cases involving latent damage to buildings and reliance on professional advice,[88] it can be seen that the Alberta alternative is far from totally revolutionary. In such cases the courts have come to the conclusion that time runs from the point at which the loss becomes apparent, rather than the point at which the negligence occurs or when damage is suffered. Furthermore, there is a provision in the Victorian *Limitation of Actions Act* which operates in the same way: where the personal injury consists of a disease or disorder, the cause of action is deemed to have accrued on the date on which the person first knows that he has suffered those injuries and that they were caused by the act or omission of some person, and the limitation period runs from this date.[89]

6.37 The most striking feature of the Alberta model is its simplicity. This applies not only to the reduction in the number of limitation periods, but also to the way in which the provisions are drafted. It is particularly true of the definition of the discovery period, which is defined as the date on which the claimant first knew that the injury has occurred, that it was to some degree attributable to the conduct of the defendant, and that it was sufficiently serious to have warranted bringing a proceeding. There is a clear contrast with the complex drafting of the equivalent provisions in the English *Limitation Act 1980*,[90] even though the kinds of knowledge sought to be included are exactly the same.[91]

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86 "[T]he length of a limitation period under the strategy at law was designed to give a claimant sufficient time to discover, to attempt to settle, and to assert his claim. ...We feel that a limitation period running from discovery should usually be shorter than one running from accrual for, although enough time must be given to attempt to settle the dispute and, if necessary, to bring the claim, no time need be allowed for discovery": Alberta Report for Discussion (1986) para 2.147.

87 See paras 4.34-4.35 above.

88 See paras 4.17-4.28 above.

89 *Limitation of Actions Act 1958* (Vic) s 5(lA). This is in addition to the discretion given to the court in personal injury cases to extend the basic six-year limitation period for such period as it determines if it decides that it is just and reasonable to do so: id s 23A. See para 5.42 above.

90 See para 5.36 above.

91 See para 6.13 above.

(v) Disadvantages

6.38 There are a number of potential problems with a legislative provision based on the Alberta *Limitations Act*.

* *The long stop period may rule out deserving claims*

6.39 Under the Alberta Act, though the limitation period does not commence running until the claim is discoverable, the action will become barred ten years after the claim arose, even if the damage has not become discoverable during that time.[92] The Ontario Bill has a 30 year period, but this is reduced to 10 years in certain instances, including building defects and a number of medical cases.[93]

6.40 The cutting-off of a right of action after ten, or even after 30, years may not be a satisfactory solution in many cases involving latent injury. Diseases such as asbestosis or mesothelioma may have a latency period of more than 30 years,[94] and there are latent property damage cases in which more than ten years elapses before the damage becomes manifest.[95] There may be other cases in which the injury could not be properly described as latent, but other factors explain the delay in the bringing of the claim.[96] Much depends on the length of the long stop period. Virtually any period that may be chosen could be too short for some plaintiffs, and even a ten year period might be regarded as too long by some defendants.

6.41 In spite of the wish of the Alberta Law Reform Institute to avoid different rules for different classes of disputes, some categorisation process may be inevitable if a limitation scheme is to deal fairly with issues such as these. There is some recognition of this in Ontario, where it is proposed that the long stop period should vary in length according to the nature of

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92 *Limitations Act 1996* (Alta) s 3(1)(b).

93 Limitations Bill 1992 (Ont) cl 15.

94 See Part I Report (1982) paras 1.15-1.20.

95 See *Dennis v Charnwood Borough Council* [1983] QB 409 (21 years); *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed [1996] 1 NZLR 513 (17 years); *Bryan v Maloney* (1995) 182 CLR 609 (18 years). See New Zealand Report (1988) 26, which shows that there is considerable variation in the length of time it takes for damage due to negligent construction of a building to become manifest.

96 See the discretion-based provisions discussed at paras 5.21-5.22 and 5.40-5.49 above. See also discussion of the problem of child sexual abuse in Ch 9 below, especially at para 9.8; and the discussion of the Commission's recommendations at para 7.36 below.

the case.[97] The justification for an ultimate period, it is suggested, is that it is unfair for the entire class of defendants to remain subject to a tiny minority of claims. In the Commission's view, these arguments may have some force in cases involving property damage and economic loss, but they are much less valid in personal injury cases, where the justification for ruling out a claim for serious injury before the plaintiff has had a chance to discover its existence would need to be considerable.

* *The long stop period may start running before the cause of action is complete*

6.42 The Alberta and Ontario schemes both provide that in the case of actions based on a breach of duty the ultimate period commences running at the date of the breach of duty, even though damage is not suffered until later.[98] It is made clear that this is not to affect the general law about when such a cause of action is complete.[99] However, this means that in negligence actions, for example, the ultimate period commences running before the cause of action is complete, which might be regarded as anomalous. Under the accrual rule, the right of action accrues when all necessary elements of the cause of action are present.[100]

* *Identifying the point of discoverability may not be simple*

6.43 The discovery provision will work satisfactorily only if it is possible without difficulty to identify when the claim becomes discoverable on the facts of each individual case. If it is necessary to go to court to determine the point at which the limitation period started running, the legislation will not have achieved its object. The Alberta Law Reform Institute suggests that legal advisers will be able to examine the facts and inform their clients whether or not the discovery period has expired.[101] However, it is not clear whether any more certainty is achieved than under Limitation Acts of the traditional type.

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97 This is not intended to suggest that the Commission approves of the details of the Ontario provisions, which make a major distinction between cases involving buildings, health facilities and health practitioners and all other cases by providing a 10 year period in the first three instances and a 30 year period in all other cases. A difference of 20 years seems to be much too great.

98 See para 6.15 above.

99 See para 6.16 above.

100 See para 4.1 above.

101 Alberta Report for Discussion (1986) para 2.180.

* *The discoverability principle is inappropriate in certain cases*

6.44 There are some claims which are not appropriately dealt with by a discoverability provision of the kind now adopted in Alberta and proposed in Ontario. It is clearly recognised that this is so in relation to claims involving title to property.[102] The Alberta Act deals with such claims by providing that the two-year discovery period does not apply where a claimant seeks a remedial order for possession of real property, with the result that the only limitation period applying to such claims is the ten year long stop period.[103] No attempt is made to reproduce the many provisions about accrual and so forth found in the real property sections in most Limitation Acts, including that of Western Australia.[104] Claims relating to real property are entirely excluded from the provisions of the Ontario Bill.[105]

* *The scheme gives the court insufficient discretion*

6.45 The Alberta scheme deliberately places severe limits on the discretion given to a court in limitation matters. Apart from the equity-based discretion to grant immunity from liability to a defendant under the doctrines of laches and acquiescence notwithstanding that the limitation period has not expired, a court has no discretion either to lengthen or to shorten the applicable limitation period.[106] This may be too rigid an approach. Failure to discover the existence of the claim is not the only factor which may delay the issue of a writ. The list of factors taken into account by the court in a discretion based system include not only the state of the plaintiff's knowledge but also the length of and reasons for the delay, the extent to which the defendant will be prejudiced, the steps taken by the defendant to make information available to the plaintiff, and the steps taken by the plaintiff once he acquires the necessary knowledge.[107] To take just one example, actions involving child sexual abuse are often not brought for many years for a variety of reasons, but lack of knowledge of the injury may not be among them.[108]

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102 The Orr Committee in 1977 recognised that the date of knowledge principle was not suitable for such claims: Orr Committee Report (1977) para 2.4.

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

104 *Limitation Act 1935* ss 5-14,20-24; for modern equivalents see eg *Limitation Act 1969* (NSW) ss 28-39. These provisions are included in the previous Alberta Act: *Limitation of Actions Act 1980* (Alta) ss 19-30.

105 Limitations Bill 1992 (Ont) cl 2(a).

106 See Alberta Report for Discussion (1986) paras 2.150-2.155.

107 See paras 5.21 and 5.43 above.

108 See para 9.8 below.

* *Adoption of the scheme would not promote uniformity*

6.46 The fact that the Alberta scheme is novel in concept and approach should not be any bar to its introduction, if it represents an improvement on limitations legislation of the traditional pattern. However, given that it must be desirable that limitation laws in Australia be as uniform as possible, adopting this new approach in Western Australia would not assist the cause of uniformity. At present, despite differences between the jurisdictions, and notwithstanding the old-fashioned nature of the law in Western Australia, there are fundamental principles common to all Australian jurisdictions, in particular the general notion that limitation periods run from the point of accrual. This is particularly important in conflict of laws situations and cases in federal courts. The High Court can transfer to State courts cases brought under its original jurisdiction;[109] federal courts may need to pick up and apply State limitation legislation;[110] under the cross-vesting legislation one court can transfer a case to another where it would be more appropriately dealt with;[111] and recent legislative changes under which limitation rules are to be regarded as substantive will have the effect that one State may be required to apply the limitation law of another.[112] In all these instances, the fact that the *Limitation Act* of one State was fundamentally different from those of the other jurisdictions would make these issues more difficult.

2. ACT OR OMISSION

(a) Introduction

6.47 A limitations scheme based on the principle that the limitation period should run from the date of the defendant's act or omission, rather than from the date of accrual of the cause of

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109 *Judiciary Act 1903* (Cth) s 44. For the considerations governing remission in such cases see *Pozniak v Smith* (1982) 151 CLR 38; limitation considerations were relevant to the question of remission in *Fielding v Doran* (1984) 59 ALJR 511.

110 State laws, including limitation laws, can be picked up under *Judicary Act 1903* (Cth) s 79, but only where that law is applicable in the federal proceedings with its meaning unchanged: see eg *Pedersen v Young* (1964) 110 CLR 162; *John Robertson & Co Ltd (in liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; *Bargen v State Government Insurance Office (Qld)* (1982) 154 CLR 318; *Commonwealth v Dixon* (1988) 13 NSWLR 601; *Timeny v British Airways plc* (1991) 56 SASR 287; *Commonwealth v Dinnison* (1995) 129 ALR 239.

111 See eg *Jurisdiction of Courts (Cross Vesting) Act 1987* (WA) s 11(1)(c) and similar provisions in all other Australian jurisdictions, which provide that it is for the court to which the case is transferred to decide which laws of procedure and evidence, including limitation rules, apply: see eg *Reidy v Trustee of the Christian Brothers* (1995) 12 WAR 583.

112 See *Choice of Law (Limitation Periods) Act 1994* (WA) and similar legislation in other Australian jurisdictions (listed in para 7.66 n 161 below). For a case in which the Supreme Court of the Australian Capital Territory applied the *Limitation of Actions Act 1974* (Qld), see *Rose v Chang-Sup Kwow* (1994) 121 ACTR 1.

action as it does under the present law, was first suggested in the report of the New Zealand Law Commission in 1988. Since then, there have been proposals for similar schemes in New Brunswick and Ontario. No jurisdiction has yet adopted such a scheme, although in some jurisdictions the long stop period is calculated from the time of the defendant's act or omission.[113]

(b) The New Zealand scheme

6.48 New Zealand Law Commission recommended a new limitations regime of general application with three central features -

(1) a standard three year limitation period commencing on the date of the act or omission which is the subject of the claim;

(2) this period to be extended in certain circumstances, in particular where the claimant shows absence of knowledge of relevant matters of fact;

(3) a long stop limitation period of 15 years measured from the date of the act or omission.[114]

It also proposed that the period should cease to run not, as is traditionally the case, when the writ is issued but only when it is served on the defendant.[115]

(i) Basic limitation period

6.49 The New Zealand Report advocated that there should be a single limitation period of three years, and that it should run not from when the cause of action accrues, but from the date of the act or omission in question. In contract disputes, this will usually be the date of breach, and so the new rule will point to the same time as the old rule about accrual. In other cases, such as negligence, where the damage frequently only occurs some time after the breach of duty, the act or omission may be an earlier date than accrual.

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113 See paras 5.62-5.66 above.
114 New Zealand Report (1988) para 128.
115 See para 20.5 below.

6.50 Reference to the date of the act or omission focuses on the conduct of the defendant of which the claimant complains. According to the New Zealand Commission, this makes the point at which the limitation period would begin to run much clearer than under the present accrual rule, under which knowing when the period commenced depends on knowing many complex rules developed by the common law for different causes of action. In the words of the Report:

> "169. In most cases the date of the 'act or omission' will be clear. It refers to that conduct of the defendant of which the claimant complains. In relation to a contract, it will usually be the date of breach and thus correspond with the present rule about accrual. In other cases, the act or omission may be an earlier date than accrual - in negligence, for example, where a delay in the occurrence of damage would relate to our proposed extension provisions rather than the date of accrual. In some categories of cases, such as those where questions of status are involved, there may be no relevant act or omission and no limitation point will arise.
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> 170. Some difficulties will continue to arise with continuing acts or omissions. In most cases a series of acts (copyright infringements, for example) will be severable with a separate limitation period applying to each. In some limited situations the courts may regard an omission as being of a continuing nature (as in *Midland Bank Trust Co Ltd v Heft, Stubbs & Kemp* [1979] Ch 384, which related to solicitors' failure to register documents on behalf of a client), although in similar situations the omission is more often treated as crystallising at the date when some action should have been taken (or a reasonable time after that date) and that is more consistent with our approach to limitations policy generally.
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> 171. As may be seen most clearly in the draft new statute we recommend...., we have provided special provisions dealing with claims based on demands, conversion, contribution, indemnity and certain intellectual property claims. We considered whether special provisions were needed for cases relating to testamentary claims but concluded that they were not. In some cases the act or omission will be the granting of probate or letters of administration, and in others the claims will be made under statutes which...will retain their own limitation provisions."[116]

6.51 The recommendation that the standard limitation period should be three years, rather than the traditional six, must be seen in the context of the fact that the New Zealand Commission proposes that the limitation period should be capable of extension in circumstances where the plaintiff does not have the necessary knowledge of the claim. Apart from suggesting that this "discovery extension" permits a shorter standard period, the New Zealand Commission argues that six years is too long, as evidenced by the general trend

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116 New Zealand Report (1988) paras 169-171.

towards the adoption of a shorter period, usually three years, for personal injury claims, and a number of other developments in the United Kingdom, Australia, Canada and elsewhere.[117]

(ii) Extension

6.52 The New Zealand Law Commission recommends that the limitation period should be capable of extension in circumstances where the plaintiff does not have the necessary knowledge of the claim. Under this recommendation, there would be added to the standard three year period a "compensatory period", 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 -

(1) the occurrence of the act or omission;
(2) the identity of the person responsible;
(3) that the act or omission had caused harm;
(4) that the harm is significant.[118]

In effect, the running of the limitation period is postponed until the damage becomes discoverable. The draft provision proposed by the New Zealand Commission[119] is clearly based on the discovery period recommended by the Alberta Law Reform Institute.[120]

(iii) Long stop

6.53 The third element in the New Zealand proposals is a long stop provision under which (subject to some exceptional situations involving infancy, deliberate concealment and conversion or fraud by trustees) no claim could be brought more than 15 years after the date of the act or omission in question.[121]

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117 The New Zealand Commission points to the adoption of two year limitation periods in many Canadian provinces (see paras 4.41-4.43 above), three-year limitation periods in England in defamation (see para 5.16 n 36 above) and consumer protection cases (in the latter instance, running from discovery of the damage: see para 5.31 above) and in the *Trade Practices Act 1974* (Cth) (see para 4.34 above), four year periods in the UNCITRAL Convention on the Limitation Periods in the International Sale of Goods (1974) and the People's Republic of China Foreign Economic Contract Law (1985), and a five year period in Scotland: New Zealand Report (1988) paras 143-153.

118 New Zealand Report (1988) para 180.

119 Draft Limitation Defences Act (NZ) s 6.

120 See para 5.39 above.

121 This is a general provision, but would not apply to personal injury because since 1972 actions for damages for personal injury have been barred by the Accident Compensation legislation: see now

(c) Other proposals

6.54 Since the New Zealand report, proposals for a limitations scheme under which the standard period would run from the date of the defendant's act or omission have been made in two Canadian jurisdictions.

6.55 In New Brunswick, the Law Reform Branch of the Office of the Attorney General issued a Discussion Paper, containing a draft Limitations Bill plus commentary, in 1988.[122] It was intended that the Bill be introduced into Parliament for consultation purposes, but this never eventuated.[123] The Bill proposed a standard four year limitation period running from the date of the act or omission giving rise to the cause of action.[124] This would apply even though the plaintiff did not know of the act or omission at the time it occurred, or did not know that it gave rise to a cause of action.[125] Where the plaintiff did not know and could not reasonably have been expected to know all the facts on which to base an action before the limitation period expired, the court would have power to revive the limitation period and extend it for up to one year from the date on which he knew or ought to have known all of those facts.[126] However, on the expiration of a period of 20 years running from the date of the act or omission, the plaintiffs cause of action would be extinguished whether or not he had acquired the necessary knowledge.[127]

6.56 The report of the Ontario Limitations Act Consultation Group in 1991 also proposes that as a general principle the limitation period should begin to run at the time of the act or omission on which the claim is based. It recommends a scheme basically similar to that put forward in Alberta, under which every claim would be subject to a primary two-year limitation period and a long stop period. However, it suggests that the primary limitation period, like the long stop period, should commence at the time of the act or omission on

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Accident Rehabilitation and Compensation Insurance Act 1992 (NZ) s 14(1), discussed by S Todd and J Black "Accident Compensation and the Barring of Actions for Damages" (1993) 1 *Tort L Rev* 197. In adopting the 15 year period the New Zealand Commission was particularly influenced by the adoption of 15 years as the appropriate long stop period in the Scarman Committee Report (1984): New Zealand Report (1988) paras 295-302.

122 New Brunswick Discussion Paper (1988).

123 Letter from Mr T Rattenbury, Office of the Attorney General, New Brunswick, 30 October 1995, on file at the Commission.

124 Draft Limitations Act (NB) s 3.

125 Id s 5.

126 Id s 6.

127 Id s 9.

which the claims is based, though if the damage were not discoverable at this point the primary period would not begin to run until the damage became discoverable. It comments:

> "The adoption of the time of the act or omission as the starting point for calculation of all limitation periods should lead to greater certainty for everyone. It is already the relevant starting point for breach of contract and many tort claims. It will provide a common standard for all other claims. Where the claim remains undiscovered beyond the primary limitation period, it provides a necessary fixed point for calculation of the ultimate limitation period. It will also encourage potential plaintiffs to be vigilant, and not to sit on their rights, waiting for their claim to mature. It will emphasize that the discovery principle...exists for exceptional cases."[128]

6.57 This particular recommendation of the Ontario Group was not adopted in the Bill introduced into the Ontario Parliament in 1992. The Bill aligned the proposed limitation scheme more closely with the Alberta model by making it clear that the primary limitation period would commence only when the damage became discoverable.[129]

(d) Discussion

(i) Comparison with accrual

6.58 As the New Zealand and Ontario Reports both point out, in many cases the date of the act or omission will coincide with the date of accrual under existing rules - for example, in the case of an action for breach of contract. 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.[130] 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[131] but also personal injury cases in which time now runs from the suffering of damage, whether discoverable or not.[132] The same may happen in actions for other torts

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128 Ontario Report (1991) 22.

129 (Ont) Limitations Bill 1992 c1 4: see para 6.4 above.

130 See eg *Davie v New Merton Board Mills Ltd* [1959] AC 604 (plaintiff injured when using defective chisel manufactured seven years earlier).

131 See paras 4.19-4.28 above.

132 See para 4.16 above.

requiring proof of damage, such as nuisance and most torts involving intentional economic loss.

(ii) Consequences of adopting act or omission as starting point

6.59 If the basic limitation period is to run from the date of the act or omission, it becomes necessary to have extension provisions under which the limitation period for any cause of action can be extended if the damage was not discoverable when the cause of action accrued. This is a cardinal feature of the recommendations in all three jurisdictions.[133] Under such a scheme it may also be necessary to have a long stop provision, at least in cases other than those involving personal injury: the arguments for and against such a provision are in essence the same as under the accrual scheme.[134] The New Zealand report recommends a 15 year long stop period,[135] the New Brunswick Discussion Paper a 20 year period,[136] and the Ontario Report a 30 year period reduced to ten years in certain cases.[137] The New Zealand proposals do not apply to personal injury claims, because in New Zealand such claims are now dealt with under the accident compensation scheme.[138]

(iii) Advantages

6.60 The act or omission alternative has a number of attractions -

(1) It is simple and easily understood, especially by lay persons to whom the notion of accrual would be well-nigh incomprehensible.

(2) It gives defendants a degree of certainty, because time runs from a certain point, such as the completion of a building - but this has to be qualified to the extent that the limitation scheme permits the extension of the limitation period in cases where the damage is not discoverable at the time the act or omission occurs. [139]

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133 New Zealand Report (1988) para 180; New Brunswick Discussion Paper (1988) 5-6; Ontario Report (1991) 23.

134 See paras 5.67-5.72 above

135 New Zealand Report (1988) para 309.

136 New Brunswick Discussion Paper (1988) 8-9.

137 Ontario Report (1991) 34-40.

138 See para 6.53 n 121 above.

139 Furthermore, the date of the act or omission is not always certain: see para 6.62 below.

(3) It deals satisfactorily with the contract/tort problem, by ensuring that in each case the limitation period runs from the date of the breach of duty, subject of course to any possible extension on the ground that the damage was not discoverable until later.

(iv) Disadvantages

6.61 The act or omission approach is open to a number of serious objections.

* *The rules would not always be certain*

6.62 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. The New Zealand Report gives some guidance in a few particular cases. It may well be that in many cases the point at which the act or omission occurs will be the same as the point of accrual. However, adopting the defendant's act or omission as the point from which the limitation period runs means exchanging the certainty of the common law rules about accrual for the uncertainty of the new concept, and this uncertainty would presumably remain until the courts developed new rules, analogous to those dealing with accrual, about what constituted the act or omission in particular cases.

* *There would be an imbalance between the standard period and the extension provisions*

6.63 There would be far too many cases in which it was necessary to rely on the extension provisions to give the plaintiff a right to sue. In a negligence case, for example, the act or omission may predate accrual by several years.[140] In many such cases, the primary limitation period would have expired, and the plaintiff will only have a right of action by virtue of the extension provisions under which the running of the period is delayed to take account of the fact that the damage is not initially apparent.

6.64 This imbalance between the standard period and the extension provisions would be particularly apparent in the hardest cases - those involving latent personal injury or disease, such as asbestosis or AIDS, and those involving economic loss arising out of latent building

140 See para 6.58 n 130 above.

defects. Personal injury cases are not a problem in New Zealand, because the right to sue in tort has been abolished and replaced by a right to claim compensation under a statutory scheme,[141] but the act / omission alternative is not suitable for adoption in a State such as Western Australia, where tort claims are still made for personal injury, unless it deals satisfactorily with such cases. As for latent property damage, the New Zealand courts, like those in Australia, have had to deal with cases where damage only becomes manifest many years after the negligence took place.[142] In most such cases plaintiffs would have to rely on the extension provision, because the standard period would have expired long beforehand.[143]

* *The limitation period would start running before the cause of action is complete*

6.65 It might be thought anomalous that the limitation period should start running before the cause of action is complete. Presumably no action could be commenced before the latter point. If that is correct, the limitation period might run its course before it was possible for the plaintiff to begin proceedings. Even though in such a case the extension provisions might well apply, the result does not seem desirable.

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141 See para 6.53 n 121 above.

142 See *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed by the Privy Council [1996] 1 NZLR 513, dealt with in para 4.23 above, where the fact that a house had been built defectively did not become apparent until 17 years after the date of construction.

143 In such cases the *Building Act 1991* (NZ) s 91 now imposes a ten-year limitation period running from the date of completion. This provision did not apply in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 because the proceedings were commenced before the legislation came into effect.

PART III: A NEW LIMITATION ACT - GENERAL PRINCIPLES

Chapter 7

THE COMMISSION'S MAJOR RECOMMENDATIONS

1. THE APPROACH OF THE COMMISSION

(a) A uniform approach

7.1 In the Commission's view, the *Limitation Act 1935* should be repealed and replaced by an entirely new Act. The existing Act is too firmly rooted in its 19th century English origins for it to be possible to eliminate its defects and convert it into a satisfactory piece of modern legislation merely by amending it.

7.2 The first aim of the new Act should be the adoption of a uniform approach to all causes of action, in the interests of simplicity and fairness. Uniform principles are needed to get rid of the complexities of the present Act and deal appropriately with new problems as they arise.

7.3 The present Act is extremely complex, because it attempts to provide a separate limitation rule for each different cause of action. There is one set of rules for contract, another for tort, another for property, another for trusts, and so on. The various limitation periods vary considerably in length, and there is the added complication that each limitation period runs from the point at which the cause of action accrues, which may have a considerable effect on the time available to the plaintiff. For example, although the limitation period for actions for breach of contract and for negligence is six years in each case, the limitation period in negligence runs from the point when damage is suffered whereas in contract it runs from the date of breach: in a case in which the plaintiff has a cause of action both in contract and in negligence, the contract period is likely to expire first.[1] Another dimension of special rules is created in cases where, for the same cause of action, different limitation rules apply to different defendants. This is the case where the plaintiff in a negligence action wishes to sue the Crown or a public authority, rather than an individual or a corporation, because the Crown

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1 See para 4.29 above.

and public authorities enjoy the benefit of special short limitation periods.[2] If there were a uniform rule that applied to all causes of action, these difficulties would disappear.

7.4 Another disadvantage of the present Act is that many claims which the law now recognises cannot be satisfactorily dealt with within the framework of an Act consisting entirely of fixed periods running from accrual. This can be clearly demonstrated by examining the various problems with which the law of limitation has had to contend over the past forty or fifty years. As the Commission has already noted,[3] these include diseases such as silicosis and asbestosis, which first made their appearance in the law reports in the late 1950s; the liability of the vendor, builder or local authority in respect of defective buildings, which was first recognised in the early 1970s and which immediately raised limitation problems; AIDS, which has been the subject of claims for compensation from the mid-1980s onwards; child sexual abuse, civil actions in respect of which began to be brought in the late 1980s; problems such as the removal of Aboriginal children from their natural parents and Aboriginal deaths in custody which have surfaced during the time that this report was being written; and potential future problems, such as those arising out of fear of contracting fatal diseases. In Western Australia, no attempt has been made to tackle these problems in a general way. In so far as any attempt has been made to deal with them, they have been treated as separate issues. Thus, legislation was enacted to cover asbestos-related diseases,[4] but this legislation did not deal more generally with other latent diseases and injuries. As a result of the failure to implement more fundamental reforms, the *Limitation Act* now in many cases denies justice to plaintiffs in the other categories of case referred to. The preferred solution is a uniform approach to reform, under which general principles are adopted which are capable of satisfactorily resolving all the difficulties that may arise.

(b) The policy basis of limitation rules

7.5 Limitation rules must achieve a balance of being fair to both plaintiff and defendant. In attempting to determine how to achieve that balance in the various different kinds of case, the Commission has obtained considerable assistance from the analysis of La Forest J of the Supreme Court of Canada in *KM v HM*,[5] a leading decision on the application of general

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2 See paras 10.4, 23.4 and 23.9 below.
3 See paras 1.13-1.16, 5.2-5.4 above.
4 *Acts Amendment (Asbestos Related Diseases) Act 1983*: see paras 5.5-5.8 above.
5 (1992) 96 DLR (4th) 289 at 301-305. For further discussion of this case, see paras 9.17-9.21 below.

principles of limitation to cases involving child sexual abuse. In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the Ontario *Limitations Act*, the judge examined the underlying rationales of limitation law, first from the perspective of fairness to the potential defendant and then from the point of view of fairness to the plaintiff. As regards the defendant, he distinguished three rationales -

(1) The certainty rationale. Statutes of limitation have long been said to be statutes of repose. There comes a time when a potential defendant should be secure in his reasonable expectation that he will not be held to account for incidents which occurred many years ago.

(2) The evidence rationale. It is not desirable to litigate claims which are based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim.

(3) The diligence rationale. Plaintiffs should act diligently and not sleep on their rights.[6]

However, in order to adopt a principled approach it was also important to be fair to the potential plaintiff. In this respect, it was essential for the plaintiff to have a reasonable opportunity of discovering the existence of the claim before the limitation period ran against him. Justice would not be done if a claim was statute-barred before the claimant became aware of its existence.[7]

7.6 As the Commission has pointed out earlier in this report,[8] the issue should also be examined from the community's point of view. It is not in the community's interests that disputes should be capable of dragging on interminably, or for litigation to be delayed for many years, with the result that the recollections of witnesses grow dim, documents are lost or destroyed, and the chances of justice being done recede. Plaintiffs should be encouraged to act quickly, but at the same time they must be afforded a reasonable opportunity of discovering

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6 Id at 301-303.
7 Id at 304-305.
8 See para 1.4 above.

the existence of the claim, and considering possible alternative means of resolution, before finally resorting to civil action.

7.7 La Forest J proceeded to examine the policy perspectives in the light of the circumstances of the particular case before the court. He concluded that cases involving child sexual abuse had a number of features which affected the weight of the various policy elements and made a difference to the balance between the interests of the parties. The certainty rationale might serve the public interest in granting repose to certain classes of defendants, for example professional persons, but there was no corresponding public benefit in protecting the perpetrators of incest. Considerations of staleness of the evidence did not loom large in such cases, since the typical case involved evidence solely from the parties themselves. Though it was generally important that plaintiffs were diligent in exercising their rights, this was different in child sexual abuse cases, due to a combination of the time needed for the plaintiff to recognise the damage done to their psyche and the social taboos surrounding sexual abuse which had prevented victims from seeking compensation until very recently.[9] Turning to the position of the plaintiff, it was now generally accepted that the injustice which statute-barred a claim before the plaintiff was aware of its existence took precedence over any difficulty encountered in the investigation of facts many years after the occurrence of the conduct in question, and this applied just as strongly to child sexual abuse cases.[10]

7.8 The Commission concludes that a limitations system needs to hold the balance fairly between the competing interests of the plaintiff and the defendant, and should also take proper account of the interests of society generally. It must be capable of dealing appropriately with a wide variety of differing circumstances, and be able to recognise the special cases which merit different treatment from the norm, without making it necessary to have different rules for each different situation.

7.9 In the next four sections the Commission investigates how well the different bases for limitation rules discussed in Chapters 4 to 6 measure up against these criteria.

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9 (1992) 96 DLR (4th) 289 at 301-304.

10 Id at 304.

(c) Retaining the existing accrual rule

7.10 The Commission has considered whether the policy objectives identified above can be achieved within the existing system under which the limitation period runs from the point when the cause of action accrues. It might be possible to have a uniform limitation period running from accrual, supported by appropriate extension provisions of one of the kinds identified in Chapter 5,[11] and perhaps also a long stop provision to limit the ambit of permissible extensions. Though no jurisdiction with an accrual system has yet come near to reducing its limitation rules to a single period,[12] there are good arguments for eliminating the longer limitation periods for deeds, judgments and so on and applying the same period to at any rate the great majority of claims.[13] Furthermore, there would be advantages in retaining the accrual system: the rules about when a cause of action accrues are set out in the case law and are well-known, if somewhat complex; the point when the cause of action is complete, and the point when the limitation period commences running, are one and the same; and since all other Australian jurisdictions have Limitation Acts under which the limitation period runs from the point where the cause of action accrues (subject to minor exceptions), the retention of such a system in Western Australia would maintain a degree of uniformity.[14]

7.11 However, reforms which retain the accrual rule in its present form would not satisfactorily resolve all the problems. Even if it were possible to reduce all the existing limitation periods to a single period, the uniformity so brought about may well be more apparent than real, because the accrual rules are not uniform.[15] As regards extension provisions, the expedients adopted in other jurisdictions have not been totally satisfactory. Where such provisions depend on the acquisition of knowledge by the plaintiff, there have been problems in defining what is meant by knowledge.[16] This matter apart, extension provisions have often been limited to tackling particular problems produced by the accrual rules.[17] Thus, for example, most jurisdictions have introduced extension provisions of some kind to deal with the problems in personal injury cases produced by *Cartledge v E Jopling &*

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11 See paras 5.9-5.58 above.
12 See paras 4.48-4.50 above.
13 See eg paras 12.8-12.12 below (deeds), 12.38-12.43 below (actions on a judgment).
14 See para 4.51 above.
15 As pointed out in para 4.29 above, actions in contract and in tort accrue at different starting points, and so even if the same limitation period applied to both, the limitation period in tort is likely to expire later than that in contract in many cases.
16 See paras 5.33-5.39 above.
17 See paras 5.1-5.4 above.

Sons Ltd,[18] but because of the developments in the case law regarding the accrual of other negligence claims, either different legislation has been introduced from that applying to personal injury claims, or no legislation has been introduced at all. A further problem is that limitation reforms which build on the common law accrual rules are sometimes affected by the judicial development of those rules and so no longer operate in quite the way intended. This has been the case with some provisions extending the ordinary limitation period in property damage cases.[19] Whereas legislative reforms are specific to the jurisdiction concerned, judicial developments can affect a number of jurisdictions. The High Court makes law for all Australian States and Territories, and Australian jurisdictions can also be affected by case law developments in other countries such as England, Canada and New Zealand.

(d) Amending the accrual rule

7.12 The Commission has considered whether it would be possible to retain the accrual rule in an amended form which ironed out the differences between different causes of action and kinds of damage. One possible reform might be to attempt to bring all negligence actions into line with *Cartledge v E Jopling & Sons Ltd*[20] by providing that in all cases the limitation period is to run from the point when damage is suffered, irrespective of whether it is discoverable or not - in effect, a return to the approach of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)*.[21] However, the disadvantage of this approach is that the limitation period can expire before the claim becomes discoverable, so effectively depriving plaintiffs of their rights to sue. In recognition of this problem, both common and statute law now appears to be moving away from this approach and towards the adoption of a rule that the cause of action accrues when it becomes discoverable (at least, in cases other than those involving personal injury).[22] A rule based on *Cartledge* and *Pirelli* would not be workable unless it were supported by wide-ranging extension provisions. Moreover, the suggested rule would not cure the problem that in cases where contract and tort liability overlap the limitation period applicable to the tort claim is in effect longer because it accrues at a later point.[23]

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18 [1963] AC 758: see paras 1.13 and 5.2 above.
19 See paras 5.51-5.58 above.
20 [1963] AC 758.
21 [1983] 2 AC 1: see para 4.18 above.
22 See paras 4.19-4.28,5.20-5.32 above.
23 See paras 4.29-4.33 above.

7.13 Another potential reform of the accrual system might be to adopt a rule that in all actions for negligence, or in all torts which are actionable only on proof of damage, the cause of action should accrue only when the damage becomes discoverable. This would be broadly in line with recent common law developments in Australia, and would be consistent with the path the common law is taking in New Zealand, Canada and the United States.[24] It would also be consistent with the approach to personal injury cases now adopted in jurisdictions such as England, where the limitation period runs either from the time the cause of action accrued, or from the time of reasonable discoverability if this is later,[25] and Western Australia has already adopted this approach in the restricted field of asbestos - related diseases.[26]

7.14 However, adopting a discoverability rule in such cases would not meet the Commission's objective of a simple and uniform approach. While it would provide a more satisfactory outcome in negligence actions (or in all cases in which torts are actionable only on proof of damage, if the reform were extended to all such cases), it would not affect torts which are actionable without proof of damage such as trespass to the person. The effect would be to perpetuate distinctions between different kinds of action. In sexual abuse cases, for example, the reform would assist a plaintiff who wanted to bring an action in negligence, but would do nothing to make it easier for victims to sue perpetrators in trespass.[27] Moreover, the suggested change would do nothing to solve, and would if anything exacerbate, the problem that occurs in cases of overlapping contract and tort liability, since the limitation period in contract would still run from breach, while that in tort would run not from the point when damage was suffered but from the potentially even later point when damage became discoverable.[28]

(e) An act or omission rule

7.15 Another alternative considered by the Commission is to abandon the accrual basis of the present law and instead adopt an approach under which the limitation period (which would be the same for all causes of action) would run from the date of the defendant's act or omission. It would also be necessary to have a general provision under which the ordinary

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24 See para 4.19-4.28 above.

25 See paras 5.20-5.29 above.

26 See paras 5.5-5.8 above.

27 On the distinction between torts requiring proof of damage and torts actionable without such proof, see paras 4.12-4.14 above. The causes of action available to victims of sexual abuse are dealt with in paras 9.9-9.11 below.

28 See para 4.29 above.

limitation period could be extended in appropriate cases, and possibly a long stop provision. A limitations system based on this approach was recommended in the Report of the New Zealand Law Commission in 1988. Under the New Zealand proposals, there would be a uniform three year limitation period running from the date of the defendant's act or omission, but in cases where the damage was not immediately apparent, the limitation period would not start to run until the damage became discoverable, subject to a rule that no claim could be brought more than 15 years after the date of the act or omission.[29]

7.16 The act or omission rule would be simple and easily understood, ridding the law of the complications of the accrual rules, and would give the uniformity of approach that the Commission is seeking. It would also deal satisfactorily with the contract/tort problem,[30] since in each case the limitation period would run from the breach of duty. However, this proposal has shortcomings which have led the Commission to reject it.[31] First, there would be far too many cases in which it was necessary to rely on the extension provisions in order to give deserving plaintiffs the right to sue, and this imbalance would be particularly apparent in the most difficult cases - those involving latent personal injury or disease, such as asbestosis or AIDS, those involving sexual abuse, and those involving economic loss arising out of latent building defects.[32] Secondly, it would give rise to the anomaly that in cases in which damage is an essential element of the cause of action, the limitation period would start running before the cause of action is complete.

(f) A discoverability rule

7.17 A further alternative, which in the Commission's view is to be preferred to any of the approaches previously considered, is to adopt a rule that the limitation period begins to run only when the damage becomes discoverable. If such a rule were adopted, there would be no need for extension provisions to cater for cases in which the damage was not immediately discoverable, because they would be taken care of by the general rule. To protect the interests of defendants, it would be desirable in addition to have a long stop rule which prevented the bringing of actions after a given number of years, whether the damage had become

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29 New Zealand Report (1988) para 128: see paras 6.48-6.53 above.

30 See para 6.60 above.

31 See paras 6.61-6.65 above.

32 In New Zealand, the limitation rules do not have to cater for personal injury cases, because the right to sue in tort has been abolished and replaced by a right to claim compensation under a statutory scheme: see para 6.53 n 121 above.

discoverable or not. The advantage of adopting an approach of the kind outlined in this paragraph is that it is capable of being applied to virtually all kinds of cases.

7.18 The discoverability rule fulfils three criteria which the Commission sees as important tests of whether any proposed rule is satisfactory -

(1) It implements the general policy that plaintiffs cannot be expected to bring an action until they are aware of the existence of a right to sue, and that they must therefore have a reasonable opportunity to discover the existence of that right.

(2) It avoids the unsatisfactory differences of approach between different kinds of damage, and ensures that all cases are treated alike.

(3) It does this by means of a rule, rather than giving the courts a discretion. The experience of jurisdictions which deal with the problem of latent damage by giving the courts a discretion suggests that the discretion is practically always exercised in favour of the plaintiff, particularly in cases where the plaintiff did not acquire the requisite knowledge within the limitation period. Adopting a rule that the limitation period commences only when the damage becomes discoverable avoids the delay and expense involved in having to make an application to a court in such cases.

7.19 The Commission has accordingly adopted the discoverability approach as the cornerstone of its recommended limitations scheme.

2. THE COMMISSION'S RECOMMENDED SCHEME

7.20 The Commission recommends that all claims (with some minor exceptions) should be subject to two limitation periods: a discovery period and an ultimate period. The claim would be time-barred once either limitation period expired. However, the court would have a discretion to permit the action to proceed in certain exceptional cases. The limitations

schemes now enacted in Alberta and proposed in Ontario adopt the same concept of two general limitation periods,[33] but do not include any additional discretionary powers.

(a) A discovery period

7.21 The Commission proposes that the new *Limitation Act* adopt the principle that the limitation period commence when the damage becomes discoverable. The format of the discovery limitation period should be similar to that in the Alberta *Limitations Act*, and should incorporate a definition of knowledge based on the Alberta definition,[34] which is much simpler than that found in most of the existing legislation (including the provisions of the present *Limitation Act* in Western Australia on asbestos-related diseases[35]). The Commission therefore **recommends** that all claims (with the exception of some special cases to be discussed later[36]) should be subject to a discovery limitation period which would expire if the claimant does not commence proceedings within three years after the date on which the plaintiff first knew, or in the circumstances ought to have known, that -

(i) the injury in respect of which he brings proceedings had occurred;

(ii) the injury was attributable to conduct of the defendant; and

(iii) the injury, assuming liability on the part of the defendant, warrants bringing proceedings.[37]

7.22 Other jurisdictions which have adopted the discoverability approach generally employ it as the basis of provisions under which the ordinary limitation period running from accrual is extended, as for example in England where the limitation period in negligence cases runs from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.[38] However, the Commission agrees with the Alberta Law Reform Institute that in such a situation the original period running from accrual becomes redundant.[39] The reality

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33 *Limitations Act 1996* (Alta); Limitations Bill 1992 (Ont): discussed in paras 6.3-6.4, 6.6-6.22 above. In its comments on the Discussion Paper (1992), the Law Society of Western Australia favoured a limitation scheme based on the Alberta proposals.

34 *Limitations Act 1996* (Alta) s 3(1)(a): see paras 6.10 and 6.13 above. See also the similar provisions in Limitations Bill 1992 (Ont) cls 4 and 5(1).

35 *Limitation Act 1935* s 38A(7)-(9): see para 5.36 above.

36 See paras 14.32-14.35, 15.29-15.35, 16.1-16.8 below.

37 The burden of proving that the claim was made within the discovery period would be on the plaintiff: see paras 8.5-8.8 below. On the reasons for choosing a three year period, see paras 7.49-7.53 below.

38 *Limitation Act 1980* (UK) ss 11(4) (personal injury), 14A(4) (other cases): see paras 5.20-5.21,5.30 above.

39 Alberta Report for Discussion (1986) paras 2.112-2.113.

is that the limitation period runs from the date of knowledge in all cases. Either the damage is immediately discoverable, in which case the limitation period starts running straight away, or it is not discoverable, in which case the limitation period does not start to run until it becomes discoverable. The Commission has therefore recommended that the basic limitation period should run from when the injury becomes discoverable.

7.23 The recommended rule is not dramatically different from the approach adopted by the present law in many areas. The common law has already made considerable progress in this direction. In negligence cases, other than those involving personal injury, the courts appear to be moving towards recognition of the principle that the cause of action accrues when the damage becomes discoverable.[40] The discoverability principle is also adopted in some of the provisions of the present *Limitation Act* in Western Australia. In cases involving asbestos-related diseases, the six-year limitation period can run either from accrual or from the date of knowledge if later.[41] Where there are equitable claims to land involving fraud, the limitation period does not run while the fraud remains concealed.[42] In other jurisdictions, the discoverability principle has been adopted over a much wider area. In England and British Columbia, both in personal injury cases and in other negligence cases, in cases where the damage is not immediately apparent the limitation period runs only from the point of discovery.[43] The same is true in Victoria, in cases involving latent personal injury.[44] In Queensland in personal injury cases, and in South Australia, the Northern Territory and Manitoba in relation to all causes of action, there are provisions under which discoverability is the prerequisite to a discretionary extension of the limitation period.[45] Though the limitation period does not formally run from the point of discovery, this is in effect what happens as the result of the court exercising its discretion. Practically all jurisdictions affirm the rule under which in fraud cases the limitation period does not run until the fraud is discovered.[46]

7.24 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 particular,

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40 See paras 4.19-4.28 above.

41 *Limitation Act 1935* s 38A(6): see para 5.5 above.

42 *Limitation Act 1935* s 27: see paras 13.49-13.50 below.

43 See paras 5.21 and 5.30 above (England), 5.27 above (British Columbia). In England, in personal injury cases, the court has a discretion to permit further extensions: see para 5.21 above

44 See para 5.42 above. The court also has a discretion to permit further extensions.

45 See paras 5.14-5.18 above.

46 See paras 13.52-13.60 below.

unlike the approach based on the retention of the existing accrual rule considered above,[47] it ensures that the benefits of the discoverability approach are available in cases in which damage is not an essential element of the cause of action, such as trespass to the person. Courts in sexual abuse cases could thus adopt the approach followed by the Supreme Court of Canada in *KM v HM*[48] and hold that the limitation period does not begin to run until the cause of action becomes discoverable, which in such cases is likely to be when the plaintiff realises the connection between the injuries suffered and the actions of the defendant.[49]

7.25 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 same way as the existing accrual rule: the limitation period would commence running on the date of 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,[50] 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.

7.26 The Alberta *Limitations Act* defines "injury" to mean personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of these, the breach of a duty.[51] However, the Alberta definition fails to specify when injury occurs for the purpose of the provision if there are two different "injuries" which occur at different times. For example, under the existing law, the limitation period in an action for breach of contract will run from the date of breach, whether or not any damage results.[52] Under the Alberta scheme, it appears that it is the intention that where a breach of contract causes personal injury or property damage,[53] the discovery period that applies to such damage should run from the date on which that damage becomes discoverable,[54] even though, because "injury" is defined to include the non-performance of an obligation, the discovery period for actions in contract would normally commence at the date of breach. The Commission

47 Paras 7.13-7.14.

48 (1992) 96 DLR (4th) 289: see para 4.24 above, and see also paras 9.17-9.21 below.

49 The provisions of the *Limitations Act 1990* (Ont) which were being interpreted in this case were identical in all relevant respects to those of the *Limitation Act 1935* (WA). However, the development of the law by the Supreme Court of Canada in previous cases allowed the Supreme Court to hold that the cause of action accrued at the point stated: see para 4.24 above.

50 See para 4.30 above.

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

52 See para 4.29 above.

53 Eg *Godley v Perry* [1960] 1 WLR 9.

54 See para 6.12 above.

recommends that the new Western Australian Act should adopt a definition of "injury" in broadly similar terms to the Alberta definition, but that it should make clear when the discovery period will start to run in cases where there is more than one potential injury.

7.27 The Commission envisages that "personal injury" will include not only the more obvious kinds of physical harm, but also psychiatric damage, whether inflicted by an intentional act or by negligence, and any other harm redressable under the principle that it is a tort intentionally to do an act calculated to cause physical harm, if physical harm results.[55] This should ensure that "personal injury" covers such cases as *Williams v Minister, Aboriginal Land Rights Act 1983*,[56] where a fair-skinned Aboriginal woman suffered a borderline personality disorder as a result of being taken away from her parents at birth and placed in a home for white children.

7.28 The Commission has considered how the definition of "injury" will apply to the torts of trespass to the person (assault, battery and false imprisonment), trespass to land and goods, conversion and detinue. Battery, which involves any unwanted contact with the person of another, however minor,[57] might constitute "personal injury", but it would be more debatable whether "personal injury" covered assault (in the technical sense of causing an apprehension of imminent contact, rather than the actual contact which constitutes a battery) or false imprisonment. It is certainly important, particularly in sexual abuse cases, to make it clear that "injury" includes assaults and batteries of all kinds, even if no other harm is inflicted.[58] The Commission **recommends** that the definition of "injury" should make it clear that "personal injury" includes all cases of trespass to the person. In some cases of battery and false imprisonment, it is possible for the tort to be committed even though the plaintiff is unaware of it at the time.[59] Here it seems consistent with the philosophy of the discovery period for it

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55 *Wilkinson v Downton* [1897] 2 QB 57. See N J Mullany and P R Handford *Tort Liability for Psychiatric Damage* (1993) ch 14.

56 (1994) 35 NSWLR 497.

57 See eg *Cole v Turner* (1704) Holt KB 108, 90 ER 958, Holt CJ: "The least touching of another in anger is a battery".

58 This would ensure that problems of the kind which arose in *Stubbings v Webb* [1993] AC 498 (see paras 9.13-9.15 below) would not arise in Western Australia.

59 See *Restatement Second: Torts* (1965) para 18 comment (d) (battery), para 35 (false imprisonment). Examples in battery would include kissing or abuse of a woman while asleep or under anaesthetic. In false imprisonment, the view that consciousness of confinement at the time it occurs is not an essential ingredient of the tort is supported by *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 and *Murray v Ministry of Defence* [1988] 1 WLR 692, Lord Griffiths at 701, differing from the old case of *Herring v Boyle* (1834) 6 C & P 496, 172 ER 1335. See W L Prosser "False Imprisonment - Consciousness of Confinement" (1955) 55 *Col L Rev* 847; P R Handford "Damages for Injured Feelings in Australia" (1982) 5 *UNSWLJ* 291, 294-296.

to run only from the time when the plaintiff finds out, or should have found out, what happened. Such a result will follow if trespass to the person is classified as "personal injury".

7.29 It might be possible to regard "property damage" as including a trespass to land or goods, even though the property did not in fact suffer any damage, but this might be thought artificial. It seems preferable to regard cases of trespass to land and goods as constituting a breach of duty. The torts of conversion and detinue deal with the loss of, rather than damage to, personal property. Such harm cannot rationally be classified as property damage. A more logical interpretation would be to regard the harm suffered in such cases as a breach of duty. Accordingly, the Commission **recommends** that the definition of "injury" should make it clear that "breach of duty" includes a trespass to land or goods, for the purposes of the torts of trespass to land or goods, and a conversion or detinue, for the purposes of the torts of conversion and detinue.

(b) An ultimate period

7.30 If the running of time for the bringing of actions was to be regulated only by the discovery rule, then defendants could remain vulnerable to a claim for a potentially unlimited length of time. This would not give proper recognition to the interests of defendants in eventual security from being sued, or to the public interest in litigation being concluded within a reasonable time, rather than allowing long running disputes to hamper commercial activity.[60] The certainty rationale already referred to emphasises the importance of ensuring that a time should eventually come when the defendant can feel secure in the knowledge that he is no longer subject to legal liability, and the evidence rationale recognises the undesirability of litigating a matter many years after the events take place, when the memories of witnesses have faded, documents may have disappeared, and assessing the reasonableness of a person's conduct becomes much more difficult. Accordingly, in the Commission's view the discovery period should be balanced by a long stop period, running from the date of the defendant's act or omission, which as a general rule will prevent any claim by a plaintiff after a given number of years have elapsed, even though the damage has not become discoverable.

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60 See paras 7.5-7.8 above.

7.31 The Commission therefore **recommends** that all claims (again subject to some special cases to be discussed later[61] should be subject to an ultimate limitation period which would expire if the claimant does not commence proceedings within a specified number of years after the claim arose. The length of the period should be 15 years, for reasons which are explained below.[62] The plaintiff's claim should be barred once either the discovery period or the ultimate period has expired.[63]

7.32 A similar provision is an essential feature of the Alberta scheme. Every claim is subject to not one but two limitation periods. The ultimate period commences when the claim "arises" (that is to say, when the act or omission on which the claim is based took place), and runs for ten years.[64] The plaintiff's claim is barred once either the discovery period or the ultimate period has run its course. What this means in practice is that in most cases the discovery period will be the applicable limitation period, so that the action will be barred within a comparatively short time (under the Alberta scheme, two years) of the claim becoming discoverable. However, if a claim remains non-discoverable for the duration of the ultimate period (in Alberta, ten years), the action will be barred even though it has not become discoverable.

7.33 The Alberta *Model Limitations Act* clarifies the question of when a claim arises for the purposes of the ultimate period in a number of particular instances. It provides:

> "(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 duty 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."[65]

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61 See paras 14.32-14.35,16.6-16.8 below.

62 Paras 7.54-7.55.

63 The burden of proving that the claim was not made within the ultimate period would be on the defendant: see paras 8.5-8.9 below.

64 *Limitations Act 1996* (Alta) s 3(1)(b): see para 6.15 above. See also the similar provision in the Limitations Bill 1992 (Ont) cl 15, under which, however, the limitation period is generally 30 years, reduced to 10 years in particular cases.

65 *Limitations Act 1996* (Alta) s 3(3). See also Limitations Bill 1992 (Ont) cl 15(11).

Further provisions deal with claims in respect of proceedings under the *Fatal Accidents Act* and for contribution.[66]

7.34 The Commission **recommends** that similar provisions should be adopted in Western Australia. They determine when the ultimate period begins running in a number of important instances. The second provision above allows the proposed scheme to adopt a uniform approach to cases where claims in contract and tort overlap.[67] In such cases, the ultimate period for both actions commences at the date of the act or omission in question. The Commission has already recommended that the discovery rule should apply to contract claims in exactly the same way as it does to tort claims.[68] A limitations scheme based on the discoverability principle thus solves the contract/tort problem much more satisfactorily than any other.

(c) A discretion to extend either limitation period

7.35 As so far discussed, the Commission's recommendations in essence adopt a limitations scheme similar to that now enacted in Alberta, under which every claim is subject to two limitation periods, and the plaintiff's action is barred once either period expires. The Alberta scheme represents a generally satisfactory approach to the problems of limitations law of the kind the Commission has in mind - one which is simple, uniform, and produces results that are fair to both plaintiffs and defendants. However, there may be a few cases in which the result produced by these rules tips the balance unfairly against the plaintiff. This is because the Alberta scheme lacks the flexibility envisaged by La Forest J in his discussion of limitation rationales in *KM v HM*.[69]

7.36 There will be two kinds of cases in which the plaintiff's claim is defeated by the running of the limitation period. The first is where the damage remains undiscoverable but the ultimate period has nonetheless expired. There are injuries which have a long latency period, for example asbestos-related diseases, which may remain undiscoverable for thirty years or more. Under the present law in Western Australia, the extension provisions specific to such diseases ensure that the plaintiff can still sue when the damage becomes discoverable,

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66 *Limitations Act 1996* (Alta) s 3(3)(d)-(e). For *Fatal Accidents Act* claims, see para 22.14 below; for contribution claims see para 12.63 below.

67 See paras 4.29-4.30 above.

68 See para 7.26 above.

69 (1992) 96 DLR (4th) 289 at 301-305: see paras 7.5-7.7 above.

however long this may take. Under the Commission's recommendations as so far explained, the ultimate period would make it necessary for proceedings to be commenced within 15 years of the act or omission which caused the damage. The second kind of case is where the discovery period has expired. If the injury is immediately discoverable, the limitation period will expire three years after the events in question, and even if it is not immediately discoverable it is likely in most cases that the discoverability period will run out well before the end of the 15 year ultimate period.[70] In this second situation there may be factors other than latency which prevent the plaintiff from bringing the action sooner. In cases involving child sexual abuse by a family member, for example, it may be many years before the victim has become independent of parents or carers and can come to terms with what has happened and contemplate the possibility of legal proceedings.[71] Another example, from New South Wales, where the court has a discretion to extend the limitation period in personal injury cases,[72] is a case where the plaintiff contracted AIDS as a result of a blood transfusion but delayed bringing an action because of physical and mental problems, concern about the effect of harmful media publicity on herself and her family, and advice that no claim had ever succeeded.[73]

7.37 The Alberta legislation does not allow a court to disregard either of the applicable limitation periods in such cases. The Alberta Law Reform Institute justified the universal application of the ultimate period by reference to the purposes of limitation rules, particularly what La Forest J in *KM v HM*[74] referred to as the certainty and evidence rationales. It said that after the running of the ultimate period the overwhelming majority of claims would have been either abandoned, settled, litigated or become subject to a limitations defence under the discovery rule, and that it was wrong for the entire society of potential defendants to remain subject to a tiny group of claims, because the cost burden of maintaining records and insurance was too great. Once the ultimate period had expired, the slate should be cleaned for the peace and repose of the collective society and its individual members. Also, after such a time, the evidence of the true facts would have so deteriorated that it would not be sufficiently

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70 There could of course also be cases in which the two periods expire simultaneously.

71 In such a case, the running of the limitation period may be delayed until the plaintiff reaches adulthood: see para 17.7 below. In addition it may be possible to prove that the injury only became discoverable when the plaintiff appreciated the connection between the acts of the perpetrator and the psychological problems suffered as a result: see eg *Gray v Reeves* (1992) 89 DLR (4th) 315 (para 9.22 below); *Tiernan v Tiernan* (unreported) Supreme Court of Queensland, 13 April 1993, 39 of 1992 (para 9.26 below).

72 See para 5.42 above.

73 *PD v Australian Red Cross Society* (1993) Aust Torts Rep 81-205.

74 (1992) 96 DLR (4th) 289 at 301-302: see para 7.5 above.

complete and reliable to support a fair judicial decision.[75] As regards the lack of exceptions to the discovery period, the Institute stated its view that the discovery period gave "even a relatively unsophisticated claimant ample time in which to attempt to settle his controversy with the defendant and to bring a claim when necessary".[76] It was not prepared to go further and give a discretionary power either to lengthen or to shorten an applicable limitation period, because "to do so would sacrifice the objectives of a limitations system".[77]

7.38 The Commission recognises the importance of these arguments, but in its view they fail to take account of the point made by La Forest J that there are exceptional kinds of case in which the limitation rationales which ordinarily justify the barring of the claim once the limitation period has run do not apply with the same force. The question is how such cases may be best provided for. Under the Alberta scheme, courts might respond to La Forest J's point through their approach to the question of when a cause of action becomes discoverable - for example, in sexual abuse cases following the approach of the Supreme Court of Canada in *KM v HM* and holding that the discovery period commenced only when the plaintiff found out the connection between her psychological problems and the abuse she had suffered many years previously. Such an approach may seem to strain the discoverability idea, and make its application rather less predictable. It would also tend to mask the need to deal with the points made by La Forest J in a systematic fashion, and with the appropriate level of caution.

7.39 Some jurisdictions deal with the problems identified by La Forest J by applying a categorisation approach. Sometimes this is used to solve the problem of the ultimate period. For example, some jurisdictions have long stop provisions which apply to all cases except those involving personal injury.[78] Others have long stop provisions which only apply to particular categories of case, such as building defects.[79] The special rules for asbestos - related diseases in Western Australia[80] in effect produce a similar result, because no limitation period applies while the damage remains undiscoverable. To address the problem posed by the discovery period, England again resorts to a categorisation approach. In personal injury cases,

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75 Alberta Report for Discussion (1986) paras 2.197-2.198.
76 Id para 2.154.
77 Ibid.
78 Eg *Limitation Act 1985* (ACT) s 40(1); *Limitation Act 1969* (NSW) s 51; *Limitation Act 1980* (UK) s 14B: see paras 5.60 and 5.62 above.
79 See para 5.66 above.
80 See para 5.5 above.

but not in any others, the discoverability rule is supplemented by a discretionary power to extend the limitation period.[81]

7.40 The Commission is not in favour of solving such problems by dividing cases into categories and having rules which apply to some categories of case and not others. 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 Commission **recommends** that there should be a very narrow discretionary power which enables a court to disregard either the discovery period or the ultimate period in appropriate cases. The court should be able to order that either period may be extended in the interests of justice, but should only be able to make such an order 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 plaintiff would have the burden of proving that the conditions for the exercise of discretion in his favour had been met.[82] It should be noted that the recommended discretion provision is phrased in narrow terms. In addition, the Commission would expect the courts to maintain a strict approach to the exercise of this discretion, in view of the focus on the discovery period and the length of the ultimate period.

7.41 The recent decision of the High Court in *Brisbane South Regional Health Authority v Taylor*[83] emphasises the limits of provisions of the kind envisaged by the Commission. It confirms that the onus of showing that a discretion to permit an extension of the ordinary limitation provision should rest on the plaintiff, and McHugh J (with Dawson J in agreement) stressed that such provisions are not to be treated as having a standing equal to or greater than provisions enacting limitation periods:

> "A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case. The purpose of [such] a provision...is 'to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time

81 See para 5.21 above.
82 See paras 8.5-8.10 below.
83 (1996) 70 ALJR 866.

> limit within which an action was to be commenced".[84] But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question."[85]

7.42 Discretion provisions in England and elsewhere provide that the court should be able to take into account all the circumstances of the case, including a number of circumstances specifically listed.[86] Though the Commission's recommended discretion is drawn more narrowly than such provisions, the Commission believes that it would be desirable for there to be similar provisions in Western Australia, and it therefore **recommends** that the court should be able to take all the circumstances of the case into account, including the following-

(1) the length of and reasons for delay on the part of the plaintiff;[87]

(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;[88]

(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;[89]

(5) the conduct of the defendant which resulted in the harm of which the plaintiff complains;[90]

(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 cause of action of the plaintiff against the defendant;

(7) the duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;[91]

(8) the extent to which the plaintiff acted properly and reasonably once the injury became discoverable;[92]

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84 *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628, the Court at 635.

85 (1996) 70 ALJR 866 at 872.

86 See paras 5.21 and 5.43 above.

87 See para 7.44 below; see also paras 12.20 (latency), 17.61 (disability) below.

88 See para 7.45 below.

89 See para 7.46 below; see also paras 11.18 (professional persons), 12.66 (joint tortfeasors) below.

90 See para 7.47 below; see also paras 9.41-9.42,12.20 and 17.61 (sexual abuse), 13.73 and 13.75 (fraud) below.

91 See paras 17.65-17.66 below.

(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.

7.43 The Commission's recommendation allows the court to make an order that either limitation period be extended in the interests of justice, but says that 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 had expired, and the general public interest in finality of litigation, are outweighed by other factors. The Commission does not believe that it is advisable to specify in legislative form what factors would be sufficient to tip the balance. This will be a matter for the courts. However, it suggests a number of guidelines which give a fuller indication of the kind of power it has in mind.

7.44 First, the mere fact that the injury remains latent after 15 years would be a relevant but not conclusive consideration. If latency were determinative, it would be simpler to abandon the ultimate period entirely, leaving the discovery period as the only applicable rule. This however would not give sufficient protection to the interests of defendants and the public to which the Commission has already referred. Under the Commission's recommendations, the rights of victims of asbestos-related diseases would be more limited than under the present law, in that once the ultimate period has expired they will have to invoke the discretionary provision. The Commission believes that it is appropriate to subject these cases to the same approach as that developed for all other cases. All relevant factors will be considered by the court in deciding whether to exercise the discretion.

7.45 Second, the nature of the plaintiff's injury is a factor which may influence the court in deciding whether or not to exercise its discretion in his favour. The law gives differing weights to different kinds of injuries.[93] All other things being equal, personal injury is a more serious matter than property damage or any other kind of injury, and this may result in a greater readiness in the court to allow an extension of time in personal injury cases than in others.

7.46 Third, the position of the defendant should be taken into account. In some cases, the nature of the activity being carried on by the defendant should be such as to put him on notice that claims can be expected long after the acts or omissions in question have taken place. For

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92 See para 18.7 below (alternative forum).

93 See eg R Pound "Interests of Personality" (1915) 28 *Harv L Rev* 343 and 445.

example, it has been evident for some years, especially as a result of previous litigation, that asbestos-related and other similar diseases have a long latency period. Those whose business activities involve the production or use of substances which cause diseases such as these 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.

7.47 The defendant's conduct will also be a relevant factor. The Commission recommends below that where the defendant fraudulently conceals the existence of the cause of action from the plaintiff this should be a factor which may influence the court in deciding to exercise its discretion in the plaintiff's favour.[94] Again, as La Forest J pointed out in *KM v HM*,[95] though the public interest justifies the granting of repose to certain classes of defendants such as professional persons, there is no corresponding public benefit in protecting those who are responsible for child sexual abuse.

7.48 Finally, the Commission suggests that a court considering whether to exercise its discretion should recognise that there are important differences between the two general limitation periods. A stronger case may be needed to justify the exercise of the discretion to extend the ultimate period than the discovery period. Disregarding the ultimate period means permitting litigation to proceed even though more than 15 years have elapsed since the acts or omissions in question, and there are strong arguments in the interests of both the defendant and the public for upholding the time-bar provided by the ultimate period in all but the most exceptional case.

3. THE LENGTH OF THE LIMITATION PERIODS

(a) The discovery period

7 .49 The Commission has recommended above that the length of the discovery period should be three years. In this it differs from the Alberta legislation, under which the discovery period is two years. In the following paragraphs the Commission explains its reasons.

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94 See paras 13.73 and 13.75 below.

95 (1992) 96 DLR (4th) 289 at 301-304: see para 7.7 above.

7.50 It is generally recognised that the length of a limitation period is arbitrary.[96] It is also recognised that there are some arguments in favour of retaining familiar limitation periods purely and simply because they are familiar.[97] On that argument, there would be something in favour of retaining the existing six year period which applies to many causes of action under the present law. However, against that can be placed arguments that at the present day, with improvements in transport and communications, and the increased pace of life generally, six years is simply too long.[98]

7.51 The most important factor in determining the length of the discovery period is to remember that it only begins to run once the cause of action becomes discoverable. The Alberta Law Reform Institute has drawn attention to the difference between a limitation period based on accrual and a limitation period based on discovery. A limitation period based on accrual must give a litigant a reasonable period of time to discover enough information to justify a conclusion that he is probably entitled to a judicial remedy, to conduct settlement negotiations, and to request a judicial remedy when such negotiations do not bring about the desired outcome.[99] A limitation period based on discovery can be appreciably shorter, because it does not have to take account of the first of these factors.[100]

7.52 The Alberta Institute concluded that either two years or three years was a reasonable length for the discovery period.[101] One year was too short, because it did not allow enough time for attempting to settle the matter by negotiation, and it was undesirable by having too short a period to compel the premature initiation of proceedings.[102] With these considerations in mind, the Institute opted for a two year period. Two years was the standard period for most personal injury and some other claims under the previous law in Alberta,[103] and is the standard period in most other Canadian provinces.[104]

7.53 In Australia, by contrast, two years is not a familiar limitation period. A number of considerations have influenced the Commission in selecting a three year period instead. A

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96 See eg Orr Committee Report (1977) para 2.50.

97 See eg Wright Committee Report (1936) para 5; Orr Committee Report (1977) paras 2.52-2.53.

98 See eg Ontario Report (1969) 31; Orr Committee Report (1977) para 2.51; New Zealand Report (1988) paras 132-153.

99 Alberta Report for Discussion (1986) para 2.53.

100 Id para 2.147.

101 Id paras 2.144, 2.181.

102 Id paras 2.143, 2.180.

103 *Limitation of Actions Act 1980* (Alta) s 51. See also ss 53 (survival of actions), 54 (action under *Fatal Accidents Act*).

104 See particularly *Limitation Act 1979* (BC) s 3(1), quoted in para 4.42 above.

major consideration is that the limitation period under the *Trade Practices Act 1974* is three years.[105] In a recent report on the *Trade Practices Act*, the Australian Law Reform Commission has expressed the view that three years is adequate preparation time while providing the incentive to act without unnecessary delay.[106] Three years is also the standard limitation period in the Northern Territory,[107] and is a familiar limitation period in the legislation of the other States, at least in personal injury cases.[108] Three years is the length of the discovery period under the English 1980 legislation,[109] and is the period chosen in the limitations scheme recommended by the New Zealand Law Commission.[110] Although under the New Zealand proposals the basic limitation period will run from the point when the act or omission takes place, if the damage is not discoverable at that point the limitation period will be delayed so as to run from the point of discoverability.

(b) The ultimate period

7.54 The Commission has recommended that the length of the ultimate period should be 15 years. This is consistent with the recommendation of the Alberta Law Reform Institute in its final report. The Institute in its earlier proposals suggested a ten year period,[111] but ultimately increased the period to 15 years because it came to the view that a ten year period was too short and would operate unfairly against claimants.[112] The legislation as eventually enacted once again reduced the period to ten years.[113] The Commission agrees with the Institute's final recommendation of a 15 year period. The Institute in its earlier proposals expressed the view that the length of the ultimate period should be long enough to ensure that within that period the vast majority of claims should have been either abandoned, settled or litigated,[114] and in the opinion of the Commission 15 years is an appropriate period for this purpose. There are similar 15 year long stop periods in the legislation in England and the Australian Capital

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105 *Trade Practices Act 1974* (Cth) s 82(2).
106 Australian Law Reform Commission *Compliance with the Trade Practices Act 1974* (Report No 68 1994) para 7.13.
107 See para 4.39 above.
108 See paras 4.11 and 4.39 above, 12.29 below.
109 *Limitation Act 1980* (UK) s 11(4): see para 5.21 above.
110 New Zealand Report (1988) para 175.
111 Alberta Report for Discussion (1986) paras 2.197-2.198.
112 Alberta Report (1989) 35.
113 See para 6.17 above.
114 Alberta Report for Discussion (1986) para 2.197.

Territory which allows extension of the limitation period in non-personal injury cases,[115] and 15 years is the period chosen by the New Zealand Law Commission.[116]

7.55 Long stop periods in existence, or proposed, in the various jurisdictions considered by the Commission vary considerably in length,[117] from ten years in the Australian building legislation[118] and the English consumer protection provisions[119] to thirty years in Manitoba[120] and under the Ontario proposals.[121] The selection of a 30 year period is doubtless motivated by the desire to make provision for injuries with a long latency period, such as asbestosis cases. However, under the Commission's recommendations there is no necessity to lengthen the ultimate period to provide for such situations, because the court will have a discretion to extend the limitation period in exceptional cases. The Commission has selected what it thinks is a long enough period to ensure that the vast majority of cases will have been disposed of one way or another, whether by abandonment, settlement or litigation. This has enabled it to confine the ambit of the discretion within narrow limits, so that it caters only for the truly exceptional case.

4. EFFECT OF THE RUNNING OF THE PERIOD

(a) The present law

7.56 Limitation provisions traditionally bar the right of action, rather than extinguishing the plaintiffs right. The only exception to this is in actions for the recovery of land or rent, where the right and title of the plaintiff is extinguished. This is the position in Western Australia,[122] where the law reproduces the position under the 19th century English statutes.[123] It is also the position in many other jurisdictions. Apart from New South Wales and British Columbia, where the law has adopted a different principle, the above statements represent the law in

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115 *Limitation Act 1980* (UK) s 14B; *Limitation Act 1985* (ACT) s 40. For the reasoning behind the selection of a 15 year period in England, see Scarman Committee Report (1984) para 4.13.

116 New Zealand Report (1988) paras 295-302, adopting the proposals in the Scarman Committee Report (1984) referred to in n 115 above.

117 See paras 5.59-5.66 above.

118 *Building Act 1993* (NT) ss 159-160; *Development Act 1993* (SA) s 73; *Building Act 1993* (Vic) s 134.

119 *Limitation Act 1980* (UK) s 11A(3).

120 *Limitation of Actions Act 1987* (Man) s 14(4).

121 Limitations Bill 1992 (Ont) cl 15. The 30 year period proposed in Ontario is reduced to ten years in certain cases.

122 *Limitation Act 1935* s 30 states the principle that in actions to recover land or rent the right and title of the plaintiff is extinguished.

123 See *Real Property Limitation Act 1833* (UK) s 34.

England, New Zealand, and all Australian and Canadian jurisdictions,[124] save only for the following qualifications -

(1) The Australian Capital Territory and the Northern Territory *Limitation Acts* contain no provisions about actions relating to land,[125] and therefore do not need to include the exception relating to such cases.

(2) In England, New Zealand, five Australian and two Canadian jurisdictions, the running of the period extinguishes title in one other case, namely an action to recover chattels.[126] This was a reform first enacted by the English *Limitation Act 1939*.[127]

7.57 The major practical effect of this distinction is that if the running of the period merely bars the plaintiff's right of action, it is possible for the defendant to waive his rights if he chooses to do so.[128] A limitation defence must be specially pleaded[129] and if the defendant chooses not to plead the defence the plaintiff's claim can proceed despite the expiry of the limitation period. In the exceptional cases in which the running of the period does extinguish the right, the rule is different: the plaintiff must on the face of the pleading show a title to possession not barred by the *Limitation Act*.[130]

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124 The following provisions state that in an action to recover land the running of the limitation period extinguishes the plaintiff's title: *Limitation Act 1980* (UK) s 17; *Limitation Act 1950* (NZ) s 18; *Limitation of Actions Act 1974* (Qld) s 24(1); *Limitation of Actions Act 1936* (SA) s 28; *Limitation Act 1974* (Tas) s 21; *Limitation of Actions Act 1958* (Vic) s 18; *Limitation of Actions Act 1987* (Man) s 53; *Limitation of Actions Act 1973* (NB) s 60; *Limitation of Realty Actions Act 1990* (Nfd) s 26; *Limitation of Actions Act 1989* (NS) s 22; *Limitations Act 1990* (Ont) s 15; *Statute of Limitations 1988* (PEl) s 46; *Limitation of Actions Act 1978* (Sask) s 46; note also *Limitation of Actions Act 1980* (Alta) s 44 (now repealed by *Limitations Act 1996* (Alta) s 16). For the present position in Alberta, see para 7.63 below.

125 See paras 2.32 n 47 and 2.34 n 51 above.

126 *Limitation Act 1980* (UK) s 3(2); *Limitation Act 1950* (NZ) s 5(2); *Limitation Act 1985* (ACT) s 43(1); *Limitation Act 1981* (NT) s 19(2); *Limitation of Actions Act 1974* (Qld) s 12(2); *Limitation Act 1974* (Tas) s 6(2); *Limitation of Actions Act 1958* (Vic) s 6(2); *Limitation of Actions Act 1987* (Man) s 54(2); *Limitation of Actions Act 1973* (NB) s 61(2).

127 S 3(2).

128 See para 7.65 below.

129 See para 8.2 below.

130 See para 8.4 below.

(b) Possible alternatives

(i) All rights extinguished

7.58 The report of the New South Wales Law Reform Commission in 1967 put forward a new approach to this issue. It recommended that the expiration of a limitation period should extinguish not only title to property, real and personal, but also the personal right to recover a debt, damages or other money. This recommendation was supported in the 1969 report of the Ontario Law Reform Commission. Both reports discuss the problem in detail.[131] Their recommendations have been echoed in reports of the Law Reform Commissions of British Columbia, Newfoundland and Saskatchewan,[132] and a working paper from the Australian Capital Territory.[133]

7.59 The detailed discussion in the New South Wales and Ontario reports focuses on a number of instances first identified by the Wright Committee Report in 1936. According to that committee, the chief consequences which flowed from the remedy being barred and not the right were that -

(1) Where a debtor paid money on account of debts, some of which were statute-barred and some not, and the money was not appropriated to any particular debt, the creditor could appropriate the money to a statute-barred debt.[134]

(2) In the case of a specific or residuary legacy, the executor could deduct the amount of a statute-barred debt owed by the legatee to the estate.[135]

(3) An executor could pay a statute-barred debt,[136] unless a court had actually declared that the debt was barred.[137]

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131 NSW Report (1967) paras 306-323; Ontario Report (1969) 126-133.

132 British Columbia Report (1974) 96-97; Newfoundland Report (1986), and see also Newfoundland Working Paper (1985) 323-329; Saskatchewan Report (1989) 49.

133 ACT Working Paper (1984) paras 208-216.

134 *Mills v Fowkes* (1839) 5 Bing NC 455, 132 ER 1174.

135 *Courtenay v Williams* (1844) 3 Hare 539, 67 ER 494.

136 *Re Rownson* (1885) 29 ChD 358; *Hill v Walker* (1858) 4 K & J 166, 70 ER 69.

137 *Midgley v Midgley* [1893] 3 Ch 282.

(4) A trustee could pay statute-barred costs.[138] This probably included any statute-barred debt.

(5) A solicitor's lien could be enforced after his costs became statute-barred,[139] as could a wharfinger's lien[140] and probably any lien.

(6) Where property was converted, though the right of action against the person who converted it was barred on the running of the limitation period, the property right still subsisted. If there was a fresh conversion by a different person, the statute began to run again.[141]

(7) A statute-barred creditor could present a bankruptcy petition, and though the debtor could plead the statute no other creditor could object.[142]

(8) Where a debt was incurred as the result of a tort, so that it could be claimed as part of the damages, it could be so claimed notwithstanding the debt was [143] statute-barred.

(9) Where a claim was made to which the law of another legal system applied, the *Limitation Act* of the forum applied because it was considered to be procedural.

The New South Wales Law Reform Commission added a tenth case which had arisen in Tasmania: the rule of equity that if a debtor to a testator becomes his executor he is deemed to have paid the debt to the estate applies to a debt statute-barred at the testator's death.[144]

7.60 The Wright Committee's conclusion was that there was not a sufficient case for change.[145] The New South Wales Law Reform Commission, after reconsidering the cases studied by the Wright Committee, came to a different conclusion. It said:

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138 *Budgett v Budgett* [1895] 1 Ch 202.
139 *Higgins v Scott* (1831) 2 B & Ad 413, 109 ER 1196
140 *Spears v Hartly* (1800) 3 Esp 81, 170 ER 545.
141 *Miller v Dell* [1891] 1 QB 468.
142 *Quantock v England* (1770) 5 Burr 2628, 98 ER 382.
143 *Allen v Waters & Co* [1935] 1 KB 200.
144 *Re Howlett* [1964] Tas SR 63.
145 Wright Committee Report (1936) para 24. Though it suggested that there might be some ground for proposing that in conversion actions the plaintiffs titre should be extinguished (case (6) above), it made

> "We think it 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."[146]

The Ontario Law Reform Commission, after another detailed examination, endorsed this statement.[147] The British Columbia Law Reform Commission, which added its agreement, said that even though limitation was no longer to be regarded as merely procedural it should still be necessary for a limitation period to be specifically pleaded,[148] a view which has received general support.[149]

7.61 Despite this level of support, it is only in New South Wales and British Columbia that the proposed reform has actually been enacted.[150] In New South Wales, there are provisions dealing with debt and damages,[151] account[152] and various other matters in addition to the provisions about real and personal property[153] found in other jurisdictions. Because the Act allows for the extension of the ordinary limitation period in personal injury cases in certain circumstances, it is also necessary to provide that in such a case the prior expiration of the period has no effect.[154]

(ii) Limitation as a defence

7.62 The traditional view that the running of a period of limitation bars the remedy and not the right continues to represent the law in nearly all jurisdictions. This view has been supported in recent years by other reports which emphasise that the function of the running of a limitation period is to provide the defendant with a defence. This was the view of the New Zealand Law Commission, whose 1988 Report recommended the enactment of a *Limitation*

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no recommendation to this effect. The English *Limitation Act 1939* nonetheless adopted this suggestion: see para 12.36 below.

146 NSW Report (1967) para 323. See also D F Jackson "The Legal Effects of the Passing of Time" (1970) 7 *Melb ULR* 407 and 449.

147 Ontario Report (1969) 132.

148 British Columbia Report (1974) 97.

149 Newfoundland Working Paper (1985) 329 and Newfoundland Report (1986); Saskatchewan Report (1989) 49; see also Ontario Report (1969) 133.

150 *Limitation Act 1969* (NSW) ss 63-68A; *Limitation Act 1979* (BC) s 9.

151 *Limitation Act 1969* (NSW) s 63.

152 Id s 64.

153 Id s 65.

154 Id s 61. S 68A provides that extinction of right or title by the running of a limitation period must be specifically pleaded.

Defences Act, in which limitation rules would be drafted in the form of defences rather than in the traditional form "no action shall be brought…". This would be more consistent with the current law under which a defendant may choose not to rely on a limitation point but instead defend a claim on the merits. In the view of the New Zealand Commission, even the running of the ultimate limitation period recommended in the report should not extinguish the plaintiff's rights.[155]

7.63 The New Zealand Report was much influenced by the Alberta Report for Discussion of 1986, which laid the foundations for a new kind of *Limitation Act*. The Alberta Report of 1989 set out the recommendations in final form. Under the legislation now enacted in Alberta, once either the discovery period or the ultimate period (the two limitation periods which apply to every claim) expires, the defendant is entitled to immunity from liability.[156]

The Alberta reports specifically recommended that the running of a limitation period should not extinguish rights, saying that was not the object of a limitations system.[157]

(iii) A middle way

7.64 The Ontario Limitations Bill 1992, which resulted from the report of the Ontario Limitations Consultation Group in 1991, is based on the principles set out in the Alberta Report. However, following the recommendations of the Consultation Group, it provides that though the running of the discovery period should not extinguish the claimant's rights, the running of the ultimate period should have this effect.[158] The recommendation owes much to the earlier recommendation of the Ontario Law Reform Commission.

(c) The Commission's view

7.65 In the Commission's view the effect of the running of a period of limitation should continue to be to bar the remedy and not the right, and it so **recommends**. 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

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155 New Zealand Report (1988) para 308. See also New Brunswick Discussion Paper (1988) 8.
156 *Limitations Act 1996* (Alta) s 3(1).
157 Alberta Report for Discussion (1986) para 9.1; Alberta Report (1989) 35.
158 Limitations Bill 1992 (Ont) cl 15(12).

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*.[159] Further, a rule that the running of a limitation period extinguished the cause of action would not be consistent with the Commission's general recommendations. Under those recommendations there will be two limitation periods which potentially apply in every case, the discovery period and the ultimate period, but a court will have a discretion in exceptional circumstances to disregard either limitation period and allow a claim to proceed despite time having run. If the running of a limitation period extinguished the claimant's rights, it would be necessary to make an exception [160] to cover cases where the period was extended under the discretionary provision. Introducing such complications seems unwarranted. It is noteworthy that under the Alberta legislation, which resembles the Commission's recommendations but does not contain the additional discretionary provision, the claimant's rights are not extinguished by the running of either limitation period: the expiry of the period merely gives the defendant a defence to the claim. Even if it were only the running of the ultimate period which extinguished the claim, as is the case under the Ontario Bill, this would still cause problems under the Commission's recommended scheme, because the court would have power to disregard the ultimate period in exceptional circumstances. The Commission therefore favours the view that the expiry of the limitation period should not extinguish liability but merely bar the remedy, and that, as in New Zealand and Alberta, the limitation provisions should be drafted in the form of giving the defendant a defence once either the discovery period or the ultimate period has run its course.

7.66 The general approach recommended by the Commission endorses the traditional attitude to the problem, and supports the useful principle that limitation defences should be specifically pleaded. Analysis of the ten issues identified by the Wright Committee and the New South Wales Law Reform Commission suggests that little harm will result from limitation provisions continuing to have only a procedural effect. One of the most important of those issues, the problem of conflict of laws, is now dealt with by legislation in force in Western Australia and introduced or being introduced in all States and Territories, under which if the substantive law of another Australian jurisdiction or New Zealand governs the

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159 See *Commonwealth v Verwayen* (1990) 170 CLR 394; *China Ocean Shipping Co Ltd v P S Chellaram & Co Ltd* (1990) 28 NSWLR 354; *Commonwealth v Clark* [1994] 2 VR 333. For earlier cases see *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240; *Lattimer v Shafran* [1983] WAR 273; *Marinelli v Jankovic* [1983] WAR 287.

160 Similar to that in *Limitation Act 1969* (NSW) s 61, discussed in para 7.61 above.

claim, a limitation law of that jurisdiction is to be regarded as part of the substantive law and applied accordingly.[161]

7.67 The Commission's general recommendations will not apply to actions for the recovery of land. The Commission recommends below that such cases should continue to be governed by rules which are broadly the same as those in the present *Limitation Act*.[162] Under the present law the running of the limitation period in such actions extinguishes the claimant's rights, so that the other party acquires proprietary rights.[163] The Commission does not consider it appropriate to alter the doctrine of adverse possession in the context of this reference. It therefore **recommends** that the present rule that in actions for the recovery of land the running of the period extinguishes the claimant's rights should be retained, at least until that doctrine is fully examined in a separate reference.[164] Since its application is confined to a particular area where exceptional rules apply, it does not really constitute an exception to the Commission's general recommendation that the running of the period should merely bar the remedy.

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161 *Limitation Act 1985* (ACT) s 56; *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5, *Limitation Act 1969* 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 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.

162 See paras 14.32-14.35 below.

163 See para 7.56 above.

164 The Commission recommends that it should be given such a reference: see para 14.31 below.

Chapter 8

CONSEQUENTIAL RECOMMENDATIONS

1. ONUS OF PROOF

(a) The present law

8.1 The onus of proving that a limitation period has expired is a matter not generally dealt with in limitation statutes.[1] It has traditionally been left to be dealt with by case law.

8.2 Unfortunately, there is some conflict on this matter in the authorities. A number of cases hold that the plaintiff bears the burden of proving that the claim is not barred by the running of the limitation period. These include various 19th century English decisions,[2] some dicta of more recent vintage from the High Court,[3] the English Court of Appeal and the House of Lords,[4] and one English Court of Appeal decision.[5] However, there were always a few authorities which upheld the contrary view that it was for the defendant to show that the limitation period has expired,[6] and this view has recently been endorsed by the Appeal Division of the Victorian Supreme Court in *Pullen v Gutteridge Haskins & Davey Pty Ltd.*[7] In an extended discussion, the Court ruled that as a matter of principle the burden should be on the defendant to show that the claim was statute barred.[8] Authorities to the contrary were to be

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1 There are no exceptions to this principle in Australia, England or New Zealand. In Canada, until the enactment of the new Alberta legislation, the only provisions were *Limitation Act 1979* (BC) s 6(2) (burden of proof of fraudulent breach of trust etc on trustee), s 6(5) (burden of proving that running of time postponed under general extension provision in s 6(3) on person claiming benefit of postponement), s 7(9) (burden of proving that period postponed or suspended on the ground of disability on person claiming benefit of postponement or suspension); *Limitation of Actions Act 1987* (Man) s 7(6) (onus of proof of disability on person claiming benefit of extension). For the provisions on onus of proof in the *Limitations Act 1996* (Alta), see paras 8.8-8.11 below.

2 *Hurst v Parker* (1817) 1 B & Ald 92, 106 ER 34; *Beale v Nind* (1821) 4 B & Ald 568, 106 ER 1044; *Wilby v Henman* (1834) 2 Cr & M 658, 149 ER 924; *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, Lord Blackburn at 135.

3 *Cohen v Cohen* (1929) 42 CLR 91, Dixon J at 97; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, Taylor J at 483.

4 *Cartledge v E Jopling & Sons Ltd* [1962] 1 QB 189, Harman LJ at 202, Pearson LJ at 208; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, Lord Reid at 771, Lord Morris of Borth-y-Gest at 775, Lord Pearce at 784.

5 *London Congregational Union Inc v Harriss & Harriss (a firm)* [1988] 1 All ER 15.

6 *Staughton v Brown* (1875) 1 VLR (L) 150; *Heginbotham v Cairns* (1885) 11 VLR 555; *Barclays Bank v Walters* The Times 20 October 1988; *Driscoll-Varley v Parkside Health Authority* (1991) 2 Med LR 346.

7 [1993] 1 VR 27. See N J Mullany "Australian Limitation Law - Relieving the Burden" (1993) 109 LQR 215.

8 [1993] 1 VR 27, the Court at 71-76. The court was influenced by the following dicta in important recent cases: *Hawkins v Clayton (t/a Clayton Utz & Co)* (1986) 5 NSWLR 109, McHugh JA at 142; *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279, Mason CJ and Gaudron J at 283;

explained as dicta [9] or as based on erroneous foundations.[10] As the court pointed out, placing the burden on the defendant is consistent with the rule that it is for the defendant to plead the running of the period in his defence,[11] rather than being raised by the plaintiff in his statement of claim. The view taken in *Pullen v Gutteridge* has been supported in other recent decisions, including the High Court case of *Webster v Lampard*.[12] Though the 30 year ultimate period in the New South Wales *Limitation Act*[13] is rather different from the ordinary limitation period,[14] it has been held that in this instance also it is the defendant who bears the onus of proving that the period has expired.[15]

8.3 There are a number of decisions which hold that the plaintiff bears the burden of proving that the ordinary limitation period has been extended on the ground of disability,[16] fraud or mistake,[17] and also that the plaintiff bears the onus of establishing grounds for a discretionary extension[18] - a principle now confirmed by the High Court.[19] Placing on the plaintiff the burden of showing that, due to exceptional circumstances, the running of the period has been postponed is entirely consistent with putting the onus of establishing that the limitation period has expired on the defendant. These decisions are therefore in harmony with

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9 *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1, Lord Fraser of Tullybelton at 18 (citing *Anns v Merton London Borough Council* [1978] AC 728, Lord Salmon at 771). *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, Lord Blackburn at 135; *Cohen v Cohen* (1929) 42 CLR 91, Dixon J at 97; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, Taylor J at 483; *Cartledge v E Jopling & Sons Ltd* [1962] 1 QB 189, Harman LJ at 202, Pearson LJ at 208; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, Lord Reid at 771, Lord Morris of Borth-y-Gest at 775, Lord Pearce at 784.

10 *Hurst v Parker* (1817) 1 B & Ald 92, 106 ER 34; *Wilby v Henman* (1834) 2 Cr & M 658, 149 ER 924.

11 See *Rules of the Supreme Court 1971* O 20 r 9(1). The leading modern judicial statements are *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51, Lord Cairns at 59; *Dismore v Milton* [1938] 3 All ER 762; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, Windexer J at 488-489; *Ganzis v Ganzis* (1963) SASR 194; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398; *Ketteman v Hansel Properties Ltd* [1987] AC 189; *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27, the Court at 74-75. See generally *The Laws of Australia* para 123.

12 (1993) 177 CLR 598; see also *Humphrey v Fairweather* [1993] 3 NZLR 91, and the discussion in *Tucker v Burran Constructions Pty Ltd* (unreported) Supreme Court of Western Australia (Full Court) 10 September 1993, Appeal 121 of 1992.

13 *Limitation Act 1969* (NSW) s 51(1).

14 See para 5.60 above.

15 *Sorrenti v Crown Corning Ltd* (1986) 7 NSWLR 77.

16 *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, Bowen CJ at 478-479; *King v Coupland* [1981] Qd R 121, Macrossan J at 123.

17 *Humphrey v Fairweather* [1993] 3 NZLR 91.

18 *Cowie v State Electricity Commission of Victoria* [1964] VR 788, Gowans J at 793; *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465, Gibbs J at 474; *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 1 WLR 744, Lord Diplock at 752; *Arnold v Baco Foods Pty Ltd* [19871 VR 401; *Beer v Waltham Forest London Borough* (unreported), England QBD, 16 December 1987, noted by A McGee *Limitation Periods* (2nd ed 1994) 348; *Barrand v British Cellophane plc* [1995] TLR 83; *S & B Pty Ltd v Podobnik* (unreported) Federal Court of Australia (Full Court), 28 October 1994,836 of 1994; *Syranamual v Commonwealth* (unreported) Supreme Court of New South Wales, 21 March 1996, 20701 of 1995. See also *Taylor v Western General Hospital* [1986] VR 250.

19 *Brisbane South Regional Health Authority v Taylor* (1996) 70 ALJR 866.

the rule as stated in *Pullen v Gutteridge*, and the court in that case suggested that a number of cases which might seem inconsistent with the rule it laid down[20] in fact dealt with extension of the ordinary limitation period. Again, these points are supported by the rules about pleading. Where the defendant pleads a limitation defence, it is for the plaintiff to plead in reply that the limitation period has been extended.[21]

8.4 In the exceptional class of case where the running of the period extinguishes the defendant's title,[22] the plaintiff bears the burden of proving this[23] and must also plead it.[24]

(b) The Commission's recommendation

8.5 The Commission is of the view that the issue of who bears the onus of proof in relation to any particular limitation period should be made clear by express provisions in the new *Limitation Act*, rather than being left to be resolved by the courts. The Commission has come to this conclusion because -

(1) As already explained, the authorities on onus of proof are conflicting. Even though the leading Australian decisions appear to have brought about a satisfactory resolution of the problem, it is still preferable for the rules to be settled beyond doubt by being expressed in statutory form.

(2) The limitations scheme which the Commission is recommending takes the form of giving a defence to the defendant if one of two potentially applicable limitation periods has expired, subject to the possibility of a court in the

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20 *Beale v Nind* (1821) 4 B & Ald 568,106 ER 1044; *O'Connor v lsaacs* [1956] 2 QB 288, Romer LJ at 364.

21 Thus where the plaintiff alleges that the limitation period is postponed due to fraud, it is sufficient to plead it in the reply: *Gibbs v Guild* (1882) 9 QBD 59; *Buckland v Ibbotson* (1902) 28 VLR 688; *Lynn v Bamber* [1930] 2 KB 72; but see *Lawrance v Lord Norreys* (1890) 15 App Cas 210; see also *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279, where fraud was not alleged in the statement of claim and was pleaded in reply against some defendants but not against the defendant in question. Acknowledgment and part payment should be pleaded in the statement of claim: *Busch v Stevens* [1963] 1 QB 1, but it may be possible as an alternative to plead them in the reply: id, Lawton J at 5,7-8; see also *Magee v Wilson* (1906) 23 WN (NSW) 137.

22 See para 7.56 above.

23 See *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51; *Pearson v Russell* (1887) 9 ALT 2; *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27, the Court at 73.

24 *De Beauvoir v Owen* (1850) 5 Ex 166, 155 ER 72; *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51; 2; *Pearson v Russell* (1887) 9 ALT 2 *Dismore v Milton* [1938] 3 All ER 762; *Darke v Eltherington* [1963] Qd R 375, Hanger J at 379-381; *Pullen v Guttendge Haskins & Davey Pty Ltd* [1993] 1 VR 27, the Court at 73. In the Australian Capital Territory and New South Wales, this rule is stated in statute: *Limitation Act 1985* (ACT) s 45; *Limitation Act 1969* (NSW) s68A.

exercise of its discretion, in exceptional circumstances, granting a plaintiff leave to sue notwithstanding the expiration of the period. (This may be compared with traditional limitation rules, which are stated in the form "no action shall be brought...".) It is important to make clear which party bears the onus of proof at each stage of this process.

8.6 The Commission therefore **recommends** that the new *Limitation Act* should contain the following provisions settling the issue of onus of proof in particular circumstances -

(1) the plaintiff should bear the burden of proving that the action was commenced before the three-year discovery period had elapsed;

(2) The defendant should bear the burden of proving that the action was not commenced before the 15-year ultimate period had elapsed;

(3) the plaintiff should bear the burden of proving that the conditions necessary for the court to allow the action to proceed despite either limitation period having expired are met.

8.7 The Commission does not recommend that there should be any change to the rules regarding the pleading of a limitation defence. It will therefore still be for the defendant in his defence to raise the issue of limitation. In the ordinary case, the defendant will do this by alleging that the injury suffered by the plaintiff occurred more than three years before the commencement of proceedings.[25] If this allegation is correct, then unless the plaintiff can show that he did not have the necessary knowledge until some time within the three year period prior to the commencement of proceedings, the discovery period will have expired and the plaintiff's claim will fail.[26]

8.8 The issue of limitation having been raised, it will be for the plaintiff to prove that the discovery period has not expired. 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

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25 The Commission recommends in para 20.7 below that it should continue to be the issue, rather than the service, of proceedings which stops time running.

26 The Ontario Report (1991) at 25 makes this clear by stating that the defendant would have the burden of proving that the claim was not brought within the primary two-year limitation period recommended by the report.

in some degree attributable to the conduct of the defendant, and that it was sufficiently serious to warrant bringing proceedings. All these are matters peculiarly within the plaintiff's knowledge, and it would be unreasonable to cast on the defendant the burden of proving what the plaintiff did or did not know at any point in time. Moreover, the necessary evidence will usually be more available to the plaintiff than to the defendant. The recently enacted Alberta legislation and other models incorporating a discovery period of this kind have similar provisions,[27] and in a number of legislative provisions, existing or proposed, under which the ordinary limitation period can be extended, proof that the necessary conditions are fulfilled is expressly put on the plaintiff.[28]

8.9 Even if the plaintiff has raised the contention that the discovery period has not run its course, the defendant will ordinarily be entitled to immunity from liability if the plaintiff did not begin proceedings until after the expiry of the 15-year ultimate period. An express provision placing the onus of proof of this issue on the defendant confirms what must logically be correct and is consistent with the common law rule as expressed in the leading Australian cases.[29] Again, there are similar provisions in the Alberta legislation and the other models followed by the Commission.[30]

8.10 The Commission has recommended that, in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period had expired, and the general public interest in finality of litigation, are outweighed by other factors, the court should be able to order that either the discovery period or the ultimate period may be extended in the interests of justice. Under this recommendation the plaintiff would have the burden of proving that the conditions for the exercise of discretion in his favour had been met. No other allocation of the burden of proof is logically possible, but in any case the Commission sees the need for the plaintiff to prove the case for extension under the stated

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27 See *Limitations Act 1996* (Alta) s 3(5)(a) (claimant has burden of proving that remedial order sought within discovery period); Limitations Bill 1992 (Ont) cl 5(2) (person with claim presumed to have known of the matters in question on the day on which the act or omission took place until contrary proved). For discussion see Alberta Report for Discussion (1986) para 2.156-2.161; Alberta Report (1989) 74; Ontario Report (1991) 25.

28 *Limitation Act 1979* (BC) s 6(5); *Statute of Limitations (Amendment) Act 1991* (Ire); Newfoundland Working Paper (1985) 204 and Newfoundland Report (1986); New Zealand Report (1988) para 181. In the absence of express provision, the common law reaches the same result: see cases cited at n 18 above.

29 See para 8.2 above. Note in particular *Sorrenti v Crown Corning Ltd* (1986) 7 NSWLR 77, dealing with the 30 year ultimate period in the *Limitation Act 1969* (NSW) s 51(1).

30 *Limitations Act 1996* (Alta) s 3(5)(b): for discussion see Alberta Report for Discussion (1986) para 2.214; Alberta Report (1989) 74. See also the similar recommendation in New Zealand Report (1988): *Draft Limitation Defences Act* (NZ) s 5(1). There is no express provision to this effect in cl 15 of the Limitations Bill 1992 (Ont), but the implication is that the burden of proof is on the defendant.

conditions as one means of ensuring that it operates only within very narrow limits. This recommendation is functionally the same as an extension provision under more traditional limitation statutes in other jurisdictions, and plaintiffs bear the burden of proof under such provisions, whether expressed statutorily or not.[31]

8.11 Consistently with its philosophy that the new *Limitation Act* should expressly allocate burdens of proof, the Commission recommends in Chapter 17 that the plaintiff should bear the onus of proving that the running of the applicable limitation period has been postponed or suspended by disability.[32] Again, this is consistent with the Alberta legislation and other models which have influenced the Commission,[33] statutory provisions in other jurisdictions [34] and the common law.[35]

2. KNOWLEDGE OF OTHERS AND THE DISCOVERY PERIOD

8.12 Where the limitation period runs from the point when the plaintiff discovered or should with reasonable diligence have discovered his loss, situations may arise in which someone connected with the plaintiff acquires the necessary knowledge before the plaintiff does. As analysed by the Alberta Law Reform Institute, there are three different situations -

(1) Where the claimant is a principal and the knowledge in question has been acquired by his agent.

(2) Where the claimant is the successor owner of a claim, for example the second or subsequent purchaser of a house built defectively.

(3) Where the claimant is the personal representative of a deceased person.[36]

The third situation will be dealt with in Chapter 22.[37]

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31 See paras 8.3 and 8.8 above.
32 See para 17.71 below.
33 See *Limitations Act 1996* (Alta) s 5(3); Limitations Bill 1992 (Ont) cls 7(2),15(9).
34 *Limitation Act 1979* (BC) s 7(9); *Limitation of Actions Act 1987* (Man) s 7(6).
35 See para 8.3 above.
36 Alberta Report for Discussion (1986) paras 2.186-2.193; Alberta Report (1989) 67-69.
37 See paras 22.23-22.24 below.

(a) Principal and agent

8.13 Where the claimant is a principal and the knowledge in question has been acquired by his agent, the Alberta Law Reform Institute recommended, and the Alberta legislation now enacts, that the discovery period should begin against the principal when either -

(1) the principal first acquired or ought to have acquired the necessary knowledge, or

(2) an agent with a duty to communicate the knowledge in question to the principal first actually acquired that knowledge.[38]

The report which preceded the Ontario Limitations Bill recommended a similar provision,[39] but there is no separate provision in the Bill dealing with the principal and agent situation.

8.14 Under the general law of agency, if an agent acquires knowledge which he is under a duty to communicate to his principal, the principal is deemed to have notice of it. According to *Bowstead on Agency*:

> "When any fact or circumstance, material to any transaction, business or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken.[40]

There is an exception where the agent is party or privy to fraud on or misfeasance against the principal.[41] Whether or not the agent has authority, actual or apparent, to communicate the information is not relevant.[42] The principal is deemed to be affected because knowledge acquired by the agent in respect of a matter where the agent has power to bind the principal, or as to which he has a duty to inform the principal, is deemed to have been passed on.[43]

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38 *Limitations Act 1996* (Alta) s 3(2)(b): see Alberta Report for Discussion (1986) para 2.188; Alberta Report (1989) 67.

39 Ontario Report (1991) 26-27.

40 F M B Reynolds *Bowstead on Agency* (15th ed 1985) 412.

41 Ibid.

42 Id 413, citing *Restatement Second: Agency* (1958) paras 273,272 comment (g).

43 Ibid, citing *Wyllie v Pollen* (1863) 32 LJCh 782, Lord Westbury LC at 283; *Waldy v Gray* (1875) LR 20 Eq 238, Bacon VC at 252; *Bradley v Riches* (1878) 9 Ch D 189, Fry J at 196.

8.15 The Alberta provision therefore does no more than reproduce the effect of the existing law. The New Zealand Law Commission came to the conclusion that the principal and agent situation could "be dealt with adequately by the courts applying ordinary principles relating to the existence or otherwise of constructive knowledge on the part of the principal".[44] The Commission agrees and therefore does not recommend the adoption of a provision based on that enacted in Alberta. It **recommends** that the question whether the agent's knowledge should be regarded as that of the principal should be determined by the ordinary law of agency.

(b) Successor owners

(i) Introduction

8.16 In certain situations, knowledge may be acquired by a claimant's predecessor in title during the time when the predecessor was entitled to the right in question. Such cases generally relate to claims in respect of defective property, and the most important example would be a claim against the builder or other person responsible for the defective state of a house which has been built defectively. Such a situation raises two issues -

(1) whether the successor owner has a right to make a claim;
(2) If so, whether the acquisition of knowledge by the prior owner causes the limitation period to start running against the successor owner.

(ii) The existing law

8.17 There is no doubt that the successor owner is owed a duty of care by the defendant. In so far as this required confirmation, it has now been authoritatively confirmed by the High Court's decision in *Bryan v Maloney*.[45] In that case, the damage did not become discoverable until after the successor owner had purchased the property. If the limitation period in such cases commences when the damage becomes discoverable,[46] the fact that the plaintiff was a successor owner, rather than the original purchaser who contracted with the defendant, occasions no special problem. It is in the rather different situation where the damage becomes

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44 New Zealand Report (1988) para 217.
45 (1995) 182 CLR 609: see para 4.19 above.
46 See paras 4.19-4.28 above.

discoverable during the prior owner's period of ownership that a successor owner who attempts to sue the builder may be met with a defence of limitation.

8.18 Prior to the decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm),*[47] it appeared that even if the damage was discoverable before the successor owner purchased the property, time only began to run against the successor owner from the date he acquired ownership.[48] In *Pirelli* the House of Lords departed from the previous cases and held that the limitation period began running not when the damage became discoverable but when it occurred. One factor which influenced this decision was the fear that the application of the discovery principle to cases in which there had been successive purchases of property would mean that a fresh cause of action would accrue each time the defective property changed hands. Lord Fraser of Tullybelton was not prepared to permit such an outcome. He stated that the duty of care of the builder:

> "...is owed to the owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title. No owner in the chain can have a better claim than his predecessor in title."[49]

8.19 Under the *Pirelli* rule, it was possible that the limitation period would expire against a successor owner before that owner acquired an interest in the property. In such a case, the successor owner would never have any effective right to make a claim against the builder.[50] However, there is a fundamental objection to such an outcome.[51] It is contrary to the established principle that there can be no claim in tort for damage to property in which the plaintiff has no proprietary interest, or for damage to property belonging to the plaintiff that occurred before he acquired his interest.[52] The New Zealand courts, which always entertained

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47 [1983] 2 AC 1.

48 *Sparham-Souter v Town & Country Developments (Essex) Ltd* [1976] QB 858; *Eames London Estates Ltd v North Hertfordshire District Council* (1981) 259 EG 491.

49 *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1 at 18. See G Robertson "Defective Premises and Subsequent Purchasers" (1983) 99 *LQR* 559; M A Jones "Defective Premises and Subsequent Purchasers -A Comment" (1984) 100 *LQR* 413; S Todd "Claims in Tort by Owners or Purchasers of Defective Property" (1984) 4 *Leg Stud* 312.

50 In *R L Polk & Co (Great Britain) Ltd v Edwin Hill & Partners* (1988) 41 BLR 89, Judge Hawser QC sought to avoid the potential injustice of this result by holding that a purchaser could sue if he did not have, and could not reasonably have had, knowledge of the existence of damage at the date of purchase.

51 See Discussion Paper (1992) paras 7.25-7.27; N J Mullany "Limitation of Actions and Latent Damage - An Australian Perspective" (1991) 54 *MLR* 216, 233-236. Mullany also points out that causes of action do not run with the land but have to be assigned by the predecessor owner: see *Perry v Tendring District Council* (1984) 30 BLR 118, Judge Newey QC at 143.

52 *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219, Roskill J at 250; *Sparham-Souter v Town & Country Developments (Essex) Ltd* [1976] QB 858, Lord Denning MR at 868, Roskill LJ at 875, Geoffrey Lane LJ at 880; *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR

grave doubts about the correctness of the *Pirelli* ruling, [53] never accepted that it cut down the rights of subsequent purchasers in this way and maintained that in such cases time could not start running until the purchaser acquired an interest in the property.[54] It has been suggested that Australian courts are unlikely to adopt the *Pirelli* approach.[55]

8.20 In the light of more recent cases in Australia and elsewhere,[56] it now seems likely that when an appropriate opportunity arises the High Court and the Supreme Court of Western Australia will reaffirm the principle that the cause of action accrues when the damage becomes discoverable. This will produce a satisfactory result if the damage becomes discoverable after the successor owner acquires an interest in the property, but if the limitation period also begins to run against the successor owner from the time when it becomes discoverable it will still be possible for the period to expire before the successor owner acquires his interest, so preventing him from making a claim against the builder.

(iii) The issue for the Commission

8.21 Under the Commission's recommended scheme, the same issue arises. The discovery period will begin when the damage becomes discoverable. The question is whether the discovery period should also begin at that point against successor owners who have not yet acquired title to the property.

8.22 A number of different situations can be envisaged -

(1) The prior owner, having discovered the existence of damage, recovers compensation from the builder, but does not use the money to repair the

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394, Richmond P at 414; *Anns v Merton London Borough Council* [1978] AC 728, Lord Salmon at 770; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, Cooke and Somers JJ at 238, Richardson J at 242; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, Brennan J at 493; *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, Lord Brandon of Oakbrook at 809-810.

53 See *Askin v Knox* [1989] 1 NZLR 248. It is now clear that the New Zealand courts have rejected *Pirelli:* see *Invercargil1 City Council v Hamlin* [1994] 3 NZLR 513, affirmed by the Privy Council [1996] 1 NZLR 513, dealt with at para 4.23 above.

54 *Paaske v Sydney Construction Ltd* (unreported) High Court, Auckland, 24 June 1983, A 387/74, summarised in (1984) 10 NZRL 120.

55 N J Mullany "Limitation of Actions and Latent Damage - An Australian Perspective" (1991) 54 *MLR* 216, 236.

56 See paras 4.19-4.28 above.

property. He sells it to the successor owner, who is ignorant of the defects at the time of purchase.[57]

(2) The prior owner discovers the existence of the damage but for some reason does not claim compensation from the builder. He sells it to the successor owner, who is ignorant of the defects at the time of purchase.[58]

(3) The prior owner never discovers the existence of the damage, although it is discoverable. He sells it to the successor owner, who is ignorant of the defects at the time of purchase.

8.23 In the first and second situations, the successor owner should have a remedy against the prior owner, either for breach of contract or for damages for deceit.[59] In the third situation, if the successor owner has no remedy against the builder he has no remedy against anyone. In the first situation, the successor owner should not be able to sue the builder because he has already compensated the prior owner, but in the other two situations the builder should be responsible to the successor owner.

(iv) Suggested solutions

8.24 There are a number of provisions or proposed provisions which adopt the solution to the problem proposed by Lord Fraser of Tullybelton in the *Pirelli* case.[60] Under Lord Fraser's view, if the limitation period has run against the prior owner, it has also run against the successor owner, who will accordingly have no rights against the builder. Lord Fraser's proposal had already been anticipated by the British Columbia *Limitation Act*, which provides that "where a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the

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57 It seems that the prior owner is under a duty to disclose the defects: *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, Richmond P at 415. If the prior owner does use the money to repair the property, and the repairs are successful, the successor owner would have no cause to complain and no claim against the builder.

58 If the successor owner is aware of the defects, and the price is reduced accordingly, the successor owner would have no claim against anyone. See *R L Polk & Co (Great Britain) Ltd v Edwin Hill & Partners* (1988) 41 BLR 89, where Judge Hawser QC suggested that a subsequent owner who was aware, or ought to have been aware, of the damage at the time of the purchase could and should have bargained for a reduction in the sale price.

59 See *Bryan v Maloney* (1995) 182 CLR 609, Brennan J at 647.

60 See para 8.18 above.

first mentioned person".[61] More recently, the Alberta Law Reform Institute has recommended, and the Alberta legislation now provides, that the discovery period should begin against a successor owner of a claim when either the prior owner or the successor owner first acquired or ought to have acquired the necessary knowledge,[62] and the Ontario Bill proposes a similar provision to the effect that if the prior owner knew or ought to have known of the matters in question before the person claiming knew of them, the person claiming is deemed to have acquired that knowledge at the same time as the prior owner first acquired or ought to have acquired it.[63] The Alberta and Ontario proposals, by adopting discovery as a general principle, increase the successor owner's chances of obtaining recompense, but are still open to the objection that time may run against the successor owner before he acquires an interest in the property.

8.25 The English *Latent Damage Act 1986* attempts to find a solution which gives the successor owner more rights against the builder than allowed to him by Lord Fraser.[64] The Act allows a fresh cause of action to accrue to the successor owner on the date he acquired an interest in the property, if a cause of action has accrued to the prior owner and the successor owner acquires an interest in the property after the date on which the original cause of action accrued but before the damage becomes discoverable.[65] The successor owner then has a choice of two limitation periods (subject to the 15 year long stop): either six years from when the property first suffered damage or three years from the date when the later owner acquired the relevant knowledge.[66] To avoid the risk of a series of limitation periods running in relation to the same property, the Act resorts to the use of two levels of legal fiction: it provides that the cause of action acquired by the purchaser is treated as based on a duty owed to the prior owner, and that for limitation purposes the cause of action is to be treated as having accrued at the date that it accrued to the prior owner.[67] Though the latter provision prevents an innocent purchaser being left without a remedy, it is still in conflict with the principle that time cannot

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61 *Limitation Act 1979* (BC) s 6(4)(c). The problem under discussion was avoided in *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 (see para 4.23 above) because Wilson J at 686-687 held that the plaintiff was not "claiming through" the original owners.

62 *Limitations Act 1996* (Alta) s 3(2)(a): see Alberta Report for Discussion (1986) para 2.187; Alberta Report (1989) 67.

63 Limitations Bill 1992 (Ont) cl 11(1); see also Newfoundland Working Paper (1985) 204.

64 The report which preceded the *Latent Damage Act* simply affirmed the view of Lord Fraser in *Pirelli*: Scarman Committee Report (1984) para 4.21.

65 *Latent Damage Act 1986* (UK) s 3(1).

66 *Limitation Act 1980* (UK) s 14A(4).

67 *Latent Damage Act 1986* (UK) s 3(2).

run against a plaintiff lacking a proprietary interest.[68] The *Latent Damage Act* plainly assumes that the cause of action accrues on damage, rather than on discoverability. It is therefore not suitable for adoption as part of a discoverability based system.

8.26 A solution which gives the successor owner a greater chance of being able to sue the builder is that proposed by the New Zealand Law Commission, which recommends that the limitation period applying to the claim of the successor owner should be regarded as beginning when he acquires an interest in the property.[69] The builder would be protected by the 15 year long stop period which would commence running on the date of the act or omission, which in the case of a defective building would probably be the date of completion. The New Zealand Report comments that the number of cases directly affected by this particular issue is likely to be extremely small in practice.

8.27 According to the New Zealand Commission, the problem with this proposal is that it leaves open the possibility of double recovery against the builder:

> "These proposals leave room for an unscrupulous building owner to recover damages or settlement money from a builder for a defect but fail to apply the money to remedial work, then sell the property without disclosing (or perhaps concealing) the defect. The purchaser might have a claim against the builder as a successor owner without prior knowledge. We think such situations would be very unlikely to arise, and the risk could be further reduced by the courts making an order for indemnity of actual remedial work costs or the builder defendant requiring some indemnity as part of a settlement, or both."[70]

8.28 In the Commission's view, the fear of double recovery is unfounded, at least in cases where judgment has already been obtained by a prior owner against the builder. If the builder were sued by a successor owner, he would be able to plead either res judicata or issue estoppel.[71] Under each of these doctrines, there must be a final judgment of a competent tribunal between the same parties litigating in the same capacity or their privies. Under the doctrine of estoppel by res judicata, where an action has been brought and judgment entered, no other proceedings can thereafter be maintained on the same cause of action.[72] The cause of

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68 See Discussion Paper (1992) paras 7.47-7.50; N J Mullany "Reform of the Law of Latent Damage" (1991) 54 *MLR* 349, 357-358.

69 New Zealand Report (1988) paras 216-225.

70 Id para 224.

71 See generally D Byrne and J D Heydon *Cross on Evidence* (Australian ed 1991) paras 5005-5100; G Spencer Bower and A K Turner *The Doctrine of Res Judicata* (2nd ed 1969); *Halsbury's Laws of England* (4th ed) vol 16 paras 1517-1570.

72 *Jackson v Goldsmith* (1950) 81 CLR 446, Fullagar J at 466.

action has passed into judgment, so that it is merged and no longer has an independent existence.[73] Under the doctrine of issue estoppel, a judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.[74] A person may be a privy in blood, title or interest.[75] For this purpose, a purchaser is the privy of a vendor,[76] provided the title relied on to establish such privity has arisen after the judgment or at least after the commencement of the proceedings in the course of which that judgment was given.[77]

8.29 These principles do not cover the case where the builder has settled with the prior owner without the matter proceeding to judgment. Here, however, the builder can be expected to protect his own position by obtaining an indemnity from the prior owner as part of the settlement, as suggested by the New Zealand Law Commission.[78] Alternatively, the parties may file a consent order.[79]

(v) The Commission's recommendation

8.30 The Commission **recommends** that in cases where the damage becomes discoverable before the successor owner acquires an interest in the property, the discovery period should begin only on the date the interest is acquired (unless the successor owner has the necessary knowledge before that date). The builder or other person responsible for the defective state of the property, like any other defendant, will have a defence if the ultimate period has expired (subject to any exercise by the court of its discretion to extend the period).

8.31 Under the existing law, if the prior owner has obtained a judgment against the builder, the builder will have a defence to any claim by the successor owner. The successor owner

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73 *Blair v Curran* (1939) 62 CLR 464, Dixon J at 532; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, Brennan J at 611.

74 *Blair v Curran* (1939) 62 CLR 464, Dixon J at 531. For a recent discussion, see *Murphy v Abi-Saab* (1995) 37 NSWLR 280, Gleeson CJ at 286-288.

75 Id para 241. *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, Lord Reid at 910; *Ramsay v Pigram* (1968) 118 CLR 271, Barwick CJ at 279; *Shears v Chisholm* [1994] 2 VR 535, J D Phillips J at 544-545.

76 *Board v Board* (1873) LR 9 QB 48; *Sumner v Schofield* (1880) 43 LT 763; see also *O'Connor v O'Connor* [1916] 2 IR 148 (successor in title to land).

77 G Spencer Bower and A K Turner *The Doctrine of Res Judicata* (2nd ed 1969) para 242; *Doe d Foster v Earl of Derby* (1834) 1 Ad & El 783, 110 ER 1406, Littledale J at 790-791, cited in *Hodson v Walker* (1872) LR 7 Exch 55, Channell B at 61; *Re De Burgho's Estate* [1896] 1 IR 274, Madden J at 280; *Pople v Evans* [1969] 2 Ch 255, Ungoed Thomas J at 261.

78 See para 8.27 above.

79 See *Rules of the Supreme Court 1971* O 43 r 16.

should have a remedy against the prior owner if the prior owner has sold the property to him without revealing its defective condition.

3. TRANSITIONAL PROVISIONS

(a) Introduction

8.32 An important question which must be addressed is whether the provisions of the new *Limitation Act* recommended in this report should apply retrospectively. In this context, retrospective operation can entail a number of different possibilities. It has to be determined whether the new Act should apply-

(1) to causes of action which are already running at the date on which the legislation comes into force;

(2) to causes of action which had become statute-barred under the old law;

(3) to actions that have already been commenced before the statute comes into force;

(4) to actions which have been concluded either by a judgment of a court or by a settlement before the statute comes into force.

8.33 In the absence of a clear indication in the legislation to the contrary, there is a presumption against giving retrospective operation to a statute which creates, abolishes or otherwise affects existing substantive rights or liabilities.[80] However, where a statute merely makes a change in procedure or the manner of enforcing rights or liabilities, this presumption does not apply. Although these principles are easy to state, they have proved difficult to apply in practice, since they rest on the somewhat elusive distinction between substance and procedure. Statutes of limitation are traditionally characterised as procedural,[81] but in reality

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80 *Maxwell v Murphy* (1957) 96 CLR 261, Dixon J at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188, Fullagar J at 194.

81 *Maxwell v Murphy* (1957) 96 CLR 261; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471; *Yrttiaho v Public Curator* (Qld) (1971) 125 CLR 228; *Van Vliet v Griffiths* (1978) 19 SASR 195 (reversed on a different point (1979) 20 SASR 524); *Daroczy v B & J Engineering Ply Ltd (in liq*) (1986)

often operate to impair or destroy substantive rights or liabilities, and the traditional characterisation has now been affected by recent legislation being enacted in all Australian jurisdictions.[82] Thus provisions in limitation legislation which enable a person to enforce a cause of action which would otherwise be barred are not usually given retrospective effect in the absence of any indication to the contrary in the statute.[83]

(b) Existing legislative provisions

8.34 The *Limitation Act 1935*, like other older Limitation Acts,[84] contains no transitional provisions indicating how the issue of retrospective operation is to be dealt with.[85] However, modern Acts generally contain express provisions dealing with this matter. Most Australian Acts provide that they do not enable actions to be brought which were barred at the date on which the Act came into force, and that they do not affect any action, arbitration or application pending at that date or the title to property which was the subject of any such application, arbitration or application.[86] The Australian Capital Territory and New South Wales Acts add that nothing prevents the commencement and maintenance of an action or arbitration within the time allowed by the previous law on a cause of action which accrued before the date the new law came into force.[87] These provisions preserve the cause of action under the old law, but do not give the plaintiff the alternative of relying on the new law in such a case. However, the Northern Territory and Queensland Acts provide that when a cause of action arose before the date of commencement, the plaintiff may have the benefit of either the old or the new law.[88] Three Canadian Acts, those of British Columbia, Manitoba and New Brunswick, expressly provide that they apply to actions which arose before the date on which

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67 ACTR 3; see however *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553; *Arnold v Central Electricity Generating Board* [1988] AC 228; *Rodway v The Queen* (1990) 169 CLR 515.

82 See para 7.66 above. The Limitation Acts of New South Wales and South Australia expressly provide that a limitation law of the State is substantive: *Limitation Act 1969* (NSW) s 78; *Limitation of Actions Act 1936* (SA) s38A.

83 See eg *Maxwell v Muphy* (1957) 96 CLR 261; *Van Vliet v Griffiths* (1978) 19 SASR 195 (reversed on a different point (1979) 20 SASR 524).

84 Such as those of South Australia, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

85 In the absence of such provisions, the Act will be construed as prospective*: Van Vliet v Griffiths* (1979) 20 SASR 524.

86 *Limitation Act 1985* (ACT) s 3; *Limitation Act 1969* (NSW) s 6; *Limitation Act 1981* (NT) s 9(1); *Limitation of Actions Act 1974* (Qld) s 8(1); *Limitation Act 1974* (Tas) s 39; *Limitation of Actions Act 1958* (Vic) s 35. See also *Limitation Act 1950* (NZ) s 34; *Limitation Act 1980* (UK) s 40, Sch 2 cl 9.

87 *Limitation Act 1985* (ACT) s 3(c); *Limitation Act 1969* (NSW) s 6(d).

88 *Limitation Act 1981* (NT) s 9(2); *Limitation of Actions Act 1974* (Qld) s 8(2).

the Act came into force.[89] However, only in the British Columbia Act is it expressly stated that statute-barred causes of action are not revived,[90] and none of these Acts deals specifically with pending actions.

8.35 Most Limitation Acts give much greater scope to retrospectivity in the context of personal injury actions. The provisions under which it is possible to extend, delay or disregard the running of the limitation period in such cases have been introduced to remedy injustice to plaintiffs under the former law, and this aim would not be fulfilled if such provisions only applied prospectively. In England, the 1963 and 1975 Acts expressly provided that the changes to the personal injury limitation period made by those Acts were to apply to causes of action which accrued before the Acts came into force, irrespective of whether the actions were already statute-barred or whether proceedings had already been commenced.[91] In Australia, the extension provisions in the Northern Territory and Queensland apply whether or not the limitation period expired before the commencement of the Act,[92] and those in the Australian Capital Territory apply whether the cause of action accrued before or after the commencement of the Act and, in the case of a cause of action accruing before commencement, whether or not proceedings were instituted prior to that date.[93] The original extension provisions in New South Wales and Victoria were also given retrospective effect.[94] However, the more recent provisions which have replaced them are not fully retrospective. In New South Wales, the new provisions apply to causes of action which accrued on or after the commencement date,[95] but only apply to causes of action accruing prior to that date to the extent set out in a Schedule.[96] In Victoria, the new provisions only apply to causes of action which arose not more than six years before the commencement date.[97] In contrast to all these instances, the Tasmanian extension provisions were expressly given a prospective operation only.[98]

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89 *Limitation Act 1979* (BC) s 14(2); *Limitation of Actions Act 1987* (Man) s 58; *Limitation of Actions Act 1973* (NB) s 64.

90 *Limitation Act 1979* (BC) s 14(1).

91 *Limitation Act 1963* (UK) s 6(1); *Limitation Act 1975* (UK) s 3(1).

92 *Limitation Act 1981* (NT) s 44(7)(a); *Limitation of Actions Act 1974* (Qld) ss 31(3)(a), 32(4)(a).

93 *Limitation Act 1985* (ACT) s 35.

94 *Limitation Act 1969* (NSW) s 58(3); *Limitation of Actions Act 1958* (Vic) s 23A(1), as enacted by the *Limitation of Actions (Personal Injuries) Act 1972* (Vic) s 3 and repealed by the *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 5.

95 *Limitation Act 1969* (NSW) ss 60A-60B, added by the *Limitation (Amendment) Act 1990* (NSW), s 3 and Sch 1.

96 *Limitation Act 1969* (NSW) Sch 5.

97 *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 11.

98 *Limitation of Actions Act 1965* (Tas) s 2(4).

8.36 The Western Australian provisions allowing the extension of the limitation period for asbestos related diseases appear to be unique in two respects. First, the Act has full operation only in cases where the plaintiff did not acquire knowledge of the relevant facts before 1 January 1994.[99] (The Act in fact commenced on 19 January 1994.) Second, though the Act is given retrospective operation in that it applies to cases in which the plaintiff acquired knowledge before this date, it imposes limits on liability in some of these cases. Where the limitation period that would have applied under the old law had expired before the action was commenced, the liability of the defendant is limited by ruling out the award of damages for non-pecuniary loss, and limiting damages for pecuniary loss to $120,000.[100]

(c) The Commission's recommendations

(i) Causes of action which have already accrued

8.37 There are strong arguments in favour of allowing causes of action which arose before the Act came into effect to be regulated by the new law. Otherwise, for many years afterwards, the rights of parties will have to be determined by reference to the repealed Act rather than the new one.[101] Most of the *Limitation Acts* with express transitional provisions referred to above[102] allow the new provisions to apply to causes of action in existence at the

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99 *Limitation Act 1935* s 38A(6). S 38A(7) explains what is meant by knowledge of the relevant facts.

100 Id s 38A(3) and (5). The provisions of section 38A which give the section retrospective operation are extremely complicated, providing for four different situations:

(1) If the old limitation period expired before 1 January 1984 and before the action was commenced, the limitation period would be three years, running from the date on which the amending Act came into operation: s 38A(2). Damages were not to be awarded except in respect of pecuniary loss, and were not to exceed $120,000: s 38A(3).

(2) If the old limitation period had not expired before 1 January 1984 but expired before the action was commenced, the limitation period was to be three years, running from the date on which the amending Act came into operation: s 38A(4) Again damages were not to be awarded except in respect of pecuniary loss, and were not to exceed $120,000: s 38A(5).

(3) If the old limitation period expired before 1 January 1984 but had not expired before the action was commenced, the limitation period was three years from the time the amending Act came into operation: s 38A(2). There were to be no limits on damages.

(4) If the old limitation period had not expired before 1 January 1984 and had not expired before the action was commenced, the limitation period was to be that given by the previous law, or if that period expired less than three years before the amending Act came into operation, three years from the time the Act came into operation: s 38A(4). There were to be no limits on damages.

See P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 *UWAL Rev* 63, 79-83. The provisions which limit damages in cases where the action was statute-barred before 1 January 1984 (s 38A(3)) or before the action was commenced (s 38A(5)) in essence adopt one of the alternatives to full retrospectivity proposed by the Commission in its Part I Report (1982): see n 107 below.

101 See British Columbia Report (1974) 102-103; Ontario Report (1991) 50-51.

102 See para 8.34 above

time the Act comes into force, and in the Commission's view the same should apply to the new Act recommended in this report.[103]

8.38 In nearly all cases, the new provisions recommended by the Commission will confer greater rights on plaintiffs than the existing Act. However, there may be a few cases where, as a result of the Commission's policy of adopting simple uniform rules, some of the longer limitation periods under the present Act will be reduced, for example those applying to specialty debts and actions to enforce a judgment.[104] In order to ensure that plaintiffs are not disadvantaged in such cases, the Commission **recommends** 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. This adopts the position taken by the *Limitation Acts* of the Northern Territory, Queensland and three Canadian jurisdictions.[105] In a case where under the Commission's recommendations either the discovery period or the ultimate period has expired, the fact that under existing rules the cause of action had already accrued at the time the new Act came into force should not prevent a court exercising its discretion in favour of disregarding the limitation period and allowing the action to continue, if it is otherwise appropriate to do so.

(ii) Actions already barred by the expiry of the limitation period

8.39 The issue of whether litigants should be able to take advantage of the new Act in cases where actions were barred under the old legislation is not so easy to resolve. 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, this report has

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103 The Commission made a similar recommendation in its earlier report: see Part I Report (1982) para 4.38. For similar recommendations see Orr Committee Interim Report (1974) para 147; British Columbia Report (1974) 103; ACT Working Paper (1984) para 9; Ireland Report (1987) 53; *Draft Limitation Defences Act* (NZ) s 22. In contrast, the Saskatchewan Report (1989) 50 recommends that the new Act should only apply to causes of action accruing after it comes into force. The *Limitations Act 1996* (Alta) s 14(1) provides that it applies where a claimant seeks a remedial order in a proceeding commenced after the date on which the Act comes into force, but the Commission has been informed that it is proposed to amend the Act to make it clear that it is immaterial whether the claim arose before or after the Act came into force: letter from Professor P J M Lown QC of the Alberta Law Reform Institute, dated 6 December 1996, on file at the Commission.

104 See paras 12.8-12.12, 12.38-12.43 below.

105 *Limitation Act 1981* (NT) s 9(2); *Limitation of Actions Act 1974* (Qld) s 8(2); *Limitation Act 1979* (BC) s 14(2); *Limitation of Actions Act 1987* (Man) s 58; *Limitation of Actions Act 1973* (NB) s 64. The Australian Capital Territory and New South Wales allow the action to continue under the old law but do not permit the plaintiff to take advantage of the new law in such a case: *Limitation Act 1985* (ACT) s 3; *Limitation Act 1969* (NSW) s 6.

clearly demonstrated that 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.

8.40 Other law reform bodies which have examined this issue have generally decided that a distinction should be made between personal injury and other cases. 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.[106]

8.41 The Commission is in agreement with the conclusions resulting from this weighing of the various policy elements, and has concluded that in this respect, and this respect only, the new *Limitation Act* should make a distinction between personal injury and all other cases. It **recommends** that as respects causes of action for personal injury, the provisions of the new Act should apply whether or not the action was barred by the provisions of the previous law.[107] In all other cases, the Act should not operate to revive a statute-barred cause of action.[108] As the Commission has already recommended,[109] "personal injury" should be defined to include trespass to the person, and it will also cover psychiatric damage and other forms of physical harm. The Act will therefore apply retrospectively not only in standard

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106 See Orr Committee Interim Report (1974) para 146; Scarman Committee Report (1984) paras 4.25-4.26; ACT Working Paper (1984) paras 6-9; NSW Report (1986) para 7.3.

107 This echoes the Commission's previous recommendation: see Part I Report (1982) para 4.38. For similar recommendations in other reports, see Orr Committee Interim Report (1974) para 147; ACT Working Paper (1984) para 9. The Commission's report recognised that its recommendations would expose a number of defendants or their insurers to a potential liability that did not previously exist, and that this might cause hardship. It therefore proposed two possible alternatives to lessen the impact on defendants caused by retrospective application of the Commission's recommendations: to limit the damages which may be awarded in retrospective cases, or to award a lump sum for past pecuniary loss and instalment payments in respect of non-pecuniary loss and future pecuniary loss: Part I Report (1982) paras 4.39-4.42.

108 For other recommendations that the new provisions should not apply to causes of action that are statute barred at the time they come into effect, see British Columbia Report (1974) 103; ACT Working Paper (1984) paras 6-7; Draft Limitation Defences Act (NZ) s 22; Saskatchewan Report (1989) 50. See also *Limitations Act 1996* (Alta) s 14(2).

109 See paras 7.27-7.28 above.

personal injury cases but also in cases involving sexual abuse and other cases involving "personal injury" in this wider sense, for example the harm resulting from the removal of Aboriginal children from their parents during infancy.

8.42 The Commission has considered whether allowing personal injury actions barred under the old law to be revived under the new law is likely to result in a flood of litigation in the first year or so after the new Act comes into effect. The Commission has made inquiries in other jurisdictions in order to ascertain whether the introduction of extension provisions in personal injury cases, applying to existing claims which have already become statute-barred, has produced a large number of resurrected claims. These inquiries suggest that there is no evidence of any such experience in other States and Territories.[110]

(iii) Pending actions

8.43 The issue of whether the new provisions should apply to cases in which an action is pending at the date on which they come into force has also been resolved in various ways according to the kind of claim involved. As regards personal injury cases, where the aim is to ensure that plaintiffs are given the benefit of the new provisions even though the cause of action has already accrued, and even though the action has already become statute barred, some jurisdictions have taken the view that it should make no difference that the plaintiff has actually commenced proceedings before the new provisions came into operation.[111] For example, the English *Limitation Act 1963*, which was the first statute to allow the extension of the ordinary limitation period in personal injury cases, provided that it should apply to causes of action which accrued either before or after the passing of the Act and as regards causes of action accruing before the passing of the Act notwithstanding that an action has been

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110 As regards the effect of particular legislation elsewhere, the Commission gratefully acknowledges the assistance of Mr Peter Quinton, Research Director of the Australian Capital Territory Community Law Reform Committee (*Limitation Act 1985* (ACT)); Professor Harold Luntz, George Paton Professor of Law, Melbourne University and sometime Secretary to the Victorian Chief Justice's Law Reform Committee (*Limitation of Actions (Personal Injuries) Act 1972* (Vic); *Limitation of Actions (personal Injury Claims) Act 1983* (Vic)); Mr Peter Hennessy, Executive Director of the New South Wales Law Reform Commission, and Ms Beverley Caska, the Commission's Librarian (*Limitation (Amendment) Act 1990* (NSW)). The legislation referred to in this footnote is dealt with in para 8.35 above.

111 This was the Commission's recommendation in its previous report: see Part I Report (1982) para 4.38. For similar recommendations see Orr Committee Interim Report (1974) para 147; ACT Working Paper (1984) para 9; Ireland Report (1987) 53.

commenced and was pending when the Act was passed.[112] There are similar provisions in the Australian Capital Territory and New South Wales.[113]

8.44 These provisions apart, legislatures have been reluctant to allow new limitation provisions to apply to cases in which proceedings have already been commenced at the time they came into force. *Limitation Acts* in six Australian jurisdictions exclude pending proceedings,[114] and Acts elsewhere contain similar exclusions.[115] While conceding that it is appropriate for the new provisions to apply to existing causes of action, 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.[116]

8.45 In the view of the Commission, this view is too restrictive. It has already recommended that where the cause of action has accrued before the new legislation comes into force, the plaintiff should have the benefit of either the old or the new limitation rules. It cannot see why the fact that the plaintiff has already commenced proceedings should in itself make any difference. It is likely that in most cases where proceedings have been begun under the old law the action will have been brought in time, but if that is not so, there is no reason why the plaintiff should not have the benefit of the reforms recommended by the Commission. It therefore **recommends** that the fact that proceedings are pending when the new Act comes into force should make no difference to its recommendation in paragraph 8.38 above.

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112 *Limitation Act 1963* (UK) s 6(1).

113 *Limitation Act 1985* (ACT) s 35(b); *Limitation Act 1969* (NSW) Sch 5 cl 4(3)(b).

114 *Limitation Act 1985* (ACT) s 3(a); *Limitation Act 1969* (NSW) s 6(a); *Limitation Act 1981* (NT) s 9(1)(b); *Limitation of Actions Act 1974* (Qld) s 8(1)(b); *Limitation Act 1974* (Tas) s 39(2); *Limitation of Actions Act 1958* (Vic) s 35(b). In most cases, these provisions are expressly made subject to the personal injury provisions, which apply even where proceedings have already been commenced: *Limitation Act 1985* (ACT) s 35(b); *Limitation Act 1969* (NSW) Sch 5 cl 4(3)(b), and see also s 58(3); *Limitation Act 1981* (NT) s 44(2)(a); *Limitation of Actions Act 1974* (Qld) s 31(3). For the position in Tasmania and Victoria, see para 8.35 above.

115 Eg *Limitation Act 1939* (UK) s 33(b); *Limitation Act 1980* (UK) Sch 2 cl 9(1)(b); *Limitation Act 1950* (NZ) s 34(b).

116 See Scarman Committee Report (1984) para 4.26; ACT Working Paper (1984) paras 6-7; Draft Limitation Defences Act (NZ) s 21. See also *Limitations Act 1996* (Alta) s 14(2), which however gives claimants who are within time under the old law two years from the date when the Act comes into force in which to make a claim.

(iv) Actions concluded by judgment or settlement

8.46 There remains the question of whether it should be possible to reopen cases in which judgment has been entered or a settlement reached. This matter has been debated in a number of recent reports in Australia on extending the ordinary limitation period in personal injury cases. The New South Wales Law Reform Commission in its 1986 report considered that it was wrong to distinguish between statute-barred plaintiffs who had commenced actions and those who had not, and that there was a difference between cases where the judgment included a finding against the plaintiff on the substantive merits of the cause of action and one which was based on the running of the limitation period. It recommended that where the court would otherwise be disposed to extend the limitation period to enable a plaintiff to commence proceedings it should have power to set aside -

(1) a judgment except where the judgment was pursuant to a verdict in favour of the defendant on the merits of the plaintiff's claim;

(2) an agreement to compromise a court action and any judgment entered pursuant to such an agreement,

whether or not the judgment or agreement occurred before the amending legislation.[117] These recommendations were in substance adopted by the 1990 amendments to the New South Wales *Limitation Act*.[118]

8.47 The Commission when dealing with this problem in the context of latent disease and personal injury in its 1982 Report said:

> "The Commission, however, does not consider that its recommendations should apply retrospectively to actions in which judgment has been entered. The Commission is of the view that there would be very few cases in this category since most persons would have been deterred from bringing an action by legal advice that the action could be defeated by a defence of limitation. It also considers that any injustice which results in the few cases that may exist is outweighed in this instance by the strong public interest in preserving the finality of judgments entered."[119]

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117 NSW Report (1986) paras 7.6-7.18 and Recommendation 16.

118 *Limitation Act 1969* (NSW) Sch 5 para 5, added by the *Limitation (Amendment) Act 1990* (NSW) s 3 and Sch 1 para 11.

119 Part I Report (1982) para 4.38.

The Commission remains of this view, and accordingly **recommends** that the new Act should not apply retrospectively to cases which have already been resolved, either by a court judgment or by settlement. The doctrine of res judicata will ensure that existing judgments and settlements cannot be reopened.[120]

120 See Tasmania Report (1992) 39-40.

PART IV: APPLICATION OF THE GENERAL PRINCIPLES: PARTICULAR PLAINTIFFS AND DEFENDANTS

Chapter 9

VICTIMS OF CHILD SEXUAL ABUSE

1. INTRODUCTION TO PART IV

9.1 In Chapters 9 to 11 the Commission considers whether there is a case for modification of the general recommendations made in Chapters 7 and 8 in a number of particular instances.

9.2 It is sometimes suggested that there are particular categories of plaintiffs who require special treatment. Under the present law, the victims of asbestos-related diseases are in a special position, since it is only in such cases that the ordinary limitation period can be extended. Under the Commission's recommendations, the general limitation periods, supplemented by the court's discretionary power of extension, will ensure that the victims of asbestos-related diseases will be dealt with fairly, and special provisions will no longer be required. However, arguments may be advanced in favour of special rules for other categories of plaintiffs. The appearance in recent years of civil actions for child sexual abuse, and the problems experienced with limitation rules in such cases, may suggest that this is an area in which a case can be made for special rules. This issue is considered in this Chapter.[1]

9.3 Alternatively, it may be suggested that there are particular categories of defendants who would suffer more seriously than others if the ordinary limitation rules were applied to them without modification. The present law puts public authorities in a special position. Actions in respect of the execution of a statutory or other public duty must ordinarily be commenced within one year, rather than the normal six-year period, and there are also special notice requirements.[2] Chapter 10 considers whether these special rules are justified. It has

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1 In New South Wales, there are special limitation provisions governing road and work accidents which apply to the exclusion of the ordinary limitation rules: see *Motor Accidents Act 1988* (NSW) s 52; *Workers Compensation Act 1987* (NSW) s 151D. Note also *Motor Accident Insurance Act 1994* (Qld) s 57 and *Workers Compensation Act 1988* (Tas) s 135, which create special limitation provisions but do not expressly exclude the Limitation Acts.

2 *Limitation Act 1935* s 47A. Similar rules apply to the Crown: *Crown Suits Act 1947* s 6. The *Local Government Act 1960* s 660, which set out similar rules for local government authorities, was repealed by the *Local Government Act 1995*, but local government authorities are able to rely on s 47 A of the *Limitation Act*.

sometimes been argued that professionals such as accountants, architects, engineers, lawyers and doctors also merit special treatment. This issue is considered in Chapter 11.

2. CHILD SEXUAL ABUSE: BACKGROUND

9.4 The problem of child sexual abuse has received much attention in recent years. Attention was first drawn to the problem in research publications, particularly in the United States,[3] but in recent years official enquiries have revealed the extent of the problem. In Canada, for example, the first major work to document the extent of child sexual abuse was the Badgley Report in 1984.[4] This report found that approximately one in three males and more than one in two females reported that they had been the victim of at least one unwanted sexual act – sexual acts for this purpose including exposures, threats, touching and attacks. Four fifths of these instances had occurred in childhood. One in five females, and one in ten males, reported that the unwanted sexual act they had experienced was a sexual attack. Only a small fraction of those who had experienced an unwanted sexual act had ever reported it to the authorities. Among the reasons given for failure to report such abuses were shame, fear of the perpetrator, fear of not being believed, feelings of partial responsibility, concern not to hurt one's family, and concern not to harm the perpetrator - who in many instances was likely to be a family member.[5] In England, the report of the Cleveland inquiry[6] (which resulted from the activities of a local authority in the north of England, which was responsible for over a hundred children being taken into care over a very short period because of suspected sexual abuse) brought the issue of child sexual abuse into the forefront of public consciousness.[7]

9.5 In Western Australia, concern about child sexual abuse caused the Government to establish the Child Sexual Abuse Task Force in 1986. The Task Force Report, submitted in

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3 See eg R Summit and J Kryso "Sexual Abuse of Children: A Clinical Spectrum" (1978) 48 *Amer J Orthopsychiat* 237; D Finkelhor *Sexually Victimized Children* (1979); F Rush *The Best Kept Secret*: *Sexual Abuse of Children* (1980); D Finkelhor "Sexual Abuse: A Sociological Perspective" (1982) 6 *Child Abuse and Neglect* 95; D J Gelinas "The Persisting Negative Effects of Incest" (1983) 46 *Psychiatry* 312; R C Summit "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 1977; D Finkelhor *Child Sexual Abuse: New Theory and Research* (1984); D Finkelhor and A Browne "The Traumatic Impact of Child Sexual Abuse: A Conceptualization" (1985) 55 *Amer J Orthopsychiat* 530.

4 Committee on Sexual Offences against Children and Youths *Report of the Committee on Sexual Offenses Against Children and Youths* (Ottawa: Supply and Services 1984).

5 See J Mosher "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *UTLJ* 169, 174-175.

6 *Inquiry into Child Abuse in Cleveland*, 1987 (Cm 412,1988).

7 See *Stubbings v Webb* [1992] QB 197, Bingham LJ at 208.

1987,[8] said that over the past decade child sexual abuse had gained increasing recognition as a problem of social consequence and significant proportions in Australia,[9] and the report noted that the reported incidence of such abuse in Western Australia was 1.25 cases per 1000 children under 18 years and 0.93 cases per 1000 children under 13 years.[10] There are similar reports in other Australian States.[11]

9.6 In spite of this increased awareness of the problem of child sexual abuse, there was no immediate realisation that redress might be sought by means of a civil action against the perpetrator or other persons responsible. The Western Australian Task Force Report, for example, discusses the introduction of new criminal offences,[12] changes to child welfare law, and the problem of child witnesses giving evidence in sexual abuse cases,[13] but does not mention the possibility of civil actions or any limitation problems which such actions might encounter. However, in the mid-1980s civil suits for child sexual abuse began to be brought in the United States, and limitation problems were encountered[14] and, for the first time, discussed in legal literature.[15] In England, the first civil action for rape was brought in 1986,[16] but *Stubbings v Webb*,[17] the action in which was brought in 1987 and came on for hearing at first instance in 1990, was the first English case to raise limitation issues in a sexual abuse context. In Canada, the first case such case raising limitation issues appears to have been *Gray v Reeves*[18] in British Columbia in 1992, and the Supreme Court of Canada dealt with these

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8 *Child Sexual Abuse Task Force: A Report to the Government of Western Australia* (1987).

9 Id Summary, i.

10 Id para 4.26.

11 New South Wales: *Final Report of the New South Wales Child Sexual Assault Task Force* (1985); South Australia: *Final Report of the Task Force on Child Sexual Abuse* (1986).

12 Implemented by the *Acts Amendment (Sexual Offences) Act 1992*.

13 This matter was referred to the Commission: see *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87 1991), implemented by the *Acts Amendment (Evidence of Children and Others) Act 1992*.

14 The first case in which an incest victim argued that the limitation period did not begin to run until the point of discovery is *Tyson v Tyson* (1986) 727 P2d 226 (Wash).

15 The first American article appears to be M G Salten "Statutes of Limitation in Civil Incest Suits: Preserving the Victim's Remedy" (1984) 7 *Harv Women's LJ* 189. Outside the United States, the first articles dealing with the limitation problems in this area have been published only very recently: see M Brazier "Personal Injury by Molestation: An Emergent or Established Tort" (1992) 8 *Fam Law* 346; J Mosher "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 UTLJ 169; D O'Halloran "Sexual Abuse Claims and the Limitation of Actions Act" (1994) 68 L1J 503; W V H Rogers "Tort Law and Child Abuse: An Interim View from England" (1994) 2 *TLJ* 257; L S O'Brien and J Peacock "Limitation Issues in Non-Accidental Injury Cases" [1995] *JPIL* 78.

16 *W v Meah* [1986] 1 All ER 935.

17 [1993] AC 498.

18 (1992) 89 DLR (4th) 315.

problems for the first time in *KM v HM*[19] later in the same year. In New Zealand, the first decision appears to be *S v G*[20] in 1994.

9.7 In Australia the first decision to raise such issues was *Tiernan v Tiernan*[21] in 1993, but this has been overshadowed by more recent litigation involving the Christian Brothers who, it is alleged, were responsible for numerous acts of physical and sexual abuse committed on young children who were being cared for in institutions run by the Christian Brothers. It appears that many of the alleged instances took place in Western Australia.[22] In *Taylor v Trustees of the Christian Brothers*[23] two plaintiffs, both now residents of Victoria, commenced actions in Victoria in respect of acts of abuse alleged to have taken place in Western Australia. The defendants applied for the proceedings to be transferred to the Supreme Court of Western Australia under the Victorian *Jurisdiction of Courts (Cross Vesting) Act 1967*, and Hayne J granted that application. It appears that a major reason for commencing the action in Victoria was to allow the plaintiffs to take advantage of the extension provisions of the Victorian *Limitation of Actions Act 1958*. The lack of extension provisions in the Western Australian *Limitation Act* would mean that the action would be barred if that Act were applicable. Hayne J ruled that limitation considerations were irrelevant to the question whether the action should be transferred, since under the cross-vesting legislation it was up to the receiving court to decide which rules of procedure and evidence to apply,[24] and that justice required that the case be transferred to Western Australia. In subsequent proceedings before the Supreme Court of Western Australia Anderson J held that the Western Australian *Limitation Act* should be applied to the matters in issue.[25] Another action was commenced in New South Wales, by former students in Christian Brothers institutions in Western Australia who are now resident in New South Wales. The six plaintiffs in this action were representatives of many others. Again, the defendants made an application to transfer the proceedings to Western Australia, but Levine J took the view that no action was

19 (1992) 96 DLR (4th) 289.

20 [1995] 3 NZLR 681.

21 (Unreported) Queensland SC, 13 April 1993, 39 of 1992.

22 The Congregation of Christian Brothers is a body of male religious within the Roman Catholic Church. It was founded in Ireland in 1802 and commenced works in Australia in 1868. From an organisational point of view Australia was originally a single province, run first from Melbourne and then after 1908 from Sydney, but in 1953 it was divided and an executive was established in Melbourne with responsibility for Victoria, Tasmania, South Australia and Western Australia, and in 1967 there was a further division of responsibility and a Province was established in Perth with responsibility for Western Australia and South Australia. In Western Australia the Brothers have been involved in the establishment and operation of various schools, orphanages and other institutions, including Tardun, Bindoon, Castledare and Clontarf.

23 (1994) Aust Torts Rep 81-288.

24 See eg *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) s 11(1)(c).

25 *Reidy v Trustee of the Christian Brothers* (1994) 12 WAR 583.

possible in Western Australia because it would be statute barred in the light of the decision of Anderson J in the earlier case. He decided that the defendants' applications to transfer the proceedings to Western Australia must fail, inter alia because the defendants' position was based on what he described as the "fiction" that the Supreme Court of Western Australia was the natural forum. In the light of Anderson J's decision, if the case was transferred to Western Australia then in reality there would be no proceedings. He also distinguished the Victorian case on the basis that the proceedings before him involved an application for extension of time, whereas in the Victorian case a statement of claim had been filed.[26]

9.8 The limitation problems in such cases arise because of the difficulties that the victims of child sexual abuse have in mounting legal proceedings until many years after the events in question. These problems are summarised by the Report of the Ontario Limitations Act Consultative Group as follows:

> "[I]t is now recognized that in some circumstances the sexual assault will render the victim incapable of considering legal proceedings until many years after the event. These circumstances typically involve victims who were in a relationship of trust and dependency. Incest is a prime example, but recent experience reveals that other sexual abuses in relationships of trust have similar effects. A number of factors combine in these situations to render the victim incapable of initiating legal proceedings against the perpetrator: the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame. In these circumstances, it is not uncommon for such a victim to cope with the violation by dissociating from the assaultive events, so that they are forgotten altogether or their emotional significance is denied. Many years of therapy may be required before the victim is able to confront the assailant. Where a victim was also physically, mentally or psychologically disabled at the time of the assault, another incapacitating factor is added to those above."[27]

3. POTENTIAL CAUSES OF ACTION

9.9 Where a plaintiff wishes to bring a civil suit in respect of child sexual abuse, the most obvious cause of action is one for battery. Battery, which involves any unlawful touching of the person of another, without that other's consent, is one variety of trespass to the person.

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26 *DJ v Trustees of the Christian Brothers* (unreported) Supreme Court of New South Wales, 15 December 1994, 17814 of 1993. However, there remained the possibility that the proceedings might be transferred to Western Australia on other grounds independent of the limitation issues, and the action was subsequently settled: see "Offer Accepted" *The West Australian*, 20 July 1996.

27 Ontario Report (1991) 20.

Assault, which involves causing an apprehension of imminent contact with the person of another, and false imprisonment are the other categories of trespass to the person. In *Stubbings v Webb*,[28] where the plaintiff sued her adoptive father and brother, alleging rape by the brother and acts of sexual assault and indecency falling short of full intercourse by the father, her action was brought in battery ... She claimed damages for personal injuries arising out of sexual abuse and other physical abuse, and the particulars of damage alleged included mental illness and psychological disturbance.[29] In *Tiernan v Tiernan*,[30] where the plaintiff's complaint was against her adoptive father and involved unwanted touching of her breasts and genital area, but no intercourse, the action was again laid in battery and also assault. In *KM v HM*,[31] where the plaintiff alleged incest by her father, she sued for damages for assault and battery and also for a breach of the fiduciary duty of a parent to protect the child's well-being and health. La Forest J, giving the judgment of the Supreme Court of Canada, confirmed that incest was not a tort in itself, but constituted the tort of assault and battery.

9.10 Since mere touching is enough to constitute a battery, there is no need to allege consequent psychiatric harm as part of the cause of action, though the existence of such harm would have an important effect on the measure of damages.[32] The cause of action would ordinarily accrue on the date of the battery (though in *KM v HM* La Forest J was able to hold that because a victim of incest is psychologically incapable of recognising that a cause of action exists until long after the abuse has ceased, the cause of action would not arise until the victim is reasonably capable of discovering the wrongful nature of the defendant's acts and her injuries). A possible alternative to battery would be an action alleging that the defendant did an act calculated to cause physical harm, and that physical harm resulted, under the principle of *Wilkinson v Downton*.[33] Physical harm is a necessary requirement of this cause of action, and in practically all cases the physical harm alleged is psychiatric damage.[34] A possible advantage of this alternative is that the limitation period would run from the date of the suffering of damage, which might be some time later than the act which caused it. A

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28 [1993] AC 498.

29 Note also *P v Keleman*, *The Independent*, 12 November 1993 (action by three daughters against father).

30 (Unreported) Supreme Court of Queensland, 13 April 1993, 39 of 1992.

31 (1992) 96 DLR (4th) 289.

32 In *KM v HM* (1992) 96 DLR (4th) 289, La Forest J at 306-307 discusses the psychological sequelae of incest. Some behavioural patterns have been characterised as "accommodation syndrome" or "post-incest syndrome". Many incest victims exhibit signs of post-traumatic stress disorder.

33 [1897] 2 QB 57. In his dissenting judgment in *T v H* [1995] 3 NZLR 37 at 43, Cooke P appears to endorse the applicability of this cause of action when he refers to "a cause of action for psychological or psychiatric harm". The majority confirmed that the plaintiff's cause of action in this case lay in assault and battery.

34 See N J Mullany and P R Handford *Tort Liability for Psychiatric Damage* (1993) 288.

further alternative may be to sue the perpetrator of the abuse in negligence, alleging a breach of a duty of care owed by the defendant to the plaintiff. Negligence was the cause of action in the New Zealand case of *S v G*.[35] Actions in negligence in respect of intentional conduct are not all that uncommon.[36]

9.11 In some cases, victims of sexual abuse have sought to sue persons other than the actual perpetrator. Such actions are brought in negligence and allege breach of a duty of care, as a result of which the abuse was allowed to take place. In *S v W*,[37] the plaintiff sued her mother alleging breach of her parental duty to protect her from the foreseeable risk of injury from sexual abuse by her father during her minority.[38] However, there will be many cases in which the facts preclude any suggestion of responsibility on the part of the mother. It may also be possible to sue in negligence some other person or body in a position of trust and responsibility who by their negligence has allowed the abuse to take place. This was the allegation made in the actions against the Christian Brothers.[39] In negligence, the cause of action accrues at the time damage is suffered. If the allegation is that sexual abuse has resulted in some form of psychiatric damage, then it is likely that the limitation period will begin to run at the time such damage is suffered, rather than at the time of the alleged abuse.[40]

4. THE PRESENT LAW IN WESTERN AUSTRALIA

9.12 Under the *Limitation Act 1935*, the limitation period applicable to actions in trespass to the person is four years,[41] and that for actions in negligence is six years.[42] These limitation periods do not start running until the plaintiff reaches the age of 18,[43] but otherwise there is no way in which these periods can be extended. Unless it is possible to argue that the cause of action in trespass does not accrue until the plaintiff is reasonably capable of discovering the

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35 [1995] 3 NZLR 681.

36 An action in negligence may be an alternative to an action under *Wilkinson v Downton* [1897] 2 QB 57: see N J Mullany and P R Handford *Tort Liability for Psychiatric Damage* (1993) 290-292.

37 [1994] TLR 670.

38 As a result of the decision of the House of Lords in *Stubbings v Webb* [1993] AC 498, an action against the father would have been barred by the running of the limitation period: see para 9.14 below.

39 See para 9.7 above. Note also English decisions where actions for negligence and breach of statutory duty were brought against a local authority which neglected to investigate apparently reliable reports of neglect and abuse, and another local authority which decided to take a child into care after an investigation had led to a conclusion that the child had been abused. The House of Lords ultimately held that there was no liability for breach of statutory duty and no common law duty of care: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

40 See N J Mullany and P R Handford *Tort Liability for Psychiatric Damage* (1993) 262.

41 *Limitation Act 1935* s 38(1)(b).

42 Id s 38(1)(c)(vi).

43 See para 17.7 below.

wrongful nature of the acts in question and the psychological effects of those acts on her, along the lines indicated by La Forest J in *KM v HM*,[44] the action will in many cases be barred long before the plaintiff is effectively able to sue. As for negligence, Anderson J in *Reidy v Trustee of the Christian Brothers*[45] confirmed that section 38(1) of the Western Australian *Limitation Act* imposed a six-year time limit without any possibility of extension. The result would be to bar the actions in question, which involved events which had taken place many years beforehand.[46]

5. THE LAW ELSEWHERE [47]

(a) Use of general limitation provisions

(i) England

9.13 In the English cases the issue has been whether plaintiffs can make use of the extension provisions whereby in personal injury cases the three-year limitation period can run from the date of knowledge, if later than the date of accrual, and if necessary can be further extended if it appears to the court that it would be equitable to allow the action to proceed. In *Stubbings v Webb*[48] the Court of Appeal applied the definition of "date of knowledge" in section 14 of the *English Limitation Act 1980*, under which the plaintiff had to know that the injury in question was significant and that it was attributable in whole or in part to the act or omission alleged to constitute negligence, nuisance or breach of duty. The court, affirming the decision of Potter J at first instance, held that even though the acts of abuse alleged took place at various times prior to 1971, the plaintiff did not acquire the necessary knowledge until 1984 when she consulted a psychiatrist specialising in child abuse and came to appreciate that her psychological problems might be linked with the sexual abuse suffered during her minority. Since the writ was issued less than three years after this date, this meant that the plaintiff was entitled as of right to pursue her action under section 14. However, the court also held that were this not the case, they would have been willing to exercise the discretion under

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44 (1992) 96 DLR (4th) 289.

45 (1994) 12 WAR 583.

46 In comments on the Discussion Paper (1992), Mr P S Bates, a legal practitioner, referred to the failure of the present law in Western Australia to allow an extension of time in child sexual abuse cases as "a serious defect in Western Australian legislation which operates a serious injustice on the citizens of the State".

47 See generally J W W Neeb and S J Harper *Civil Action for Childhood Sexual Abuse* (1994) chs 4-10.

48 [1992] QB 197.

section 33 in her favour. Bingham LJ, who gave the leading judgment, was influenced particularly by the effect on the plaintiff's life of the wrong done to her, and was unimpressed by the defendants' contention that the delay had deprived them of evidence that they could have obtained from friends and neighbours, since acts such as those alleged by the plaintiff were of necessity committed in private. He did not think that the delay had impaired the defendants' ability to defend themselves.[49]

9.14 An alternative submission by the defendants to the Court of Appeal was that the action was for an intentional trespass to the person, and that the applicable limitation period was therefore six years without possibility of extension, since the three year limitation period and the extension provisions only applied to "any action for damages for negligence, nuisance or breach of duty ... where the damages claimed ...consist of or include damages in respect of personal injuries".[50] The Court of Appeal dismissed this argument, holding that it was bound by its own decision in *Letang v Cooper*[51] that the words "breach of duty" were wide enough to cover trespass to the person. The House of Lords, however, distinguished that case as one dealing with an unintentional trespass.[52] It held that the breach of duty referred to was a breach of a duty of care not to cause personal injury, rather than breach of an obligation not to infringe any legal right of another person. The limitation period had therefore expired six years after the plaintiff attained her majority[53] and there was no way in which it could be extended.

9.15 This decision alters the previously understood interpretation of the provisions in question, and it means that a number of previous cases would now be decided differently.[54] It has been criticised for bringing about various other changes to the law which cannot have

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49 Id at 209-210.

50 The plaintiff had sued in trespass rather than negligence hoping to escape the three year limitation period, her writ not having been issued until more than three years after the date of the injury.

51 [1965] 1 QB 232: see para 2.51 above.

52 [1993] AC 498.

53 The limitation period does not run during the period when the plaintiff is a minor: *Limitation Act 1980* (UK) s 28(1). In actions such as this, the position is the same in Western Australia: see para 17.7 below.

54 Eg *Long v Hepworth* [1968] 1 WLR 1299 (infant plaintiff struck in eye by handful of cement which, it was alleged, was intentionally thrown at her by defendant; writ issued within six years; held, action barred because three year limitation period applying to personal injury caused by breach of duty had expired); *Halford v Brookes* [1991] 1 WLR 428 (plaintiff sued on behalf of estate of 16-year old daughter who had been strangled and stabbed to death, allegedly by first defendant; writ issued nine years afterwards, once plaintiff was advised that there was a possibility of bringing a civil action; Court of Appeal held that although plaintiff had sufficient knowledge by the time the three-year limitation period expired, they would in their discretion extend it; in subsequent proceedings the plaintiff succeeded in her claim: *Halford v Brookes* [1991] TLR 427).

been intended.[55] From a limitation point of view, it shows that if the intention is that cases of intentional trespass to the person[56] are to be included within the scope of provisions dealing with "personal injury", then definitions must make this clear.[57]

9.16 In the subsequent case of *S v W*,[58] the plaintiffs claim against her father for trespass to the person was struck out for the same reasons as in *Stubbings v Webb*. However, the plaintiff also claimed against her mother in negligence, alleging breach of her parental duty to protect her from the foreseeable risk of sexual abuse by her father. Even though this was a claim in negligence, counsel for the mother argued that the court was in substance concerned with sexual assault rather than in negligence, and that as a matter of policy it should not allow an extension of time under the *Limitation Act*. The Court of Appeal did not accept this submission, holding that the claim against the mother was not a claim in trespass to the person, and so *Stubbings v Webb* was not applicable.

(ii) Canada

9.17 The leading Canadian authority on the application of limitation periods in situations involving sexual abuse is the decision of the Supreme Court in *KM v HM*.[59] It is of particular interest in that the Ontario *Limitations Act*, like the Western Australian *Limitation Act*, does not contain any provisions under which the ordinary limitation period can be extended. The appellant was a victim of incest by her father, beginning when she was eight and continuing until she left home at the age of 17 in 1974. She suffered psychological problems typically associated with victims of incest, but it was not until she started to attend a counselling group in 1984 and began therapy that she came to understand that her psychological problems were caused by her father's actions. In 1985 she commenced a civil action against her father, alleging assault and battery and also breach of the fiduciary duties that he owed as a parent.

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55 See W V H Rogers "Limitation and Intentional Torts" (1993) 143 *NLJ* 258; M A Jones "Accidental Harm, Intentional Harm and Limitation" (1994) 110 *LQR* 31. Among the consequences of the decision are (1) the creation of an anomaly in a case where the victim of a deliberate assault dies - if the victim lives, the six-year period will apply, but if the victim dies there will be a new three-year period commencing on death, because the *Fatal Accidents Act 1976* (UK) quite clearly applies to trespass to the person, since it applies where "death is caused by any wrongful act, neglect or default": s 1(1); (2) medical malpractice claims will be subject to two different limitation periods depending on whether the claim arises in negligence or trespass to the person.

56 And probably also causes of action under *Wilkinson v Downton* [1897] 2 QB 57 for acts calculated to cause physical harm.

57 The case has recently been referred to the European Court of Human Rights: see E Palmer (1996) 2 *European Human Rights LR* 111; *Sparks v Harland* [1996] TLR 492.

58 [1994] TLR 670.

59 (1992) 96 DLR (4th) 289.

The trial judge held that the four-year limitation period allowed by the Ontario *Limitations Act* in cases of assault and battery,[60] even when extended by the appellant's minority, barred the action, and the Ontario Court of Appeal dismissed the appeal. However, on further appeal to the Supreme Court of Canada, the appeal was allowed. La Forest J, giving the leading judgment on behalf of himself and three other members of the seven-judge court, held that in cases of incest, because the victim is typically psychologically incapable of recognising that a cause of action exists until long after the abuse has ceased, the limitation period does not begin to run until the victim is reasonably capable of discovering the wrongful nature of the perpetrator's acts and the injuries she has suffered. This was so whether the victim knew about the assaults but did not know the physical and psychological problems caused by them, or whether she had no recollection of the abuse until she commenced the action because of the trauma associated with it.

9.18 In order to assess whether allowing the action to proceed would be fair to the defendant, La Forest J examined the policy reasons for the existence of limitation provisions, and showed why they do not hold good in incest cases. As noted earlier in this report,[61] La Forest J distinguished between three different reasons for the existence of such provisions - the certainty, evidentiary and diligence rationales -[62]

(1) Under the certainty rationale, statutes of limitation are said to be statutes of repose, in that there comes a time when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. However:

> "In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example, the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose."[63]

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60 *Limitations Act 1990* (Ont) s 45(1)(j).

61 See para 7.5 above.

62 See also the analysis in J Mosher "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *UTLJ* 169, 184-197.

63 *KM v HM* (1992) 96 DLR (4th) 289, La Forest J at 302.

(2) The evidentiary rationale concerns the desire to foreclose claims based on stale evidence.

> "However, it should be borne in mind that in childhood incest cases the relevant evidence will often be 'stale' under the most expedient trial process. It may be 10 or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name... In any event, I am not convinced that in this type of case evidence is automatically made stale merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves."[64]

(3) Plaintiffs are expected to act diligently and not sleep on their rights.

> "There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.
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> As I mentioned earlier, many, if not most, of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood. Secondly, ...when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim. ... Needless to say, a statute of limitations provides little incentive for victims of incest to prosecute their actions in a timely fashion if they have been rendered psychologically incapable of recognizing that a cause of action exists.
>
> Further, one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity. The cogency of these social forces would inevitably discourage victims from coming forward and seeking compensation from their accusers."[65]

9.19 La Forest J said that it was important to consider not only fairness to the potential defendant, but also fairness to the potential plaintiff, and he referred to earlier decisions of the Supreme Court which had supported the principle that it was unjust for a claim to be statute-barred before the plaintiff was aware of its existence, particularly *City of Kamloops v Nielsen*[66] in the context of building cases and *Central Trust Co v Rafuse*[67] in relation to

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64 Ibid.

65 Id at 303-304.

66 (1984) 10 DLR (4th) 641: see para 4.23 above.

professional negligence. In the latter case, Le Dain J had articulated the reasonable discoverability principle as a generally applicable rule, by analogy with similar developments in the United States.[68] La Forest J in *KM v HM* held that this principle should be extended to incest cases. He was able to refer not only to the psychiatric literature but also to similar developments in the United States,[69] and endorsed the approach of the California courts in *Evans v Eckelman*[70] under which the all-important point was whether the plaintiff was aware of the wrongfulness of the defendant's acts. This had to be assessed from the point of view of a hypothetical reasonable person in the position of the appellant in the instant case. Such a person could not, and the appellant did not, discover the wrongful nature of the respondent's acts and her injuries until she entered therapy.

9.20 La Forest J was prepared to hold that there was a presumption that an incest victim did not discover the connection between her injuries and the abuse until she commenced therapy. Two members of the court, Sopincka and McLachlin JJ, while concurring generally, were not prepared to support such a presumption. Sopincka J said that presumptions were generally inadvisable because of uncertainty as to their legal effect, and that this presumption would cause difficulties for the trial judge and litigants in cases of this kind.

There was no justification for reversing the legal burden of proof in respect of the issue of reasonable discoverability.[71] McLachlin J preferred to leave the question as a matter of fact to be determined in all the circumstances, and said that she did not see any magic in the commencement of a therapeutic relationship.[72] La Forest J's reasoning has also been criticised by an academic commentator.[73]

9.21 The court held that the defendant was liable not only in tort, for assault and battery, but also for breach of his fiduciary duty as a parent.[74] This being an equitable claim, no limitation period applied, and the court ruled that it would be inappropriate to apply the *Limitations Act* by analogy.[75] It also held that the claim was not barred by laches.[76] Reverting

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67 (1986) 31 DLR (4th) 481: see para 4.24 above.
68 See para 4.28 above.
69 (1992) 96 DLR (4th) 289 at 305-312.
70 (1990) 265 Cal Rptr 605.
71 (1992) 96 DLR (4th) 289 at 338-339.
72 Id 339-340.
73 J Mosher "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 *UTLJ* 169, 213-216.
74 *KM v HM* (1992) 96 DLR (4th) 289, La Forest J at 321-328.
75 Id at 330-333.

to the claim for assault and battery, the appellant had raised the issue of fraudulent concealment for the first time in the Supreme Court, and therefore it could not be considered. However, La Forest J suggested that it would be applicable to incest cases, because the perpetrator typically conceals his actions and masks their wrongfulness.[77]

9.22 An earlier Canadian case, *Gray v Reeves*,[78] illustrates the approach likely to be taken to sexual abuse cases under the British Columbia *Limitation Act*, which, unlike the Ontario legislation, does contain extension provisions. Under the British Columbia legislation, the running of time in an action, inter alia, for personal injury is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that an action would have a reasonable prospect of success.[79] Hall J in the British Columbia Supreme Court concluded that time began to run when the victim came to recognise the nexus between her injuries and the incest she had suffered as a child:

> "[T]he hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate that a wrong or wrongs that had occasioned significant harm to her well being could be established."[80]

(iii) New Zealand

9.23 The New Zealand decision of *S v G*[81] is closely related to the decision of the Supreme Court of Canada in *KM v HM*.[82] The plaintiff claimed damages for what was alleged to have been an abusive sexual relationship over a three year period ending in 1981. According to section 4(7) of the New Zealand *Limitation Act 1950*, an action in respect of bodily injury to the person could not be brought more than two years after the cause of action accrued, except that it could be brought within six years with the consent of the defendant or the leave of the court. The plaintiff sought leave to commence proceedings under these provisions, and

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76 Id at 333-336.
77 Id at 315-321.
78 (1992) 89 DLR (4th) 315.
79 *Limitation Act 1979* (BC) s 6(3): see para 5.27 above.
80 (1992) 89 DLR (4th) 315 at 350.
81 (1995) 3 NZLR 681.
82 (1992) 96 DLR (4th) 289: see paras 9.17-9.21 above.

Blanchard J considered the question of the accrual of the cause of action and in particular whether accrual had been postponed until October 1990 when the plaintiff first realised the causal connection between the damage she had suffered and the defendant's behaviour. On the basis of the recent decisions in New Zealand, Australia and Canada which gave support to the principle that a cause of action only arose when the damage became discoverable, and in particular *KM v HM*, the judge concluded that the plaintiff's cause of action in negligence did not accrue until she herself appreciated the causal connection between the injury from which she was suffering and the sexual relationship which had occurred between herself and the defendant. On the basis that the cause of action accrued in October 1990, and the action had therefore been brought more than two but less than six years afterwards, Blanchard J granted leave.[83] On appeal, where the issue received much more detailed consideration, the New Zealand Court of Appeal accepted that it might be appropriate to apply the reasonable discoverability principle both to a claim in negligence, where the reasonable discoverability of the link between psychological and emotional harm and past sexual abuse might be employed to determine the accrual of the cause of action,[84] and to a claim for assault and battery, where damage was not an element but the reasonable discoverability approach might be applied to the recognition of the lack of true consent to the conduct. However, the Court of Appeal, which heard additional evidence as to the circumstances of the abuse, reversed the decision to grant leave to proceed. The plaintiff's mother had taken her to live in a community where free and open sexual practices were an integral part of the lives of the residents, and it was in this context that the alleged abuse had taken place. The difficulty for the defendant in proving the circumstances of the assault, the prospect that the penalty imposed on him would represent double punishment,[85] and the possibility that others might also have had some responsibility for the psychological damage caused to the plaintiff through her experiences in the community meant that the prejudice to the defendant if the case were allowed to proceed outweighed the desirability of allowing the plaintiff to bring her intended proceedings.

9.24 In *S v G* the issue was whether the plaintiff could be granted leave to proceed. In the later case of *H v R*[86] a first instance court applied the principles of *S v G* in coming to a

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83 Sub nom *G v S* (unreported) New Zealand High Court (Auckland), 22 June 1994, CP 576/93.

84 Though there might also be immediate damage resulting from the sexual abuse, in which case the psychological and emotional damage had to be separate and distinct in order for the reasonable discoverability principle to operate.

85 Compensatory damages for personal injury are not available in New Zealand: see para 6.53 n 121 above. The plaintiff's action was therefore for exemplary damages. The defendant had already been convicted for various offences committed against the plaintiff.

86 [1996] 1 NZLR 299.

decision on the merits of the case. The plaintiff claimed damages for sexual abuse alleged to have been inflicted on him by the defendant over twenty years previously, when the plaintiff was in his early teens. The abuse had a significant effect on the plaintiff over a long period, and caused him to suffer a classifiable psychiatric disorder. As in *KM v HM*, on which the plaintiff's claim was clearly modelled, the action was for battery and breach of fiduciary duty. As regards the claim for battery, Hammond J accepted that "bodily injury" in section 4(7) of the *Limitation Act* extended (at least in this context) to psychiatric conditions. Lack of true consent being an element of the cause of action, it was only when the psychiatric damage was or reasonably should have been identified and linked to its cause that it could be said that all the elements of the tort were complete and the cause of action had accrued. By this test, the action had been brought either within the basic two year limitation period laid down by section 4(7), or just outside it: in the latter instance, the court could exercise the discretion granted to it by this section and extend the two year limitation period by a further four years. Hammond J approached the claim for breach of fiduciary duty by saying that the statutory limitation period should be applied by way of analogy. Thus this claim also had been brought in time. He found that the cause of action in battery was made out and awarded damages. This rendered it unnecessary to decide whether a claim for breach of fiduciary duty had been established.

9.25 Another recent New Zealand case, *T v H*,[87] has demonstrated that the discoverability principle alone is not sufficient to deal satisfactorily with sexual abuse cases. In this case the plaintiff was aware of the effects of the abuse she had suffered at the hands of a friend of her father, but was afraid to disclose it to anyone or take any proceedings until his death, when she brought a claim for assault and battery against his estate. A majority of the New Zealand Court of Appeal did not feel able to apply the discoverability principle, and distinguished *KM v HM* on the ground that in this case the plaintiff was aware of the assault but mentally disabled from acting on it. The limitation period commenced at the latest when the last act of abuse took place.[88]

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87 [1995] 3 NZLR 37.

88 Since the action was brought under the *Law Reform Act 1936* (NZ) s 3 (which stated the limitation period applicable to actions against the estate of a deceased defendant) the disability provisions of the *Limitation Act 1950* (NZ) did not apply. The Court of Appeal was therefore unable to accept the plaintiff's argument that due to her mental state following the abuse she was under a disability and the limitation period did not commence until she ceased to be under disability.

(iv) Other Australian jurisdictions

9.26 The first Australian decision in which a court considered the question whether a limitation period can be extended in a sexual abuse context is the Queensland case of *Tiernan v Tiernan*.[89] The plaintiff, who had been indecently assaulted by her adoptive father when she was a child, only began to realise the true nature of her psychological problems later in life, when she shared a flat with two law students and began to tell them of her experiences. Byrne J held that it was possible to extend the limitation period, even though the original limitation period had expired 20 years before the issue of the writ. Applying the Queensland extension provision,[90] he held that a material fact of a decisive character relating to the right of action was not within the plaintiff's means of knowledge until after the end of the limitation period, and that it was appropriate to order that the limitation period be extended. Knowledge that there might be an association between the abuse and the avoidant personality disorder from which she was suffering was significant and therefore a material fact and, so far as this fact was capable of being ascertained by her, she had taken reasonable steps to ascertain it before the end of the limitation period - in 1971, knowledge of the connection between sexual abuse and personality disorders was limited, and legal advice received would not have been encouraging. One significant feature of the case is that it was unquestioned that the harm suffered by the plaintiff constituted personal injury for the purposes of the Queensland extension provisions. These provisions, like the English provisions in issue in *Stubbings v Webb*,[91] apply to actions for damages for negligence, nuisance and breach of duty, where the damages claimed consist of or include damages for personal injury, but it is specifically provided that trespass is also included.[92]

9.27 Under the legislation in New South Wales, Victoria and the Australian Capital Territory, the court has a discretion to extend the limitation period in a personal injury case.[93] In New South Wales the provisions in question were introduced in 1990 and only apply where the cause of action accrued on or after 1 September 1990,[94] and so it is unlikely that they have yet been called upon in sexual abuse cases. As and when they are invoked, the plaintiff will have to show that she was unaware of the fact, nature, extent or cause of the injury at the

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89 (Unreported) Supreme Court of Queensland, 13 April 1993, 39 of 1992.
90 *Limitation of Actions Act 1974* (Qld) s 31: see para 5.14 above.
91 [1993] AC 498: see paras 9.13-9.14 above.
92 *Limitation of Actions Act 1974* (Qld) s 31(1).
93 The provisions are discussed in para 5.42 above.
94 *Limitation Act 1974* (NSW) s 60A.

relevant time, since it is only in such cases that the limitation period can be extended for more than five years.[95] The older extension provisions[96] are essentially the same as those in Queensland.

9.28 The extension provisions in Victoria give the court a discretion to extend the period for such period as it determines, if it decides that it is just and reasonable to do so,[97] but they only apply to causes of action accruing on or after 11 May 1977,[98] and therefore some sexual abuse cases will still be governed by the older provisions[99] which are similar in most respects to those of Queensland. Victoria also has a provision under which, where personal injuries consist of a disease or disorder, the limitation period begins to run on the date of discovery.[100] Though disorder is not defined, it seems that this provision is applicable to sexual abuse cases.[101]

9.29 The Australian Capital Territory has discretion-based provisions similar to those now in force in Victoria,[102] and unlike the Victorian provisions they are fully retrospective. These provisions were recently invoked in *A v D*[103] where the plaintiff brought an action against a doctor for sexual assault committed during a medical examination 25 years previously, and applied for an extension of the limitation period. The plaintiff's claim was prompted by articles in the press. Until then, she had been unaware that she had any right to seek compensation. However, the defendant had ceased practice and had destroyed all his records, which put him at a disadvantage in defending the claim. Miles CJ held that it was not just and reasonable to extend the limitation period, and dismissed the plaintiff s application.

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95 Id ss 60F-60G. This provision can apply to causes of action accruing before 1 September 1990, under the provisions of Sch 5.

96 *Limitation Act 1974* (NSW) s 58.

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

98 *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 11.

99 Ie s 23A of the *Limitation of Actions Act 1958* (Vic) as enacted by the *Limitation of Actions (Personal Injuries) Act 1972* (Vic) s 3 and repealed by the *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 5.

100 *Limitation of Actions Act 1958* (Vic) s 5(1A).

101 *Mason v Mason* (unreported) Victorian Court of Appeal, 23 July 1996, 7698 of 1995, holding that intentional assault by a husband on his wife was a breach of duty under s 5(1A). The court declined to follow *Stubbings v Webb* [1993] AC 498 (see paras 9.13-9.14 above). Prior to this case, in *Taylor v Trustees of the Christian Brothers* (1994) Aust Torts Rep 81-288, the plaintiffs suggested that if the action was allowed to proceed in Victoria there was a possibility that the limitation period might be extended under either s 23A or s 5(1A). See also D O'Halloran "Sexual Abuse Claims and the Limitation of Actions Act" (1994) *LIJ* 503 at 505, suggesting that without further amendment the Act remains unsatisfactory for victims of sexual abuse.

102 *Limitation Act 1985* (ACT) s 36.

103 (Unreported) Supreme Court of the Australian Capital Territory, 20 September 1995, SC 336 of 1994.

9.30 The discretionary provisions in the Australian Capital Territory, New South Wales and Victoria apply to actions where the damages claimed consist of or include damages for personal injury.[104] There is no express provision to the effect that this includes trespass to the person, although this is presumably the case.

9.31 The Tasmanian provisions only extend the limitation period from three years to six,[105] and so would be hopelessly inadequate in sexual abuse cases. The Northern Territory and South Australian provisions are not unlike those in Queensland except that they are not limited to personal injury cases.[106]

(b) Special provisions on sexual abuse

9.32 Though there have been many law reform reports in recent years advocating changes to limitation laws, only one squarely addresses the problem of sexual abuse - the report of the Ontario Limitation Act Consultation Group in 1991.[107] The proposals in this report are now embodied in a Bill which has been introduced into the Ontario Parliament.[108] However some Canadian jurisdictions have recently enacted minor amendments giving special rights to sexual abuse victims.

(i) Ontario

9.33 The Ontario Limitations Bill deals with the problem of sexual abuse by introducing three special provisions.

9.34 First, there will be no limitation period in "a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was

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104 *Limitation Act 1985* (ACT) s 36(1); *Limitation Act 1974* (NSW) s 60C(1); *Limitation of Actions Act 1958* (Vic) s 23A(1).

105 *Limitation Act 1974* (Tas) s 5(3). The Tasmanian Law Reform Commissioner has recommended the introduction of a provision allowing the discretionary extension of the limitation period similar to those now in force in Victoria and the Australian Capital Territory; Tasmania Report (1992) 34-36. The report recognises the need for this provision to allow the extension of the period in sexual abuse cases; id 12.

106 *Limitation Act 1981* (NT) s 44; *Limitation of Actions Act 1936* (SA) s 48. An action for damages for trespass to the person can be extended under these provisions; *Deally v Mace* (unreported) Supreme Court of South Australia, 5 March 1991, 3330 of 1983.

107 Ontario Report (1991).

108 Limitations Bill 1992 (Ont).

dependent, whether or not financially".[109] In this and other recommendations, sexual assault means an assault which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated, and would include not only incest and rape but also any non-consensual intentional touching in circumstances of a sexual nature.[110]

9.35 For reasons already discussed,[111] in circumstances such as these the victim may well be rendered incapable of considering legal proceedings until many years after the event. The Ontario Limitation Act Consultation Group thought it inappropriate that any limitation period should apply to such claims, for the following reasons:

> "To impose a limitation period on actions for sexual assault in a relationship of trust or dependency is to reward assailants who have most effectively traumatized and silenced their victims. Clearly, the public interest does not require that immunity from liability be extended to those assailants.
>
> One of the purposes of limitation periods is to discourage parties from giving vent to old disputes. However, in these cases, it appears that public policy with respect to incest and other sexual assaults demands that 'old' disputes be allowed to proceed in order to provide relief for the victim and to deter abusers. Indeed, for criminal prosecution of this conduct, there would be no limitation period.
>
> Another reason for limitation periods is the loss of evidence by an unsuspecting defendant while the undisclosed plaintiff waits until he or she has collected sufficient evidence. However, in these situations the defendant is unlikely to be prejudiced by the loss of evidence, since it is his or her sexual conduct that is in issue. Indeed, it is the plaintiff who is more likely to face evidentiary problems, because the assault will often have taken place when the plaintiff was young or otherwise vulnerable.
>
> Similarly, the plaintiff is unlikely to delay beyond the first point at which he or she can bring the action since bringing the claim is often essential to the healing process."[112]

9.36 Secondly, for claims of sexual assault which occur other than in relationships of trust or dependency as defined above, and for claims of non-sexual assault in relationships of trust and dependency, the Bill creates a rebuttable presumption that the plaintiff was "incapable of commencing the proceeding because of his or her physical, mental or psychological condition" until the proceeding was in fact commenced. Neither the discovery period nor the ultimate period would run during any such period of incapacity.[113]

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109 Id cl 16(h).

110 Ontario Report (1991) 17, following *R v Chase* [1987] 2 SCR 293.

111 See para 9.8 above, quoting the Ontario Report (1991) 20.

112 Ontario Report (1991) 20-21.

113 Limitations Bill 1992 (Ont) cl 9(1) (discovery period); cl 15(7)(a) (ultimate period).

9.37 The Ontario Report comments:

> "In such circumstances, it does not seem unreasonable to assume that most victims will be unable to commence civil proceedings within two years of the attack. The focus should be on the validity of the claim, and not on the condition of the plaintiff. Thus, instead of compelling every victim to prove inability to pursue the claim, the limitation period should be postponed unless the defendant can prove that the victim was capable of bringing the proceedings within the relevant two-year limitation period.
>
> The class of defendants who would have to prove the plaintiff's capability is drawn more narrowly than in the cases of sexual assault in Rec 2(g)[114] because the defendant will be dealing with claims in respect of any assault. The broad compass of assault includes not only the most vicious or persistent beating but also the non-consensual administration of medical treatment and a shove by a teacher or police officer. It would be unduly onerous for a doctor or police officer to prove 10 years after the event that the plaintiff was in a position to commence the proceedings two years earlier.
>
> However, in the case of sexual assault, or a non-sexual assault of a person in a personal and intimate relationship or a relationship of dependency, the defendant will have direct knowledge of the circumstances and will not have significant problems about the loss of evidence."[115]

9.38 Finally, while the proposals in the Bill are generally only to apply to acts or omissions that occur before the new legislation comes into force if the limitation period that would otherwise apply has not expired, the above two provisions would be fully retrospective, so that once the legislation came into force they would apply to all cases no matter how long ago the acts of sexual abuse took place.[116]

9.39 Again, the Ontario Report provides a justification for allowing the provisions on sexual abuse cases to have retrospective effect:

> "While there is a presumption against enacting legislation that applies retroactively, it is far from an absolute rule. Retroactive legislation is warranted where it is necessary to remedy previous injustices. In the opinion of the Consultation Group retroactive application of the legislation is clearly called for in the case of actions arising from assault and sexual assault. A major goal of the proposed reforms is to remove as many obstacles as possible from the attempts by victims to seek civil redress for assault or sexual assault. To limit this relief only to those victims for whom an old limitation period is still in effect on the date of the new statute would be to ignore the needs of

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114 The recommendation dealt with in para 9.34-9.35 above.

115 Ontario Report (1991) 31-32.

116 Limitation Bill 1992 (Ont) cl 23(7)

> the countless victims whose cause of action had been barred by the rigid rules of the old law. In effect, no one over 22 years of age would be able to bring an action."[117]

(ii) Other Canadian provinces

9.40 In the wake of the Ontario proposals and the decision in *KM v HM*,[118] three Canadian legislatures have recently amended their limitation legislation to introduce special provisions dealing with sexual abuse. In British Columbia and Saskatchewan, the amendments abolish limitation periods in cases of misconduct of a sexual nature occurring while the plaintiff was a minor.[119] In Prince Edward Island the legislation goes further, removing the limitation period in all cases of sexual misconduct and in all cases where injury occurred in the context of a relationship of intimacy or dependency.[120] Each of these provisions abolish limitation periods, and so are functionally equivalent to the first Ontario recommendation discussed above, but it is the Prince Edward Island statute which comes closest in its details to the Ontario model.

6. EFFECT OF THE COMMISSION'S GENERAL RECOMMENDATIONS

9.41 The Commission has recommended that there should be two generally applicable limitation periods: a three year period running from the date on which the plaintiff first acquired, or in his circumstances ought to have acquired, the necessary knowledge, and a 15 year ultimate period running from the date on which the claim arose. Once either period has expired, the defendant will ordinarily be entitled to plead a defence of limitation. However, in exceptional circumstances, in the interests of justice, the court has a discretion to extend either limitation period.

9.42 In Chapter 17, the Commission will make recommendations as to the operation of limitation periods in cases where the plaintiff is a minor. Subject to this, the effect that the Commission's general recommendations will have in cases involving sexual abuse by a person in a position of trust is as follows.

> (1) In any action by a victim of sexual abuse, whether brought in trespass to the person, negligence, or any other cause of action, the limitation period will run

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117 Ontario Report (1991) 51.
118 (1992) 96 DLR (4th) 289.
119 SBC 1992 c 44; SS 1993 Bill 15.
120 SPEI 1992 c 63.

from the date of the abuse, if the plaintiff has knowledge at that point in time that the injury had occurred, that it was to some degree attributable to the conduct of the defendant, and that it was sufficiently serious to have warranted bringing proceedings. If not, the limitation period will run from the later point in time when the plaintiff acquires that knowledge. It will ordinarily be barred once the discovery period has expired.

(2) Even if the plaintiff has not acquired the required knowledge by the end of the ultimate period, the action will ordinarily be barred at this point.

(3) However, it will be open to the plaintiff to apply to the court for either the discovery period or the ultimate period to be extended, and the court will grant an extension if the plaintiff satisfies the burden of proof placed on him by this provision.

(4) Since the above provisions will operate retrospectively in cases in which the damage consists of or includes personal injury (which would be defined to include trespass to the person),[121] they will operate retrospectively in sexual abuse cases. This will include cases in which an action has been commenced, but has not resulted in a judgment.

7. IS THERE A NEED FOR SPECIAL PROVISIONS?

9.43 The question is whether the Commission's general recommendations will be adequate to ensure that plaintiffs who bring actions for sexual abuse by a person in a position of trust will not be unfairly defeated by the application of the ordinary limitation rules, or whether there should be some special rules applying specifically to child abuse cases. In principle, the Commission would prefer that all cases should be governed by the same rules, rather than have special rules for special cases, but the fact that a few jurisdictions, including Ontario, whose proposals are very similar to those which the Commission will recommend, have enacted or proposed special rules of this nature shows that the question of special rules demands serious consideration. The most comprehensive special provisions are those in the

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121 See para 7.28 above.

Ontario Limitations Bill. In the following paragraphs the Commission considers whether similar provisions are needed in Western Australia.

9.44 The first suggested provision would abolish limitation periods in cases involving sexual assault by a person in a position of trust and dependency.[122] However, the arguments advanced in favour of such a provision are in essence the same arguments as those put forward in *KM v HM*[123] to support the view that the limitation period should not begin to run until the discoverability requirement is satisfied. In most cases, the plaintiff's right to sue will be preserved by the discovery period recommended by the Commission. If either the discovery period or the ultimate period has run against the plaintiff, it will still be possible to request the court to exercise its discretion and extend the ordinary limitation period. 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 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.

9.45 The second suggested provision would enact a presumption of incapacity in other sexual assault cases, and in non-sexual assault cases where there is a relationship of trust or dependency.[124] There are several arguments against this proposal -

(1) It makes it necessary to inquire when the plaintiff recovered, so shifting attention away from the alleged misconduct of the defendant and focusing on the situation of the plaintiff.

(2) In *KM v HM*, La Forest J, speaking for four members of the seven-member court, approved a somewhat similar presumption, that an incest victim did not discover the nexus between her injuries and the abuse until she commenced therapy.[125] This was criticised by other members of the court on a number of

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122 See paras 9.34-9.35 above.
123 (1992) 96 DLR (4th) 289.
124 See paras 9.36-9.37 above.
125 (1992) 96 DLR (4th) 289 at 314-315.

> grounds. Sopincka J, for example, said that the use of presumptions was inadvisable because of uncertainty as to their legal effect,[126] and both he and McLachlin J[127] were against shifting the normal burden of proof.

Under the scheme recommended by the Commission, burdens of proof are carefully allocated.[128] It is for the plaintiff to show that the discovery period has not run, and for the defendant to show that the ultimate period has expired. If either period is found to have run, it is for the plaintiff to persuade the court to exercise discretion in his favour. To have a reverse presumption in cases involving assault or abuse would be inconsistent with the uniformity of approach which the Commission is seeking to adopt.

9.46 The third suggested special provision would give the first and second provisions retrospective effect.[129] However, under the Commission's general recommendations the new Act would operate retrospectively as regards all cases where the damage consists of or includes personal injury, including trespass to the person. There would therefore be no need for any special provision for retrospectivity in sexual abuse cases.

9.47 The Commission's conclusion is that its general recommendations will ensure that plaintiffs in sexual abuse cases are not unfairly defeated by the running of the limitation period, and will make it possible for actions to be brought in Western Australia in circumstances in which they can presently be brought in other States, such as New South Wales and Victoria. It therefore **recommends** that there is no need to enact provisions dealing specifically with sexual abuse, or with sexual abuse by a person in a position of trust.

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126 Id at 338-339.
127 Id at 339-340.
128 See paras 8.5-8.11 above.
129 See paras 9.38-9.39 above.

Chapter 10

PUBLIC AUTHORITIES

1. INTRODUCTION

10.1 Under the present law in Western Australia, there are three significant categories of defendants who enjoy a specially privileged position, in that the limitation rules which apply to them are more favourable than those which apply to all other defendants: public authorities, the Crown and local government authorities. In each case, the action must ordinarily be brought within one year after the cause of action accrues, although with the consent of the defendant or the leave of the court the action may be brought within six years; and there is an additional requirement that before the action is brought the defendant must be given notice, within a designated period (usually fairly short) of the circumstances on which the proposed action will be based. In the case of actions against the Crown, the relevant legislative provisions are contained in legislation other than the *Limitation Act*.[1] Until July 1996, when the *Local Government Act 1995* came into force, actions against local government authorities were also regulated by a special legislative provision.[2] Actions against public authorities, however, are dealt with in the *Limitation Act* itself, in section 47A - a provision which, as from 1 July 1996, also applies to actions against local government authorities.

10.2 This chapter deals with the limitation period laid down by section 47A of the *Limitation Act*. The legislative provision applying to actions against the Crown, and the now repealed provision applying to actions against local government authorities, are dealt with in a later Part of this report.[3]

10.3 Most other jurisdictions once had similar provisions, but they have now been abolished practically everywhere except Western Australia. In the Commission's view, they should also be abolished in this State, so that the ordinary limitation period applies to public authorities in exactly the same way as to private defendants.

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1 *Crown Suits Act 1947* s 6.
2 *Local Government Act 1960* s 660.
3 See Ch 23 below.

2. THE PRESENT LAW IN WESTERN AUSTRALIA

10.4 The limitation periods applicable to actions against public authorities were at one time to be found in the statutes setting up particular authorities, and differed widely from one authority to another.[4] However, in 1954, these provisions were unified by a new provision added to the *Limitation Act*, section 47A, which attempted to impose a measure of uniformity.[5] Section 47A(1) provides that:

> "Notwithstanding the foregoing provisions of this Act but subject to the provisions of subsections (2) and (3) of this section, no action shall be brought against any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority, unless -
>
> (a) the prospective plaintiff gives to the prospective defendant, as soon as practicable after the cause of action accrues, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and his name and address and that of his solicitor or agent, if any; and
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> (b) the action is commenced before the expiration of one year from the date on which the cause of action accrued,
>
> and for the purposes of this section, where the act, neglect or default is a continuing one, no cause of action in respect of the act, neglect or default accrues until the act, neglect or default ceases but the notice required by paragraph (a) of this subsection may be given and an action may thereafter be brought while the act, neglect or default continues."

Section 47A(2) provides that a person may consent in writing to the bringing of an action against him at any time before the expiration of six years from the date on which the cause of action accrued, whether or not the notice as required by section 47A(1) has been given. Section 47A(3) provides that an application may be made to the court for leave to bring an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice as required by section 47A(1) has been given to the prospective defendant. Where the court considers that -

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4 See eg *Dermer v Minister for Water Supply, Sewerage and Drainage* (1941) 43 WALR 85, dealing with the limitation period in the *Land Drainage Act 1925*.

5 This reform was based on a similar reform implemented in England by the *Limitation Act 1939* (UK): see para 10.12 below.

(1) the failure to give the required notice, or the delay in bringing the action, as the case may be, was occasioned by mistake or any other reasonable cause, or

(2) the prospective defendant is not materially prejudiced in his defence or otherwise by the failure or delay,

the court may, if it thinks it is just to do so, grant leave to bring the action, subject to such conditions as it thinks it is just to impose. However, before an application is made under section 47A(3), the party intending to make the application shall, at least 14 days beforehand, give notice in writing of the proposed application, and the grounds on which it is to be made, to the prospective defendant.[6]

10.5 The complications of these provisions present considerable difficulty both for plaintiffs and defendants, as is evidenced by the considerable volume of case law that has accumulated on section 47A and the closely related provisions in the *Crown Suits Act* and the *Local Government Act*, particularly in recent years.[7] In the following paragraphs the Commission briefly summarises the issues that have been canvassed in the cases.

10.6 Where the plaintiff wishes to sue a public authority[8] for an act, neglect or default of the kind specified,[9] a notice setting out the information required[10] must be given as soon as

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6 Sub-ss (5) to (9), added by the *Acts Amendment (Asbestos Related Diseases) Act 1983* s 5, set out rules which apply where the cause of action involves an asbestos-related disease. Where the plaintiff did not have knowledge of the relevant facts before 1 January 1984, the limitation period set by section 47A runs not from the point when the cause of action accrues but from the time when the plaintiff has the knowledge referred to in s 38A of the *Limitation Act*: s 47A(7). (For s 38A, see para 5.5 above.) Where the plaintiff did have such knowledge before 1 January 1994, if the six year limitation period had expired before the action commenced, the limitation period was to run from the time the amending Act came into operation (19 January 1984): s 47A(5), and damages were limited to pecuniary loss and were not to exceed $120,000: s 47A(6); if the period had not expired before the action commenced, the limitation period was again to run from the date on which the Act came into operation: s 47A(5), but there were no limits on damages. Even though the limitation period applicable before the coming into operation of the amending Act had expired before the date on which the Act came into operation, notice may now be given, an action may be commenced, and consent may be given or leave granted to bring an action, in accordance with these provisions: s 47A(8). See P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 *UWAL Rev* 63,86-88.

7 Since 1991 there have been at least fifty cases, reported and unreported, in the Supreme or District Courts: see P Handford "Limitation of Actions - An Update" in Law Society of Western Australia *Get Tort Wise* (1996), Appendix. For discussion of earlier case law see J F Young "An Examination of Legislation Requiring Notice before Commencing Action" in Law Society of Western Australia *Causes of Action and Time Limitations* (1985), 18-36.

8 S 47A(l) refers to bringing an action against "any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority". The effect of this provision is that it applies to persons who are in some sense public authorities: *Posner v Roberts* [1986] WAR 1; *Alcoa of*

practicable,[11] and the action[12] must be brought[13] within one year of the accrual of the cause of action.[14] If this is not done,[15] then unless the defendant consents in writing to the bringing of the action within six years the plaintiff will have to apply for leave.[16] There are two grounds on which the court may grant leave. They are -

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Australia Ltd v State Energy Commission of Western Australia (unreported) Supreme Court of Western Australia, 5 October 1995, CIV 2048 of 1993. See also *Pilbara Iron Ltd v Bonotto* (1994) 11 WAR 348, where the defendants were deemed to be a public authority under the *Iron Ore (Mount Newman) Agreement Act 1964*.

S 47A(4)(a) provides that "person" includes "a body corporate, Crown agency or instrumentality of the Crown created by an Act or an official or person nominated under an Act as a defendant on behalf of the Crown". The effect of s 47A(l) and (4)(a) is that, while the Crown is excluded, the persons or bodies referred to in s 47A(4)(a) are included: *Smith v Australian National Line* (unreported) Supreme Court of Western Australia, 27 August 1996, CIV 1432 of 1996.

9 S 47A applies if the authority is exercising for the benefit of the public a public duty or authority which is not merely an incidental, ie. subsidiary or auxiliary, power: *Alcoa of Australia Ltd v State Energy Commission of Western Australia* (unreported) Supreme Court of Western Australia, 5 October 1995, CIV 2048 of 1993, which contains a comprehensive discussion of the earlier authorities, notably *Bradford Corporation v Myers* [1916] 1 AC 242; *Griffiths v Smith* [1941] AC 170; *Firestone Tire and Rubber Co v Singapore Harbour Board* [1952] AC 452; *Government of Malaysia v Lee Hock Ning* [1974] AC 76. Parker J's decision in the Alcoa case was affirmed sub nom *State Energy Commission of Western Australia v Alcoa of Australia Ltd* (unreported) Supreme Court of Western Australia (Full Court) 2 May 1996, FUL 58 of 1994 (but see Rowland J's dissenting judgment). S 47A applies not only where the act is done in pursuance or execution of any Act, but also in respect of acts in intended execution of the Act: *Webster v Lampard* (1992) 7 WAR 296, reversed by the High Court on another point (1993) 177 CLR 598. On whether s 47 A should apply between employer and employee, see *Davies v City of Cockburn* (unreported) Supreme Court of Western Australia, 6 April 1992, 1332 of 1992; *Thorne v Fremantle Hospital* (1995) 13 SR(WA) 127; *Holland v King Edward Memorial Hospital for Women* (1995) 14 SR(WA) 305; *Mitchell v Royal Perth Hospital* (1995) 14 SR(WA) 345. "Cause of action" is to be given a liberal interpretation: *Biljabu v State of Western Australia* (1993) 11 WAR 372; *Judamia v State of Western Australia* (unreported) Supreme Court of Western Australia (Full Court), 1 March 1996, Appeal FUL 34 of 1995.

10 On what constitutes notice, see *Biljabu v State of Western Australia* (1993) 11 WAR 372; *Markotich v State of Western Australia* (unreported) Supreme Court of Western Australia, 8 September 1994, 1492 of 1994; *Thorne v Board of Management of Fremantle Royal Hospital* (1995) 13 SR(WA) 127; *Mitchell v Royal Perth Hospital* (1995) 14 SR(WA) 345.

11 For examples of what is "as soon as practicable", see *Luetich v Walton* [1960] WAR 109; *Hall v Motor Vehicle Insurance Trust* [1984] WAR 111.

12 On whether a provision such as s 47A would apply to a request for declaratory relief, see *Judamia v State of Western Australia* (unreported) Supreme Court of Western Australia (Full Court), 1 March 1996, Appeal FUL 34 of 1995, dealt with in para 23.6 below).

13 The requirement also applies to amendment of a statement of claim to add a cause of action under s 47A: *Repanic v Lakes Hospital Board Authority* (1994) 10 SR(WA) 270.

14 S 47A provides that where the act, neglect or default is a continuing one, no cause of action accrues until it ceases. As to what is a continuing cause of action, see *Hammond v Minister for Works* (1992) 8 WAR 505; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992*; Biljabu v State of Western Australia* (1993) 11 WAR 372; *Judamia v State of Western Australia* (unreported) Supreme Court of Western Australia (Full Court), 1 March 1996, Appeal FUL 34 of 1995.

15 Consent or leave can overcome complete failure to comply with the requirements, as well as mere delay: *Baker v Shire of Albany* (1994) 14 WAR 46.

16 On what constitutes an application, see *Baker v Shire of Albany* (1994) 14 WAR 46. An appeal against a grant of leave requires leave, since the decision to grant leave is an interlocutory matter: *State Energy Commission of Western Australia v Alcoa of Australia Ltd* (unreported) Supreme Court of Western Australia (Full Court) 2 May 1996, Appeal FUL 58 of 1994.

(1) Where the court considers that the failure to give notice or the delay in bringing the action was occasioned by mistake or other reasonable cause.[17] A mistake of law may constitute mistake,[18] but ignorance of the law is not mistake,[19] though it may be relevant to establishing reasonable cause.[20] "Reasonable cause" means a cause which a reasonable person would regard as sufficient.[21] A plaintiff who acted reasonably in employing a solicitor has reasonable cause for not giving notice.[22] For the purpose of assessing the reasonableness of delay, the relevant period is the entire period of delay, and not just the year within which the action should have been brought.[23]

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17 On the definition of mistake, see *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992. There must be a causal relationship between the mistake or other cause and the failure or delay: *Posner v Roberts* [1986] WAR 1; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992; *State Energy Commission of Western Australia v Alcoa of Australia Ltd* (unreported) Supreme Court of Western Australia (Full Court), 2 May 1996, Appeal FUL 58 of 1994. Since the statute refers to "mistake or *other* reasonable cause", the mistake must be reasonable: *Ion v Minister for Works* (unreported) District Court of Western Australia, 7 May 1993, 7972 of 1992.

18 *Murray v Baxter* (1914) 18 CLR 622; *Milentis v State of Western Australia* (unreported) Supreme Court of Western Australia, 30 August 1991, 1122 of 1991; *Alcoa of Australia Ltd v State Energy Commission of Western Australia* (unreported) Supreme Court of Western Australia, 9 March 1994, 2048 of 1993.

19 *Murray v Baxter* (1914) 18 CLR 622; *Black v City of South Melbourne* [1963] VR 34; *Nicholls v Minister for Health* (1992) 8 SR(WA) 310;. *Davies v City of Cockburn* (unreported) Supreme Court of Western Australia, 6 April 1992, 1332 of 1992; *Ion v Minister for Works* (unreported) District Court of Western Australia, 7 May 1993, 7972 of 1992; *Alcoa of Australia Ltd v State Energy Commission of Western Australia* (unreported) Supreme Court of Western Australia, 9 March 1994, 2048 of 1993; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992; see also *Leech v Melbourne & Metropolitan Tramways Board* [1958] VR 398, doubted in *Akermanis v Melbourne & Metropolitan Tramways Board* [1959] VR 114, Sholl J at 119.

20 *Melbourne & Metropolitan Tramways Board v Witton* [1963] VR 417. However ignorance of the right to make a claim is not of itself a reasonable cause: *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993,2298 of 1992; *Thorne v Board of Management of Fremantle Royal Hospital* (1995) 13 SR(WA) 127.

21 *Quinlivan v Portland Harbour Trust* [1963] VR 25, Sholl J at 28; see also *Black v City of South Melbourne* [1963] VR 34; *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232; *Farr v Shire of Manjimup* (unreported) Supreme Court of Western Australia, 15 June 1993,1584 of 1993; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992; *Marshall v West Australian Government Railways Commission* (1994) 11 SR(WA) 148; *Parker v State Government Insurance Commission* (1995) 13 SR(WA) 166; *Thorpe v Shire of Coolgardie* (1995) 14 SR(WA) 133. It is wider than mistake: *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992. As to the circumstances which may constitute reasonable cause, see eg *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992 (impecuniosity); *Thorne v Fremantle Hospital* (1995) 13 SR(WA) 127 (delay in taking proceedings); *Thorpe v Shire of Coolgardie* (1995) 14 SR(WA) 133 (failure of solicitor to give advice or take action); *Fisher v Shire of Ashburton* (unreported) Supreme Court of Western Australia, 17 November 1995, CIV 1855 of 1995. A combination of circumstances may amount to reasonable cause: *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992.

22 *Quinlivan v Portland Harbour Trust* [1963] VR 25; *Black v City of South Melbourne* [1963] VR 34; *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232; *Farr v Shire of Manjimup* (unreported) Supreme Court of Western Australia, 15 June 1993, 1584 of 1993.

23 *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232; *Ridgeway v Shire of Moora* (1986) Aust Torts Rep 80-033; *Milentis v State of Western Australia* (unreported) Supreme Court of Western Australia, 30 August 1991, 1122 of 1991; *Culum v Board of Management of Sir Charles Gairdner Hospital* (1993) 9

(2) Where the court considers that the defendant was not materially prejudiced in his defence or otherwise by the failure or delay. The court must consider the extent and degree of prejudice.[24] The legal burden of proving absence of material prejudice is on the plaintiff, but the defendant has an evidentiary burden to show some basis in fact for the existence of prejudice.[25] Prejudice is considered as at the time of the application.[26]

10.7 Even if one or the other of these grounds is satisfied, the court will only grant leave if it thinks it is just to do so. However, the plaintiff does not need to establish a prima facie case of liability for the court to be satisfied that it is just to give leave.[27] Though it is possible to

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SR(WA) 76; *Alcoa of Australia Ltd v State Energy Commission of Western Australia* (unreported) Supreme Court of Western Australia, 9 March 1994, 2048 of 1993; the contrary position was taken in *Davies v City of Cockburn* (unreported) Supreme Court of Western Australia, 6 April 1992, 1332 of 1992; *Fisher v Shire of Ashburton* (unreported) Supreme Court of Western Australia, 17 November 1995, CIV 1855 of 1995.

24 *Blum v Motor Vehicle Insurance Trust* [1966] WAR 121; *Alcoa of Australia Ltd v State Energy Commission of Western Australia* (unreported) Supreme Court of Western Australia, 9 March 1994, 2048 of 1993. Lapse of time is capable of constituting; material prejudice: *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992.

25 *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232, Burt CJ at 235; *Hall v Motor Vehicle Insurance Trust* [1984] WAR 111; *Posner v Roberts* [1986] WAR 1; *Ridgeway v Shire of Moora* (1986) Aust Torts Rep 80-033; *Davey v West Australian Coastal Shipping Commission* (unreported) Supreme Court of Western Australia, 5 December 1989, 3107 of 1989; *City of Gosnells v Roberts* (1991) 74 LGRA 1; *Ion v Minister for Works* (unreported) District Court of Westem Australia, 7 May 1993, 7972 of 1992; *Hennessey v City of Fremantle* (1995) 12 SR(WA) 360; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992; *Marshall v West Australian Government Railways Commission* (1994) 11 SR(WA) 148; *Baker v Shire of Albany* (1994) 14 WAR 46; *Lunness v City of Perth* (1994) 12 SR(WA) 99; *Northey v Minister for Education* (1995) 13 SR(WA) 124; *Thorpe v Shire of Coolgardie* (1995) 14 SR(WA) 133; *Cumalkous v Western Australian Government Railways Commission* (unreported) Supreme Court of Western Australia (Full Court), 15 September 1995, Appeal FUL 135 of 1995; *Fisher v Shire of Ashburton* (unreported) Supreme Court of Western Australia, 17 November 1995, CIV 1855 of 1995.

26 *Akermanis v Melbourne & Metropolitan Tramways Board* [1959] VR 114; *Posner v Roberts* [1986] WAR 1; *Milentis v State of Western Australia* (unreported) Supreme Court of Western Australia, 30 August 1991, 1122 of 1991; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992; see also *Fisher v Shire of Ashburton* (unreported) Supreme Court of Western Australia, 17 November 1995, CIV 1855 of 1995.

27 *Victorian Railways Commissioners v Casaccio* [1961] VR 157; *Minister for Community Welfare v Bennett* (unreported) Supreme Court of Western Australia (Full Court), 2 September 1983, Appeal 119 or 1983; *Ballato v Nicholls* (unreported) Supreme Court of Western Australia, 15 February 1990, 2007 of 1989; *City of Gosnells v Roberts* (1991) 74 LGRA 1, Ipp J at 8; *Farr v Shire of Manjimup* (unreported) Supreme Court of Western Australia, 15 June 1993, 1584 of 1993; *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992; *Keddis v West Australian Government Railways Commission* (1994) 11 SR(WA) 232; *Northey v Minister for Education* (1995) 13 SR(WA) 124; *Thorpe v Shire of Coolgardie* (1995) 14 SR(WA) 133; *Bingham v England* (1996) Aust Torts Rep 81-393; *State Energy Commission of Western Australia v Alcoa of Australia Ltd* (unreported) Supreme Court of Western Australia (Full Court), 2 May 1996, Appeal FUL 58 of 1994. On the effect of the claim being taken over by insurers, see *State Energy Commission of Western Australia v Alcoa of Australia Ltd* (unreported) Supreme Court of Western Australia (Full Court), 2 May 1996, Appeal FUL 58 of 1994.

make up for the failure to comply with the original notice requirement and limitation period by making an application under the above provisions, there is another notice requirement (that in section 47A(3)(c)) which must be complied with before making the application.

10.8 Though until recently there has been controversy on the point, as a result of *Pilbara Iron Ltd v Bonotto*[28] it now seems to be settled that the action cannot be brought without previously making the application,[29] and that the application cannot retrospectively validate the bringing of an action without complying with the leave requirement.[30] RSC O 42 r 2, under which the court has power to backdate an order, may not be used to overcome this difficulty.[31] In addition, the application cannot be brought without previously serving the notice required by section 47A(3)(C).[32] Thus, service of the notice under section 47A(3)(c), the making of the application for leave, and the bringing of the action itself, must all occur within the six year period.[33]

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28 (1994) 11 WAR 348.

29 See also *Heaney v Roberts* (1991) 7 SR(WA) 234; *In the Matter of Section 47A of the Limitation Act 1935*: *Sims v Coombes* (1993) 9 SR(WA) 360; *Heaney v Thomter* (unreported) Supreme Court of Western Australia, 1 June 1994, 2073 of 1993; *Snowden v City of Melville* (1994) 11 SR(WA) 228; *Power v City of Perth* (1994) 12 SR(WA) 83; *Hambley v Shire of Plantagenet* (1994) 12 SR(WA) 262; *Holland v King Edward Memorial Hospital for Women* (1995) 14 SR(WA) 305; *City of Gosnells v Ahmed* (unreported) Supreme Court of Western Australia (Full Court), 6 October 1995, Appeal FUL 130 of 1994; *Judamia v State of Western Australia* (unreported) Supreme Court of Western Australia (Full Court), 1 March 1996, Appeal FUL 34 of 1995; see also *Irwin v Board of Management of Royal Perth Hospital* (1994) 11 SR(WA) 140 (commencement of two identical proceedings, with request that they be heard together, was abuse of process). The rule applies whether leave is sought before or after the expiration of the six year period: *Power v City of Perth* (1994) 12 SR(WA) 83. Earlier cases suggesting that the action could be brought without previously making the application, such as *Kelly v Minister for Education* (1987) 4 SR(WA) 6 and *Stanko v Canning City Council* (1992) 7 WAR 542, are no longer authoritative.

30 In addition to cases cited in the previous footnote, see *Mole v Forests Commission of Victoria* [1957] VR 583; *Hunter v Victoria* [1960] VR 349; *Repanic v Lakes Hospital Board Authority* (1994) 10 SR(WA) 270; *Burke v State of Western Australia* (1994) 10 SR(WA) 381; *Baker v Shire of Albany* (1994) 14 WAR 46, Kennedy J at 57; *Jumeau v Water Authority of Western Australia* (1994) 11 SR(WA) 293; *Irrera v State of Western Australia* (1994) 11 SR(WA) 360. Again, the older cases that hold the contrary are no longer authoritative. In *Galic v Royal Perth Hospital* (1994) 11 SR(WA) 272, Heenan CJDC at 274 commented: "[T]he failure of [the plaintiff's] solicitors to apply for appropriate leave under the *Limitation Act* within time was due to their belief, shared by many other solicitors, that the courts had power to grant such leave retrospectively. It was only in April last, in *Pilbara Iron Ltd v Bonotto* (1994) 11 WAR 348, that the Supreme Court held to the contrary." In *Pigram v State Housing Commission* (1994) 10 SR(WA) 371, where the defendant accepted that it would be an unnecessary inconvenience to both parties if the plaintiff had to issue a new writ, so leave if granted should apply retrospectively.

31 *Jumeau v Water Authority of Western Australia* (1994) 11 SR(WA) 293; *Hambley v Shire of Plantagenet* (1994) 12 SR(WA) 262. These cases reject earlier decisions to the contrary, such as *Marshall v Western Australian Government Railways Commission* (1994) 11 SR(WA) 148 and *Neale v Minister for Education* (1994) 11 SR(WA) 307; see also *Dwyer v City of Fremantle (No 2)* (1996) 15 SR(WA) 208, holding that *Marshall* was decided per incuriam. See however *Bingham v England* (1996) Aust Torts Rep 81-393, Pidgeon J (dissenting) at 63, 469-63, 470. Ipp J at 63, 470-63, 471 endorsed the orthodox view.

32 *Irwin v Board of Management of Royal Perth Hospital* (1994) 11 SR(WA) 140.

33 *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232; *Stanko v Canning City Council* (1992) 7 WAR 542; *Culum v Board of Management of Sir Charles Gairdner Hospital* (1993) 9 SR(WA) 76; *Burke v State of Western Australia* (1994) 10 SR(WA) 381; *Jumeau v Water Authority of Western Australia* (1994) 11 SR(WA) 293. By virtue of the *Interpretation Act 1984* s 61, the six year period is extended

10.9 It is established that a District Court judge has jurisdiction to hear applications for leave, even though the District Court was not in existence when section 47A was enacted.[34]

10.10 The provisions of section 40 of the *Limitation Act 1935*, under which the limitation period does not commence until a plaintiff who is a minor at the time the cause of action arose becomes 18, do not apply to actions against public authorities under section 47A.[35]

3. THE LAW ELSEWHERE

10.11 It is questionable whether these special provisions continue to be either necessary or desirable. In England, in most Australian jurisdictions, in New Zealand and in most Canadian provinces, equivalent rules have long been abolished.

(a) England

10.12 The question of limitation periods against public authorities was considered by the Wright Committee in 1936. At that time, under the *Public Authorities Protection Act 1893*, actions against public authorities had to be brought within six months.[36] The Committee in its Report commented:

> "The policy is quite clear, namely, to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the courts. It may well be that such a policy is justifiable in the case of important administrative acts, and that serious consequences might ensue if such acts could be impugned after a long lapse of time. But the vast majority of cases in which the Act has been relied upon are cases of negligence of municipal tram drivers or medical officers and the like, and there seems no very good reason why such cases should be given special treatment merely because the wrong doer is paid from public funds."[37]

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where the last day falls on a Saturday or Sunday: *Heaney v Thomter* (unreported) Supreme Court of Western Australia, 1 June 1994, 2073 of 1993.

34 See *Bonotto v Pilbara Iron Ltd* (1993) 9 SR(WA) 159 (reversed on another point sub nom *Pilbara Iron Ltd v Bonotto* (1994) 11 WAR 348), *Farr v Shire of Manjimup* (unreported) Supreme Court of Western Australia, 15 June 1993, 1584 of 1993; *Baker v Shire of Albany* (1994) 14 WAR 46.

35 *Scott v State of Western Australia* (1994) 11 WAR 382; *Holland v King Edward Memorial Hospital for Women* (1995) 14 SR(W A) 305, though note the doubts of Kennedy DCJ at 310. See also *Minister for Community Welfare v Bennett* (unreported) Supreme Court of Western Australia (Full Court), 2 September 1983, Appeal 119 of 1983, where Burt CJ discussed but did not decide this issue.

36 *Public Authorities Protection Act 1893* (UK) s 1.

37 Wright Committee Report (1936) para 26

The Committee did not recommend the abolition of these special rules, but suggested mitigating the problems they caused by extending the limitation period to one year, and making it run from accrual of the cause of action rather than the date of the act, neglect or default in question. The *Public Authorities Protection Act* was amended along these lines by the *Limitation Act 1939*.[38]

10.13 Continuing dissatisfaction with the existence of special rules for public authorities led to further consideration being given to the matter in the report of the Tucker Committee in 1949.[39] The Committee approached the problem from the point of view that the special rules fixed for the benefit of public authorities by the 1893 Act were a curtailment of the rights of the individual and could only be justified if it was clearly established that there was a real likelihood of injustice on a considerable scale resulting from its repeal. It said that it was clear that the Acts often caused injustice to plaintiffs where a genuine claim was barred through inadvertence or for other reasons. It pointed to the fine distinctions as to the conduct which came within the Act, the conflicting cases, and the complications resulting from having to ascertain whether a public body qualified for protection and whether it had caused an injury in the course of carrying out its public duty. It came to the conclusion that most cases would continue to be brought promptly even if the special limitation period were removed, and that there was no evidence that the difficulties which ensued from claims not being brought promptly (such as the problem of keeping records) were peculiar to public authorities. Large corporations were in the same position, and in any case public authorities engaged in commercial activity to an increasing extent. The Committee recommended that the *Public Authorities Protection Act* should be repealed. This recommendation was implemented by the *Law Reform (Limitation of Actions etc) Act 1954*. Since then, the position in England has been that the limitation periods applicable in actions against public authorities are exactly the same as those applying to any other defendant.

(b) Australia

10.14 Four Australian States have adopted the reform recommended by the Tucker Committee. In three of them the reform followed hard on the heels of the English Act.

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38 S 21.

39 Tucker Committee Report (1949) paras 6-25.

Tasmania abolished special limitation and notice requirements in 1954[40] and Queensland followed in 1956.[41] In Victoria, when the special limitation periods were abolished in 1955,[42] the notice requirements were retained, on the recommendation of the Statute Law Revision Committee,[43] but in 1966 they were repealed,[44] bringing actions against public authorities fully into line with all other actions. In New South Wales, the special rules were abolished by the *Notice of Action and Other Privileges Abolition Act 1977*.[45] The reform was delayed because the New South Wales Law Reform Commission did not report on public authorities in its first report on limitation of actions in 1967.[46] However, its third report in 1975[47] gave full consideration to this matter, and its recommendation to abolish special limitation and notice rules was implemented by the 1977 Act. Neither the Australian Capital Territory nor the Northern Territory now has any special rules of the kind under discussion. Outside Western Australia, only in South Australia do such rules survive. Section 47 of the South Australian *Limitation of Actions Act 1935* provides that where any Act imposes a limitation period of less than twelve months from the time the cause of action arises, then notwithstanding that limitation, the action may be brought within one year. This period is capable of extension under the general extension provisions in section 48.[48] These provisions as presently drafted represent a considerable amelioration of the previous position.[49]

10.15 The third report of the New South Wales Law Reform Commission contains the fullest Australian discussion of the arguments against special limitation and notice provisions. As regards notice requirements,[50] it said that there was really only one substantial ground for giving public authorities special treatment, namely the need for prompt notice to marshal evidence, particularly the testimony of employees of the authority whose period of employment might be of only limited duration. This, however, was no different from the

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40 *Limitation of Actions Act 1954* (Tas) s 3 and 2nd Sch, inserting s 6A in the *Public Officers Protection Act 1934* (Tas).

41 *Law Reform Limitation of Actions Act 1956* (Qld) s 4 (limited to personal injuries). The Queensland Law Reform Commission *Report on a Bill to Amend and Consolidate the Law Relating to Limitation of Actions* (QLRC 14 1972) 6 proposed the abolition of all remaining notice requirements, which was effected by the *Limitation of Actions Act 1974* (Qld) s 4 and Sch.

42 *Limitation of Actions Act 1955* (Vic) s 34, re-enacted in *Limitation of Actions Act 1958* (Vic) s 34.

43 Victorian Statute Law Revision Committee *Report on the Limitation of Actions Bill* (1949) para 5.

44 *Limitation of Actions (Notice of Action) Act 1966* (Vic) s 2.

45 S 4 and Sch.

46 NSW Report (1967).

47 NSW Report (1975).

48 See para 5.18 above. Note also *Limitation of Actions Act 1936* (SA) s 50, which provides that where a statute imposes a requirement of notice before action, a court can dispense with it.

49 S 47 was repealed and re-enacted by the *Limitation of Actions Act Amendment Act 1975* (SA) s 2. However the recommendation of the South Australia Report (1970) 5 that s 47 should be abolished has not been implemented.

50 NSW Report (1975) paras 13-39.

position of large private corporations. The notice rules were an anachronism conceived at a time when public authorities were not funded by government and did not have the same ability to insure as they now have. The greatest objection to the continuation of notice requirements was that they were discriminatory and unfair. The report endorsed the words of a leading article in the Australian Law Journal:

> "The most obscure country shire is to receive notice of claim before any action may be taken against it or its servants. The largest private retail store in which thousands of people pass daily is not to receive such notice. There is discrimination in favour of public bodies as against private persons."[51]

The report examined developments in other jurisdictions in detail and said that it would be a mistake for New South Wales to close its eyes to such developments and retain a system that had been generally abandoned because it had been found unsatisfactory. It concluded that policy considerations were against the continuance of notice requirements. The Commission noted that the law was hard to find, and that such requirements caused an increase in costs and were a source of injustice.

10.16 The special limitation provisions applicable in actions against public authorities came in for similar criticism.[52] After a detailed examination of the trend in other jurisdictions in favour of abolition of such requirements, it concluded that they should also be abolished in New South Wales. It drew attention to a number of grounds on which authorities had submitted that special limitation periods should be retained -

(1) public authorities would have difficulty in preparing their budgets if limitation periods were extended;

(2) authorities would be severely handicapped by having to retain records for longer periods;

(3) there would be problems arising from loss of evidence, due to the substantial staff turnover of public authorities;

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51 J A Redmond "Notices before Action" (1964) 37 *ALJ* 316 at 317.

52 NSW Report (1975) paras 40-133.

(4) the protection of special limitation periods was necessary because of the element of risk to which public authorities were subject in running their affairs.

The authorities also raised the traditional arguments always advanced against any extension of liability - that there would be an increase in litigation, and that it would encourage false and fraudulent claims. The New South Wales Law Reform Commission refuted each of these arguments in detail, pointing out that as regards each of the four points listed above public authorities were not in a position different from that of private corporations, and that it was unfair to disadvantage individuals to help the budgets of public authorities. The views of the Tucker Committee were expressly endorsed.

(c) New Zealand and Canada

10.17 It is not only in England and Australia that there has been a movement to abolish special limitation and notice rules. In New Zealand the one year limitation period and accompanying notice requirements formerly contained in section 23 of the *Limitation Act 1950* were abolished in 1962[53] as the result of recommendations made in a report by the Department of Justice.[54] In Canada, the equivalent rules have been abolished in Alberta, British Columbia and Manitoba,[55] and abolition has been recommended in Ontario, Newfoundland and Saskatchewan.[56] The 1969 Report of the Ontario Law Reform Commission contained a detailed discussion of the case against special limitation and notice provisions similar to those found in the reports of the Tucker Committee and the New South Wales Law Reform Commission already discussed. The Commission noted that no adverse effects had been experienced as a result of the repeal of such provisions in England, New York and elsewhere. The Report refuted all the arguments presented by municipalities for the retention of such rules, and recommended the repeal of all special limitation periods. In the words of the Ontario Commission:

> "The most significant element in settling upon the time for making a claim must be the nature of the injury: it cannot be the nature of the person who is liable. Whether a

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53 By the *Limitation Amendment Act 1962* (NZ) s 3.

54 *Limitation Act 1950, Report by Department of Justice* LR 175, 5-6. See also G P Barton "Limitation Periods for the Protection of Public Authorities" (1960-62) 3 VUWLR 133.

55 SA 1966 c 49 s 4 (see Alberta Report for Discussion (1986) para 3.100); SBC 1975 c 37 s 16, now re-enacted in *Limitation Act 1979* (BC) s 15; SM 1967 c 32 s 3C, now re-enacted in *Limitation of Actions Act 1987* (Man) s 4.

56 See Ontario Report (1969) 74-90; Newfoundland Working Paper (1985) 253-263 and Newfoundland Report (1986); Saskatchewan Report (1989) 54-57.

> personal injury occurs on the operating table, on the highway, or on faulty stairs in a private residence, the same factors are relevant. The injured person must have a reasonable time to discover the extent of his injuries, to find out his legal position and to attempt to reach a settlement without bringing an action. Furthermore, an injured person should be entitled to some time for recovery from his injuries. He should not, in an ordinary case of hospitalisation, have to be worried about issuing a writ from his hospital bed."[57]

4. THE COMMISSION'S RECOMMENDATION

10.18 The limitation and notice provisions in section 47A have the potential to cause great injustice. They are a trap for the unwary plaintiff, who may know that the ordinary limitation period is six years but is very unlikely to know that much more restrictive rules apply if he is contemplating suing a public authority. They are also a trap for unwary lawyers, since the case law provides more than a few instances of legal advisers who were apparently unaware of the statutory requirements. They make litigation exceedingly complex: case after case turns not on the justice of the claim but on whether all the necessary procedural steps have been taken, within the right time and in the right order, and whether remedial steps taken when something has gone wrong are legitimate or not.[58] In most cases, the court ultimately grants leave, having found that there is reasonable cause or an absence of material prejudice, but if it cannot reach such a conclusion the legislation operates harshly on the plaintiff by frustrating an otherwise just claim.

10.19 Many of the recent cases could be used to demonstrate the points made in the previous paragraph. *Bonotto v Pilbara Iron Ltd*[59] is a particularly good example. The plaintiff was injured on 4 July 1986 while riding a motor cycle on an access road which led from the town of Port Hedland to the mining site at Mount Newman. He brought an action against the

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57 Ontario Report (1969) 78. The Limitations Bill 1992 (Ont) repeals all special limitation and notice provisions, though it retains a ten year ultimate period for health facilities, as opposed to the thirty year period which will ordinarily apply: cl 15(3).

58 An additional complication, since the enactment of the *Workers' Compensation and Rehabilitation Amendment Act 1993*, is the need for plaintiffs injured in accidents occurring prior to 1 July 1993 to file a certificate in the proceedings claiming damages within 90 days of the date on which the certificate was given (s 11). If this is not done a worker is precluded from suing his employer for damages for negligence except where the damage has resulted in a 30 per cent degree of disability or a future pecuniary loss valued in 1996 at $102,041 (s 93D). If the plaintiff has omitted to comply with the requirements of s 47 A of the *Limitation Act*, it will be necessary to see: leave and then bring a fresh action. If the certificate has already been issued it may be impossible to file it in the proceedings in time. There has been controversy in the cases as to whether the time for filing the certificate in the proceedings under s 11 can be extended, but the predominant view now appears to be that this is not possible. See *Dwyer v City of Fremantle (No 1)* (1996) 15 SR(WA) 201, where the previous authorities are discussed.

59 (1993) 9 SR(WA) 159 (District Court), sub nom *Pilbara Iron Ltd v Bonotto* (1994) 11 WAR 348 (Full Court).

defendants in the District Court on 10 February 1992. The defendants were responsible for the maintenance of the road, and the action alleged that the road had been negligently constructed and was inadequately maintained. At some time subsequent to 4 July 1992 (the date on which the six year limitation period expired), the defendants' solicitors discovered that the defendants were a road authority by virtue of a provision in the *Iron Ore (Mount Newman) Agreement Act 1964*, and as such entitled to rely on section 660 of the *Local Government Act*. There was case law authority[60] suggesting that municipalities could also rely on section 47A. Accordingly, the defendants on 13 August 1992 applied to strike out the statement of claim on the ground that the action had been brought without prior application being made for leave under sections 660 and 47A. At the hearing the Deputy Registrar advised the plaintiffs they could amend their statement of claim so as to request that the application for leave be backdated to the date of the issue of the writ: this advice was presumably based on case law to the effect that the application for leave could have retrospective operation.[61] Leave to amend was granted. The application for leave then came on before Clarke DCJ in the District Court, but by this time the defendants were arguing that a District Court judge did not have jurisdiction to hear it. As a result, in a chamber summons on 12 February 1993, the plaintiff applied to transfer the action to the Supreme Court. This application was dismissed.[62] Clarke DCJ then determined whether the defendants could rely on sections 660 or 47A.

10.20 Two problems confronted him. One was the view of Master Bredmeyer in *Stanko v Canning City Council*[63] that section 660 was less restrictive than section 47A, in that it only required the application to be made within the six year period, it being possible to serve the writ subsequently, whereas under section 47A both the application and the writ itself had to be filed within the time limit. Clarke DCJ decided that he did not agree with this decision, and that both sections were complied with if the application was made within six years. The second problem was that the six year period for making application had expired: the action had been commenced within six years, but without leave. Invoking various provisions of the *Rules of the Supreme Court*,[64] Clarke DCJ held that the plaintiffs could amend their statement of claim to include the necessary application for leave, and that it could be backdated.

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60 Eg *Ridgeway v Shire of Moora* (1986) Aust Torts Rep 80-033.

61 Eg *Stanko v Canning City Council* (1992) 7 WAR 542.

62 Subsequent cases have since confirmed that District Court judges are competent to hear the application: see para 10.9 above.

63 (1992) 7 WAR 542.

64 Principally *Rules of the Supreme Court 1971* O 21 r 5.

10.21 This decision was appealed to the Full Court, which settled the controversy in the cases as to whether applications for leave could have retrospective effect. The Full Court allowed the appeal and held that the application to amend should not have been permitted. On the proper construction of section 660, the right to make application for leave related to an action not yet commenced, and it could not be used retrospectively to validate an action begun without leave. It was, of course, impossible to discontinue the action and serve a fresh writ,[65] because the time limit had expired. This ruling related directly only to section 660, but it has now been established that it applies to section 47A also, though for a time controversy continued.[66] The Full Court refused to determine whether section 660 operated to the exclusion of section 47A, although in a later case it has now confirmed that this is so.[67] The result of all this was that Pilbara Iron Ltd were able to escape liability to Mr Bonotto, invoking a ground of which neither they nor their solicitors were aware until after the limitation period had expired. If the plaintiff had sued for an accident suffered during the course of his employment, rather than one which happened while he was riding his motorbike in the vicinity of his work, such escape would not have been possible.

10.22 These complications apart, there does not seem to be any sufficient reason why public authorities should be governed by different limitation rules from those which apply to ordinary defendants. This theme runs through many of the reports from other jurisdictions to which the Commission has already referred.[68] In the last two years, it has been echoed by judges in Western Australia. The first judge to question the existence of the special rules was Rowland J in *Scott v Western Australia*.[69] He said:

> "This case again draws attention to the fact that the ... *Limitation Act 1935* ... does not apply in circumstances where s 47A of the *Limitation Act* has effect, nor to actions under the *Fatal Accidents Act 1959* where similar provisions are incorporated and which Act provides its own code of limitation. One assumes that, as this matter has been criticised by the courts and commentators over many years, this position is accepted by Parliament. However, if that assumption is not correct, the matter requires serious consideration."[70]

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65 As was done, for example, in *Markotich v State of Western Australia* (unreported) Supreme Court of Western Australia, 8 September 1994, 1492 of 1994.

66 See *Irwin v Board of Management of Royal Perth Hospital* (1994) 11 SR(WA) 140; *Marshall v West Australian Government Railways Commission* (1994) 11 SR(WA) 148; *Baker v Shire of Albany* (1994) 14 WAR 46; *Jumeau v Water Authority of Western Australia* (1994) 11 SR(WA) 293; *Irrera v State of Western Australia* (1994) 11 SR(WA) 360.

67 *Baker v Shire of Albany* (1994) 14 WAR 46.

68 See paras 10.12-10.17 above.

69 (1994) 11 WAR 382.

70 Id at 383.

More recently, he expressed similar sentiments in *State Energy Commission of Western Australia v Alcoa of Australia Ltd*.[71]

10.23 A similar view was taken by Kennedy DCJ in *Northey v Minister for Education*.[72] The plaintiff was injured in the course of her employment at a government school, and nearly six years later applied for leave to sue for damages. The defendant pleaded that it was materially prejudiced by the delay. The judge commented:

> "It has always been accepted that where employees sue employers who happen to be government departments, they must seek leave under the *Limitation Act* if the 12 months has expired. For my part I wonder if that is so and I wonder if these government departments should be in any better position than, for example, church organisations that run schools all over the State and whether it is the case that this is in the execution of a public duty and why it is they should be in a better position than other organisations....[H]ad this woman been working for a church school, the church school would not be able to make the complaint that the respondent is now making."[73]

Kennedy J in *Bingham v England*[74] has now expressed the same view:

> "[T]he number of cases which have come before this Court in recent times in relation to legislation which fixes a time limit less than the standard limitation period, including not only the *Fatal Accidents Act* but also s 6 of the *Crown Suits Act 1947* and s 660 of the *Local Government Act 1960*, indicates that this is an area which justifies a careful re-evaluation as to the need for such special provisions and, if they are to be retained, as to their wording."[75]

10.24 In the Commission's view, Western Australia should follow the example of most other jurisdictions and abolish the special limitation and notice requirements imposed by section 47 A.[76] The limitation rules that apply in actions against public authorities should be the same as those that apply in all other cases. The arguments against the existence of such rules which have proved decisive in other jurisdictions apply with equal force in Western Australia. As *Bonotto v Pilbara Iron Ltd* and many other cases show, such rules -

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71 (Unreported) Supreme Court of Western Australia (Full Court), 2 May 1996, Appeal FUL 58 of 1994, at 6-7. In each case he referred to the Law Reform Commission's *Discussion Paper on Limitation and Notice of Actions* (1992), which questions the need for such rules.

72 (1995) 13 SR(WA) 124.

73 Id at 125.

74 *Bingham v England* (1996) Aust Torts Rep 81-393.

75 Id at 63,468.

76 The abolition of these requirements was supported by all who commented on this issue in response to the Discussion Paper (1992), including the Law Society of Western Australia and two legal practitioners, Mr P S Bates and Mr C Phillips.

(1) are anachronistic;

(2) are unfair and discriminatory;

(3) cannot be rationally justified, since private corporations are in exactly the same position as public authorities, especially those which conduct commercial enterprises;[77]

(4) are productive of fine distinctions as to whether something is done "in pursuance or execution or intended execution of any Act, or of any public duty or authority";

(5) are a trap for the unwary;

(6) operate harshly on the plaintiff;[78]

(7) often force the commencement of an action, because there is insufficient time to pursue other alternatives;

(8) make litigation unnecessarily complex;

(9) increase costs; and

(10) sometimes frustrate just claims.

10.25 The Commission **recommends** that the special limitation period and notice requirements in section 47A be abolished, leaving the ordinary limitation rules to apply in actions against public authorities. The Commission's general recommendations, under which when the plaintiff is aware of the damage suffered the ordinary limitation period will be three years rather than six, will ensure that public authorities, bereft of the protection of section 47A, will not face an unnecessarily long period of limitation.

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[77] The move to privatise particular functions of government agencies confirms this point: though the function will not change, Its reclassification as private will presumably have the effect that the limitation and notice rules in s 47A will not apply. Healy DCJ in *Irwin v Board of Management of Royal Perth Hospital* (1994) 11 SR(WA) 140 at 146 suggests that there are good policy reasons why the limitation period should not be extended in the case of a public authority: it is in their interest to know when tort liability is at an end. But the same applies to private defendants.

[78] For example, because the disability rules extending time for minors and others do not apply: see para 10.10 above.

Chapter 11
PROFESSIONAL PERSONS

1. INTRODUCTION

11.1 Over the last thirty years, the steady expansion of liability in negligence has increased the pressures placed on those who provide services to the public - particularly professionals such as accountants, architects, engineers, doctors and lawyers. *Hedley Byrne & Co Ltd v Heller & Partners*[1] signalled the beginning of this period of expansion. In this case the House of Lords held that liability in negligence was not limited to the causing of personal injury or property damage by careless acts or omissions, but lay also for financial loss caused by reliance on negligent statements, where the parties were in a special relationship.

11.2 In addition to this general expansion of the horizons of duty of care in negligence, *Hedley Byrne* has influenced two specific developments which relate to the liability of professionals. First, not long after *Hedley Byrne* and partly as a result of it, the courts reaffirmed the rule that persons in a contractual relationship could be liable in tort as well as in contract.[2] As a result, clients have an alternative to suing for damages for breach of contract: they can claim damages in negligence for at least some of their financial losses,[3] and can avail themselves of any advantages which the one cause of action has over the other. Secondly, thirty years before *Hedley Byrne*, *Donoghue v Stevenson*[4] had exploded the "privity of contract fallacy" - the notion that the liability of a contracting party, whether in contract or tort, was limited by the contract, so that a duty of care in tort was owed only to the other contracting party and not to anyone else. *Hedley Byrne* confirmed the general applicability of the approach adopted in *Donoghue v Stevenson*. In *Hedley Byrne*, but for a disclaimer clause, the defendant bank would have been liable to the plaintiffs, with whom they had no contractual relationship, for a negligent statement about the creditworthiness of a company which was a customer of the bank. In reliance on the statement, the plaintiffs entered into a contract with the company and suffered loss. The exposure of the privity fallacy has resulted in accountants and auditors being held to owe a duty of care to persons other than their

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1 [1964] AC 465.

2 See *Esso Petroleum Co Ltd v Malrdon* [1976] QB 801, Lord Denning MR at 819; *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554; *Midland Bank Trust Co Ltd v Hett, Stubos & Kemp (a firm)* [1979] Ch 384. See also para 4.30 above.

3 There would be some limitations: damages are not available in tort for reliance or expectation losses: see eg A I Ogus *The Law of Damages* (1973) 283-288; M J Tilbury *Civil Remedies* vol 1 (1990) paras 3032-3034.

4 [1932] AC 562.

clients;[5] to lawyers being held liable for negligence to third parties, for example to disappointed beneficiaries as a result of negligence associated with the drafting of a will;[6] and to builders, architects and others associated with the design and building of premises being recognised as owing a duty of care not only to the original owner, for whom the work was carried out, but also to subsequent purchasers.[7]

11.3 Doctors in some respects stand outside this particular process of development, since (although it would be possible for a doctor to be liable where a patient relies on a careless statement and suffers loss[8]) their liability in the main involves carelessness in act or omission, and resulting physical harm. However, over the period under discussion there has been a general raising of the standard of care expected of medical professionals, aided by advances in medical technology. In addition, in recent years the law has moved away from the principle

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5 Particularly in New Zealand: *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553; *Allied Finance & Investment Ltd v Haddow & Co* [1983] NZLR 22. See also *JEB Fasteners Ltd v Marks Bloom & Co* (*a firm*) [1983] 1 All ER 583; however, the English courts are now taking a more restricted view: see *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Al Saudi Banque v Clarke Pixley (a firm)* [1990] Ch 313; *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113; *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 259; *Galoo Ltd (in liq) v Bright Grahame Murray (a firm)* [1994] 1 WLR 1360. In Canada, see *Haig v Bamford* (1976) 72 DLR (3rd) 68. Australian courts have not yet taken a conclusive position on this issue: see *The Laws of Australia Vol 33.2*: *Negligence* paras 32-38; R P Balkin and J L R Davis *Law of Torts* (2nd ed 1996) 417-420. Recent cases include *R Lowe Lippman Figdor & Franck v AGC (Advances) Ltd* [1992] 2 VR 671; *Columbia Coffee & Tea Pty Ltd v Churchill* (1992) 29 NSWLR 141; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1994) 61 SASR 424; *Hong Kong Bank of Australia Ltd v BPTC Ltd (in liq)* (1995) Aust Torts Rep 81-358; *Edwards Karwacki Smith & Co Pty Ltd v Jacka Nominees Pty Ltd (in liq)* (1995) 13 ACLC 9; *Executor Trustee Australia Ltd v PMH (Reg)* (1995) 63 SASR 393. See H Anderson "A Different Solution to the Auditors' Liability Dilemma" (1996) 8 *Bond LR* 72

6 *Whittingham v Crease & Co* (1978) 88 DLR (3rd) 353; *Ross v Caunters* [1980] Ch 297; *Watts v Public Trustee* [1980] WAR 97; *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37; *White v Jones* [1995] 2 AC 207; *Van Erp v Hill* (1995) Aust Torts Rep 81-317; note also *Hawkins v Clayton* (1988) 164 CLR 539 (duty of solicitor holding will to inform executor). In the light of more recent cases the decision in *Seale v Perry* [1982] VR 193 that solicitors owe no duty to disappointed beneficiaries is clearly out of date. For other instances involving the liability of solicitors to third parties, see *Central Trust Co v Rafuse* (1986) 31 DLR(4th) 481.

7 *Bryan v Maloney* (1995) 182 CLR 609; *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Askin v Knox* [1989] 1 NZLR 248; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, affirmed [1996] 1 NZLR 513; *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; *Winnipeg Condominium Corporation No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193. The proposition was supported by earlier English authorities: *Dutton v Bognor Regis Urban District Counci*l [1972] 1 QB 373; *Anns v Merton London Borough Council* [1978] AC 728; *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554; but these cases have now been repudiated: *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499. On the general responsibility in tort of builders, architects and others see eg *A C Billings & Sons Ltd v Riden* [1958] AC 240; *Gallagher v N McDowell Ltd* [1961] NI 26; *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Sharpe v E T Sweeting & Son Ltd* [1963] 1 WLR 665; *Clay v A J Crump & Sons Ltd* [1964] 1 QB 533; *Rimmer v Liverpool City Council* [1985] QB 1.

8 See eg *Smith v Auckland Hospital Board* [1965] NZLR 191.

that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion.[9]

2. LIABILITY INSURANCE AND LIMITATION OF LIABILITY

11.4 Though it has been accepted for some time that the ability of defendants to protect themselves by liability insurance is relevant to the question of legal liability, until recent years it has generally been assumed that such insurance is available to every professional, and that the liability insured against can be unlimited in amount. It is now clear that this is not so, as recent reports in a number of jurisdictions have demonstrated.[10] In the words of the *Report of the Western Australian Select Committee on Professional and Occupational Liability*:

> "First, there is a growing problem in obtaining affordable professional indemnity insurance, second, there is a growing trend by professionals to practice [sic], 'defensive professionalism', thereby reducing the quality of services provided to the community and third, there is a reduced chance of consumers receiving any redress as many professionals protect themselves by' 'going bare' by not having any assets, including insurance. "[11]

11.5 The Select Committee was established by the Legislative Council of the Western Australian Parliament in 1991, in response to concerns about the development of professional liability and its impact on obtaining insurance which had already been manifested in New South Wales. The then Attorney General, Hon J M Berinson QC MLC, said that the purpose of establishing the Committee was:

> "...to encourage consideration of the possibility of establishing limits to the civil liability of professionals and other occupational groups, and of the means by which limited liability could be achieved while still maintaining a proper level of protection for the public."[12]

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9 See *F v R* (1983) 33 SASR 189; *Rogers v Whitaker* (1992) 175 CLR 479; *Reibl v Hughes* (1980) 114 DLR (3rd) 1.

10 See Company and Securities Law Review Committee *Civil Liability of Company Auditors* (Discussion Paper No 3, 1985); NCSC Working Party *Report to Ministerial Council on Civil Liability of Company Auditors* (1987); (NSW) Attorney General's Department Issues Paper *Limitation of Professional Liability for Financial Loss* (1989); Parliament of Western Australia Select Committee on Professional and Occupational Liability *Final Report* (1994); South African Law Commission *Limitation of Professional Liability* (Project 70: Working Paper 51 1994). See also G L Priest "The Current Insurance Crises and Modern Tort Law" (1987) 96 *Yale LJ* 1521; M Mills "Lessons from America: Professional Liability and Tort Reform" (1995) 12 *Aust Bar Rev* 210.

11 Parliament of Western Australia Select Committee on Professional and Occupational Liability *Final Report* (1994) i.

12 Western Australia *Parliamentary Debates* (1991) vol 294, 6096.

11.6 The Select Committee heard evidence to the effect that the cost of insurance, and the amount of cover required, were rising steadily. All professions which gave evidence - accountants, architects, engineers, lawyers, veterinary surgeons and medical practitioners - reported that the cost of insurance had risen greatly over the past few years. Because the liability of professionals was unlimited, there was uncertainty as to whether claims would always be met. The capacity of professionals to meet a claim depended on the level of insurance and their personal assets. In practice, the cover maintained by professionals acted as a de facto cap on the claims that could be made, but the increasing cost of insurance was causing an increasing number of professionals to divest themselves of their assets and not take out insurance. This was an unsatisfactory situation for all concerned - unsatisfactory for professionals because of the increasing costs, which were affecting the way they practised their profession and in some cases were causing them to abandon practice, and unsatisfactory for consumers because of the possibility that claims would not be met.

11.7 The solution envisaged by the Select Committee was one under which the liability of professionals would be limited to the availability of insurance, thus ensuring that there was some guarantee of payment for the vast majority of claimants. The Select Committee's report, submitted in January 1994, recommended the enactment of a Professional Standards Bill under which a scheme of limited liability could be agreed for each profession, and a draft bill was set out in the Report. The Select Committee outlined the scheme as follows:

> "A professional association will be required to apply to the [Professional Standards] Council for the making of a recommendation, by the Council, to the Minister that the association may promote a scheme for the provision to its members of a limitation on their professional liability. The Council is then required to conduct public consultation for the purpose of formulating a practical scheme.
>
> This scheme is to be forwarded to the Minister who, representing the public interest, may give his consent, with or without amendment, or refuse to consent to the making of the scheme. Upon consent being granted, the Minister shall issue a certificate to the professional association specifying the form of the scheme to which approval has been granted.
>
> An application is then made to the Court for approval. Objection to the approval of the scheme may be made by any person. In such a case the onus of proof rests with the professional association to prove to the Court that the scheme is procedurally in order and fair within the principle of the Act. The Court's jurisdiction in relation to the

giving of approval extends to such matters as when any retrospectivity will come into effect."[13]

11.8 As has already been noted, it was the concern about these issues which had already been raised in New South Wales which led to the setting up of the Western Australian Select Committee. Later in 1994, the New South Wales Parliament passed the *Professional Standards Act*, under which, in broadly the same way as envisaged by the Select Committee, individual professions may submit schemes under which, once approved, the liability of their members can be limited.

11.9 The major thrust of the Select Committee's report was the need for liability to be limited, in order that professionals might not be held liable beyond the limits of their ability to insure. However, the Select Committee also recommended some other changes to the law to alleviate problems experienced by professionals -

(1) The modification of the law relating to joint and several liability, and its replacement by a principle under which each joint tortfeasor was responsible only for his share of the blame. Accountants, architects and engineers, in particular, had found themselves facing huge liabilities as a result of being sued jointly with other defendants who were insolvent or had gone out of business. These professionals, because they carried liability insurance, had been made to bear the entire burden of the losses suffered, even though they were not primarily responsible.[14]

(2) The adoption in statutory form of the *Bolam* test of professional standard of care,[15] namely the standard of the ordinary skilled person exercising and professing to have that special skill,[16] and, in medical negligence cases, the right to apply for the appointment of medical assessors to assist the judge.[17]

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13 Parliament of Western Australia Select Committee on Professional and Occupational Liability *Final Report* (1994) 50-51.

14 Id 26-27, 40-42.

15 Id 9 and 47.

16 *Bolam v Friern Hospital* [1957] 1 WLR 582. The case affirms the principle that a doctor cannot be under any liability merely because there is a body of opinion which takes the contrary view. There is no reference in the Report to *Rogers v Whitaker* (1992) 175 CLR 479, in which the High Court disapproved the *Bolam* test.

17 Parliament of Western Australia Select Committee on Professional and Occupational Liability *Final Report* (1994) 47.

(3) That there be provision for structured settlements in all personal injury cases, on the lines of the existing provision in road accident cases under the *Motor Vehicle (Third Party Insurance) Act 1943*.[18] This recommendation resulted from concern that lump sums might go to persons other than the plaintiff, in cases where the plaintiff died early, or that the plaintiff's life span might be underestimated, in which case there would be inadequate provision for the plaintiff in later life.[19]

11.10 In addition, there were recommendations concerned with the limitation period. One dealt with the limitation period applying in cases where the plaintiff was under a disability.[20] Of more general importance is the suggestion by some professionals that their liability be confined to "the contractual period of limitation",[21] in other words, that the rule under which in contract the six year limitation period runs from the date of breach of contract should apply in all actions against a negligent professional, whether brought by a contracting party, who would have the option of suing either in contract or in the tort of negligence, or by a third party, who of necessity would sue in negligence.[22] This suggestion was made by the architects and the engineers, so as to limit their liability for latent defects in buildings: after six years, it was suggested, professionals and their insurers should be able to cease their concern about a particular job. Essentially the same suggestion was made by the lawyers, because of the developments in the case law under which solicitors were now liable in negligence, both to clients and to third parties who had suffered loss because of solicitors' carelessness. The Select Committee's formal recommendation was confined to "the limitation period in the building and engineering industry",[23] but the draft legislation in the report is not so confined.[24] The Select Committee recommended two amendments to the *Limitation Act*, as follows:

> "37B. When an act or omission gives rise to causes of action in both tort and contract, or tort and on a covenant or other speciality [sic], then the limitation period to be applied and its manner of application shall be that which would apply if the action were upon a simple contract.

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18 Id 47-48.

19 The Report makes this recommendation in spite of the fact that, as it admits (id 48), structured settlements under the *Motor Vehicle (Third Party Insurance) Act 1943* have not proved popular.

20 Id 48: see para 17.38 below.

21 Id 37, 43.

22 See para 11.2 above.

23 Parliament of Western Australia Select Committee on Professional and Occupational Liability *Final Report* (1994) 8.

24 Id 88.

> 37C. Where an action is brought in respect of the design or construction of some object, whether fixed or moveable, where it is alleged that any loss or damage (other than personal injury or death) was caused by any act or omission in its design or construction, then where the claimant's action is dependent upon having at some time had an interest in the object, then despite the claimant not then or at any time having any contractual relationship with the person who designed or constructed it, the limitation period and its manner of application, so far as the claim relates to that act or omission shall be as if the claimant was claiming under a simple contract for the design and construction and not otherwise."

11.11 On one interpretation, the Select Committee was recommending that a special limitation period should apply to the liability of certain professionals. This raises an important issue: is there any justification for a shorter limitation period for professionals, or certain categories of professionals, than that which applies to all other cases?

3. THE LIMITATION PERIOD FOR PROFESSIONAL LIABILITY

11.12 No Australian Limitation Act contains any special limitation period applying to actions against any particular category of defendant - save for the special limitation period applicable to actions against public authorities which still exists in Western Australia, even though such provisions have been abolished in most other States and Territories.[25] Nor, until recently, has there been any general practice of conferring special limitation periods on particular professions by way of special legislation. In 1993, however, three jurisdictions enacted legislation providing a special limitation period for actions, other than for personal injury or death, in respect of defective building work. Such actions must now be brought within ten years of completion of the work[26] and the common law rules under which it appears that the cause of action accrues on discovery of the damage[27] no longer apply.[28] Two years earlier, an equivalent provision was enacted in New Zealand.[29] The Australian legislation has resulted from an initiative to enact a uniform building code, under which there

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25 See Ch 10 above.

26 *Building Act 1993* (NT) ss 159-160; *Development Act 1993* (SA) s 73; *Building Act 1993* (Vic) s 134. In South Australia, the time runs from completion of the building work; in the Northern Territory, from the issue of an occupancy permit, or, if no such permit is issued, from the date of first occupation after completion; in Victoria, from the issue of an occupancy permit, or if no such permit is issued, from the date of issue of the certificate of final inspection.

27 See paras 4.19-4.20 above.

28 In South Australia, the general extension provision in s 48 of the *Limitation of Actions Act 1936* (SA) no longer applies to such actions: *Building Act 1993* (SA) s 73(1). However, there is no equivalent provision in the Northern Territory legislation.

29 *Building Act 1991* (NZ) s 91.

would be a ten year limitation period.[30] There is support for a ten year limitation period in Western Australia.[31]

11.13 The situation in Australia contrasts with that in Canada, where most jurisdictions at one time had special limitation periods for actions against various professional groups similar to the special limitation periods which formerly applied to actions against public authorities.[32] Thus, in Ontario, for example, there are special limitation periods applicable to professional negligence and malpractice actions and actions against hospitals.[33] Similar provisions were formerly in force in British Columbia[34] and Alberta,[35] and still exist in Newfoundland[36] and Saskatchewan.[37] However, there is a clear general trend in favour of abolishing such provisions, together with the similar provisions applying to public authorities. In 1969 the Ontario Law Reform Commission said that these special short periods of limitation were not generally necessary, and that there should be as few as possible.[38] In 1974 the British Columbia Law Reform Commission made a similar recommendation.[39] The Bill implementing the Commission's recommendations (which became the *Limitation Act 1975*) contained no special provisions of this kind, but a few were reinstated by amendments during its passage through Parliament.[40] The arguments for the existence of such periods were once again reviewed by the British Columbia Commission in 1990, and once again it recommended

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30 This development was initiated by the Australian Uniform Building Regulations Co-ordinating Council, which commissioned the preparation of model legislative provisions to allow for the development of national building legislation, a move endorsed by the Standing Committee of Attorneys General in 1991: see "Nationwide building code wins all-round ministerial support" *The Australian* 26 July 1991; "Model legislation will combat building costs" *The Australian* 27 April 1992. The model provisions were incorporated into a proposed Model Building Act, which was submitted to all States and Territories. It is up to each jurisdiction to decide whether it wishes to adopt the Model Act, or incorporate relevant model legislative provisions into its own legislation. In Western Australia, a Working Party was set up to comment on these proposals: see *Integrated Building Act*: *Report of the Working Party* (1992); see also R Varghese "Liability of Building Work Regulators" (Paper prepared for Department of Local Government Symposium on the *Integrated Building Act* 17 and 18 March 1994). The working party saw significant advantages in all States and Territories having a common framework for building legislation, but did not see it as its role to comment on whether this should be by way of the adoption of a model Act or by the incorporation of relevant provisions into State legislation.

31 The Working Party supported a ten year limitation period, on the basis that "[t]he vast majority (average 90%) of claims are made within 7 years of the incident. The balance, with few exceptions, are made within 10 years": *Integrated Building Act: Report of the Working Party* (1992) 23.

32 See J P S McLaren "Of Doctors, Hospitals and Limitations -'The Patient's Dilemma'" (1973) 11 *Osgoode Hall LJ* 85; K Roach "The Problems of Short Limitation Periods" (1993) 31 *Osgoode Hall LJ* 721.

33 Ontario Report (1969) 75-76.

34 British Columbia Report (1974) 105.

35 *Limitation of Actions Act 1980* (Alta) ss 55-56, now repealed by *Limitations Act 1996* (Alta) s 16.

36 Newfoundland Working Paper (1985) 250-251.

37 Saskatchewan Report (1989) 53-54.

38 Ontario Report (1969) 77.

39 British Columbia Report (1974) 105.

40 See British Columbia Report (1990) 46.

abolition.[41] Abolition has also been recommended by the Law Reform Commissions of Newfoundland and Saskatchewan.[42]

11.14 It is noteworthy that the latest proposal to reform the law in Ontario retains the use of special limitation periods. The Report of the Limitations Act Consultation Group in 1991 recommended that although the ultimate period should ordinarily be 30 years, it should be possible in exceptional cases to create a special ultimate limitation period of not less than ten years. Such a period should not be prescribed unless it was clearly in the public interest having regard to:

> "(a) (i) the likelihood of continuing changes in the standard of care, and
>
> (ii) the difficulty of obtaining evidence of the earlier standard of care;
>
> (b) the effect of potential liability in excess of 10 years on obtaining liability insurance or participating in another indemnification scheme; or
>
> (c) the effect of potential liability in excess of 10 years on the costs of retaining records; and
>
> (d) the unlikelihood of meritorious claims arising after 10 years."[43]

Health service providers and the building design professions were said to be especially vulnerable to changing standards of practice.[44] The Limitations Bill introduced into the Ontario Parliament in 1992 accordingly contained ten year ultimate limitation periods for claims based on the negligent act or omission of a health facility or a health facility employee, and claims based on the malpractice or negligent act or omission of a health practitioner (in each case, not applicable if the claim was based on the leaving of a foreign body having no therapeutic or diagnostic purpose in the body of the claimant), and claims based on a deficiency in the design, construction or general review of an improvement to real property carried out under a contract.[45]

11.15 The retention of these special periods of limitation in the Ontario scheme appears to constitute a recognition that there are "groups of persons who, because they routinely render

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41 Id 47-61.
42 Newfoundland Working Paper (1985) 251-252 and Newfoundland Report (1986); Saskatchewan Report (1989) 54.
43 Ontario Report (1991) 37-38.
44 Id 38-39.
45 Limitations Bill (Ont) cl 15(3)-(6).

services to scores of persons when practicing their vocations or professions, are particularly vulnerable to the injustice that can flow from the adjudication of a stale claim".[46] The Commission accepts that stale claims place professionals under a number of difficulties, but the issue is whether special limitation periods are the most desirable solution to the problem. In order to deal with this issue, it is necessary to recognise, as did the Ontario Limitations Act Consultation Group, that there are several different factors which combine to make long limitation periods a problem for professionals - the fact that standards of care may change over time (especially in relation to medical professionals) so that it is often impossible long after the event to say what the standard was at any particular time, the problems of obtaining insurance against unlimited liability, the difficulties of record-keeping, and the fact that the likelihood of meritorious claims arising declines as time goes on.[47]

11.16 In *KM v HM* La Forest J highlighted the second of these factors when he suggested that "there are instances where the public interest is served by granting repose to certain classes of defendants, for example, the cost of professional services if practitioners are exposed to unlimited liability".[48] This quotation is particularly significant because it addresses the problem of unlimited liability of professionals which has been identified in Western Australia and elsewhere, and suggests that special limitation periods may be a possible solution. However, in the Commission's view, the solution to the problem of unlimited liability is to create a scheme for limitation of liability along the lines of that drawn up by the Western Australian Parliamentary Select Committee,[49] and now in force in New South Wales.[50]

11.17 The Select Committee also suggested a number of other measures which could be taken to improve the position of particular professional groups, notably changes to the law relating to joint and several liability. Recent changes in the United States have seen the rule relating to joint and several liability modified or abolished in 41 out of 50 States,[51] and the

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46 Alberta Report for Discussion (1986) para 1.24.

47 Ontario Report (1991) 38-40.

48 *KM v HM* (1992) 96 DLR (4th) 289, La Forest J at 302.

49 See para 11.7 above.

50 See para 11.8 above, Note however the provisional view of the South African Law Commission in its Working Paper on *Limitation of Professional Liability* (Project 70: Working Paper 51 1994) iv: "With the information at its disposal the Commission is not persuaded that there is justification at this stage to limit the delictual liability of any category of professionals by legislation. The Commission is, in particular, of the opinion, that the legal rules that establish and demarcate liability do not require adaptation. It appears to the Commission that it is within the power of the various professional groups to regulate the liability of their members within acceptable bounds through internal measures and by means of insurance."

51 M Middleton "A Changing Landscape" *ABA Jo*, August 1995, 56 at 59.

three Australian jurisdictions which have imposed a ten year limitation period in building cases have also enacted limitations on joint and several liability and rights to contribution which apply in such cases.[52] The law relating to joint and several liability, especially in relation to professional defendants, is a matter which would be suitable for reference to this Commission.[53]

11.18 The problem of unlimited liability, therefore, does not in itself constitute a case for enacting special limitation periods for professionals. In the Commission's view, the solution to the other problems identified above[54] is not to have special limitation periods for actions against professionals which are shorter than those which apply in all other cases, but to ensure that the general limitation periods are appropriate for all cases including those involving professional liability. This the Commission has sought to do by recommending a limitation scheme under which two limitation periods apply to all claims.[55] A claim will ordinarily become barred within three years of the damage becoming discoverable, and in any case within 15 years of the act or omission which gives rise to the cause of action. Though in exceptional cases the court has a discretion to allow an action to be brought after the expiration of either of these periods, the problems that occur in actions against professionals, such as changes to the standard of care, evidentiary difficulties, the cost of keeping records and the unlikelihood of meritorious claims arising after the end of the limitation period, would be factors that would be taken into account. It should be particularly noted that under the Commission's recommendations, in actions in tort, as in actions for breach of contract, the ultimate limitation period will be measured from the date of the act or omission in question. This will eliminate the distinction between actions in tort and actions in contract which exists under the present law and to which attention was drawn by the Select Committee.[56]

11.19 Underlying all these arguments is the general principle that limitation periods should be the same in all classes of case. The Commission has already recommended that public authorities should not be in a privileged position in this regard. It now **recommends** that the

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52 *Building Act 1993* (NT) ss 155-157; *Development Act 1993* (SA) s 72; *Building Act 1993* (Vic) ss 131-132.

53 The New South Wales Law Reform Commission currently has a reference on contribution between persons liable for the same damage: see New South Wales Law Reform Commission *Annual Report 1994* 19.

54 Para 11.10.

55 See paras 7.20-7.48 above.

56 See para 11.10 above. In addition, unlike the draft provision proposed by the Select Committee, it does this without resort to a legal fiction that the limitation period to be applied to a tort action is that which would be applied if the action were one for breach of contract.

limitation periods which apply in actions against professional persons should be the same as those which apply in all other cases.

4. THE POSITION OF BUILDERS

11.20 The discussion in this chapter has concentrated on professional persons. It would be unprofitable to enter into debate on the question whether builders are professionals in the same sense as lawyers, doctors, accountants, architects, engineers and so on. In so far as the discussion in this chapter is relevant to the question of defective buildings, it applies to builders just as much as to architects and engineers. Builders, just as much as architects and engineers, may under the present law owe a duty of care to subsequent purchasers of a defective building, as confirmed by the recent High Court decision in *Bryan v Maloney*.[57] Builders are affected by the recommendations of the Select Committee of the Western Australia Parliament,[58] and builders are covered by the limitation provisions which apply to defective building work in certain Australian jurisdictions.[59]

11.21 Subsequent to the decision in *Bryan v Maloney*, the Commission received submissions from the Housing Industry Authority Ltd (Western Australian Division) and the Master Builders' Association of Western Australia about the need for a ten year limitation period running from the date of completion, similar to the provisions in force in Victoria, South Australia and the Northern Territory. The Commission is of the view that ten years is too short a limitation period, especially when one considers that the purchase of a house is the largest financial investment that the average Australian will ever make, and that one would normally expect a house to remain standing for much longer than ten years before it begins to fall down. However, the Commission had building cases, as well as many other cases, in mind when formulating its general recommendations, and in the Commission's view its general recommendations will ensure that building cases will be resolved in a manner that is fair to all parties. It should be particularly noted that the 15 year ultimate period will cut down the scope of the common law as represented by *Bryan v Maloney*, because if after 15 years the damage has not been discoverable, the defendant's liability will ordinarily be at an end. However, in

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57 (1995) 182 CLR 609. See also other authorities cited at n 7 above. The authority of *Bryan v Maloney* does not extend to the construction of a commercial building, or to a case where the purchaser relies exclusively on the contract of sale: *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101. Nor does the duty of care cover a builder who erects a house otherwise than under a contract: *Zumpagno v Montagnese* (unreported) Victorian Court of Appeal, 3 October 1996, 5160 of 1994.

58 See para 11.10 above.

59 See para 11.12 above.

exceptional cases, the court would be able to order that the running of the ultimate period should be disregarded.

PART V: APPLICATION OF THE GENERAL PRINCIPLES: COMMON LAW AND EQUITY

Chapter 12

COMMON LAW ACTIONS

1. INTRODUCTION TO PARTS V AND VI

12.1 The Commission has recommended that there should be two general limitation periods, the discovery period and the ultimate period, together with a discretionary power to disregard either period in exceptional circumstances, where the interests of justice demand it.

12.2 It is the view of the Commission that these rules should apply to all cases with very limited exceptions. In Chapters 9 to 11 it has already considered whether there is a case for recognising special limitation periods to cater for the circumstances of particular categories of plaintiffs and defendants, and has concluded that no such case exists.

12.3 In Chapters 12 and 13, the Commission discusses the application of its general recommendations to particular kinds of claim, with the object of determining whether there are particular classes of legal claims for which the general rules are not suitable. Chapter 12 discusses the application of those rules to common law actions. This is the area at present covered by section 38 of the *Limitation Act*, which sets out a number of different limitation periods for different causes of action. Chapter 13 discusses the application of the two general rules to suits in equity. Traditionally, the rules in the *Limitation Act* have applied mainly to common law claims: their application to equity has been limited. In the Commission's view, this attitude is out of date. There is no reason why the *Limitation Act* rules should not apply to equitable claims as fully as those of the common law. The general limitation periods recommended by the Commission are suitable for application to practically all common law claims formerly governed by particular *Limitation Act* rules, and practically all equitable claims, whether formerly governed by rules in the *Limitation Act* or not.

12.4 However, there are a few particular kinds of claim which are not appropriately dealt with by the Commission's general principles. The Commission has come to the conclusion that claims involving real property are not satisfactorily resolved by the discoverability approach, and that it is better to retain more traditional rules. This also applies to some claims

in the closely associated area of mortgages. Other special considerations suggest that different rules are desirable for actions to recover tax. These areas are dealt with in Chapters 14 to 16, in the next Part of the report.

2. COMMON LAW ACTIONS: CONTRACT AND QUASI-CONTRACT

(a) Actions in contract

12.5 Under the present law, the limitation period for actions in contract is six years,[1] running from the date on which the cause of action accrues, which is the date on which the breach of contract took place.[2] There is no possibility of extension of the six-year period, even in a situation where the plaintiff suffers personal injury or property damage as the result of breach of contract but the damage is not immediately apparent.

12.6 Under the Commission's recommendations, actions for damages for breach of contract will be subject to the two general limitation periods recommended by the Commission, the three year discovery period and the 15 year ultimate period. Where the breach of contract and any damage suffered as a result are immediately apparent, the discovery period will commence immediately. The discovery period runs from the point when the plaintiff has knowledge of the injury and various facts relating to it, and "injury" is defined to include the non-performance of an obligation.[3] However, in cases where the injury is not immediately apparent - as, for example, in some cases where breach of contract results in personal injury - the discovery period will not begin until the injury becomes discoverable, which will be the point at which the plaintiff acquires, or should reasonably have acquired, knowledge that the injury has occurred, that it was to some degree attributable to the conduct of the defendant, and that it was sufficiently serious to have warranted bringing proceedings. This is subject to the ultimate period, which will ensure that an overall limitation period of 15 years applies (except for the possibility of discretionary extension in very narrow circumstances). The ultimate period, in the case of an action for breach of contract, will run from the date of breach of contract.[4]

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1 *Limitation Act 1935* s 38(1)(c)(v). Contracts relating to seamen's wages are dealt with by the *Administration of Justice Act 1705* (UK) s 17, still applicable in Western Australia: see paras 21.3-21.4 below.

2 See para 4.7 above.

3 See paras 7.21-7.26 above.

4 See paras 7.31-7.34 above.

12.7 One effect of the Commission's recommendations will be that in the ordinary case the limitation period in actions for breach of contract will be reduced from six years to three. The Commission considers that three years should be sufficient time for bringing an action in all but exceptional cases.[5] Though most Australian jurisdictions retain a six-year limitation period for actions in contract,[6] a three year period already applies under the Northern Territory *Limitation Act*[7] and in actions for contravention of the *Trade Practices Act*.[8] Under the Commission's recommendations, if the damage is not immediately apparent, the limitation period is in effect extended, because the commencement of the discovery period is delayed. The discretion provision is available to take care of exceptional cases where it is just to disregard either the discovery period or the ultimate period.

(b) Actions on a specialty

12.8 Limitation Acts commonly provide a longer period of limitation for deeds than for simple contracts. In the Australian Capital Territory, New South Wales and the Northern Territory, the legislation lays down a 12-year limitation period for all actions founded on a deed,[9] as opposed to the shorter period (six years in New South Wales and the Australian Capital Territory, three years in the Northern Territory) applying to simple contracts.[10] The other Australian jurisdictions have a limitation period for actions on a "specialty". In South Australia and Victoria this limitation period is 15 years;[11] in Queensland and Tasmania it is 12 years, unless a shorter period is prescribed by any other provision of the Act.[12] "Specialty" may denote any contract under seal, but is usually used to mean a specialty debt, that is, an

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5 See paras 7.49-7.53 above.

6 *Limitation Act 1985* (ACT) s 11(1) ("any cause of action"); *Limitation Act 1969* (NSW) s 14(1)(a); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); *Limitation of Actions Act 1936* (SA) s 35(a); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(1)(a). Six years is also the limitation period for contract actions in England, New Zealand and most Canadian jurisdictions: *Limitation Act 1980* (UK) s 5; *Limitation Act 1950* (NZ) s 4(1)(a); *Limitation Act 1979* (BC) s 3(4) ("any other action not specifically provided for"); *Limitation of Actions Act 1987* (Man) s 2(1)(i); *Limitation of Actions Act 1973* (NB) s 9 (other actions); *Limitation of Personal Actions Act 1990* (Nfd) s 2(2)(e); *Limitation of Actions Act 1989* (NS) s 2(1)(e); *Limitations Act 1990* (Ont) s 45(1)(g); *Statute of Limitations 1988* (PEI) s 2(1)(g) ("any other action not...specifically provided for"); *Limitation of Actions Act 1978* (Sask) s 3(1)(f)(i). Six years was formerly the limitation period for such actions in Alberta: see *Limitation of Actions Act 1980* (Alta) s 4(1)(c)(i), now repealed by *Limitations Act 1996* (Alta) s 16.

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

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

9 *Limitation Act 1985* (ACT) s 13; *Limitation Act 1969* (NSW) s 16; *Limitation Act 1981* (NT) s 14(1).

10 See para 12.7 above.

11 *Limitation of Actions Act 1936* (SA) s 34; *Limitation of Actions Act 1958* (Vic) s 5(3).

12 *Limitation of Actions Act 1974* (Qld) s 10(3); *Limitation Act 1974* (Tas) s 4(3).

obligation under seal securing a debt or a debt due from the Crown or under statute.[13] In this sense a specialty includes a bond, a contract under seal and a covenant.[14] An action on a specialty refers only to actions to enforce obligations created or secured by a specialty, and does not include an action to enforce an obligation merely acknowledged or evidenced by an instrument under seal.[15] However, it includes not only actions for specific performance of the debt or other obligation created by the specialty but also actions for damages for breach of the obligation.[16]

12.9 The Western Australian *Limitation Act* also prescribes a longer limitation period for such cases. Section 38 provides that actions of covenant or of debt upon any bond or other specialty are subject to a 20-year limitation period.[17] The 20-year period was that imposed for such actions by the English *Civil Procedure Act* of 1833.[18] The Wright Committee in its 1936 Report said that there should continue to be a longer limitation period for actions on instruments under seal, but said that 20 years was too long, and recommended a reduction to 12 years.[19] This recommendation was accepted in England,[20] and has also been adopted in substance by Australian jurisdictions, which have reduced the period to either 12 or 15 years.

12.10 There can be no doubt that the 20-year period is much too long. The issue for the Commission, however, is the more fundamental question whether it is still necessary to have a longer limitation period for instruments under seal than for ordinary contracts. England and the Australian jurisdictions have maintained a conservative stance on this issue, no doubt as a result of the influence of the reports of the Wright Committee and the New South Wales Law Reform Commission, both of which recommended that there should be a longer period for deeds than for simple contracts, on the ground that "contracting parties should be able, by observing appropriate formalities, so to arrange matters that they have longer than six years in which to enforce contractual rights".[21]

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13 *R v Williams* [1942] AC 541, Viscount Maugham at 554.

14 *Royal Trust Co v Attorney General* (Alta) [1930] AC 144, Lord Merrivale at 150-151.

15 *Iven v Elwes* (1854) 3 Drew 25, 61 ER 810; *Re Art Reproduction Co Ltd* [1952] Ch 89; *Re Compania de Electricidad de la Provincia de Buenos Aires Ltd* [1980] Ch 146, Slade J at 186.

16 *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281.

17 *Limitation Act 1935* s 38(1)(e)(i).

18 *Civil Procedure Act 1833* (UK) s 3.

19 Wright Committee Report (1936) para 5.

20 *Limitation Act 1939* (UK) s 2(3); see now *Limitation Act 1980* (UK) s 8.

21 NSW Report (1967) para 114; see also Wright Committee Report (1936) para 5; Orr Committee Report (1977) para 2.59.

12.11 On the other hand, most Canadian jurisdictions have abolished the distinction. The impetus for this development was the *Uniform Limitation of Actions Act 1931*, which provided that the same six-year period should govern both specialties and simple contracts. Four Provinces and both Territories adopted this approach.[22] More recently, the issue was considered by the Law Reform Commissions of Ontario and British Columbia. The Ontario Report of 1969, after a full examination of the issue, recommended the preservation of the longer period but did not give reasons, apart from supporting the recommendations of the Wright Committee and the New South Wales Law Reform Commission.[23] This Report was never implemented. The British Columbia Report of 1974 also examined the issue but came to the opposite conclusion:

> "Most acts which may be done by deed may also be done by simple contract. The one exception is a promise to pay money which is not supported by consideration. There seems to be little justification for a longer limitation period with respect to gifts of money made under seal than with respect to ordinary debts."[24]

The British Columbia *Limitations Act of 1975* accordingly contains no special limitation period for deeds.[25] More recently still, legislation now enacted in Alberta and proposed in Ontario adopts a standard limitation period running from the point of discovery.[26] There is no room in such proposals for a special period for deeds. Canadian jurisdictions, therefore, have generally thought it unnecessary to have a longer limitation period for deeds than for actions on simple contracts.

12.12 This Commission prefers the arguments of the British Columbia Law Reform Commission to those expressed in the English and Australian reports referred to above. It cannot see why there should be a longer limitation period for contracts under seal, if the only

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22 Alberta, Manitoba, Prince Edward Island, Saskatchewan, Northwest Territories, Yukon Territory: see para 1.11 above. See eg *Limitation of Actions Act 1987* (Man) s 2(1)(i); *Statute of Limitations 1988* (PEl) s 2(1)(g) ("any other action not...specifically provided for"); *Limitation of Actions Act 1978* (Sask) s 3(1)(f)(i); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(c)(i), now repealed by *Limitations Act 1996* (Alta) s 16. British Columbia apart, the other jurisdictions retain the 20-year period provided for in the old English law: *Limitation of Actions Act 1973* (NB) s 2; *Limitation of Personal Actions Act 1990* (Nfd) s 2(1)(b); *Limitation of Actions Act 1989* (NS) s 2(1)(c); *Limitations Act 1990* (Ont) s 45(1)(b). However, the Newfoundland Law Reform Commission recommended that the period should be the same as for ordinary contract actions: Newfoundland Working Paper (1985) 66 and Newfoundland Report (1986).

23 Ontario Report (1969) 45-47.

24 British Columbia Report (1974) 27-28.

25 The applicable limitation period would be 6 years under *Limitation Act 1979* (BC) s 3(4).

26 See paras 6.3-6.4, 6.6-6.14 above.

function of that rule is to allow parties a means of fixing a longer limitation period.[27] In the Commission's view, the limitation period for contracts under seal should be the same as that for simple contracts. It accordingly **recommends** that the proposed general discovery and ultimate limitation periods should apply to contracts under seal in exactly the same way as they will apply to simple contracts. This is the position under the Alberta and Ontario provisions which are similar to those of the Commission.

(c) Actions in quasi-contract

12.13 The limitation period for actions in quasi-contract is currently six years, as a result of the inclusion in section 38(1)(c)(v), which prescribes a six-year limitation period for actions founded on any simple contract, of "a contract implied in law".[28] The position is the same in most other jurisdictions.[29] The effect of the application to such claims of the two general limitation periods will be much the same as for actions for breach of contract:[30] the limitation period will ordinarily be three years running from the date of the breach, act or omission which gave rise to the right to make restitution.[31] One of the advantages of this is that the unsatisfactory classification of such actions in the current Act will disappear.

(d) Actions for an account

12.14 The current Western Australian provisions distinguish between actions for account which concern the trade of merchandise between merchant and merchant, their factors and

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27 Note also the view that it is possible to extend the limitation period by agreement: see paras 18.1-18.2 below. If this is correct, there would be no necessity to use a deed for this purpose.

28 For discussion of the limitation periods applicable to other claims based on restitutionary principles, see para 4.9 above.

29 Either because the limitation period for actions in contract is stated to apply to contracts implied in law: *Limitation of Actions Act 1936* (SA) s 35(a); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation of Actions Act 1987* (Man) s 2(1)(i); *Limitation of Actions Act 1989* (NS) s 2(1)(e); *Limitation of Actions Act 1978* (Sask) s 3(1)(f); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(c)(i), now repealed by *Limitations Act 1996* (Alta) s 16; or because it is stated to apply to actions in quasi-contract: *Limitation Act 1969* (NSW) s 14(1)(a); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); see also *Limitation Act 1981* (NT) s 12(1)(a), under which the limitation period is three years; or even though the section makes no express reference at all (see para 4.9 n 22 above): *Limitation Act 1980* (UK) s 5; *Limitation Act 1950* (NZ) s 4(1)(a); *Limitation of Personal Actions Act 1990* (Nfd) s 2(2)(e); *Limitations Act 1990* (Ont) s 45(1)(g); or under general "catchall" provisions: *Limitation Act 1985* (ACT) s 11(1); *Limitation Act 1979* (BC) s 3(4); *Limitation of Actions Act 1973* (NB) s 9; *Statute of Limitations 1988* (PEl) s 2(1)(g).

30 See para 12.6 above.

31 For details of when a right to claim in quasi-contract accrues under the present law, see para 4.9 above.

servants[32] and other actions for account,[33] though both are subject to a six-year limitation period.[34]

12.15 There is no need to have two separate provisions. Reference to the position in the other Australian jurisdictions reveals two alternatives. The other States have a provision based on section 2(2) of the English *Limitation Act 1939* under which actions for an account are governed by a six-year period,[35] and the Northern Territory has a similar provision, but with a three-year period.[36] The Australian Capital Territory, on the other hand, has adopted a provision found in the current English Act, under which an action for an account may not be brought after the expiration of any time limit under the Act applicable to the claim which is the basis of the duty to account.[37] Under this provision, if the basis of the duty to account was a cause of action founded on a contract, the limitation period would be the limitation period appropriate to contract actions, which is six years in both jurisdictions (and also in Western Australia), but if it rested on some other basis, for example a fraudulent breach of trust, a longer limitation period might apply.[38]

12.16 There has been some controversy as to whether section 2(2) of the English Act of 1939 applies to all actions for an account, both at law and in equity. Since the common law liability to account is thought to be obsolete, it is particularly important to determine the extent to which equitable actions are within its scope. It should be noted that according to section 2(7), section 2 does not apply to any claim for equitable relief except so far as the provision may be applied by analogy.[39] One view is that, despite section 2(7), section 2(2) applies directly to an action in equity for an account, whether the liability to account is legal

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32 *Limitation Act 1935* s 38(1)(c)(ii).

33 Id s 38(1)(c)(iii).

34 Four Canadian jurisdictions also retain these provisions: see *Limitation of Actions Act 1973* (NB) s 8; *Limitation of Personal Actions Act 1990* (Nfd) s 2(2)(d); *Limitation of Actions Act 1989* (NS) s 2(2); *Limitations Act 1990* (Ont) s 46.

35 *Limitation Act 1969* (NSW) s 15; *Limitation of Actions Act 1974* (Qld) s 10(2); *Limitation Act 1974* (Tas) s 4(2); *Limitation of Actions Act 1958* (Vic) s 5(2); see also *Limitation of Actions Act 1936* (SA) s 35(b). New Zealand and two Canadian jurisdictions have similar provisions: *Limitation Act 1950* (NZ) s 4(2); *Limitation of Actions Act 1987* (Man) s 2(1)(i); *Limitation of Actions Act 1978* (Sask) s 3(1)(f)(ii); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(c)(ii), now repealed by *Limitations Act 1996* (Alta) s 16. In two Canadian jurisdictions, the six year "catchall" provision applies: *Limitation Act 1979* (BC) s 3(4); *Statute of Limitations 1988* (PEI) s 2(1)(g).

36 *Limitation Act 1981* (NT) s 13 (in line with provisions for other common law actions).

37 *Limitation Act 1985* (ACT) s 12, founded on *Limitation Act 1980* (UK) s 23.

38 In the Australian Capital Territory the limitation period for a fraudulent breach of trust is 12 years: *Limitation Act 1985* (ACT) s 27(1). If the duty to account arises out of a fiduciary relationship and not any particular breach of duty, no time limit will apply: *Attorney-General (UK) v Cocke* [1988] Ch 414.

39 On the application of the *Limitation Act* by analogy to equitable claims see paras 13.3-13.4 below.

or equitable.[40] Another view is that the section applies directly only to the action at law, but that it will be applied by analogy in an action for account in equity.[41] A third view, possibly now predominant, is that there are limits to the extent to which the section can be applied by analogy and that the six-year limitation period did not apply to an equitable action for an account.[42]

12.17 The adoption by the Commission of standard limitation periods applying to practically all claims, legal or equitable, bypasses this controversy. Whether the liability to account is legal or equitable, it will be governed by the standard period. For the purposes of the running of the discovery period, the injury will be either economic loss, the non-performance of an obligation or the breach of a duty, according to the circumstances.[43] For the purposes of the ultimate period, the claim will normally be one based on the breach of a duty, and the period would run from the time when the conduct, act or omission in question occurred.

3. TORT

(a) The present position

12.18 Currently, there is no general provision in the Western Australian *Limitation Act* dealing with actions in tort. Instead there is a series of provisions applying to particular torts. A six year period applies to actions for trespass to land or goods, detinue and conversion,[44] all other actions founded on tort,[45] and all other actions in the nature of actions on the case.[46] A four year period applies to actions for trespass to the person, menace, assault, battery, wounding or imprisonment.[47] A two year period applies to actions for slander actionable without proof of damage.[48]

12.19 This complicated position is the result of the retention of the provisions of English law, much as they were enacted in 1623. In most other Australian jurisdictions, the position is

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40 *Halsbury's Laws of England* 4th ed vol 28 para 698 n 2.
41 G H Newsom and L Abel-Smith *Preston and Newsom on Limitation of Actions* (3rd ed 1953) 56.
42 *Tito v Waddell (No 2)* [1977] Ch 106, Megarry J at 250-251.
43 This parallels the position in England and the Australian Capital Territory, where the time limit which applies to such actions depends on the basis of the duty to account: see para 12.15 above.
44 *Limitation Act 1935* s 38(1)(c)(iv).
45 Id s 38(1)(c)(vi).
46 Id s 38(1)(c)(vii).
47 Id s 38(1)(b).
48 Id s 38(1)(a)(ii).

much simpler. In all jurisdictions except the Northern Territory, there is a six-year limitation period for actions in tort.[49] In the Northern Territory, the period is three years.[50] There is a major exception to the six-year rule in New South Wales, Queensland, South Australia and Tasmania, which have adopted a reform first enacted in England[51] under which there is a shorter limitation period - three years - for personal injury cases.[52] There is one other exception in South Australia, where a two-year limitation period applies in all cases of slander.[53]

(b) General effect of the Commission' s recommendations

12.20 The two general limitation periods recommended by the Commission will apply to all tort actions. This will effect a considerable simplification of the law. The result will be that tort actions will ordinarily be governed by the three-year discovery period. If the injury suffered by the plaintiff (whether personal injury, property damage or economic loss, or in the absence of any of these, the breach of a duty) is immediately apparent, the three-year period will run from the date of the injury. If the plaintiff does not have the necessary knowledge at that point in time, the period will run from the time when he acquires that knowledge. This is subject to the impact of the 15-year ultimate period, which runs from the date of the act or omission giving rise to the loss:[54] ordinarily, a plaintiff cannot recover after 15 years, whether the loss has become discoverable or not. However, in exceptional cases, a plaintiff may be able to persuade a court to exercise its discretion to extend the period.[55]

12.21 One of the benefits of the Commission's recommended reform is that where the damage is apparent at the time of the relevant act or omission, the limitation period applying

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49 *Limitation Act 1985* (ACT) s 11(1) ("any cause of action"); *Limitation Act 1969* (NSW) s 14(1)(b); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); *Limitation of Actions Act 1936* (SA) s 35(c); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(1)(a). England and New Zealand also have a six year limitation period for tort actions: *Limitation Act 1980* (UK) s 2; *Limitation Act 1950* (NZ) s 4(1)(a). Canadian jurisdictions, on the other hand, generally retain one limitation period for trespass to the person (generally two years, but in some jurisdictions one year or four years), another for personal injury and other negligence actions (generally two years, but six years in some jurisdictions) and sometimes further limitation periods for other cases, eg highway traffic accidents: for details see J C Morton *Limitation of Civil Actions* (1988) Appendix "Limitation Periods in Canada".

50 *Limitation Act 1981* (NT) s 12(1)(b).

51 *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 2(1); see now *Limitation Act 1980* (UK) s 11.

52 *Limitation Act 1969* (NSW) s 18A; *Limitation of Actions Act 1974* (Qld) s 11; *Limitation of Actions Act 1936* (SA) s 36; *Limitation Act 1974* (Tas) s 5(1).

53 *Limitation of Actions Act 1936* (SA) s 37.

54 In cases involving a continuing course of conduct or a series of related acts or omissions, the period will run from the point when the conduct terminated or the last act or omission occurred: see paras 7.33-7.34 above.

55 See paras 7.35-7.48 above.

to actions in tort will be three years, rather than the six-year period which now applies to most cases. In recent years there has been a movement in favour of shorter limitation periods in tort cases. This can be seen, for example, in the general three-year period prevailing in the Northern Territory,[56] the three-year rule for personal injury cases now operative in a number of Australian jurisdictions,[57] the three-year rule which now applies not only in personal injury cases but in a number of other situations in England,[58] and a marked trend in favour of a two-year limitation period for many tort actions in Canada.[59] In general, the reason for the adoption of shorter periods is that six years is simply too long. If the plaintiff can wait six years before commencing an action, it means that by the time it is heard the evidence is stale and witnesses may have died, disappeared or forgotten the details of what happened. This applies with especial force in personal injury cases, but it is also true for many other tort cases.[60] Since in most jurisdictions it is possible for the standard period to be extended where the plaintiff is unaware that he has suffered loss, and sometimes where there are other special reasons for so doing, there is no need to take cases where the damage is not immediately apparent into account in determining the length of the standard period. Three years should be enough for the plaintiff who is aware of the existence of a claim to take legal advice, attempt to settle the claim through negotiation and then, if that fails, commence proceedings.

(c) Elimination of unnecessary distinctions

12.22 Another benefit of the Commission's general recommendations is that they eliminate the unnecessary distinctions between different causes of action in tort which are found in the present law.

(i) Defamation

12.23 Under section 38 of the *Limitation Act*, all actions for libel and actions for slander actionable only on proof of damage are subject to a six-year limitation period,[61] but the

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56 See para 4.39 above.

57 See paras 4.11, 4.39 and 12.29 above.

58 See paras 5.21 (personal injury), 5.30 (actions for negligence involving damage other than personal injury), 5.31 above (defective products), 12.25 below (defamation).

59 See paras 4.41-4.43 above. This probably originates in the two-year period for some torts inserted in the Canadian *Uniform Limitation of Actions Act 1931* in 1944; see Ontario Report (1969) 37-38.

60 There are exceptional cases, such as those involving sexual abuse, in which these factors do not operate with the same force; see paras 9.17-9.18 above.

61 *Limitation Act* s 38(1)(c)(vi).

exceptional instances in which slander is actionable without proof of damage[62] are governed by a much shorter limitation period of two years.[63]

12.24 The result of these provisions is that the more serious forms of slander are subject to a shorter limitation period than any others. This seems impossible to justify. No other Australian jurisdiction has a parallel distinction. The nearest approach is South Australia, which has a shorter limitation period for slander than for libel.[64] All other jurisdictions either have the same limitation period for both varieties of defamation, or have abolished the distinction between them. The Commission **recommends** that actions for slander actionable without proof of damage should no longer be subject to a shorter limitation period than other defamation actions. The Commission's general recommendations apply to all defamation actions, and make no distinction between different forms of defamation for limitation purposes.

12.25 The Commission's general recommendations also achieve another desirable objective: shortening the limitation period applicable to defamation. It has been recognised for some time that a six year limitation period for defamation actions is too long. In England, following the recommendations of the Faulks Committee,[65] the *Limitation Act 1980* was amended to provide for a three-year limitation period for libel and slander.[66] The Australian Law Reform Commission, in its report on *Unfair Publication: Defamation and Privacy*, recommended that defamation actions should be commenced within six months from the date the plaintiff first became aware of the publication, and in any event not later than three years from the date of publication.[67] This Commission, in its report on *Defamation*, agreed.[68] A report on the law of defamation cannot help but make recommendations limited to defamation law, but in the context of limitation of actions the disadvantage of such recommendations is that they create extra categories of limitation rules, something which the Commission is seeking to avoid. Its

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62 Words imputing the commission of a crime or a loathsome disease and allegations of unfitness for a profession, trade or office, and accusations of unchastity on the part of women: see J G Fleming *The Law of Torts* (8th ed 1993) 548-551. The last category is statutory: in Western Australia, see *Slander of Women Act 1900* (WA).

63 *Limitation Act 1935* s 38(1)(a)(ii).

64 The limitation period for slander is two years: *Limitation of Actions Act 1936* (SA) s 37, and for libel six years: id s 35(c).

65 *Report of the Committee on Defamation* (Faulks Committee) (1975 Cmnd 5909) para 538.

66 *Limitation Act 1980* (UK) s 4A, inserted by the *Administration of Justice Act 1985* (UK) s 57(2).

67 Australian Law Reform Commission *Unfair Publication: Defamation and Privacy* (Report No 11 1979) para 281.

68 Law Reform Commission of Western Australia *Report on Defamation* (Project No 8 Part II 1979) para 20.9.

recommendations are generally in harmony with the direction indicated for the reform of limitation periods in the area of defamation, but allow the limitation period for such cases to be the same as for all others.

12.26 An Act of 1888 still in force provides a special limitation period of one year for defamation actions against newspapers.[69] The Act contained a number of measures to prevent the bringing of civil actions of a frivolous nature against journalists, and was said to be necessary as a result of peculiar circumstances then prevailing in Western Australia.[70] In its report on *Defamation: Privileged Reports* this Commission's predecessor, the Law Reform Committee, questioned the validity of special rules applying only to newspapers[71] and suggested that the period of one year was too short,[72] but it concluded that the existing limitation period should continue to apply until there was a general review. In its subsequent report on *Defamation* the Commission envisaged that this review would be conducted in the context of its reference on limitation of actions.[73] However, the scope of this reference was subsequently confined to the *Limitation Act* and a few closely associated statutes. The Commission in this report therefore makes no recommendation for the abolition of the special one-year period applying to newspapers.

(ii) Trespass to the person

12.27 At present, the *Limitation Act* distinguishes between actions for "trespass to the person, menace, assault, battery, wounding, or imprisonment" for which there is a four-year period,[74] and all other torts, for which the limitation period is six years. There is thus one rule for trespass to the person, and another for other kinds of trespass, such as trespass to land and to goods; and one rule for personal injury directly inflicted, and another rule for all other cases of personal injury. No other Australian jurisdiction adopts any such distinction.

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69 The *Newspaper Libel and Registration Act 1884 Amendment Act 1888* s 5. The period was originally four months, but was extended to one year in 1957 by The *Newspaper Libel and Registration Act Amendment Act 1957* s 4.

70 Western Australia *Parliamentary Debates* (1888) vol 14 412-413. The reasons for including a special short limitation period in this enactment are obscure. This clause was not in the Bill when debated at second reading or committee stages, and must have been introduced at a later stage.

71 Law Reform Committee of Western Australia *Defamation: Privileged Reports* (Project No 8 Part I 1972) para 35.

72 Id para 79.

73 Law Reform Commission of Western Australia *Defamation* (Project No 8 Part II 1979) para 20.9 n 14.

74 *Limitation Act* s 38(1)(b). Actions for menace have been obsolete for many years: see para 2.49 above.

12.28 This may perhaps have been justifiable many years ago, because these torts were also crimes, but at the present day there is no valid reason for regarding these particular torts as being in some way different from all others. Moreover, it may be possible, at least in some cases, to avoid the four-year limitation period by bringing an action for some other tort. An action in negligence is available as an alternative to a negligent trespass,[75] and it may be possible to bring an action under the principles of *Wilkinson v Downton*[76] for intentional harm directly inflicted.[77] The Commission's recommendation for a general three year period applying to all causes of action will mean that such complications will be a thing of the past.

(iii) Personal injury generally

12.29 In 1983, in its first report on limitation of actions, this Commission stated as a general principle that the limitation period in all personal injury cases should be six years.[78]

Western Australia has never adopted provisions found in England and in some Australian jurisdictions under which the limitation period for personal injury actions is shorter than that for other tort actions - three years rather than six. Such provisions resulted from the report of the Tucker Committee in England in 1949, which adopted the view that in personal injury cases six years was too long.[79] England shortened the period for personal injury to three years in 1954[80] and four Australian jurisdictions followed suit between 1956 and 1965,[81] with New South Wales adopting a similar reform in 1990.[82] However, this move has not enjoyed

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75 See para 2.51 above.

76 [1897] 2 QB 57.

77 See P R Handford "*Wilkinson v Downton* and Acts Calculated to Cause Physical Harm" (1985) 16 *UWAL Rev* 31, 34-38.

78 Part I Report (1982) para 4.2.

79 Tucker Committee Report (1949) para 22: see also para 4.39 above.

80 *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 2(1), adding a proviso to *Limitation Act 1939* (UK) s 2(1); see now *Limitation Act 1980* (UK) s 11.

81 *Law Reform (Limitation of Actions) Act 1956* (Qld) s 5 (see now *Limitation of Actions Act 1974* (Qld) s 11); *Limitation of Actions and Wrongs Acts Amendment Act 1956* (SA) s 4 (see now *Limitation of Actions Act 1936* (SA) s 36); *Limitation of Actions Act 1958* (Vic) s 5(6) (repealed by *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 3); *Limitation of Actions Act 1965* (Tas) s 2(1) (see now *Limitation Act 1974* (Tas) s 5(1)). The Tasmanian Act of 1965 provided for a limitation period of 2½ years, a compromise between the views of the House of Assembly, which wanted two years, and the Legislative Council, which preferred three years: Tasmania Report (1992) 44. The 1974 Act extended this to three years.

82 *Limitation Act 1969* (NSW) s 18A, added by the *Limitation (Amendment) Act 1990* (NSW) s 3 and Sch 1(3). This resulted from the recommendations of the NSW Report (1986) para 6.11. The New South Wales Law Reform Commission had made an earlier recommendation to the same effect: NSW Report (1975) para 140, but this was not implemented.

universal favour. Victoria recanted in 1983, returning to a six-year period for personal injury cases,[83] and there is a recent recommendation that Tasmania should do the same.[84]

12.30 The Commission remains of the view that it is undesirable for personal injury cases to be treated differently from other causes of action. One important reason is that putting personal injury actions in a separate category creates boundary disputes about what is or is not a personal injury action, as for example in a recent English decision in which it was held that a claim for damages arising from a failed sterilisation operation which resulted in an unwanted pregnancy and the birth of a healthy child was a personal injury claim.[85] "Personal injury" is generally defined as including any disease and any impairment of a person's physical or mental condition,[86] and so it clearly includes psychiatric as well as physical injury;[87] it may also include distress falling short of psychiatric injury, such as worry or inconvenience caused by a house being built defectively,[88] but this would be more controversial. Actions involving the secondary consequences of personal injury - for example, actions for contribution or indemnity between tortfeasors,[89] actions against a solicitor for negligently failing to institute a personal injury action,[90] and actions against a doctor for financial loss caused by the negligent performance of an operation[91] - are not included, but an action by a partnership for personal injury to a partner is a personal injury action.[92] Different views have been expressed as to whether a direct action against a statutory insurer is a personal injury action for this purpose.[93]

12.31 The problems are magnified by the fact that the jurisdictions with a shorter period for personal injury actions do not define the personal injury category in a uniform way. In South

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83 *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 3, repealing *Limitation of Actions Act 1958* (Vic) s 5(6).

84 Tasmania Report (1992) 45.

85 *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543.

86 *Limitation Act 1969* (NSW) s 11(1); *Limitation of Actions Act 1974* (Qld) s 5(1); Limitation of Actions Act 1936 (SA) s 36(2); *Limitation of Actions Act 1975* (Tas) s 5(5); see also *Limitation Act 1985* (ACT) s 8(1); *Limitation Act 1981* (NT) s 4(1); *Limitation of Actions Act 1958* (Vic) s 3(1).

87 "Nervous shock" claims require proof of a recognisable psychiatric injury: *Hinz v Berry* [1970] 2 QB 40 Lord Denning MR at 42-43; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, Windeyer J at 394.

88 *Gabolinsky v Hamilton City Corporation* [1975] 1 NZLR 150.

89 *Unsworth v Commissioner for Railways* (1958) 101 CLR 73; *Bargen v State Government Insurance Office (Qld)* (1982) 154 CLR 318; but see *Kennett v Brown* [1988] 1 WLR 582 where one defendant suffered personal injury and claimed for it against the co-defendant.

90 *Ackbar v C F Green & Co Ltd* [1975] QB 582.

91 *Pattison v Hobbs The Times* 11 November 1985.

92 *Howe v David Brown Tractors (Retail) Ltd* [1991] 4 All ER 30.

93 See *Hall v National & General Insurance Co Ltd* [1967] VR 355, Gowans J at 367; *Insurance Commissioner of the State Motor Car Insurance Office v Moss* [1969] VR 650; *Carslake v Guardian Assurance Co* (1977) 15 SASR 378.

Australia, the legislation refers to an action in which the damages claimed consist of or include personal injury,[94] but in Tasmania the action must in addition be one for negligence, nuisance or breach of duty,[95] and in Queensland and New South Wales actions for trespass are also included.[96] The words "negligence, nuisance and breach of duty" have generally been given a wide construction to include most torts, and so for example actions for loss of consortium[97] and services[98] are included, and the express inclusion of trespass in two States confirms decisions which held that such actions were actions of breach of duty, and so the shorter period applied.[99] In three of these States the legislation expressly provides that actions for breach of contract are included,[100] but the position is presumably the same in South Australia despite the absence of express provision. In all these jurisdictions except New South Wales, the legislation refers to an action in which the damages "consist of or include" personal injury, and so an action in which the plaintiff wishes to claim both for personal injury and for some other damage must be brought within the three year period.

12.32 The Commission does not see the point of encouraging classification disputes of this sort. There should be one rule capable of accommodating all causes of action.

(d) Some particular issues

12.33 It will be necessary to supplement the general limitation provisions recommended by the Commission in one or two particular respects.

(i) Application to trespass, conversion and detinue

12.34 The Alberta *Limitations Act*, which has been closely followed in the recommendations of this Commission, makes the running of the discovery period depend on knowledge by the plaintiff of various matters relating to the injury suffered. "Injury" is defined as meaning

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94 *Limitation of Actions Act 1936* (SA) s 36(1).

95 *Limitation Act 1974* (Tas) s 5(1).

96 See *Limitation Act 1969* (NSW) s 11(1); *Limitation of Actions Act 1974* (Qld) s 11.

97 *Opperman v Opperman* [1975] Qd R 345.

98 *Ure v Humes Ltd* [1969] QWN 25.

99 *Kruber v Grzesiak* [1963] VR 621; *Letang v Cooper* [1965] 1 QB 232; *Long v Hepworth* [1968] 1 WLR 1299; but a different view was recently taken in *Stubbings v Webb* [1993] AC 498: see paras 9.13-9.15 above.

100 *Limitation Act 1969* (NSW) s 11(1); *Limitation of Actions Act 1974* (Qld) s 11; *Limitation Act 1974* (Tas) s 5(1).

personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of these, the breach of a duty.[101]

12.35 The Commission has already considered in some detail how the definition of injury will apply to the torts of trespass to the person, land and goods, and conversion and detinue. It has recommended that "personal injury" should be defined to include trespass to the person, for the purposes of the torts of assault, battery and false imprisonment, and that "breach of duty" be defined to include a trespass to land or goods, for the purposes of the torts of trespass to land and goods, and a conversion or detinue, for the purposes of the torts of conversion and detinue.[102]

(ii) Successive conversions

12.36 As regards conversion and detinue, most Limitation Acts have a special provision to deal with the situation where, at some time after the initial conversion or detention, a further conversion or detention takes place without the plaintiff having first recovered possession. Although separate causes of action arise in respect of each conversion or detention, it is provided that no action may be brought in respect of any subsequent conversion or detention once the limitation period for the first conversion or detention has expired.[103] Such a provision originally appeared in the English *Limitation Act 1939*,[104] and similar provisions are now to be found in all the modern Australian Acts[105] and those of New Zealand[106] and some Canadian jurisdictions.[107] In New South Wales, the Northern Territory, the Australian Capital Territory and British Columbia, the provision also applies to an action to recover the proceeds of sale of goods, in order to make it quite clear that the provision applies when the plaintiff waives the tort to sue in quasi-contract.[108]

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

102 See paras 7.28-7.29 above.

103 As the Hon H Zelling pointed out in his comments on the Discussion Paper (1992), it may be possible to avoid the effect of this provision by suing in trespass to goods.

104 *Limitation Act 1939* (UK) s 3(1); see now *Limitation Act 1980* (UK) s 3(1).

105 *Limitation Act 1969* (NSW) s 21; *Limitation of Actions Act* 1958 (Vic) s 6(1); *Limitation of Actions Act 1974* (Qld) s 12(1); *Limitation Act 1974* (Tas) s 6(1); *Limitation Act 1981* (NT) s 19(1); *Limitation Act 1985* (ACT) s 18.

106 *Limitation Act 1950* (NZ) s 5(1).

107 See *Limitation Act 1979* (BC) s 10; *Limitation of Actions Act 1987* (Man) s 54(1); *Limitation of Actions Act 1973* (NB) s 61(1).

108 See NSWLRC Report para 128. It may be that even without this addition the provision would have applied in such a case: *Beaman v ARTS Ltd* [1948] 2 All ER 89, Denning J at 92-93.

12.37 The Alberta *Limitations Act*, on which the Commission's major recommendations are based, does not contain any such provision, perhaps because there was no such provision in the former Alberta Act. However, the problem seems to the Commission to be one for which the new Limitation Act in Western Australia should provide. The limitation period applicable to the initial conversion will ordinarily run from the time of the conversion, in accordance with the recommendation previously referred to;[109] if there is a further conversion or detention before the plaintiff recovers possession this will not extend the period. The Commission **recommends** that a similar provision to that now in force in New South Wales should be incorporated in the new Western Australian Act.

4. RELATED PROVISIONS

(a) Actions to enforce a judgment

12.38 The normal method of enforcing a judgment is by execution. The *Supreme Court Act 1935* provides that a six year limitation period applies to enforcement by this means.[110] However, a judgment for the payment of a definite sum of money can be enforced by action[111] even though at the present day it is rarely necessary to resort to this means of enforcement. The limitation period for enforcement of judgments in the *Limitation Act*[112] applies only to the enforcement of a judgment by action, and issuing execution on a judgment is not an "action" for this purpose.[113]

12.39 In most jurisdictions, the limitation period that applies to actions on a judgment is longer than the period generally applying to most common law causes of action such as actions for breach of contract. Under the old English legislation a 20-year period originally applied to actions to "recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent".[114] However, when the English Act was amended in 1874 this and other 20-year periods were reduced to 12 years.[115] The

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109 See para 12.35 above.

110 *Supreme Court Act 1935* s 141(1). Where six years have elapsed since the judgment, a party may apply to the court for leave to issue execution: id s 141(2).

111 *Berliner lndustriebank Aktiengesellschaft v Jost* [1971] 1 QB 278, Brandon J at 285, affirmed [1971] 2 QB 463; *E D & F Man (Sugar) Ltd v Haryanto* [1996] TLR 491.

112 See para 12.39 below.

113 *W T Lamb & Sons v Rider* [1948] 2 KB 331; *Easton v Brown* [1981] 3 All ER 278; but see *Lougher v Donovan* [1948] 2 All ER 11

114 *Real Property Limitation Act 1833* (UK) s 40.

115 *Real Property Limitation Act 1874* (UK) s 8.

amended provision was copied into the Western Australian *Limitation Act 1935*,[116] and so survives to the present day.

12.40 The limitation period for actions on a judgment has thus long been associated with the limitation period which applies to actions for the recovery of land or rent. This continues to be so not only in Australia but also in New Zealand and Canada. Though in most jurisdictions the provision is now separate from that for mortgages, liens and other sums charged on land, the limitation period remains 10, 12, 15 or 20 years,[117] depending on the number of years which must elapse before an action to recover land becomes statute-barred.

12.41 The association between actions on a judgment and actions to recover land was explained by the Report of the English Law Reform Committee in 1977:

> "Until 1852, an action on a judgment was the simplest way in which a judgment creditor could recover his money after a year and a day had elapsed since the judgment; and a judgment was, until 1864, chargeable *per se* on, and payable out of, the proceeds of sale of real property. In view of this latter rule, it is understandable that the period for an action on a judgment has since 1833 been the same as that for an action relating to land."[118]

The Committee went on to say that it was unnecessary to preserve the special period for such actions, pointing out that the enforcement of a judgment by action, rather than by execution, was very rare, and referring also to difficulties arising from the fact that the section had been held to bar certain forms of execution.[119] It recommended that the normal six-year period should apply instead.[120] This recommendation was implemented by the 1980 Act.[121] As the Committee noted, this would bring it into line with the limitation period for the issue of

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116 *Limitation Act 1935* s 32(1).

117 The period in most Australian jurisdictions is 12 years: *Limitation Act 1985* (ACT) s 14(1); *Limitation Act 1969* (NSW) s 17(1); *Limitation Act 1981* (NT) s 15(1); *Limitation of Actions Act 1974* (Qld) s 10(4); *Limitation Act 1974* (Tas) s 4(4). This is also the case in New Zealand: *Limitation Act 1950* (NZ) s 4(4). However it is 15 years in South Australia and Victoria: *Limitation of Actions Act 1936* (SA) s 34; *Limitation of Actions Act 1958* (Vic) s 5(4). In most Canadian jurisdictions it is 10 years, primarily through the influence of the *Uniform Limitation of Actions Act 1931*: see eg *Limitation Act 1979* (BC) s 3(2)(f), and note also s 11 which deals with the procedure to be adopted after the expiration of the limitation period; *Limitation of Actions Act 1987* (Man) s 2(1)(1); *Statute of Limitations 1988* (PEI) s 2(1)(f); *Limitation of Actions Act 1978* (Sask) s 3(1)(i); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(f), now repealed by *Limitations Act 1996* (Alta) s 16; other Canadian jurisdictions still retain the original 20 year period: see *Limitation of Actions Act 1973* (NB) s 2; *Limitation of Realty Actions Act 1990* (Nfd) s 24(1); *Limitation of Actions Act 1989* (NS) s 23; *Limitations Act 1990* (Ont) s 45(1)(c).

118 Orr Committee Report (1977) para 4.13.

119 See *W T Lamb & Sons v Rider* [1948] 2 KB 331; *Lougher v Donovan* [1948] 2 All ER 11; *Mills v Allen* [1953] 2 QB 341.

120 Orr Committee Report (1977) paras 4.13-4.16.

121 *Limitation Act 1980* (UK) s 24.

execution on a judgment. The New Zealand Law Commission has also recommended that the limitation period applying to the enforcement of judgments by action should be the same as that for execution, and that in each case this should be the standard period recommended by that Commission for all actions, namely three years with the possibility of extension.[122]

12.42 On the other hand, a number of reports have championed the case for retaining a longer limitation period for actions on a judgment than for other actions. In the view of the Ontario Law Reform Commission:

> "[A] judgment is something more than a contract debt or a debt due under a specialty. It is a declaration by the court under which the rights of the parties have been determined. Once the time for an appeal has passed, there is no room for dispute. Furthermore, the successful plaintiff cannot be said to have slept on his rights. He has taken action and, as a consequence, recovered judgment. Accordingly, the Commission believes that a longer period should be allowed for actions on judgments than for those on ordinary contract debts or on specialties."[123]

The British Columbia Law Reform Commission agreed.[124] More recently, the Alberta *Limitations Act 1996*, by way of exception to the two standard limitation periods which otherwise apply to nearly all actions, enacts a ten-year limitation period for claims based on a judgment or order for the payment of money.[125]

12.43 This Commission agrees that the arguments of the Ontario Law Reform Commission for having a longer limitation period for actions on judgments than for most other actions have some merit. However, it has concluded that they are not sufficient to justify a departure from the general scheme recommended by the Commission, in view of the desirability of having all actions subject to that general scheme and keeping exceptions to an absolute minimum. Little harm would be done to the interests of plaintiffs by the application of the two

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122 New Zealand Report (1988) para 329.

123 Ontario Report (1969) 49.

124 British Columbia Report (1974) 33-34.

125 *Limitations Act 1996* (Alta) s 11. The Alberta Law Reform Institute originally proposed that there should be no limitation period for actions on a judgment, because of the distinction it sought to make between remedial orders (to which the *Limitation Act* should apply) and enforcement orders (which should not be subject to any limitation period, because a plaintiff who came to court to enforce a remedial order had already complied with all necessary limitation requirements): Alberta Report for Discussion (1986) paras 3.23-3.24. For the recommendations on judgments for the payment of money see id paras 3.25-3.51. In its final report the Institute said that there was a distinction between collecting on a judgment by various procedural means, such as a writ of execution or a garnishee order, and pursuing the cause of action created by a judgment, and that it was appropriate to have a limitation period for the latter. However, it merely endorsed the existing Alberta rule, and did not put forward any argument for or against the application of the general limitation provision: Alberta Report (1989) 97, and see also 42-43.

general principles. In the ordinary case, the plaintiff would be aware of the existence of the judgment, and if this were not so the limitation period can be as much as 15 years, which is broadly consistent with the longer period recognised by the existing law and advocated by the Ontario Commission. The Commission therefore **recommends** that the two general limitation periods should apply to actions to enforce a judgment.

12.44 In theory, it would be possible for the claimant, before the end of the limitation period, to bring an action on the judgment and recover judgment, thus producing a fresh judgment and a fresh limitation period. The Ontario Law Reform Commission recommended that this should not be permissible,[126] but other commissions have generally disagreed.[127] This Commission likewise sees no reason to limit the rights of a judgment creditor in this way.

12.45 The existing provision in Western Australia applies only to the judgments of Western Australian courts. Judgments of courts in other jurisdictions are "foreign judgments", to which the limitation period appropriate to actions for breach of contract applies.[128] In addition to enforcement at common law, foreign judgments can be enforced by registration under statutory provisions,[129] but as with domestic judgments, the *Limitation Act* provision applies only to enforcement by action and not to enforcement by registration. The legislation on registration of judgments imposes its own limitation period.[130] The rule in Western Australia that the *Limitation Act* provision on judgments only applies to local judgments also holds good in several other jurisdictions, but in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland, the provisions apply also to judgments of a court outside the jurisdiction. Such a judgment becomes enforceable for this purpose on the date on which it became enforceable in the place where it was given.[131] Under the Commission's recommendations, this would become a non-issue, since the standard limitation period would apply to foreign judgments, whether by virtue of being judgments or by virtue of being regarded as actions in contract. The advantage of this is that it ensures that the same limitation period applies to judgments of other courts as to those of courts in Western Australia.

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126 Ontario Report (1969) 51.

127 See eg British Columbia Report (1974) 35.

128 *Grant v Easton* (1883) 13 QB 302, Brett MR at 303; *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 QB 463.

129 See *Foreign Judgments Act 1991* (Cth), which effectively supersedes State legislation such as the *Foreign Judgments Act 1963* (WA).

130 Six years from the date of the judgment or, if there has been an appeal, the date of the last judgment in the proceedings: *Foreign Judgments Act 1991* (Cth) s 6(1).

131 *Limitation Act 1985* (ACT) s 14(2); *Limitation Act 1969* (NSW) s 17(2); *Limitation Act 1981* (NT) s 15(2); *Limitation of Actions Act 1974* (Qld) s 10(4A). See NSW Report (1967) para 117.

(b) Actions to enforce an arbitral award

12.46 The present law in Western Australia distinguishes between actions to enforce an arbitral award where the agreement to arbitrate is not under seal ("actions of debt upon any award where the submission is not by specialty"), in which case the limitation period is six years,[132] and cases where the agreement to arbitrate is under seal, in which case the limitation period which applies to actions to enforce the award is the 20-year period which applies to agreements under seal.[133] The same distinction is made in all other Australian jurisdictions. Thus, the limitation period which applies in cases where the agreement to arbitrate is not under seal is the ordinary period which applies to most common law actions - six years,[134] except in the Northern Territory where it is three years.[135] The period which applies where the agreement is under seal is either a special 12 year period[136] or the period applicable to contracts under seal, which is generally 12 years but 15 years in South Australia and Victoria.[137] The other legal systems examined in this report generally adopt a similar approach.[138]

12.47 In the Commission's view, limitation periods for the enforcement of arbitral awards should be governed by two principles. First, all awards should be governed by the same limitation period, whether the agreement to arbitrate was under seal or not. Second, such actions should be regarded as equivalent to actions to enforce a judgment, and the rule which applies to them should be exactly the same. The Commission has already recommended that the limitation period which applies to contracts under seal should be the same as that which applies to all other contracts, namely the general discovery and ultimate periods. It has also

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132 *Limitation Act 1935* s 38(1)(c)(i).

133 Id s 38(1)(e)(i).

134 *Limitation Act 1985* (ACT) s 17(2)(b); *Limitation Act 1969* (NSW) s 20(2)(b); *Limitation of Actions Act 1974* (Qld) s 10(1)(c); *Limitation of Actions Act 1936* (SA) s 35(a); *Limitation Act 1974* (Tas) s 4(1)(c); *Limitation of Actions Act 1958* (Vic) s 5(1)(c).

135 *Limitation Act 1981* (NT) s 18(2)(b).

136 *Limitation Act 1985* (ACT) s 17(2)(a); *Limitation Act 1969* (NSW) s 20(2)(a); *Limitation Act 1981* (NT) s 18(2)(a).

137 See para 12.8 above.

138 In England and New Zealand, a six year period applies where the arbitration agreement is not under seal: *Limitation Act 1980* (UK) s 7; *Limitation Act 1950* (NZ) s 4(1)(c); where it is under seal the limitation period for deeds applies. In Canada, the same approach is found in Newfoundland, Nova Scotia and Ontario: *Limitation of Personal Actions Act 1990* (Nfd) s 2(2)(a)(i); *Limitation of Actions Act 1989* (NS) s 2(1)(e); *Limitation Act 1990* (Ont) s 45(1)(d); however in the jurisdictions which have adopted the *Uniform Limitation of Actions Act 1931* the limitation period for contracts under seal is the same as that for simple contracts: see para 12.11 above, and it appears that arbitral awards are covered by the six-year period applying to "any other cause of action", as to which see para 4.45 above.

recommended that the limitation period which applies to actions on a judgment should be the general discovery and ultimate periods. It now **recommends** that this same recommendation should also apply to actions to enforce arbitral awards.[139]

(c) Actions to enforce a recognisance

12.48 A recognisance is an obligation entered into before a court conditional on the obligor or some other person doing some act such as appearing before a court to stand trial for a criminal offence, give evidence at a trial or keep the peace. The person entering into the obligation agrees to pay a fixed sum on non-fulfilment of the condition. In the event of non-payment, an action may be brought to enforce the undertaking. The action is not unlike an action to enforce a judgment.

12.49 Under the present law in Western Australia, which has retained the traditional provision found in the old English legislation,[140] the limitation period is 20 years,[141] running from the date on which the recognisance is breached, that is, the date on which performance of the condition is required and is not forthcoming. Reform bodies in England, Australia and elsewhere are united in their view that 20 years is far too long,[142] and in those Australian jurisdictions which now have modern Limitation Acts the ordinary limitation period applies - three years in the Northern Territory[143] and six years in all other jurisdictions.[144] There is no reason why the standard limitation periods recommended by the Commission should not apply to such actions, and the Commission therefore **recommends** that actions to enforce a recognisance should be governed by the two general limitation periods.

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139 In British Columbia, the *Limitation Act* achieves this by defining "judgment" to include arbitral awards: *Limitation Act 1979* (BC) s 1. The *Limitations Act 1996* (Alta) does not mention arbitral awards. The Limitations Bill 1992 (Ont) s 16(e) provides that no limitation period applies to proceedings to enforce an award in an arbitration to which the *Arbitrations Act 1990* (Ont) applies.

140 *Civil Procedure Act 1833* (UK) s 3.

141 *Limitation Act 1935* s 38(1)(e)(ii). Some Canadian jurisdictions also retain this period: *Limitation of Actions Act 1973* (NB) s 2; *Limitation of Personal Actions Act 1990* (Nfd) s 2(1)(c); *Limitation of Actions Act 1989* (NS) s 2(1)(c); *Limitations Act 1990* (Ont) s 45(1)(c).

142 Wright Committee Report (1936) para 5; NSW Report (1967) para 106; Ontario Report (1969) 44; British Columbia Report (1974) 28-29.

143 *Limitation Act 1981* (NT) s 12(1)(c).

144 *Limitation Act 1981* (ACT) s 11(1) ("any cause of action"); *Limitation Act 1969* (NSW) s 14(1)(c); *Limitation of Actions Act 1974* (Qld) s 10(1)(b); *Limitation Act 1974* (Tas) s 4(1)(b); *Limitation of Actions Act 1958* (Vic) s 5(1)(b). The same period applies in New Zealand: *Limitation Act 1950* (NZ) s 4(1)(b), and in Canadian jurisdictions which adopted the Uniform Act: see eg *Limitation of Actions Act 1987* (Man) s 2(1)(i); *Statute of Limitations* (PEI) s 2(1)(g) ("any other action not...specifically provided for"); *Limitation of Actions Act 1978* (Sask) s 3(1)(f)(i); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(c)(i), now repealed by *Limitations Act 1996* (Alta) s 16. In England the former six year period under *Limitation Act 1939* (UK) s 2(1)(b) was repealed without replacement by the *Limitation Amendment Act 1980* (UK) s 13 and Sch 1 para 2.

(d) Actions to recover penalties, forfeitures and other sums recoverable under statute

12.50 The Western Australian *Limitation Act* contains a number of specific provisions dealing with actions to recover penalties or forfeitures recoverable under statute, all inherited from the old English law -[145]

(1) actions, suits and other proceedings for forfeiture on a penal statute where the forfeiture or benefit is limited to the Crown must be commenced within two years;[146]

(2) where the forfeiture or benefit is limited to the Crown and to any person who prosecutes in that behalf, the action must be commenced by that person within one year of the offence, and in default may be commenced by the Crown within two years after that year ended;[147]

(3) where the forfeiture or benefit is limited to any person who prosecutes in that behalf, the action must be commenced within one year of the offence;[148]

(4) actions for penalties, damages or sums given by any enactment to the party grieved must be commenced within two years of the offence.[149]

12.51 In the case of actions to recover a sum recoverable by virtue of an enactment other than a penalty or forfeiture, it has to be determined whether the action is an action for a debt on a statute, which is an action on a specialty and is therefore subject to the 20 year period which applies to such actions,[150] or an action for a debt which a statute enables to be brought, which is not an action on a specialty, and thus subject to the ordinary six-year limitation period which applies to actions in debt.[151] This distinction, drawn in 19th century English case law,[152] survives in Western Australia: in *State Government Insurance Commission v Teal*,[153]

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145 In this instance, the *Common Informers Act 1588* (UK) s 5 and the *Civil Procedure Act 1833* (UK) s 3.
146 *Limitation Act 1935* s 37(1).
147 Id s 37(2).
148 Id s 37(3).
149 Id s 38(1)(a)(i).
150 *Limitation Act 1935* s 38(1)(e)(i): see para 12.9 above.
151 Id s 38(1)(c)(i).
152 *Cork & Bandon Railway Co v Goode* (1853) 13 CB 826, 138 ER 1427; see also *Cooper v Municipality of Brisbane* (1900) 10 QLJ 120; *Skinner v Trustees Executors & Agency Co Ltd* (1901) 27 VLR 218; *De Rossi v Walker* (1902) 2 SR(NSW) 249; *Public Trustee v Schultz* [1973] 1 NSWLR 564.

Commissioner Williams QC had to examine this distinction at some length in order to reach the conclusion that an action against a compulsory motor insurer under the *Motor Vehicle (Third Party Insurance) Act 1943* was an action for a debt on the statute rather than an action for a debt which the statute enabled to be brought, thus attracting the 20-year limitation period. It was in this context that Commissioner Williams QC made the comment already quoted that the reasoning process necessary to reach this conclusion highlighted the need for a thoroughgoing review and redrafting of the *Limitation Act*.[154]

12.52 Previous reports by other law reform bodies have recognised that the provisions on penalties and forfeitures are obscure and can be considerably simplified.[155] Starting with the Wright Committee Report in 1936, such reports have consistently recommended that actions to recover a sum due on an enactment other than a penalty or forfeiture should not be governed by the specialty limitation period, but should be subject to the ordinary six-year limitation period.[156]

12.53 The English legislation of 1939 reduced the former limitation provisions to two. This reform has been followed by Australian jurisdictions with modern limitation legislation, and also by New Zealand.[157] Under such legislation -

(1) actions to recover a penalty or forfeiture recoverable by virtue of an enactment are subject to a two year limitation period;[158]

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153 (1990) 2 WAR 105.

154 See para 2.54 above. Modern limitation legislation has removed the distinction: see *Central Electricity Board v Halifax Corporation* [1963] AC 785.

155 Wright Committee Report (1936) para 4; NSW Report (1967) para 119; Ontario Report (1969) 51-53; British Columbia Report (1974) 29-31; Newfoundland Working Paper (1985) 70-71.

156 Wright Committee Report (1936) para 5; NSW Report (1967) para 107; Ontario Report (1969) 44-45; British Columbia Report (1974) 29; ACT Working Paper (1984) paras 59-62; Newfoundland Working Paper (1985) 69 and Newfoundland Report (1986).

157 Most Canadian jurisdictions retain the older law: see eg *Limitation of Actions Act 1987* (Man) s 2(1)(a)-(b); *Limitations Act 1990* (Ont) s 45(1)(h) and (m); *Statute of Limitations 1988* (PEI) s 2(1)(a)-(b); *Limitation of Actions Act 1978* (Sask) s 3(1)(a)-(b); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(a)-(b), now repealed by *Limitations Act 1996* (Alta) s 16. In New Brunswick, Newfoundland and Nova Scotia there is only a two year period: *Limitation of Actions Act 1973* (NB) s 3; *Limitation of Personal Actions Act 1990* (Nfd) s 2(4)(a); *Limitation of Actions Act 1989* (NS) s 2(1)(b). For British Columbia see para 12.56 below.

158 *Limitation Act 1985* (ACT) s 15(1); *Limitation Act 1969* (NSW) s 18(1); *Limitation Act 1981* (NT) s 16(1); *Limitation of Actions Act 1958* (Qld) s 10(5); *Limitation Act 1974* (Tas) s 4(6); *Limitation of Actions Act 1958* (Vic) s 5(5)(a); *Limitation Act 1950* (NZ) s 4(5). These provisions are based on *Limitation Act 1939* (UK) s 2(5).

(2) actions to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture, are subject to a six year limitation period - either under a specific provision,[159] or, in the Australian Capital Territory, under the standard limitation period.[160]

12.54 The first category is comparatively narrow. Except that "penalty" does not include a fine to which a person is liable on conviction for a criminal offence,[161] the terms are not defined by statute. The provision covers an action to recover additional tax[162] actions for penalties against persons acting as local government councillors while disqualified,[163] and in some cases actions for damages of a non-compensatory nature.[164] It does not cover actions for damages for negligence,[165] actions to recover statutory compensation for loss sustained as a result of a misleading prospectus[166] or for damage caused by riot,[167] or actions to recover a penalty under industrial relations legislation.[168]

12.55 The second provision covers a variety of instances, of which the following are merely examples: actions to recover assets vested in a public authority,[169] actions for compensation following a local government boundary change,[170] indemnities in respect of workers compensation paid to an injured worker,[171] claims under charges created by statute in respect

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159 *Limitation Act 1969* (NSW) s 14(1)(d); *Limitation of Actions Act 1958* (Qld) s 10(1)(d); *Limitation Act 1974* (Tas) s 4(1)(d); *Limitation of Actions Act 1958* (Vic) s 5(1)(d); *Limitation Act 1950* (NZ) s 4(1)(d). In the Northern Territory the period in three years: *Limitation Act 1981* (NT) s 12(1)(d). These provisions are based on *Limitation Act 1939* (UK) s 2(1)(d).

160 *Limitation Act 1985* (ACT) s 11(1).

161 *Limitation Act 1985* (ACT) s 15(2); *Limitation Act 1969* (NSW) s 18(2); *Limitation Act 1981* (NT) s 16(2); *Limitation of Actions Act 1958* (Qld) s 10(5)A; *Limitation Act 1974* (Tas) s 4(6); *Limitation of Actions Act 1958* (Vic) s 5(5)(b); *Limitation Act 1950* (NZ) s 4(5).

162 *Deputy Commissioner of Taxation v Jonrich Pty Ltd* (1986) 86 FLR 25; *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55.

163 *Paine v Loft* [1953] VLR 601; *Attorney General (Vic) v Black* [1959] VR 45.

164 *John Robertson & Co Ltd (in liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65.

165 *Carslake v Guardian Assurance Co* (1977) 15 SASR 378; *Whiteway v Fire & All Risks Insurance Co Ltd* [1972] Tas SR 5.

166 *Thomson v Lord Clanmorris* [1900] 1 Ch 718.

167 *Jarvis v Surrey County Council* [1925] 1 KB 554.

168 *Jones v Lorne Saw Mills Pty Ltd* [1923] VLR 58; *Australasian Meat Industry Employees Union v Thomas Playfair Pty Ltd* (1962) 3 FLR 234.

169 *Central Electricity Board v Halifax Corporation* [1963] AC 785.

170 *West Riding County Council v Huddersfield Corporation* [1957] 1 QB 540.

171 *Ex parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450.

of unsatisfied liabilities,[172] and (probably) claims under statutory provisions giving one individual rights against another.[173]

12.56 In England, the two year period has now been repealed. As a result all actions to recover sums recoverable by virtue of any enactment are subject to a six-year limitation period.[174] A similar reform has taken place in British Columbia as a result of the recommendation of the Law Reform Commission of British Columbia, which after an examination of the various actions to recover penalties and forfeitures concluded: "This Commission questions the wisdom of providing limitation periods for these archaic actions".[175] There is now no specific limitation provision in the British Columbia Act dealing with actions on a statute. They are covered by the six-year period applicable to any action not specifically provided for by the Act.[176] In these two jurisdictions, therefore, all actions to recover sums due under a statute are now subject to the standard limitation period.

12.57 In view of the narrowness of the category covered by the two-year period, it seems to the Commission that Western Australia should take advantage of the experience of England and British Columbia. It therefore **recommends** that all actions to recover sums recoverable by virtue of an enactment should be subject to the two general limitation periods recommended in this report. This means that such actions will ordinarily become time-barred after three years, but in cases where the injury is not immediately apparent the running of this period will be delayed, in accordance with principles already outlined. Under the present law the time when a cause of action to recover a sum recoverable under a statute accrues depends on the proper construction of the statute.[177] In appropriate cases, there may be successive causes of action, each with its own limitation period.[178] The two standard periods recommended by the Commission will work in the same way. The "injury" on which the running of the discovery period depends can be personal injury, property damage, economic loss, the non-performance of an obligation, or, in the absence of any of these, the breach of a duty. The ultimate period for a claim based on a breach of duty arises when the conduct, act

172 *Ceric v C E Heath Underwriting and Insurance (Australia) Pty Ltd* (1994) 4 NTLR 135.

173 *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574 (action under *Misrepresentation Act 1967* (UK) s 2(1); but see *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462, criticised by A McGee *Limitation Periods* (2nd ed 1994) 52.

174 *Limitation Act 1980* (UK) s 9.

175 British Columbia Report (1974) 30.

176 *Limitation Act 1979* (BC) s 3(4).

177 See *Ex parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450; *Yorkshire Electricity Board v British Telecommunications plc* [1986] 1 WLR 1029; *Swansea City Council v Glass* [1992] QB 844.

178 *Smith, Stone & Knight v City of Birmingham District Council* (1989) 13 Con LR 118.

or omission in question occurred, and where there is a continuing course of conduct or a series of related acts or omissions arises when the conduct terminated or the last act or omission occurred.

(e) Actions to recover arrears of interest

12.58 Under the present law in Western Australia there are a number of provisions dealing with the recovery of arrears of interest. A six year period applies to actions to recover arrears of interest in respect of any sum of money charged on land or rent, or arrears of interest in respect of any legacy, or actions for damages in respect of any such arrears.[179] Again, a six year period applies to actions to recover arrears of interest in respect of any sum of money, whether payable under a covenant or otherwise, or any action for damages in respect of such arrears.[180] These provision are however subject to a special provision dealing with actions to recover arrears of interest due on a mortgage,[181] and provisions prescribing a longer period for actions of debt for rent on a covenant in an indenture of demise (12 years),[182] actions of covenant or debt on a bond or other specialty (20 years),[183] and actions in the nature of debt or scire facias on a recognisance (20 years).[184]

12.59 Most actions to recover arrears of interest are therefore subject to the standard six-year period which applies to most actions in Western Australia. The exceptional cases exist because of the out of date rules regarding specialty debts and recognisances: the Commission has already recommended that these rules are unnecessary and that such actions are appropriately governed by standard limitation periods.[185] The Commission's view is that all actions for arrears of interest should be subject to the standard limitation period.[186] This is broadly the situation in the other Australian jurisdictions with modern Limitation Acts, though the various provisions differ in matters of detail.[187] The most interesting legislative provisions

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179 *Limitation Act 1935* s 34. There is an equivalent provision in South Australia: *Limitation of Actions Act 1935* (SA) s 35(e) and (f).

180 *Limitation Act 1935* s 38(1) proviso.

181 Id s 34 first proviso: see para 15.13 below.

182 Id s 38(1)(d).

183 Id s 38(1)(e)(i).

184 Id s 38(1)(e)(ii).

185 See paras 12.12 and 12.49 above.

186 Actions to recover interest due on a mortgage are dealt with in paras 15.33 and 15.35 below.

187 In New South Wales and the Northern Territory, actions for interest are dealt with by provisions dealing with the recovery of income: *Limitation Act 1969* (NSW) s 24(1); *Limitation Act 1981* (NT) s 22(1). In Tasmania and Victoria, there are specific provisions dealing with the recovery of arrears of interest: *Limitation Act 1974* (Tas) s 4(5); *Limitation of Actions Act 1958* (Vic) s 5(7). In Queensland there is no general provision, but only a series of particular provisions: see eg *Limitation of Actions Act 1974* (Qld)

are those in force in the Australian Capital Territory, where actions to recover arrears of interest are covered by the general "catchball" provision.[188] A further provision dealing specifically with arrears of interest provides that an action to recover arrears of principal money may not be brought after the expiration of the limitation period for an action to recover the principal money.[189] This is consistent with the rule at common law.[190]

12.60 The Commission thus **recommends** that actions for arrears of interest should be governed by the two general periods recommended by the Commission. In the ordinary case, therefore, a three-year limitation period should apply. In accordance with the common law principle, the obligation to pay interest should be treated in exactly the same way as the obligation to pay the principal debt. Both the discovery and the ultimate period will thus commence when they commence in relation to the principal debt. In the case of the discovery period, the injury will normally be the non-performance of an obligation or the breach of a duty; as regards the ultimate period, such claims will normally be claims based on a demand obligation, and will commence when a default in performance occurs after a demand for performance is made.

(f) Contribution between tortfeasors

12.61 Alone among Australian jurisdictions, Western Australia has no statutory limitation period for actions for contribution or indemnity between tortfeasors. The applicable limitation period is deduced by applying the principle that the action for contribution or indemnity is an action on the case.[191] A six year limitation period applies to such actions by virtue of section 38(1)(c)(vii) of the *Limitation Act*.

12.62 In most other jurisdictions there are statutory provisions setting out limitation periods applicable to contribution actions. They can be analysed as falling into three categories -

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ss 26(5), 28. The legislation in England, New Zealand and Canada likewise does not have provisions of a general nature relating to the recovery of arrears of interest.

188 *Limitation Act 1985* (ACT) s 11(1).

189 *Limitation Act 1985* (ACT) s 20(1). This does not apply to actions to recover interest secured by a mortgage: s 20(2).

190 *Elder v Northcott* [1930] 2 Ch 422. This principle has also been adopted in New South Wales and the Northern Territory: *Limitation Act 1969* (NSW) s 24(2); *Limitation Act 1981* (NT) s 22(2).

191 See NSW Report (1967) para 155, citing *Stephen on Pleading* (7th ed 1866) 12 and *Thomson v Lord Clanmorris* [1900] 1 Ch 718.

(1) In some jurisdictions, the limitation period is made to run from the date on which the right to contribution accrued. In England, actions to recover contribution under the *Civil Liability (Contribution) Act 1978* may not be brought more than two years after that right accrued.[192] The date on which the right to contribution accrues is defined as the date on which the person in question is held liable, either by judgment or under an award made on arbitration, or the date on which he agrees to pay compensation (whether liability is admitted or not).[193] South Australia and Manitoba also have a two year period running from the date on which the tortfeasor's right to contribution accrued.[194]

(2) In Victoria and Tasmania, the limitation period for a contribution action is based on the date on which the writ in the original action is served on the tortfeasor. In Victoria, actions for contribution may be commenced at any time during the period within which the action against the tortfeasor might have been commenced, or within one year after service of the writ on that person, whichever is the longer.[195] In Tasmania such actions must be commenced within a year after the writ on the original action was served on the tortfeasor, but the court may extend the period if satisfied that the person from whom contribution is sought will not be prejudiced.[196]

(3) The Limitation Acts in New South Wales, Queensland, the Northern Territory and the Australian Capital Territory adopt a recommendation first put forward by the New South Wales Law Reform Commission in 1967, which build on the English approach by adding an alternative period. In these jurisdictions, an action for contribution must be brought within two years of the date the action accrues to the tortfeasor, or within four years of the date the limitation period

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192 *Limitation Act 1980* (UK) s 10(1). The *Civil Liability (Contribution) Act 1978* (UK) extends the right to contribution beyond tortfeasors to other cases.

193 Id s 10(2)-(4).

194 *Wrongs Act 1958* (SA) s 25(3); *Limitation of Actions Act 1987* (Man) s 17. In each case, the accrual of the right is defined terms similar to those in the English Act, except that the legislation does not specifically provide for the possibility of settlement without admission of liability. This was also true of the English provision when originally introduced: see *Limitation Act 1963* (UK) s 4. It was criticised on this ground by NSW Report (1967) para 157.

195 *Wrongs Act 1958* (Vic) s 24(4).

196 *Tortfeasors and Contributory Negligence Act 1954* (Tas) s 3(5)-(6).

> for the principal cause of action expires if this latter period expires first.[197] The New South Wales Law Reform Commission recommended against following the English provision because the period might not commence running for an indeterminate time after the happening of the facts making a person liable as a tortfeasor and the point of commencement might be outside his control and possibly outside his knowledge.[198] The alternative four-year period in effect acts as a long stop period and ensures that four years after the limitation period for the principal cause of action has expired a tortfeasor against whom contribution might be claimed can be certain that no action will be brought against him. A period of four years was chosen because it was long enough to give the person claiming contribution ample time to make enquiries and commence proceedings, even if there were appeals or new trials or both in the action against him.[199]

12.63 The issue was discussed at some length by the Alberta Law Reform Institute.[200] The Institute, like the Commission, recommended that two general limitation periods should apply to most causes of action, and this recommendation has now been implemented by the Alberta *Limitations Act 1996*. The Act, following the recommendations in the Institute's report, provides that, for the purposes of a claim for contribution, the ultimate period should begin when the tortfeasor was made a defendant in respect of, or incurred a liability through the settlement of, the compensation claim, whichever first occurs.[201] In the Institute's view, this was a more suitable rule than allowing the period to run from the time when the compensation claim accrued against the tortfeasor (the earliest possible point from which the contribution claim could run) or the point when liability on the compensation claim was finally imposed (the latest possible point from which the contribution claim could run). In support of the recommended option, the Institute said:

> "[A]s a practical matter, once [the tortfeasor] becomes a defendant under any claim he will begin to investigate the facts, and if it is a tort claim he will have a strong

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197 *Limitation Act 1985* (ACT) s 21(1); *Limitation Act 1969* (NSW) s 26(1); *Limitation Act 1981* (NT) s 24(1); *Limitation of Actions Act 1974* (Qld) s 40(1). Under the first of the two alternatives, the cause of action arises on the date of the judgment, award or agreement: *Limitation Act 1985* (ACT) s 21(2); *Limitation Act 1981* (NT) s 24(2); *Limitation Act 1969* (NSW) s 26(2); *Limitation of Actions Act 1974* (Qld) s 40(2).

198 NSW Report (1967) para 158.

199 Id para 160.

200 Alberta Report for Discussion (1986) paras 2.206-2.213; Alberta Report (1989) 71-74.

201 *Model Limitations Act* (Alta) s 3(3)(e).

> incentive to learn whether or not there are any other tort-feasors who would in the future have a duty to contribute and hence to reduce his ultimate economic loss. In short, [this] option...gives a claimant for contribution ample time to take steps to find other persons to share the potential liability.[202]

12.64 The Institute did not expressly discuss the application of the discovery period to contribution claims. However, 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 an arbitration award, or a settlement, with or without admission of liability. 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. However, in cases where liability is put in issue, either in court proceedings or by submitting the matter to arbitration, there is an important difference between the point when possible liability first becomes an issue and the later point when liability is finally confirmed. Before the latter point, the tortfeasor might be put on inquiry, as the passage quoted above suggests, but he cannot be regarded as having suffered an injury.

12.65 This Commission therefore **recommends** that, for the purposes of contribution actions -

(1) the discovery period should run from the time when the tortfeasor's liability is finally confirmed, either by a court judgment, or an arbitration award, or by a settlement (with or without admission of liability);

(2) 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 was made a defendant in respect of the compensation claim.

This results in a rule which resembles that which has been adopted in New South Wales and three other Australian jurisdictions, and which in the Commission's view is superior to any other Australian provision on the point.

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202 Alberta Report for Discussion (1986) para 2.210.

12.66 It is possible, though unlikely, that the ultimate period might expire before the tortfeasor's liability is finally confirmed. In such cases, there might be an argument for extending the limitation period under the Commission's recommended discretionary provision.

(g) Other joint rights and liabilities

12.67 The *Limitation Act* contains a provision, inherited from the *Statute of Frauds Amendment Act 1828*,[203] under which, in actions against two or more defendants, whether co-contractors or co-debtors or not, if the plaintiff is barred as against one or more defendants but not the other or others, judgment may be given for the plaintiff as to the defendants against whom he is entitled and for the other defendant or defendants against the plaintiff.[204]

12.68 Adopting the recommendations of the New South Wales Law Reform Commission,[205] the New South Wales *Limitation Act* has a modernised version of this provision and also a similar provision dealing with the situation where two or more persons would have a cause of action jointly but for the running of the limitation period against one or more of them.[206] Equivalent provisions have been adopted in the Australian Capital Territory and the Northern Territory.[207] The Commission **recommends** that provisions dealing with joint rights and joint liabilities based on those of New South Wales should be included in the new Western Australian Act.

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203 *Statute of Frauds Amendment Act 1828* (UK) s 1.

204 *Limitation Act 1935* s 45. The Ontario Act, which is of similar antiquity to the Western Australian Act, has a similar provision: *Limitations Act 1990* (Ont) s 53. More modern Acts generally omit it.

205 NSW Report (1967) paras 342-345.

206 *Limitation Act 1969* (NSW) ss 75-76.

207 *Limitation Act 1985* (ACT) ss 52-53; *Limitation Act 1981* (NT) ss 49-50.

Chapter 13

EQUITABLE CLAIMS

1. THE GENERAL POSITION

(a) Introduction

13.1 In this report the Commission has recommended that there should be two general limitation periods, the discovery period and the ultimate period, which should apply to all claims, with as few exceptions as possible. In the previous chapter the Commission concluded that it was appropriate for this recommendation to apply to all common law claims. In this chapter the Commission considers whether the two general limitation periods can also apply to all claims of an equitable nature.

13.2 This would be a much more far-reaching step to take, because originally the Limitation Acts did not apply directly to equitable claims at all. Early limitation statutes such as the English *Limitation Act 1623* dealt purely with common law claims. Equity however developed two doctrines to deal with the running of time. First, in certain cases, it applied provisions of the Limitation Acts by analogy. Second, in cases where it was not appropriate for the Limitation Acts to be applied by analogy it could reject claims which had not been prosecuted with due diligence under the doctrines of laches and acquiescence.

(i) Application of the Limitation Acts by analogy

13.3 Even where limitation statutes had no direct application to causes of action founded on equity, they could be applied by analogy under doctrines developed by equity, in accordance with the maxim that equity follows the law.[1] The most common situation in which the Limitation Acts apply by analogy is where an equitable counterpart of a legal remedy is claimed, as for example where a tenant for life who was impeachable for waste wrongfully cut timber. Equity held that time ran against those entitled in remainder from the moment of

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[1] The distinction formerly made between acting in obedience to the statute and acting by analogy to the statute is now obsolete: see J Brunyate *Limitation of Actions in Equity* (1932) 5-16; G H Newsom and L Abel-Smith *Preston and Newsom on Limitation of Actions* (3rd ed 1953) 256. The distinction was developed in the judgment of Lord Redesdale in *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607.

cutting, just as it would at common law in an action for conversion.[2] In the words of Lord Westbury LC in *Knox v Gye*:[3]

> "[W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the *Statute of Limitations*, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. ...Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords."

13.4 In order for the doctrine to apply, there must be an analogy at law. In *Cohen v Cohen*,[4] where a husband received insurance moneys on behalf of his wife as her trustee and was therefore under a duty to pay those moneys and not merely an equivalent amount, the *Limitation Act* did not apply as there was no analogy available at law.

13.5 One limitation on the doctrine of analogy was that equity would not apply it in cases of concealed fraud. The law in Western Australia still makes a distinction between common law and equity in this respect, though in most other jurisdictions the equitable rule has now been adopted by the Limitation Acts and applies to all actions both legal and equitable.[5]

(ii) Laches and acquiescence

13.6 Equity can reject claims which have not been prosecuted with due diligence under the doctrines of laches and acquiescence.[6] Under the doctrine of laches, equity will refuse a remedy to a plaintiff who has not prosecuted a claim with due diligence after he has notice of the facts giving rise to the claim such that it has become inequitable to bring proceedings. Mere delay is insufficient to establish the defence. According to the leading case of *Lindsay Petroleum Co v Hurd*,[7] the delay must either (a) amount to acquiescence in the defendant's

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2 *Seagram v Knight* (1867) LR 2 Ch App 628. For other examples, see *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117, 41 ER 886; *Metropolitan Bank v Heiron* (1880) 5 Ex D 319; *Re Lady Hastings* (1887) 35 Ch D 94; *Friend v Young* [1897] 2 Ch 421; *Bulli Coal Mining Co v Osborne* [1899] AC 351; *Motor Terms Co Ltd v Liberty Insurance Ltd (in liq)* (1967) 116 CLR 177.

3 (1872) LR 5 HL 656 at 674. See also *Smith v Clay* (1767) 3 Bro CC 639n, 29 ER 743, Lord Camden LC at 744.

4 (1929) 42 CLR 91.

5 See paras 13.49-13.60 below.

6 See generally R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992) ch 36; *Orr v Ford* (1989) 167 CLR 316, Deane J at 337-342.

7 (1874) LR 5 PC 221, Lord Selborne at 239-240.

conduct,[8] or (b) cause the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the situation or otherwise permit a situation to arise which it would be unjust to disturb.[9] 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. Delay is generally calculated from the date when the plaintiff became aware of facts giving an entitlement to relief.

13.7 With regard to laches of kind (a), in cases where a statutory period applies directly or by analogy, delay for less than the statutory period is not in itself evidence of acquiescence.[10] A plaintiff may wait until the last day of the limitation period before commencing an action.[11] Where no statutory limitation period applies, whether delay amounts to acquiescence is a question of fact. With regard to laches of kind (b), delay making it unjust for the plaintiff to be given a remedy may bar an action to which a statutory limitation period applies before the limitation period expires if it gives rise to an estoppel.[12]

13.8 Although acquiescence can be an element in the defence of laches, it is a separate defence and has no necessary connection with the passing of time. It amounts to waiver of the plaintiffs rights precluding the later enforcement of those rights because it would be inequitable to do so. It may consist of standing by while the right is infringed, thereby inducing the defendant to believe that the conduct is assented to;[13] subsequent adoption of the infringement; release of the defendant from liability; or delay in seeking redress. Only in the last case is delay an element. In order to establish acquiescence, there must be -

(1) full knowledge of the facts;[14]

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8 See eg *Mitchell v Homfray* (1881) 8 QBD 587 (gifts by patient to doctor affirmed by delay of patient's executor); *Hourigan v Trustees Executors & Agency Co Ltd* (1934) 51 CLR 619 (15 year delay before challenging will); contrast *Orr v Ford* (1989) 167 CLR 316 (standing by with knowledge of deceased's change of attitude regarding property did not defeat claim).

9 See eg *Re Jarvis (decd)* [1958] 1 WLR 815 (plaintiff stood by while defendant made profit from improper use of property); *Lamshed v Lamshed* (1963) 109 CLR 440 (third parties acted to their detriment in reliance on plaintiff's delay); *Nelson v Rye* [1996] 1 WLR 1378.

10 *Fullwood v Fullwood* (1878) 9 Ch D 176.

11 *Archbold v Scully* (1861) 9 HLC 360, 11 ER 769, Lord Wensleydale at 383; *Hartley v Birmingham City District Council* [1992] 1 WLR 968.

12 *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, Wilberforce J at 115, affirmed [1964] Ch 303, Willmer LJ at 353.

13 See eg *De Bussche v Alt* (1878) 8 Ch D 286, Thesiger LJ at 314.

14 *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, Wilberforce J at 107-108.

(2) some positive act of assent - mere passive acceptance of a state of affairs will not amount to acquiescence;[15]

(3) capacity to acquiesce - the plaintiff must be of full age and mental competence;

(4) a voluntary acquiescence, free from duress or undue influence.[16]

Acquiescence can be a defence even if a statutory limitation period applies and can be pleaded in the same action independently of such a period or of laches.[17]

(b) Extension of Limitation Acts to equitable claims

13.9 Before 1833 there was no statute of limitations, either in England or in any Australian jurisdiction, which expressly applied to any claim in equity. However, in that year, the English Parliament passed two important pieces of reforming legislation. The *Civil Procedure Act* for the first time provided limitation periods for all specialty debts. The *Real Property Limitation Act* set out a code of provisions regulating actions for the recovery of land, including limitation periods, and applied to suits in equity as well as actions in law. It contained an express provision that a suit in equity to recover land or rent was to be barred by the same period as would bar a similar action at law.[18] The Act also made provision for a number of other claims relating to land, including actions to redeem mortgages of land and recover money charged on land. These statutes were adopted or copied by other jurisdictions, both in Australia and elsewhere: in Western Australia, they were adopted by an Act of 1837.[19] Amendments to the *Real Property Limitation Act 1833* made by the *Real Property Limitation Act 1874* were again adopted by most other jurisdictions, including Western Australia.[20]

13.10 This important extension of statute into the area of equitable claims was taken a step further by the English *Trustee Act 1888*, which for the first time applied a limitation period to actions by beneficiaries against trustees, subject to exceptions in the case of fraud, fraudulent breach of trust and conversion of the trust property.[21] This was subject to an additional limitation in the case of express trustees, as the result of a rule of equity preserved by the

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15 *Allcard v Skinner* (1887) 36 Ch D 145, Lindley LJ at 186.
16 *Allcard v Skinner* (1887) 36 Ch D 145.
17 *Re Howlett (decd)* [1949] Ch 767
18 *Real Property Limitation Act 1833* (UK) s 24.
19 6 Will IV no 4.
20 *Real Property Limitation Act 1878*.
21 *Trustee Act 1888* (UK) s 8.

Judicature Acts of 1873-75.[22] Again, these provisions were adopted by many other jurisdictions, including Western Australia.[23]

(c) The present position in Western Australia

13.11 As a result of these and other developments, the present position in Western Australia is that many equitable claims are now the subject of *Limitation Act* provisions -

(1) As regards actions to recover land,[24] the *Limitation Act* applies to all claims in equity as well as to all claims at law. Section 24 of the *Limitation Act 1935* provides that no person claiming land or rent in equity shall bring any suit to recover the land or rent but within the period during which he might have brought an action to recover it if he had been entitled at law to the same estate, interest or right that he claims in equity.

(2) Most actions relating to mortgages are covered by *Limitation Act* provisions,[25] but there is no provision in the Act for actions to redeem or foreclose mortgages of personalty,[26] and equity will not apply the statutory period by analogy.[27] However, the action may fail through laches or acquiescence.[28]

(3) The *Limitation Act* applies to actions by beneficiaries against trustees, subject to the exceptions previously stated for fraud, fraudulent breach of trust and

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22 *Supreme Court of Judicature Act 1873* (UK) s 25(2). *Taylor v Davies* [1920] AC 636, Viscount Cave at 650-651: "It is clear that...an express trustee could not rely, as a defence to an action by his beneficiary, either upon the statutes of limitation or upon the rules which were enforced by Courts of equity by analogy or in obedience to those statutes. The possession of an express trustee was treated by the Courts as the possession of his cestuis que trustent [sic], and accordingly time did not run in his favour against them."

23 *Trustees Act 1900* s 13; *Supreme Court Act 1880* s 8(2).

24 See paras 14.2-14.24 below.

25 See paras 15.2-15.14 below.

26 *London & Midland Bank v Mitchell* [1899] 2 Ch 161 (foreclosure).

27 *Charter v Watson* [1899] 1 Ch 175 (redemption); see also *Australia & New Zealand Banking Group v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478.

28 *Re Stucley* [1906] 1 Ch 67; *Weld v Petre* [1929] 1 Ch 33 (redemption). If the security comprises both land and personalty, the limitation period for land apparently applies: *Charter v Watson* [1899] 1 Ch 175, except perhaps where the security is mostly personalty, where redemption after the statutory period may be allowed with regard to the personalty: Re *Jauncey* [1926] Ch 471.

conversion of trust property: *Limitation Act 1935* section 47.[29] There is some doubt about the extent of its application to express trustees.[30]

(4) The *Limitation Act* contains limitation periods for actions by beneficiaries against personal representatives in respect of legacies under a will (section 32) and on intestacy (section 33).[31]

(5) It appears that the provisions in the Act dealing with actions of account (section 38(1)(c)(ii) and (iii)) are limited to common law actions, because they reproduce provisions from the English *Limitation Act 1623*. However, it seems that these provisions can be applied by analogy in actions for account in equity, at least in some cases.[32]

(6) The rule that in equity concealed fraud prevents the running of the limitation period until the time when it was or ought to have been discovered is stated in section 27 of the *Limitation Act*, but this only applies to actions to recover land or rent. Otherwise, the equitable principles relating to fraud and mistake are not stated in statutory form, though in cases of mistake the Act may be applied by analogy.[33]

13.12 This leaves a number of equitable claims which are not governed by any limitation period. For example, there is no provision of the *Limitation Act* which applies to rescission for misrepresentation or undue influence, rectification, the specific restitution of chattels, claims for specific performance or injunction, or actions for breach of fiduciary duty.[34] The doctrines of laches and acquiescence are specifically safeguarded by section 28 of the *Limitation Act*, which provides that nothing in the Act is to be "deemed to interfere with any rule or

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29 See paras 13.24-13.30 below.

30 See para 13.28 below.

31 See para 13.39 below.

32 See paras 12.14-12.17 above. This controversy has mainly been discussed in the context of more modern provisions such as *Limitation Act 1939* (UK) s 2(2).

33 See paras 13.49-13.51 below.

34 For more detailed analyses, see Ontario Report (1969) 20; G H Newsom and L Abel-Smith *Preston and Newsom on Limitation of Actions* (3rd ed 1953) 261-264. As to actions for breach of fiduciary duty, see *KM v HM* (1992) 96 DLR (4th) 289; *Nelson v Rye* [1996] 1 WLR 1378; *H v R* [1996] 1 NZLR 299.

jurisdiction of a court of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act".[35]

(d) The position elsewhere

13.13 Though in Western Australia the *Limitation Act* now applies to a number of equitable claims, the position in Western Australia is not representative of the position in most other Australian jurisdictions, nor in England, New Zealand or certain Canadian jurisdictions.[36] As in other areas of limitation law, the march of progress has left Western Australia behind, because of the failure to adopt modern reforming legislation. The English *Limitation Act 1939* applied to equitable claims over a much wider area than the previous legislation, and the New South Wales *Limitation Act* passed 30 years later made further inroads on the exclusive preserve of equity. In Canada, the *Uniform Act* and later the British Columbia legislation incorporated important rules relating to equitable claims.

13.14 The following paragraphs analyse the position reached in other jurisdictions in which such reforms have been adopted, and compare it with the position in Western Australia.

(i) Actions to recover land

13.15 As regards actions to recover land, it is generally accepted that the Limitation Acts apply to actions to enforce equitable estates or interests in land in the same manner as they apply to actions to recover land by virtue of a legal estate or interest. This is expressly stated in the Limitation Acts of all Australian States which have modern limitation legislation,[37] and in the legislation in England[38] and New Zealand.[39] The provisions are simply a modernised version of that which appears in the Western Australian Act as section 24 and which

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35 This provision originated in the *Real Property Limitation Act 1833* (UK) s 27, and may therefore have originally been intended to apply only to actions in respect of land. However, it now appears to operate as a rule of general application. See Ontario Report (1969) 21.

36 As regards Canada, it is not so easy to generalise: the position varies from one province to another.

37 *Limitation Act 1969* (NSW) s 36; *Limitation of Actions Act 1974* (Qld) s 16(1); *Limitation Act 1974* (Tas) s 13(1); *Limitation of Actions Act 1958* (Vic) s 11(1). There are no such provisions in the legislation of the Australian Capital Territory and the Northern Territory because these Acts do not deal with land: see paras 2.32 n 47 and 2.34 n 51 above. In South Australia (which does not have modern limitation legislation) there is no equivalent provision, but "land" is defined to include any estate or interest: *Limitation of Actions Act 1936* (SA) s 3(1).

38 *Limitation Act 1980* (UK) s 18(1).

39 *Limitation Act 1950* (NZ) s 10(1).

originated in the English legislation of 1833.[40] Canadian Acts do not generally state this principle, although it is clearly implied: they have all adopted the English 1833 legislation.[41]

(ii) Mortgages

13.16 While the legislation in Western Australia on limitation periods relating to mortgages remains much the same as it was over a century ago, most other jurisdictions have made significant reforms. As a result of the recommendations of the Wright Committee Report in 1936, the English *Limitation Act 1939* introduced much more modern provisions on mortgages which covered all actions on mortgages, whether of realty or personalty, though the rules for realty and personalty were still different in a number of instances. What is significant for present purposes is that this legislation filled in the gaps which existed in the earlier legislation and which still exist in Western Australia. In 1967 the New South Wales Law Reform Commission Report took development a stage further, and the mortgage provisions in that State's *Limitation Act 1969* are much simpler than the English provisions, and apply in the same terms to all mortgages of both land and personalty. The comparative provisions are analysed in more detail in Chapter 15.

(iii) Trusts

13.17 Again, the provisions relating to trusts in the Limitation Acts under examination are in various stages of historical development. However, in the Acts with the most advanced provisions, those of New South Wales, the Northern Territory, the Australian Capital Territory and British Columbia, there are limitation periods for all actions by beneficiaries against trustees, including actions involving fraud, fraudulent breach of trust and conversion of trust property. In evolutionary terms these Acts are two stages ahead of Western Australia. This is dealt with in more detail below.[42]

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40 *Real Property Limitation Act 1833* (UK) s 24.

41 One exception is Newfoundland, where the legislation belongs to the same era as the Western Australian Act: see *Limitation of Realty Actions Act 1990* (Nfd) s 19.

42 See paras 13.24-13.38 below.

(iv) Deceased estates

13.18 Again, the legislation in Western Australia has lagged behind the process of evolutionary development. More modern Acts, such as the English statute and the Australian statutes based on it, have adopted a single provision covering all actions by beneficiaries against personal representatives, instead of the piecemeal legislation found in the Western Australian Act (even though, unlike some other Acts, in this State the limitation periods are the same in each case). Acts which are even more modern - again, those of New South Wales, the two Territories and British Columbia - have simplified the position by defining a trust to include the duties incident to the office of personal representative, so that whether a personal representative is in fact acting as a trustee or not, the limitation provisions dealing with trusts apply, making separate provisions unnecessary. Again, the matter is dealt with in more detail below.[43]

(v) Account

13.19 Though most jurisdictions have provisions on actions of account which are considerably more modern in appearance than those in Western Australia (for example, in not differentiating between merchants and others), there has been controversy as to whether such provisions cover actions for an account in equity as well as at law - a matter dealt with in Chapter 12.[44] It was there pointed out that the most modern provisions, those in England and the Australian Capital Territory, had rendered this controversy a thing of the past. Under these provisions, an action for an account may not be brought after the expiration of any time limit under the Act applicable to the claim which is the basis of the duty to account.[45]

(vi) Fraud and mistake

13.20 Most modern jurisdictions have extended the equitable rules about fraud and mistake to include common law claims as well. The new rule that fraud and mistake postpone the running of the limitation period is stated in the Limitation Acts, making it unnecessary to invoke the doctrine of analogy. In British Columbia, the rule relating to fraud and mistake has become part of a more general principle under which in many cases time does not begin to run

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43 See paras 13.39-13.48 below.
44 See paras 12.15-12.16 above.
45 *Limitation Act 1980* (UK) s 23; *Limitation Act 1985* (ACT) s 12.

until the plaintiff has or should have discovered his loss, and a number of recent reform proposals point in the same direction. These matters are dealt with in more detail below.[46]

(vii) The gaps that remain

13.21 Even though the coverage of equitable claims in more modern limitation legislation is much more complete than in Western Australia, most of those Acts still leave important equitable claims not covered by any limitation period, so that there is still some scope for the doctrines of laches and acquiescence. There is legislation in all jurisdictions which parallels section 28 of the Western Australian Act in preserving equity's jurisdiction to refuse relief on these grounds.[47]

13.22 There is an important limitation in the legislation of most Australian jurisdictions and also England and New Zealand which ensures that most equitable remedies remain unaffected by limitation periods. Under these provisions limitation periods dealing with common law claims are not to apply to any claim for specific performance or an injunction or other equitable relief.[48] These provisions make an exception for cases in which, before the adoption of modern limitation legislation, courts of equity applied limitation periods for such claims by analogy.

13.23 However, the legislation in the Australian Capital Territory and several Canadian jurisdictions is not so limited. Section 11 of the Australian Capital Territory *Limitation Act 1985* provides that an action on any cause of action is not maintainable after the expiration of a limitation period of six years. The only limitations are that it does not apply to a cause of action in respect of which another limitation period is provided by the *Limitation Act* or another Act.[49] There is no equivalent of the provision about specific performance and other

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46 See paras 13.49-13.60 below.

47 *Limitation Act 1985* (ACT) s 6; *Limitation Act 1969* (NSW) s 9; *Limitation Act 1981* (NT) s 7; *Limitation of Actions Act 1974* (Qld) s 43; *Limitation of Actions Act 1936* (SA) s 26; *Limitation Act 1974* (Tas) s 36; *Limitation of Actions Act 1958* (Vic) s 31; *Limitation Act 1980* (UK) s 36(2); *Limitation Act 1950* (NZ) s 31; *Limitations Act 1996* (Alta) s 10; *Limitation Act 1979* (BC) s 2; *Limitation of Actions Act 1987* (Man) s 59; *Limitation of Actions Act 1973* (NB) s 65; *Limitation of Realty Actions Act 1990* (Nfd) s 22; *Limitation of Actions Act 1989* (NS) s 31; *Limitations Act 1990* (Ont) s 2; *Statute of Limitations 1988* (PEl) s 51; *Limitation of Actions Act 1978* (Sask) s 51.

48 *Limitation Act 1969* (NSW) s 23; *Limitation Act 1981* (NT) s 21; *Limitation of Actions Act 1974* (Qld) s 10(6)(b); *Limitation Act 1974* (Tas) s 9; *Limitation of Actions Act 1958* (Vic) s 5(8); *Limitation Act 1980* (UK) s 36(1); *Limitation Act 1950* (NZ) s 4(9). The actions excluded vary slightly: the New South Wales provision, for example, excludes contract, tort, recognisances, money recoverable by virtue of an enactment, deeds, judgments, penalty and forfeiture, arbitral awards and successive wrongs to goods.

49 *Limitation Act 1985* (ACT) ss 11(2), 4(a).

equitable remedies referred to in the previous paragraph, and the result must be that the six-year limitation period applies in such cases. British Columbia and some other Canadian jurisdictions have a similar provision.[50]

2. TRUSTS

(a) Present position in Western Australia

13.24 The limitation periods applicable to trusts[51] are set out in section 47(1) of the *Limitation Act 1935*:

> "(1) In any action or other proceeding against a trustee or any person claiming through him, or in reference to any trust, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was a party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use, the following provisions shall apply:-
>
> (a) All rights and privileges conferred by this Act or any statute of limitations shall be enjoyed in the like manner and to the like extent as would have been the case if the trustee or person claiming through him had not been a trustee or person claiming through him.
>
> (b) If the action or other proceeding is brought to recover money or other property and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him (otherwise than as a trustee or person claiming through a trustee) in an action of debt for money had and received; but so nevertheless that the statute or bar by lapse of time shall run against a married woman entitled in possession to her separate use, whether with or without a restraint upon anticipation; but shall not begin to run against any beneficiary until the interest of such beneficiary is an interest in possession."

These provisions reproduce the provisions of the English *Trustee Act 1888* section 8, and were originally introduced into Western Australian law by the *Trustees Act 1900* section 13.[52]

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50 See *Limitation Act 1979* (BC) s 3(4); *Limitation of Actions Act 1987* (Man) s 2(1)(n); *Limitation of Actions Act 1973* (NB) s 9; *Statute of Limitations 1988* (PEI) s 2(1)(g); *Limitation of Actions Act 1978* (Sask) s 3(1)(j); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(g), now repealed by *Limitations Act 1996* (Alta) s 16. See also paras 4.45 above and 19.7 below.

51 It is difficult to define a trust for limitation purposes, although in general there will be a trust in any case where the legal and beneficial interests in property, real or personal, are in different hands: see *Royal Norwegian Government v Constant & Constant* [1960] 2 Lloyd's Rep 431.

(i) The previous law

13.25 Prior to the introduction of these reforms, there were no statutory limitation periods which applied directly in actions against trustees. The law made a distinction between express trustees, who could plead only laches and acquiescence, and constructive trustees, who under the doctrine of analogy could plead the limitation period prescribed for analogous common law claims, usually six years in the case of personalty and longer in the case of realty. In cases where the auxiliary jurisdiction of equity was invoked, that is, where an equitable remedy was sought to assist in the enforcement of a legal right, if the legal right was barred by the statute (for example, in an action relating to land), again by the operation of the doctrine of analogy equity had no power to provide a remedy. Another rule which produced a distinction between express trustees and other kinds of trustees was that equity would never allow an express trustee to plead laches against the beneficiary even where the trustee was not at fault.[53]

(ii) The effect of the legislation

13.26 The 1888 Act, now represented in Western Australia by section 47, was a step forward in that, for the first time, limitation periods were applied directly to trustees. But the way the provision is drafted reflects its origin as a statutory interference with the previously accepted law. The trustee is entitled to plead lapse of time in the like manner and to the like extent as if he had not been a trustee and was being sued in an action of debt for money had and received. In addition to the reference to an action of debt for money had and received, the mention of time running against a married woman entitled in possession to her separate use, whether with or without a restraint on anticipation, harks back to a time when married women did not have full property rights and equity invented devices such as the restraint on anticipation to protect their separate property from being annexed by their husbands. Restraints on anticipation were abolished in Western Australia in 1969,[54] following the lead of most other jurisdictions.[55] In all these ways, the drafting of the section is now clearly out of date.

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52 There are some minor differences between the text of the *Trustees Act 1900* s 13 and the *Limitation Act 1935* s 47: see para 13.29 below.

53 This account of the pre-1888 law closely follows H A J Ford and WA Lee *Principles of the Law of Trusts* (3rd ed 1996) para 18170.

54 *Property Law Act 1969* s 31.

55 See eg *Married Women (Restraint upon Anticipation) Act 1949* (UK).

13.27 Under the terms of section 47, no limitation period applies where the claim is founded on fraud, fraudulent breach of trust or to recover property retained or converted by the trustee.[56] Fraud in this context means equitable fraud, rather than its narrower common law meaning.[57] The requirement that the trustee must be party or privy to the fraud means that there must be some moral complicity on the trustee's part.[58] As regards property retained or converted by the trustee, it must be shown that the property is in the trustee's possession when the action is commenced.[59] If it has been disposed of, the provision no longer applies. The provision on property retained or converted is confined to actions by a beneficiary against a trustee, but the fraud provision, although it applies to actions by a beneficiary under a trust, is not confined to actions against a trustee but can lie against others.[60] The second provision, unlike the first, applies even where the breach of trust is innocent.

(iii) Express and other trustees

13.28 It has been seen that the pre-1888 law made several distinctions between express and other kinds of trustees. It is not altogether clear to what extent the English *Trustee Act 1888* applied to express trustees. The provisions of the English *Judicature Acts of 1873-75* expressing the general rule that equity prevails over the common law had provided that no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be held to be barred by any statute of limitations.[61] However the 1888 Act defined "trustee" to include an executor or administrator and a trustee whose trust arose by construction and implication of law as well as an express trustee.[62] The Wright Committee Report in 1936 suggested that the 1888 Act probably intended to do away with the distinction between express and other trustees, but that the problem remained that the exceptions apparently did not apply to a constructive trustee, such as an executor or administrator, so allowing such trustees to plead the statute even though they had retained the property or converted it to their own use.[63] In the years after 1888, the courts sought to modify

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56 In such cases the action may be defeated by laches or acquiescence: see eg *Re Warren (decd)* [1918] VLR 209; *Cohen v Cohen* (1929) 42 CLR 91; *Dalton v Christofis* [1978] WAR 42.

57 See *Re Sale Hotel & Botanical Gardens Co Ltd* (1897) 77 LT 681; *Hicks v Trustees Executors & Agency Co Ltd* (1901) 27 VLR 389.

58 *Thorne v Heard* [1894] 1 Ch 599, Kay LJ at 608.

59 See eg *Wassell v Leggatt* [1896] 1 Ch 554; *Re Sharp* [1906] 1 Ch 793; *Pullan v Koe* [1913] 1 Ch 9; *Re Howlett (decd)* [1949] Ch 767.

60 *Anhaeusser v Anhaeusser* [1930] St R Qd 55; *G L Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216.

61 *Supreme Court of Judicature Act 1873* (UK) s 25(2).

62 *Trustee Act 1888* (UK) s 1(3).

63 Wright Committee Report (1936) para 11.

the effect of this rule by giving a wide meaning to "express trust", so as to bring most cases of fiduciary relationship within the exception.[64] It appears that the position was the same in Western Australia: the *Judicature Act* provision was copied in the *Supreme Court Act 1880*,[65] and the *Trustee Act* provision in the *Trustees Act 1900*.[66]

13.29 The more recent history of these provisions in Western Australia is somewhat unfortunate. In 1935 the present *Supreme Court Act* replaced the 1880 Act. The *Judicature Act* provision was reproduced, prefaced by the words "Except as provided by the *Trustee* [sic] *Act, 1900*".[67] It was proclaimed to commence on 1 May 1936. However, the *Limitation Act 1935*, which was presumably being drafted at the same time, reproduced the trusts provisions of section 8 of the English *Trustee Act 1888* in section 47. The *Limitation Act* was proclaimed to commence on 9 April 1936 and did not repeal the provision in the *Trustees Act 1900*. Thus, between 1 May 1936 and 1 January 1963, when the *Trustees Act 1900* was replaced by the *Trustees Act 1962*, there were two sets of limitation provisions for trusts, in different Acts. Until the most recent reprint, the *Judicature Act* provision in the *Supreme Court Act 1935* read "Except as provided by the *Trustees Act 1962*", but unfortunately there are no limitation provisions in that Act.[68]

13.30 Two other provisions of the *Limitation Act*, sections 25 and 26, deal with the situation where land is vested in a trustee on an express trust. Section 25 provides that the beneficiary's right to sue accrues at and not before the time when the land is conveyed to a purchaser for valuable consideration, and section 26 provides that the limitation period for recovering money charged on or payable out of any land secured by an express trust is not to be longer than it would be if there were no such trust. These provisions are both derived from the English *Real Property Limitation Act 1833* and were therefore part of the background against which the Judicature Acts, the *Trustee Act 1888* and subsequent Western Australian legislation were drafted.

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64 See eg *Soar v Ashwell* [1893] 2 QB 390, Bowen LJ at 395 and 398, and authorities there cited; *Re Eyre-Williams* [1923] 2 Ch 533.

65 S 8(2).

66 S 13. The definition of "trustee" was incorporated in s 3.

67 S 25(2).

68 Following correspondence between the Commission and Parliamentary Counsel, the reprint of 23 November 1995 reinstated the reference to the *Trustees Act 1900*.

(b) Comparison with other jurisdictions

13.31 While Western Australia retains trust provisions drafted in England over a century ago, many other jurisdictions now have much more modern provisions.[69] As pointed out above,[70] the most modern Acts are in evolutionary terms two stages ahead of Western Australia. South Australia is the only other Australian jurisdiction to retain such old provisions,[71] although most Canadian jurisdictions remain in a similar position.[72]

(i) The first stage of reform

13.32 The first wave of reform resulted from the Wright Committee Report in 1936, which recommended that the distinction between express and constructive trustees should be abolished.[73] The legislation which resulted from this report, the English *Limitation Act 1939*, provided a uniform period of limitation for all actions against trustees, except in actions involving fraud or fraudulent breach of trust or to recover trust property retained or converted by the trustee, where the rule that no limitation period should apply was retained.[74] In place of the older provision, which had said that the applicable limitation period was that which would have applied if the defendant had not been a trustee, the Act stated a specific limitation period applicable to trustees:

> "Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is

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69 The Law Society of Western Australia in its comments on the Discussion Paper (1992) said that the Western Australian provisions on trusts should be replaced by more modern legislation.

70 See para 13.17 above.

71 *Limitation of Actions Act 1936* (SA) ss 31-32 contains the equivalents of *Limitation Act 1935* (WA) ss 25, 26 and 47 and *Supreme Court Act 1935* (WA) s 25(2).

72 See *Limitation of Actions Act 1973* (NB) s 56; *Trustees Act 1973* (NB) s 43 (as in Western Australia between 1935 and 1962, two provisions exist side by side); *Trustee Act 1990* (Nfd) s 31; *Limitation of Actions Act 1989* (NS) s 27; *Limitations Act 1990* (Ont) s 43; *Statute of Limitations 1988* (PEI) s 43; *Limitation of Actions Act 1978* (Sask) s 43. The similar provision in *Limitation of Actions Act 1980* (Alta) s 41 was repealed by the *Limitations Act 1996* (Alta) s 16. The following jurisdictions retain the *Judicature Act* rule under which claims by a beneficiary against a trustee in respect 01 an express trust are not barred by any statute of limitations: (NB) *Limitation of Actions Act 1973* s 58(3); *Limitations Act 1990* (Ont) s 44(2); *Statute of Limitations 1988* (PEI) s 42; *Limitation of Actions Act 1978* (Sask) s 42. For discussion of the unsatisfactory state of the law in these provinces, see Ontario Report (1969) 53-61; Newfoundland Working Paper (1985) 92-101; Saskatchewan Report (1989) 19-22; D W M Waters *Law of Trusts in Canada* (2nd ed 1984) 1014-1024.

73 Wright Committee Report (1936) para 11. The Discussion Paper (1992) para 4.68 suggested that the *Limitation Act 1935* anticipated the reform recommended by the Wright Committee by the incorporation in s 47 of the definition of "trustee" in subsection (3). However, this was merely a revision of the definitions that had appeared in earlier legislation.

74 *Limitation Act 1939* (UK) s 19(1).

> prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."[75]

What is significant about this provision is not only that it in terms stated a limitation period for such actions, but that the ordinary six-year period which applied to most other actions was deemed appropriate. Legislation along these lines has been adopted in Queensland, Tasmania and Victoria, in New Zealand and in the Canadian province of Manitoba.[76]

13.33 The present English legislation has retained a provision based on this model.[77] However, in one situation it has extended the protection of the Act to a case which formerly fell outside the area covered by the six-year limitation period. Adopting a recommendation of the Orr Committee Report,[78] it provides that where a trustee who is also a beneficiary under the trust, acting honestly and reasonably, has retained trust property or its proceeds as his share on a distribution of trust property, his liability to an action for recovery of trust property or its proceeds after the expiration of the six year limitation period is limited to the excess over his proper share.[79]

(ii) The second stage of reform

13.34 The New South Wales Law Reform Commission, in their 1967 Report, expressed the view that not even a fraudulent trustee should be forever outside the law of limitation of actions:

> "Under the law as it stands, a beneficiary under no disability and knowing of his rights may wait, subject to questions of laches and acquiescence, for thirty or forty or more years and then call upon his trustee (or the executors of the trustee) to meet charges of

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75 Id s 19(2). An action to recover trust property is an action in which a beneficiary is claiming to recover the actual property which is the subject of the trust. It therefore does not include an action for an account: *Re Flavelle (decd)* [1969] 1 NSWR 361. An action for breach of trust covers a wide area and includes an action for an account: *Re Timmis* [1902] 1 Ch 176, and an action for the administration or execution of a trust: *Re Page* [1893] 1 Ch 304. There is not much authority on the definition of breach of trust, but see generally *Tito v Waddell* (No 2) [1977] Ch 106, Megarry VC at 247-250. As to when breach of trust accrues, see para 4.10 above. The provision applies only to actions by beneficiaries, and therefore does not apply to an action by the Attorney General to enforce a charitable trust: *Attorney General (UK) v Cocke* [1988] Ch 414, but it will apply to an action by the Attorney to protect the interests of potential beneficiaries: *President & Scholars of the College of St Mary Magdalen, Oxford v Attorney General* (1857) 6 HLC 189, 10 ER 1267.

76 *Limitation of Actions Act 1974* (Qld) s 27; *Limitation Act 1974* (Tas) s 24; *Limitation of Actions Act 1958* (Vic) s 21; *Limitation Act 1950* (NZ) s 21; *Limitation of Actions Act 1987* (Man) s 49.

77 *Limitation Act 1980* (UK) s 21.

78 Orr Committee Report (1977) para 3.84.

79 *Limitation Act 1980* (UK) s 21(2). A similar reform was recommended in the Australian Capital Territory: see ACT Working Paper (1984) para 169, but was not implemented.

> fraud in relation to events of which all documentary and other evidence is likely to be lost. This is wrong and should be changed."[80]

It recommended that in cases of fraud, fraudulent breach of trust or retention or conversion of the trust property, the beneficiary should have twelve years from the time when he discovered or might with reasonable diligence have discovered the facts in which to bring an action. It is noteworthy that this recommendation is based on the discovery principle. It also recommended that there should be a limitation period in actions to recover the trust property not only against the trustee but against any other person into whose hands it could be traced.[81] These recommendations were adopted in the New South Wales *Limitation Act 1969*.

13.35 This legislation completes the process first begun by the English *Trustee Act 1888*: all actions involving trusts are subjected to a statutory limitation period. It divides such actions into two categories -

(1) In the following cases, a trustee or beneficiary or a person claiming through a beneficiary may not bring an action more than 12 years from the date when he discovers or might with reasonable diligence have discovered the facts giving rise to the case of action and that the cause of action has accrued:

> "(a) in respect of fraud or a fraudulent breach of trust, against a person who is, while a trustee, a party or privy to the fraud or the breach of trust or against his successor;
>
> (b) for a remedy for the conversion to a person's own use of trust property received by him while a trustee, against that person or against his successor;
>
> (c) to recover trust property, or property into which trust property can be traced, against a trustee or against any other person; or
>
> (d) to recover money on account of a wrongful distribution of trust property, against the person to whom trust property is distributed or against his successor".[82]

(2) In all other cases of breach of trust, there is a six-year limitation period, running from the date when the cause of action accrues.[83]

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80 NSW Report (1967) para 230. Contrast the recommendation of the Orr Committee Report (1977) paras 3.82-3.83 that there should not be a statutory limitation period for claims based on the trustee's fraud. No reasons were given, apart from agreement with the views of commentators.

81 NSW Report (1967) paras 230-231.

82 *Limitation Act 1969* (NSW) s 47(1). The onus of proof of fraud lies on the person who alleges it: *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279.

83 Id s 48. As to when a cause of action for breach of trust accrues, see para 4.10 above.

In each case, the limitation period only applies if it expires later than any other applicable limitation period fixed by some other section of the Act.

13.36 Similar provisions have now been adopted in some other jurisdictions. The Northern Territory provisions[84] reproduce those of New South Wales, except that the limitation period for actions for breach of trust is three years and not six, in accordance with the Northern Territory's policy of having a three year limitation period for most actions. The provision in the Australian Capital Territory Act for a twelve-year period[85] is again modelled on the New South Wales section; the six-year period for other breaches of trust is brought about via the general provision under which all actions not otherwise provided for are subject to a six year limitation period.[86] Both of these jurisdictions, in their different ways, recognise that it is appropriate for breaches of trust to be subject to the same limitation period as that which governs most other actions.

13.37 In Canada, the Law Reform Commissions of Ontario and British Columbia have both recommended that all actions for breach of trust should be subject to some limitation period. They divided such actions into two categories in much the same way as the New South Wales Commission had done.[87] In British Columbia, these recommendations were implemented in 1975. A ten-year period applies to the four categories singled out by the New South Wales Act,[88] and all other cases of breach of trust are subject to the general six-year period.[89] Interestingly, all these cases are in effect subject to a discovery rule. In cases of fraud or fraudulent breach of trust, or actions against a trustee to recover trust property retained or converted, the limitation period does not commence running until the beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act on which the action is based.[90] In other actions for breach of trust, time does not begin to run until the plaintiff has the necessary knowledge.[91]

13.38 Thus, the most modern *Limitation Act* provisions on trusts subject all actions involving breach of trust to some limitation period, and recognise that in most cases it is

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84 *Limitation Act 1981* (NT) ss 32-33.
85 *Limitation Act 1985* (ACT) s 27.
86 Id s 11(1).
87 Ontario Report (1969) 53-61; British Columbia Report (1974) 37-43.
88 *Limitation Act 1979* (BC) s 3(2).
89 Id s 3(4).
90 Id s 6(1).
91 Id s 6(3). "Knowledge" is defined in s 6(3) and (4). This definition also applies to personal injury and other actions; see para 5.34 above.

appropriate for such actions to be governed by the general limitation period applying to most other causes of action. The British Columbia provisions are of especial significance in that they recognise that all actions for breach of trust should be subject to the discovery principle.

3. DECEASED ESTATES

(a) Present position in Western Australia

13.39 A number of provisions of the *Limitation Act* deal with claims against personal representatives. The general provision in section 4, under which a 12 year limitation period applies to actions for the recovery of land, applies to actions against personal representatives in respect of land devised by will. Under section 32, the limitation period for claiming personalty under a legacy in a will is again 12 years: this provision applies to actions "to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy". Under section 33, the limitation period for claiming on intestacy is again 12 years. Under section 34, actions to recover arrears of interest in respect of any legacy, or damages in respect of those arrears, are subject to a six year limitation period running from the date on which the interest became due. All these provisions have been copied from 19th century English legislation.[92]

(b) Comparison with other jurisdictions

(i) Introduction

13.40 As is the case with trusts, the legislation in Western Australia dealing with limitation periods in actions against personal representatives has lagged behind the process of evolutionary development, a state shared by the legislation in South Australia and certain Canadian jurisdictions. South Australia, New Brunswick, Newfoundland, Nova Scotia and Ontario, in addition to Western Australia, retain the provision under which legacies are

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92 Land: *Real Property Limitation Act 1874* (UK) s 1 (replacing *Real Property Limitation Act 1833* (UK) s 2); legacies: *Real Property Limitation Act 1874* (UK) s 8 (replacing *Real Property Limitation Act 1833* (UK) s 40); intestacy: *Real Property Limitation Act 1860* (UK) s 13; interest: *Real Property Limitation Act 1833* (UK) s 42.

lumped together with mortgages, judgments and liens.[93] A bewildering variety of limitation periods apply: ten years in Ontario, 12 years in Western Australia, 15 years in South Australia and 20 years in the other jurisdictions. In each case, the limitation period for actions for the recovery of land is the same and includes land devised in a will.[94] Only Western Australia has a limitation period for personalty on intestacy. In Ontario at least, this omission is an unfortunate error. The legislation of 1865 copied the intestacy provision in the English *Real Property Limitation Act 1860* on which the Western Australian section 33 is based, but it was inadvertently omitted in the consolidation of the legislation in 1911.[95] The Ontario Act retains a provision under which an action of dower must be brought within ten years of the death of the husband of the doweress[96] - of limited usefulness in modern conditions.

13.41 In other jurisdictions, reforms have proceeded through two stages.

(ii) The first stage of reform

13.42 The first reform development was the recognition that there should be a single limitation period for all claims against deceased estates, whether under a will or on intestacy, and that this provision should be separated from provisions relating to mortgages, judgments and so forth. Responsibility for this initiative is shared by the Canadian *Uniform Act* and the Wright Committee Report.

13.43 The Canadian *Uniform Act of 1931* contained a specific provision dealing with actions claiming the personal estate of a deceased person, whether under a will or on intestacy,[97] and this was adopted by six Canadian jurisdictions, although there were interesting variations in the length of the limitation period - for example, six years in Alberta, ten years in Manitoba and Saskatchewan, and twenty years in Prince Edward Island.[98] With the exception of

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93 *Limitation of Actions Act 1936* (SA) s 33(1); *Limitation of Actions Act 1973* (NB) s 25(1); *Limitation of Realty Actions Act 1990* (Nfd) s 24; *Limitation of Actions Act 1989* (NS) s 23; *Limitations Act 1990* (Ont) s 23(1).

94 *Limitation of Actions Act 1936* (SA) s 4; *Limitation of Actions Act 1973* (NB) s 29; *Limitation of Realty Actions Act 1990* (Nfd) s 3; *Limitation of Actions Act 1989* (NS) s 10; *Limitations Act 1990* (Ont) s 4.

95 Ontario Report (1969) 57.

96 *Limitation Act 1990* (Ont) s 25. In New Brunswick and Nova Scotia, there is a six year limitation period for arrears of dower: *Limitation of Actions Act 1973* (NB) s 33(2); *Limitation of Actions Act 1989* (NS) s 25.

97 Canadian *Uniform Limitation of Actions Act 1931* s 41.

98 *Limitation of Actions Act 1980* (Alta) s 14(1); *Limitation of Actions Act 1987* (Man) s 50; *Statute of Limitations 1978* (PEI) s 11(1); *Limitation of Actions Act 1978* (Sask) s 12(1).

Alberta, the period was the same as that for actions for the recovery of land.[99] The Alberta legislation was of special interest because it recognised that the limitation period for such claims need not be any different in length from that which applies to most other actions. The Alberta statute has now been superseded by the more recent reforms of the *Limitations Act 1996*, but in the other five jurisdictions this legislation remains in force.

13.44 Five years after the Canadian *Uniform Act*, though seemingly without reference to it, the Wright Committee Report recommended that there should be a uniform limitation period for all claims against personal representatives, whether for land under a devise, or to personalty in a legacy, or to land or personalty on an intestacy.[100] This reform was implemented by the English 1939 Act, which provided a 12 year period (the same as that for actions for the recovery of land) for actions claiming the personal estate of a deceased person.[101] A similar provision has been adopted by the Limitation Acts in Queensland, Tasmania, Victoria and New Zealand.[102] These provisions are subject to the provisions under which no limitation period applies in actions involving fraud, fraudulent breach of trust, or retention or conversion of trust property: in such cases, no limitation period will apply to an action claiming the personal estate of a deceased person,[103] though the action may be defeated by the doctrines of laches and acquiescence.

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99 *Limitation of Actions Act 1987* (Man) s 25; *Statute of Limitations 1978* (PEI) s 16; *Limitation of Actions Act 1978* (Sask) s 18. In Alberta the limitation period for actions for the recovery of land was ten years: *Limitation of Actions Act 1980* (Alta) s 18, and is still ten years under the new Act: *Limitations Act 1996* (Alta) s 3(4).

100 Wright Committee Report (1936) para 12.

101 *Limitation Act 1939* (UK) s 20; see now *Limitation Act 1980* (UK) s 22. This applies to all claims by beneficiaries, either under a will or on intestacy. It applies to all actions to recover legacies, whether charged on land or personalty, or unsecured: see *Sheppard v Duke* (1839) 9 Sim 567, 59 ER 477. It applies not only to claims against personal representatives, but also to claims against persons to whom assets of the estate have been wrongly distributed: *Re Diplock* [1948] Ch 465. Where a legacy is payable and there are assets available to pay it, time runs from the date on which the right to recover the legacy accrues. In the case of an immediate legacy, this will be the date of death; where a legacy is payable on the happening of some future event, when the event happens; if it is to be paid out of a reversionary fund, when the reversion falls in in the case of a residuary legacy, and also on intestacy, at the end of one year from the testator's death: see *The Laws of Australia* para 98. These provisions do not apply to claims by creditors, as such claims do not arise under a will or on intestacy: *Re Blow* [1914] 1 Ch 233. Depending on the circumstances, such claims may be for breach of contract, a specialty debt, or money secured by mortgage or charge. Where the claim is against a personal representative who has improperly parted with possession, the claim may be for an account on on a devastavit (to which the limitation period for breach of contract applies: see *Thorne v Kerr* (1855) 2 K & J 54, 69 ER 691; *Re Gale* (1883) 22 Ch D 820; *Lacons v Wormall* [1907] 2 KB 350; *National Trustees Executors & Agency Co of Australasia Ltd v Dwyer* (1940) 63 CLR 1).

102 *Limitation of Actions Act 1974* (Qld) s 28; *Limitation Act 1974* (Tas) s 25; *Limitation of Actions Act 1958* (Vic) s 22; *Limitation Act 1950* (NZ) s 22. In Victoria the limitation period is 15 years, in line with the period for actions for the recovery of land.

103 *Re Pollock (decd)* [1964] VR 554.

13.45 One matter about which there has not been controversy is claims for arrears of interest on a legacy. The Acts referred to above, like the Western Australian Act, provide for a six year limitation period.[104]

(iii) The second stage of reform

13.46 Most of the provisions referred to in the previous section recognise the close relationship between actions involving trusts and actions against personal representatives by placing the deceased estates provisions immediately after the trusts provisions. In the Canadian statutes they are grouped together under the heading "Trusts and trustees", and they are also grouped under a separate heading in England, Victoria and New Zealand.

13.47 As a result of the initiative taken by the New South Wales Law Reform Commission in 1967, some jurisdictions have taken the next logical step and recognised that, instead of having separate provisions for deceased estates, the trusts provisions should apply to all such actions. This is achieved by defining a trust for the purposes of the Act as including the duties incident to the office of personal representative.[105] The New South Wales *Limitation Act 1969* implemented this reform,[106] and there are now similar provisions in the Australian Capital Territory and the Northern Territory.[107] One important effect of this is that in these jurisdictions it has been recognised as appropriate that actions against personal representatives should ordinarily be governed by the standard limitation period - six years in New South Wales and the Australian Capital Territory and three years in the Northern Territory. There is no separate period in these jurisdictions for interest on a legacy, which is dealt with by provisions dealing with arrears of income[108] or under general limitation provisions.[109]

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104 *Limitation of Actions Act 1974* (Qld) s 28; *Limitation of Actions Act 1936* (SA) s 35(e); *Limitation Act 1974* (Tas) ss 4(5), 25; *Limitation of Actions Act 1958* (Vic) s 5(7); *Limitation Act 1980* (UK) s 22; *Limitation Act 1950* (NZ) s 22; *Limitation of Actions Act 1973* (NB) s 57; *Limitation of Realty Actions Act 1990* (Nfd) s 25(1); *Limitation of Actions Act 1989* (NS) s 26; *Limitations Act 1990* (Ont) s 17(1). In the other jurisdictions, this is covered by the catchall provision: *Limitation of Actions Act 1987* (Man) s 2(1)(n); *Statute of Limitations 1988* (PEI) s 2(1)(g); *Limitation of Actions Act 1978* (Sask) s 3(1)(j); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(g), now repealed by *Limitations Act 1996* (Alta) s 16.

105 NSW Report (1967) para 234. The Law Society of Western Australia in its comments on the Discussion Paper (1992) supported such a reform in Western Australia.

106 *Limitation Act 1969* (NSW) s 11(1).

107 *Limitation Act 1985* (ACT) s 8(1); *Limitation Act 1981* (NT) s 4(1).

108 *Limitation Act 1969* (NSW) s 24(1); *Limitation Act 1981* (NT) s 22(1). See para 12.59 above.

109 *Limitation Act 1985* (ACT) s 11(1); *Limitation Act 1979* (BC) s 3(4).

13.48 In Canada, the Law Reform Commissions of Ontario and British Columbia agreed that executors and administrators should be treated as trustees for limitation purposes, and that all actions against personal representatives should be subject to a ten year period.[110] The British Columbia *Limitation Act* adopts these recommendations.[111] Though such actions are thus made subject to a longer than average limitation period, an important result of regarding such actions as actions for breach of trust is that they are made subject to the discovery principle, under which accrual of the cause of action is postponed if the plaintiff lacks the necessary knowledge at the time the cause of action would ordinarily accrue.[112]

4. FRAUD AND MISTAKE

(a) Present position in Western Australia

(i) Fraud

13.49 Where a claim is based on the fraud of the defendant, or where the existence of a claim is concealed from the plaintiff's knowledge by the fraud of the defendant, the rule in equity was that time ran from the discovery of the fraud or fraudulent concealment. In relation to suits in equity for the recovery of land or rent, the rule was set out in section 27 of the *Limitation Act*, which provided that the claim was deemed to have accrued at the time when the fraud was, or with reasonable diligence might have been, known or discovered;[113] otherwise the rule was based on case law. This contrasted with the rule at common law, which was that fraud did not postpone the running of time.

13.50 Before the Judicature Acts, equity courts applied the equity doctrine to actions within their exclusive competence, but the common law courts applied the common law rule not only to claims within their exclusive competence but also to actions in respect of which they had concurrent jurisdiction with courts of equity.[114] After the fusion of the administration of law

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110 Ontario Report (1969) 60; British Columbia Report (1974) 43.

111 *Limitation Act 1979* (BC) ss 1 (definition of "trustee"), 3(2)(a) (ten year limitation period for actions against personal representatives).

112 Id s 6(3)(h).

113 The section also provides that nothing in it enables any owner to sue in equity for the recovery of land or rent, or to set aside the conveyance, on the ground of fraud, against a bona fide purchaser for valuable consideration who did not assist in the commission of the fraud and at the time of the purchase did not know and had no reason to believe that such fraud had been committed.

114 See *Imperial Gas Light & Coke Co v London Gas Light Co* (1854) 10 Ex 39, 156 ER 346; *Hunter v Gibbons* (1856) 1 H & N 459, 156 ER 1281.

and equity, effected in Western Australia by the *Supreme Court Act 1880*, as a general rule the equitable rule will prevail. However, it appears that this will not be so in cases where the common law courts had formerly enjoyed exclusive jurisdiction. In actions for negligence[115] or breach of contract,[116] for example, the fact that there is concealed fraud will not affect the running of the period. Though there are decisions and dicta to the contrary,[117] the preponderance of modern authority suggests that in such cases the common law rule still applies.[118] This state of affairs was one of the major reasons for the Commission being asked to review the *Limitation Act*.

(ii) Mistake

13.51 There is a principle of equity that where relief was sought from the consequences of a mistake (for example, when money was paid or property transferred under a mistake) time would run only from the time when the mistake was, or could with reasonable diligence have been, discovered. However, at common law time would run from the date of payment and not from the discovery of the mistake. After the *Judicature Act* reforms, the equitable rule was applied to cases formerly within the exclusive jurisdiction of courts of equity, and cases formerly within the concurrent jurisdiction of both systems,[119] but the common law rule continues to apply to cases formerly within the exclusive jurisdiction of courts of common law,[120] and also to claims in equity if they were strictly analogous to common law claims.[121] This remains the position in Western Australia.

(b) Comparison with other jurisdictions

13.52 The law as stated above for Western Australia also applies in South Australia and in a number of Canadian jurisdictions. As in Western Australia, the only statutory provision on fraud or mistake is that which provides that in suits in equity concealed fraud postpones the

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115 *Armstrong v Milburn* (1885) 54 LT 247.

116 *Barber v Houston* (1884) 14 LR Ir 273.

117 *Bulli Coal Mining Co v Osborne* [1899] AC 351; see also *Gibbs v Guild* (1882) 9 QBD 59, Lord Coleridge CJ at 63-65, Brett LJ at 70; *Lynn v Bamber* [1930] 2 KB 72, McCardie J at 74-78.

118 See *R v McNeill* (1922) 31 CLR 76, Isaacs J at 99-100; *Nelson v Larholt* [1948] 1 KB 339; *Metacel Pty Ltd v Ralph Symonds Ltd* [1969] 2 NSWR 201; *State of Western Australia v Wardley Australia Ltd* (1991) 102 ALR 213, the Court at 236-237; R P Meagher, W M C Gummow and J R F Lehane *Equity: Doctrines and Remedies* (3rd ed 1992) para 3419. See also the earlier discussion in *McKerlie v Lake View & Star Ltd (No 2)* (1939) 41 WALR 86.

119 *Re Mason* [1929] 1 Ch 1; Re Blake [1932] 1 Ch 54.

120 *Baker v Courage & Co* [1910] 1 KB 56.

121 *Re Robinson* [1911] 1 Ch 502; *Re Mason* [1929] 1 Ch 1; *Re Blake* [1932] 1 Ch 54.

running of the limitation period.[122] However, in most other jurisdictions there are provisions in the Limitation Acts which ensure that the equitable rule prevails in all situations.

(i) England and Australia

13.53 In England, the Wright Committee Report in 1936 expressed the view that the law was unsatisfactory and recommended that all cases where an action was based on fraud or mistake, or the existence of a cause of action was concealed by fraud, time should run against the plaintiff only from the point when he discovered the fraud or mistake or could with reasonable diligence have discovered it. However, there should be an exception for a bona fide purchaser along the same lines as that in the existing statutory provision dealing with actions in equity to recover land or rent.[123] This recommendation was implemented by the English Act of 1939[124] and duly followed in the legislation in Queensland, Tasmania, Victoria and New Zealand.[125]

13.54 The New South Wales Law Reform Commission in their 1967 Report suggested some minor changes in wording to make it clear that a cause of action based on fraud referred primarily to fraud at common law, whereas concealment by fraud was not limited to fraud in its common law meaning.[126] The Commission also recommended that the provision should be extended so as to cover fraudulent concealment of identity,[127] in order to reverse a decision in which this had been held not to prevent the limitation period from running.[128] These reforms are incorporated in the amended version of the English provisions found in the legislation in New South Wales and the Northern Territory.[129]

13.55 Back in England, the Orr Committee in their 1977 Report were also concerned with making it clear that the reference in the Act to fraudulent concealment was not limited to fraud at common law, as Lord Denning MR had pointed out in *King v Victor Parsons & Co (a firm).*[130] As a result of the Committee's recommendations,[131] the *Limitation Act 1980*

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122 *Limitation of Actions Act 1936* (SA) s 25; *Limitation of Realty Actions Act 1990* (Nfd) s 21; *Limitation of Actions Act 1989* (NS) ss 29-30; *Limitations Act 1990* (Ont) ss 28-29.

123 Wright Committee Report (1936) paras 22-23.

124 *Limitation Act 1939* (UK) s 26.

125 *Limitation of Actions Act 1974* (Qld) s 38; *Limitation Act 1974* (Tas) s 32; *Limitation of Actions Act 1958* (Vic) s 27; *Limitation Act 1950* (NZ) s 28.

126 NSW Report (1967) paras 268-269, 271.

127 Id para 270.

128 *R B Policies at Lloyd's v Butler* [1950] 1 KB 76.

129 *Limitation Act 1969* (NSW) ss 55-56; *Limitation Act 1981* (NT) ss 42-43.

130 [1973] 1 WLR 29 at 33.

131 Orr Committee Report (1977) paras 2.23-2.24.

reformulated the section: it now referred to "deliberate concealment" instead of fraudulent concealment.[132]

13.56 This process of development was completed in the Australian Capital Territory, where the Act adopted the improvements to the original English provision made in New South Wales, but followed the later English initiative by referring to deliberate, rather than fraudulent, concealment.[133]

13.57 In all these Acts, the location of the provisions in question suggests that they are viewed as extending the ordinary limitation period. In fact, they amount to rather more. They are saying that, in certain circumstances, it is appropriate for the limitation period to run from the point of discoverability, and not from some earlier point in time. The Orr Committee Report recognises this by discussing the "concealed fraud approach" alongside the date of knowledge approach and the discretion approach as possible alternatives to the traditional accrual rule as a means of dealing with the problem of latent damage.[134]

(ii) The Canadian Uniform Act

13.58 The provisions of the Canadian *Uniform Limitation of Actions Act 1931* relating to fraud are in general less satisfactory than those which have since been adopted in England and Australia: the Act has one concealed fraud provision for actions relating to land and another which applies to most other actions. These dual provisions have been retained in the Canadian Acts which adopt the *Uniform Act*,[135] and when a new Part was added to the Alberta Act dealing with limitation periods in tort it incorporated a third concealed fraud provision.[136]

13.59 However, these Acts also contain, separate from these provisions, limitation periods for-

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132 *Limitation Act 1980* (UK) s 32. The section covers both the situation where the concealment happened at the same time as the accrual of the cause of action and that where it occurred subsequently: see *Sheldon v R H M Outhwaite (Underwriting Agencies)* [1996] 1 AC 102.

133 *Limitation Act 1985* (ACT) ss 33-34. See ACT Working Paper (1984) paras 202-203.

134 Orr Committee Report (1977) paras 2.21-2.30.

135 See eg *Limitation of Actions Act 1987* (Man) ss 5, 38; *Statute of Limitations 1988* (PEI) ss 3, 31; *Limitation of Actions Act 1978* (Sask) ss 4, 31; note also *Limitation of Actions Act 1980* (Alta) ss 6,31, now repealed by *Limitations Act 1996* (Alta) s 16; see also *Limitation of Actions Act 1973* (NB) ss 6,44.

136 *Limitation of Actions Act 1980* (Alta) s 57, inserted by SA 1966 s 3 (now repealed by *Limitations Act 1996* (Alta) s 16).

(1) actions grounded on fraudulent misrepresentation;

(2) actions grounded on "accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with".[137]

In each case, the limitation period is six years, running from discovery. What is significant about the latter period is that it is not limited to actions grounded on mistake, but appears to embrace other equitable grounds of relief which would not formerly have been subject to any limitation period.

(iii) British Columbia

13.60 The Ontario Law Reform Commission in its 1969 Report recommended that there should be one provision of general application rather than the multiple provisions in the Acts referred to in the previous paragraph, and saw the New South Wales recommendations as a desirable model.[138] Later reports have endorsed these recommendations.[139] However, the British Columbia Law Reform Commission went further and suggested that the provisions relating to fraud and mistake should be seen as part of the general provisions under which, in particular cases, time should not run until the cause of action becomes discoverable. Section 6 of the British Columbia *Limitation Act 1979* accordingly provides that among the cases in which the running of time is postponed on this basis are actions:

"(d) based on fraud or deceit;
(e) in which material facts relating to the cause of action have been wilfully concealed;
(f) for relief from the consequences of a mistake."[140]

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137 See eg *Limitation of Actions Act 1987* (Man) s 2(1)(j) and (k); *Statute of Limitations 1988* (PEI) s 2(1)(e) and (f); *Limitation of Actions Act 1978* (Sask) s 3(1)(g) and (h); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(d) and (e), now repealed by *Limitations Act 1996* (Alta) s 16.

138 Ontario Report (1969) 109-111.

139 British Columbia Report (1974) 79; Newfoundland Working Paper (1985) 202-203 and Newfoundland Report (1986).

140 *Limitation Act 1979* (BC) s 6(3). This subsection is quoted more extensively in para 5.27 above.

5. THE COMMISSION'S RECOMMENDATIONS

(a) Application of the two general limitation principles

13.61 At the beginning of this chapter the Commission asked the question whether it was appropriate to subject all equitable claims to the two general limitation periods which the Commission has recommended in this report. It made the point that the application of these principles to claims in equity was a much more far-reaching step than applying them to common law actions, because of the traditional limits on the extent to which the Limitation Acts applied to equitable actions (whether directly or by analogy), and the development by equity of other means to deal with the running of time, such as the doctrines of laches and acquiescence.

13.62 However, the Commission has come to the conclusion that it is desirable for its recommended general principles to apply to equitable claims just as much as to the common law, save only for those few areas where the Commission has concluded that special rules should be preserved - principally actions for the recovery of land and actions relating to mortgages - and it so **recommends**. It has reached this conclusion for the following reasons -

(1) For the full benefits of the reforms proposed by the Commission to be realised, the two general limitation periods recommended by the Commission have to apply to all types of claim, including equitable claims.

(2) The examination of developments in the major areas of equitable jurisdiction undertaken in this chapter shows that the law has already proceeded a long way towards the desired goal.

(i) The desirability of uniform rules

13.63 The Commission's aim is that there should be a single set of limitation principles which applies to every kind of claim. The Commission acknowledges that there will inevitably be a few exceptional cases where special rules continue to apply,[141] but it is important that its two general limitation periods should be seen as appropriate for all other

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141 See paras 14.32-14.35, 15.31-15.33, 16.7-16.8 below.

kinds of claim. This applies just as much to equitable claims, on which in the past the *Limitation Act* has had only limited effect, as to common law claims, which have been subject to the *Limitation Act* for many years.

13.64 The importance of this was recognised by the Alberta Law Reform Institute, which recommended a similar approach under which there would be general principles which could be applied to all kinds of claim, legal or equitable. The Alberta Institute identified two limitation strategies, the strategy at law, involving the assignment of claims to different categories, and the use of different periods of fixed duration for different categories, with limitation periods commencing when the cause of action accrued, and the strategy in equity, the two chief features of which were the fact that the operation of the limitation period commenced at the time of discovery, and that its length was measured by judicial discretion. Its recommended approach owed much more to the strategy in equity than the strategy at law. The Institute made it quite clear that in order for the full benefits of its proposed reforms to be realised the two limitation periods had to apply to all kinds of claim. There could be no exception for equity, or for some equitable claims:

> "One of our members argued strongly that 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 we should recommend. His argument is based on the acceptance of a difference in kind between claims originating at law and claims, or at least certain claims, originating in equity.....
>
> The majority of us have not been persuaded that this argument should prevail. 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.....The ultimate limitation period we recommend will give trustees the same protection that it gives to other potential defendants."[142]

To permit exceptions, other than for very special cases, would be to bring back the categorisation problems that the Institute was seeking to avoid. Only if the new principles applied to all claims would the benefits of simplicity and comprehensibility be realised to the full. The force of these arguments has now been recognised by the Alberta legislation, which

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142 Alberta Report (1989) 36-37.

has implemented the recommendations of the Institute in full. The new Alberta *Limitations Act 1996* applies to all claims, whether common law or equitable in origin, alike.[143]

13.65 The same views were expressed in the earlier report of the Ontario Law Reform Commission which, though it was never implemented, has had considerable influence on later proposals. The Ontario Commission said that "as a general principle, there should be specific time limits for the bringing of all actions and proceedings". Judicial review apart, "the policy which underlies limitation statutes applies to the commencement of every other kind of action", even actions for fraudulent breach of trust. Though the Commission did not propose a single limitation period (or two limitation periods) for all kinds of action, it did propose that the statute should expressly provide that all causes of action were governed by it, with the exception of judicial review and actions subject to some special limitation period, and it therefore recommended a "catchall" provision of the kind already discussed.[144]

13.66 More recently, the recommendations of the New Zealand Law Commission support the adoption of a single set of limitation principles governing all actions, including equitable actions. The Commission said:

> "[T]he advantages of a general limitations regime apply to equitable claims as well as to others. We...believe that our proposals would not involve fundamental change to, or unduly limit the effectiveness of, equitable remedies. Further, we subscribe to the view that any attempts to keep equity and its remedies separate from the common law and its remedies more than a century after the fusion of common law and equity are unhelpful."[145]

13.67 Though there are reports which have made more conservative recommendations,[146] the most important recent reports are clearly in favour of extending the *Limitation Act* to all equitable claims. The Commission also supports this view. More than a century after the administration of law and equity was fused by the Judicature Acts,[147] it would be wrong to

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143 Except for the partial retention of the principles of acquiescence and laches in relation to equitable claims: see para 13.77 below.

144 Ontario Report (1969) 22-23.

145 New Zealand Report (1988) para 337.

146 Eg Orr Committee Report (1977) paras 3.94-3.101, which recommended that there should be no change in the law relating to acquiescence and laches, and that there should not be a limitation period for specific performance or injunction; ACT Working Paper (1984) paras 11-13, which made basically similar recommendations. The Law Society of Western Australia in its comments on the Discussion Paper (1992) said that equitable claims should continue to be governed by equity rather than legislation.

147 *Supreme Court of Judicature Acts* (UK) 1873 and 1875. These reforms were adopted in Western Australia by the *Supreme Court Act 1880*.

perpetuate distinctions based on the jurisdiction of courts in England which have been extinct since the late 19th century.

(ii) The reach of existing law

13.68 The case for the application to equitable claims of the two principles proposed by the Commission does not rest only on the arguments of law reform commissions. It can be powerfully supported by reference to the considerable inroads on equitable principles made by Limitation Acts over the last hundred years. The detailed examination made by the Commission in this chapter supports this claim. Though the Western Australian Act may not have moved with the times, modern limitation legislation now embraces most important areas of equity. Thus, in jurisdictions like New South Wales, the two Australian Territories and British Columbia, the Limitation Acts cover all actions relating to land, whether the interest in question is legal or equitable; all actions on a mortgage; all breaches of trust; all actions against personal representatives; all actions of account; and all claims based on fraud or mistake. In New South Wales and the Northern Territory, the principal limitation on the application of the Limitation Acts in the sphere of equity is the rule that limitation periods for actions of contract, tort and the like do not apply to causes of action for specific performance or for an injunction or other equitable relief.[148] However the Acts of the Australian Capital Territory and a majority of Canadian jurisdictions do not stop there, but seek to include all claims not subject to limitation periods in other legislation, through the use of a "catchall" provision[149] and, in Canada, a limitation period for "accident, mistake, or any equitable ground of relief not hereinbefore specifically dealt with".[150]

13.69 Also noteworthy is a movement towards applying to equitable claims the ordinary limitation period which applies to most common law actions. For example, in most jurisdictions, the ordinary six year period applies to most actions for breach of trust,[151] and in the Northern Territory the ordinary three year period applies;[152] in the Australian Capital Territory and British Columbia breaches of trust, along with most common law claims, simply fall to be dealt with by the general "catchall" provisions.[153] Also significant are the provisions

148 See para 13.22 above.
149 See para 13.23 above.
150 See para 13.59 above.
151 See paras 13.31-13.38 above.
152 See para 13.36 above.
153 See para 13.23 above.

dealing with equitable claims which make the limitation period run from the point of discovery: this applies to actions for fraudulent breaches of trust and other actions made subject to a twelve year period in New South Wales and the two Territories[154] and a ten year period in British Columbia,[155] and actions grounded on fraud or mistake almost everywhere.[156] It does little violence to any of these actions to smooth out some of the differences and subject them all to the two general principles: a three year period running from discovery, and a 15 year period running from when the cause of action arises, the claim to be barred once one or other of these periods has expired (subject to the exercise of the court's discretion in exceptional cases).

13.70 In some cases, only the discovery period will in practice apply. Thus, for example, a breach of fiduciary duty that is continuous would give rise to successive claims, and the effect would be to suspend the ultimate period indefinitely.[157] Nor would the ultimate period apply to duties based on an easement, a profit a prendre or a restrictive covenant, because again the rights described are continuous and the complainant would have successive claims.[158]

(b) Qualification of the general principles in particular cases

13.71 Though modern statutes have made a good deal of progress in reducing the many different rules for different equitable claims found in the older Acts, none has quite succeeded in reducing all claims to common principles of the kind proposed. An issue for the Commission is whether the special policy rules which lay behind the imposition of longer periods in particular cases, or other special rules, are worth preserving.

(i) Fraudulent concealment

13.72 It is standard for Limitation Acts to provide that where a cause of action is concealed by fraud, time does not begin to run until the point when the fraud is or with reasonable diligence might have been discovered.[159] In a limitations system in which all claims are subject to a discovery limitation period, such as that now enacted in Alberta and proposed in

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154 See paras 13.34-13.36 above.
155 See para 13.37 above.
156 See paras 13.52-13.60 above.
157 Alberta Report (1989) 37.
158 Id 40.
159 See paras 13.53-13.60 above.

Ontario, the fraudulent concealment rule can playa reduced role: all claims, and not just those concealed by fraud, are being subjected to the discovery principle. However, under such schemes it would be possible for the ultimate period to run its course before the claim becomes discoverable. 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 plaintiff from discovering the claim before the ultimate period expires. The Alberta and Ontario provisions thus both provide that fraudulent concealment has the effect of suspending the ultimate period,[160] although there are some differences of detail between the two proposals. The principal difference is that the Alberta rule is limited to cases where the defendant fraudulently concealed the fact that the injury had occurred, whereas the Ontario rule also applies to concealment of the fact that the injury was to some degree attributable to the defendant's conduct, or that it was sufficiently serious to have warranted action by the claimant the other integral elements of the discovery rule. It should also be noted that under both these proposals concealed fraud suspends the ultimate period. Once the truth is discovered, the ultimate period will presumably start running again - but the discovery period (which under these proposals will be two years) will also presumably commence at this point.[161] Unless the ultimate period has less than two years to run, the action will be barred by the running of the discovery period. It might be preferable to provide that in cases where there is concealed fraud the ultimate period will not apply, so that the case will be regulated solely by the discovery period.[162]

13.73 The main issue for the Commission is whether any such rule is required under its recommendations, which differ from the Alberta and Ontario provisions in that in very exceptional cases a court may in its discretion allow the action to proceed despite the running of either period. The Commission's view is that where fraudulent concealment by the defendant has prevented the plaintiff from having a full discovery period (or indeed any discovery period at all) and the claim has been barred by the running of the ultimate period, rather than having a separate rule dealing specifically with fraudulent concealment, the court should take the fraudulent concealment into account in exercising its discretion whether or not

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160 *Limitations Act 1996* (Alta) s 4(1); Limitations Bill 1992 (Ont) cl 15(7)(b).

161 See Alberta Report (1989) 77.

162 This seems to be the intent of the rather more complex proposal in New Zealand under which the ultimate period is 15 years from the date of the act or omission in question unless a later date applies to the claim: one such later date is three years after the claimant gains knowledge of any fact referred to in the definition of the discovery period that was deliberately concealed by the defendant: *Draft Limitation Defences Act* (NZ) s 5.

to allow the action to proceed despite the running of the period. 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,[163] and the existence of fraudulent concealment would be an important issue in weighing these considerations The Commission therefore **recommends** that there is no need for a separate rule dealing with fraudulent concealment.

(ii) Fraudulent breach of trust and other cases

13.74 Most *Limitation Acts* have put actions against a trustee for fraud or fraudulent breach of trust or retention or conversion of trust property into a different category from other breaches of trust either by providing that they are not subject to a limitation period or, in the case of more modern Acts such as those of New South Wales or British Columbia, making such actions subject to a longer limitation period than other breaches of trust and providing for the period to run from discovery of the fraud. Another category of action which has commonly been made subject to a longer limitation period than most others is an action against a personal representative.

13.75 Again, the question for the Commission is whether it is appropriate to preserve such rules, if there is a way in which this can be done without doing violence to the general principles which form the Commission's core recommendations - for example by providing that the ultimate period should not apply in such cases. However the Commission has come to the conclusion that this issue should be resolved in the same way as fraudulent concealment. 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. The Commission therefore **recommends** that there is no need for a separate rule dealing with fraudulent breach of trust or the recovery of trust property.

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163 See paras 7.35-7.48 above.

(c) Laches and acquiescence

13.76 The adoption of provisions which subject all equitable claims to general *Limitation Act* principles will obviously have a major effect on the traditional equitable doctrines described at the beginning of this chapter. The doctrine of analogy, already reduced to a shadow of its former self by the fact that most equitable claims are now directly the subject of *Limitation Act* provisions, will disappear. The Commission sees this as a wholly desirable development. The question remains whether there is any scope for the doctrines of laches and acquiescence, or whether the new principles (which are in part based on rules derived from the operation of these doctrines) have superseded them.

13.77 Under the new Alberta legislation, these doctrines are retained in modified form. The *Limitations Act 1996* provides that nothing in it precludes a court from barring the defendant's claim under the equitable doctrines of acquiescence and laches, notwithstanding that the defendant would not be entitled to a defence of limitation pursuant to the Act.[164] In other words, where there is a claim in equity requesting an equitable remedy, a court will be able to deny the plaintiff the remedy sought on the grounds of laches or acquiescence, even though the appointed limitation period has not expired.

13.78 Though the Ontario Bill does not appear to contain a similar provision, it seems to the Commission that the Alberta provision performs a useful function in retaining important equitable doctrines without prejudicing the general scheme, and it **recommends** that a similar provision be adopted in Western Australia. This would be the only case in which the court could shorten an otherwise applicable limitation period.

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164 *Limitations Act 1996* (Alta) s 10. The Act speaks of granting the defendant "immunity from liability" in such a situation.

PART VI: SPECIAL RULES

Chapter 14

ACTIONS RELATING TO LAND

1. INTRODUCTION

14.1 In relation to actions for the recovery of land, the law of limitation of actions takes on a special significance. The running of the limitation period does much more than merely bar the right of action: it results in the extinction of the property rights of the former owner, and the acquisition of property rights by a new owner. Before the limitation period can start running, there must be some person in "adverse possession" of the land, and if that person[1] is still in adverse possession on the expiry of the limitation period, the adverse possessor is recognised as having acquired rights in the land to the exclusion of the former owner and anyone else (except any person who has a better claim than the former owner). The special nature of rules of limitation in this context is one of the chief reasons why the Commission has decided that actions for the recovery of land should continue to be governed by their own particular rules, rather than being made subject to the Commission's two general limitation principles.

2. THE PRESENT LAW IN WESTERN AUSTRALIA

(a) The general law

14.2 The law relating to actions for the recovery of land is contained in sections 4 to 14 of the *Limitation Act 1935*. These provisions are little more than a transcription of the provisions of the English *Real Property Limitation Act 1833*, as amended by the *Real Property Limitation Act 1874*, and adopted or copied in earlier Western Australian legislation.[2] The language of these provisions is complex and often anachronistic, and they are drafted in typical 19th century drafting style involving the use of long and complex sentences. Though the substance of the law as stated in these provisions is generally adequate, the out of date form in which they are couched is a serious problem. In the account of the law given in the

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1 Or someone who has succeeded to that person's interest: see para 14.12 below.

2 *Imperial Acts Adoption Act 1837*; *Real Property Limitation Act 1878*.

following paragraphs, an attempt is made to convey the substance of the provisions without necessarily reproducing the language in which they are drafted.[3]

(i) The basic provisions

14.3 Under section 4 of the *Limitation Act*, actions to recover land and rent[4] may not be brought more than 12 years from the date on which the right of action accrued to the claimant or some person through whom he claims. As with all the provisions under consideration, section 4 is expressed to include making an entry or distress as well as bringing an action. Section 24 confirms that the limitation periods applicable to actions to recover estates and interests to which a person is entitled at law also cover equitable estates and interests.

14.4 Statutory provisions determine the time at which the right of action accrues in particular situations.[5] By section 5(a), where the claimant, or some person through whom he claims, has been in possession of the land and, while so entitled, is dispossessed or discontinues possession, the right of action is deemed to have accrued on the date of dispossession or discontinuance. The reference to a person through whom the claimant claims means that if a true owner who has been dispossessed or discontinues possession subsequently assigns or devises the land to another, the assignee or devisee is in no better position than the true owner.

14.5 Alternatively, the holder of a present interest may never have obtained possession. This will be the case if the claimant is entitled under a will or on intestacy. Section 5(b) provides that if the deceased was in possession of the land on death and was the last person entitled to the land to be in possession, the right of action is deemed to have accrued on the date of death. This is supported by section 8, which provides that an administrator is deemed to claim as if there had been no interval between the date of death and the grant of administration. An executor derives title from the will, and so the cause of action would date from death.

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3 For a fuller account of the law, see *The Laws of Australia* paras 71-88.

4 On the recovery of rent, see para 14.24 below.

5 Where there are situations which do not fall within these or other specific provisions about accrual, the time of accrual has to be ascertained on general principles: see *James v Salter* (1837) 3 Bing NC 544, 132 ER 520, Tindal CJ at 553, and other authorities cited in *The Laws of Australia* para 72 n 9.

14.6 The claimant, or some person through whom he claims, may have received an assurance of land other than by will. By section 5(c), where the person making the assurance is in possession of the land at the date the assurance took effect, and no person has been in possession of the land by virtue of the assurance, the right of action is deemed to have accrued on the date when the assurance took effect.

(ii) Adverse possession

14.7 Section 5 provides that the right to bring an action to recover land does not accrue "until such land is in the actual possession of some person not entitled to such possession", whether or not the claimant has been in possession or receipt of the rents and profits of the land. It has always been a cardinal principle of this area of the law that time does not begin to run until there is some person in "adverse possession". Under the old pre-1833 law, this term had acquired a technical meaning.[6] This meaning is now obsolete, but it is still convenient to use the term "adverse possession" to refer to the requirement imposed by section 5. In essence, adverse possession in this sense means actual possession of the land without the licence of the true owner.[7]

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6 There had to be a disseisin, an abatement, an intrusion or a discontinuance: see *Staughton v Brown* (1875) 1 VLR(L) 150, Fellows J at 158-159. See also F A Bosanquet and J R V Marchant *Darby and Bosanquet's Statutes of Limitations* (2nd ed, 1893) 271-275.

7 A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) para 15.11. An anonymous submission made in response to the Discussion Paper (1992) criticised the Commission for using the term "adverse possession" and also for assuming that the possession requirement under the law in Western Australia was the same as that in other jurisdictions. "The textbook referred to as an authority (Bradbrook), is defective in various ways. It does not correctly state the law in WA. This is not the only textbook that goes astray in an attempt to manufacture a common law in this area. In general, the discussion paper is misguided for the same reason: The assumption is made that there is a common law of *adverse* possession which is applicable in all jurisdictions regardless of the specific legislation applicable - almost as though the relevant limitation enactments were non-existent, or alternatively, were a mere commentary on some universal rules of common law. This area of law is basically the creature of parliaments. The legislation is central to it and varies from other States and from the English statute." This commentator points out that the Limitation Act does not use the term "adverse possession", which "is a term that has resulted in unnecessary litigation and uncertainty elsewhere, and should be strictly quarantined from this jurisdiction. Fortunately WA has been free of this confusion because the law is much more based on objectively verifiable factors." He suggests that *McWhirter v Emerson-Elliott* [1960] WAR 208 properly represents the Western Australian law.
The Commission is not in agreement with this submission, and suggests that its author may have supposed that the Commission was referring to the pre-1833 doctrine of adverse possession. The term "adverse possession" is used by P R Adams *The Law of Real Property and Conveyancing in Western Australia* (1950) 268, and Western Australian cases on the possession requirement under the Limitation Act, such as *Petkov v Lucerne Nominees Pty Ltd* (1992) 7 WAR 163, use the term "adverse possession" and cite leading decisions on adverse possession from England and Victoria. In *McWhirter v Emerson-Elliott*, Wolff CJ at 213 refers to "the nature of possession required to establish adverse possession under s 5 of the *Limitation Act 1935*".

14.8 Possession has two elements: factual possession and the intention to possess. Factual possession means an appropriate degree of physical control. The possessor must have been dealing with the land in the way an occupying owner might have been expected to deal with it, and show that no one else has done so.[8] Whether or not the owner realises that dispossession has taken place is irrelevant.[9] The issue must be determined according to the nature of the land and the manner in which land of that nature is commonly used or enjoyed,[10] which is a question of fact.[11] Possession must be single and exclusive, and so the owner and the alleged possessor cannot both be in possession at the same time. Time cannot run in favour of a person in possession on behalf of the true owner because such possession is that of the true owner.[12] There will be no adverse possession where a person possesses only by permission of the true owner, or under a contract or trust.[13] It has been suggested that it is necessary for the acts of user by the alleged adverse possessor to be inconsistent with the rights of the true owner and the use the true owner intends to make of the land,[14] but it now appears that the alleged adverse possessor does not have to show acts of user inconsistent with the true owner's intended use.[15]

14.9 The person claiming to have taken adverse possession must have the necessary intention to possess. Intention may be the determining factor if the acts relied on are ambiguous.[16] The would-be adverse possessor must intend not merely to trespass but to use the land as his own and exclude all others, including the true owner.[17] Some authorities affirm

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8 *Powell v McFarlane* (1977) 38 P & CR 452, Slade J at 471.

9 *Rains v Buxton* (1880) 14 Ch D 537.

10 *Powell v McFarlane* (1977) 38 P & CR 452, Slade J at 471.

11 *Horton v Briggs* (1903) 6 WALR 26. For examples see *The Laws of Australia* para 74 nn 5-20. One Western Australian example is *McWhirter v Emerson-Elliott* [1960] WAR 208, which shows that the character and value of the property, its natural use and the interests of the proprietor are relevant: on the facts adverse possession of land adjoining an orchard was not established.

12 *O'Neil v Hart* [1905] VLR 107.

13 *Hyde v Pearce* [1982] 1 WLR 560.

14 The suggestion originates from *Leigh v Jack* (1879) 5 Ex D 264; see also *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159; *Treloar v Nute* [1976] 1 WLR 1295; *Riley v Penttila* [1974] VR 547. The suggested doctrine was expanded in two cases which held that if the true owner had no present purpose for the land in mind but contemplated a particular use in the future, the alleged adverse possessor had an implied licence to be on the land and so was not in adverse possession: *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex & BP Ltd* [1975] QB 94; *Gray v Wykeham-Martin* (unreported) English Court of Appeal, 17 January 1977, No 10A.

15 *Buckinghamshire County Council v Moran* [1990] Ch 623. See paras 14.37-14.38 below.

16 *Riley v Penttila* [1974] VR 547.

17 See eg *Powell v McFarlane* (1977) 38 P & CR 452, Slade J at 472; *Buckinghamshire County Council v Moran* [1990] Ch 623, Slade LJ at 641.

the need for a specific intention to exclude the true owner,[18] but others suggest that all that is necessary is an intention to exercise control and exclude strangers.[19]

14.10 If land is in adverse possession for the statutory period, the true owner's rights are extinguished, as provided in section 30.[20] However, the title of the dispossessed person is extinguished only against the adverse possessor,[21] and the extinguishing of the true owner's rights does not affect the rights of others who have an interest in the land, such as an easement or restrictive covenant.[22]

14.11 In order to extinguish the true owner's rights, adverse possession must continue unbroken for the full limitation period. Time will stop running if the true owner asserts his rights by bringing an action to recover the land or by making a peaceable but effective re-entry. However, the *Limitation Act* provides that no person is deemed to have been in possession of land by reason only of having made a formal entry (section 12), and that a right of action is not preserved by any continual or other claim on or near the land (section 13). The entry must amount to a resumption of possession.[23]

14.12 It is not necessary for the person who takes adverse possession to complete the full period himself. The possessor has a proprietary interest based on possession which is enforceable against all other persons except the true owner or someone with a better right,[24] and that interest can be transferred by sale, gift or under a will,[25] and the recipient acquires the same rights as the original possessor, though the recipient must also take adverse possession.[26] If the adverse possessor is dispossessed by another, then provided there is continuous and uninterrupted adverse possession, the period of adverse possession is not broken and the first adverse possessor's period in occupation counts towards the second adverse possessor's statutory period.[27] However, an adverse possessor who abandons possession before the full

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18 *Littledale v Liverpool College* [1900] 1 Ch 19, Lindley MR at 23; *Clement v Jones* (1909) 8 CLR 133; *Murnane v Findlay* (No 2) [1926] VLR 80; *Riley v Penttila* [1974] VR 547.

19 *Ocean Estates Ltd v Pinder* [1969] 2 AC 19.

20 See para 7.56 above.

21 So, for example, a lessee whose right of action has been extinguished by the running of time can still assert a claim against the lessor.

22 Re *Nisbet and Potts' Contract* [1906] 1 Ch 386.

23 *Symes v Pitt* [1952] VLR 412.

24 See *Asher v Whitlock* (1865) LR 1 QB 1; *Allen v Roughley* (1955) 94 CLR 98.

25 See *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, Bowen CJ at 476.

26 *Trustees Executors & Agency Co v Short* (1888) 13 App Cas 793.

27 *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

limitation period has run loses any interest in the land, and if the adverse possessor or anyone else once again acquires possession the two periods of adverse possession cannot be added together.[28]

14.13 Section 14 deals with the situation where land is held by two or more persons as joint tenants or tenants in common (and also refers to the obsolete form of joint tenancy known as coparcenary).[29] Where one or more such persons has been in possession of the whole or more than their undivided share, for their own benefit or for the benefit of a person other than the other tenants, this is not deemed to be possession by the other tenants. In such circumstances, there is adverse possession.[30]

(iii) The Crown

14.14 Section 36 provides that the title of the Crown to land is not affected by adverse possession. There is therefore no applicable limitation provision: the Crown can recover land no matter how long any possessor has been in occupation.

(iv) Particular provisions relating to freehold land

14.15 Various provisions in the *Limitation Act* deal with future interests. By section 5(d), where the estate or interest claimed is one in reversion or remainder or any other future estate or interest, and no person has taken possession of the land in respect of that estate or interest, the right of action is deemed to have accrued on the date on which the estate or interest became an estate or interest in possession by the determination of the preceding estate or interest. Section 7 further provides that the action is deemed to have accrued on this date even if the person claiming the land was previously in possession or receipt of the profits. However, the operation of section 5(d) is subject to the principle that a cause of action cannot accrue unless there is a person in adverse possession in whose favour the limitation period can run.

14.16 The first proviso to section 7 adds a qualification to the above rule. If the land has been in adverse possession while the present interest is subsisting, the holder of the future

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28 *Trustees Executors & Agency Co v Short* (1888) 13 App Cas 793; *Horton v Briggs* (1903) 6 WALR 26.

29 See para 2.56 above.

30 See *Paradise Beach & Transportation Co Ltd v Price-Robinson* [1968] AC 1072.

interest may not have the full limitation period from the time the interest becomes an interest in possession in which to bring the action. If the person entitled to the preceding estate or interest was not in possession of the land on the date of determination of the estate or interest, the person entitled to the succeeding estate or interest may not bring an action more than 12 years from the date on which the right of action accrued to the person entitled to the preceding estate or interest, or six years from the date on which that interest accrued to the person entitled to the succeeding estate or interest, whichever period last expires.[31] Where a person is entitled to an estate or interest in possession and also to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred by the *Limitation Act*, section 20 provides that neither he nor anyone claiming through him can bring an action unless in the interim a person entitled to an intermediate estate or interest has recovered possession.

14.17 Sections 21 to 23 deal with entailed interests, even though the *Property Law Act 1969*[32] abolished such interests and converted all existing entailed interests into fee simple estates. Section 21 provides that where the right of a tenant in tail to recover land has been barred by the running of the limitation period, no action can be brought by anyone claiming any interest which the tenant in tail might lawfully have barred. Section 22 deals with the position where the tenant in tail has died before the expiration of the limitation period. Section 23 deals with taking possession under an assurance which attempts to bar the entail but fails to do so.

14.18 Sections 25 and 26 deal with land subject to a trust. Under section 25, where any land is vested in a trustee on an express trust, the right of the beneficiary or anyone claiming through him to bring an action against the trustee or any person claiming through him to recover the land is deemed to have accrued at the time when the land has been conveyed to a purchaser for valuable consideration, and is deemed to have accrued only against that purchaser and anyone claiming through him. Under section 26, the limitation period for actions to recover money charged on or payable out of land and secured by an express trust is the same as it would be if there were no such trust. There are no provisions in the *Limitation Act* dealing expressly with land held on trust for sale.[33]

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31 Where there are successive persons entitled in remainder, each has six years from the time his respective interest falls into possession: *Re Earl of Devon's Settled Estates* [1896] 2 Ch 562.

32 S 23.

33 Limitation provisions dealing with land subject to a trust for sale are found in most modern Limitation Acts, as are provisions on settled land: for the provisions in Australian legislation, see para 14.52 below.

14.19 Under section 5(e), a right of action to recover land by virtue of a forfeiture or breach of condition accrues on the date on which the forfeiture was incurred or the condition broken. Section 6 provides that if such a right has accrued to a person entitled in reversion or remainder and the land was not recovered as a result, the right of action to recover the land is not deemed to accrue to that person until the estate or interest becomes a present estate or interest. These rules apply to freehold interests as well as leases.[34]

(v) Leases and tenancies

14.20 Where there is a lease for a fixed term, the landlord's right to recover possession of the land from the tenant accrues when the lease expires.[35] Time does not run against the landlord during the term since the grant of the lease converts the landlord's right to possession into a future interest, which accrues on the date on which the preceding interest (the lease) determines. It seems that the general principle that no right of action can arise unless there is some person in adverse possession does not apply in this case. The provision in section 5 which expresses the principle that there must be some person in adverse possession before the limitation period can start running applies only to freehold interests.[36]

14.21 Special rules govern tenancies at will and periodic tenancies. Under section 9 of the *Limitation Act*, tenancies at will are deemed to be determined either at the determination of the tenancy or at the end of one year after their commencement. If the tenant continues in possession after the right of action accrues, the tenant's possession is adverse to the landlord.[37] By section 10, in the case of a yearly or other periodic tenancy where there is no lease in writing, the right of action is deemed to have accrued at the end of the first year or other period or at the last time when rent was received, whichever last happens.[38]

However, settled land has been abolished in Western Australia and also in Queensland: see para 14.52 below.

34 *Doe d Hall v Moulsdale* (1847) 16 M & W 689, 153 ER 1367 (conditional fee tail); *Astley v Earl of Essex* (1874) LR 18 Eq 290 (conditional fee simple).

35 *Chadwick v Broadwood* (1840) 3 Beav 308, 49 ER 121; *Walter v Yalden* [1902] 2 KB 304.

36 There is some English authority in favour of a similar principle: see *Hayward v Chaloner* [1968] 1 QB 107. See however *Jessamine Investment Co v Schwartz* [1978] QB 264, Stephenson LJ at 276. See also *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159, where the issue was not referred to although the case involved a tenancy, and *Smirk v Lyndale Developments Ltd* [1975] Ch 317, Pennycuick VC at 332.

37 *Hogan v Hand* (1861) 14 Moo PC 310,15 ER 322; *Lynes v Snaith* [1899] 1 QB 486.

38 See eg *Long v Tower Hamlets London Borough Council* [1996] 3 WLR 317.

14.22 The dispossession of a tenant by a third party gives both the tenant and the landlord remedies against the third party. A right to recover the land accrues to the tenant, but since the landlord's reversion is a future interest the landlord's right of action does not accrue until the interest becomes an interest in possession at the end of the lease. A tenant whose title has been extinguished by adverse possession of a third party can surrender the leasehold interest to the landlord, who may recover the land from the adverse possessor.[39] The result of this rule is that the landlord and the tenant can work together to defeat the interest of the adverse possessor who has extinguished the tenant's title. It is also possible for a tenant whose title has been extinguished by the adverse possession of a third party to recover possession by acquiring the reversion from the landlord, since the lease merges in the freehold and is extinguished.[40]

14.23 The landlord's title to the land can be extinguished during the term of the lease if rent is paid to a third party. By section 11, where a person is in possession of land by virtue of a lease in writing under which rent of not less than $2 a year is reserved, and the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately on the determination of the lease, and no rent is subsequently received by the person rightfully entitled, the right of action of the person rightfully entitled to recover the land accrues on the date when rent is first received by the wrongful claimant and not at the date of determination of the lease.

14.24 Under section 34, actions to recover arrears of rent, or damages in respect of the arrears, must be brought within six years of the date when the arrears became due.[41] However, if the lease is under seal, section 38(1)(d) provides that the limitation period is 12 years. An action to recover rent will be barred if the running of the limitation period bars the landlord's right to recover the land,[42] but the right to recover the arrears is not destroyed,[43] and so if the landlord forfeits the lease for non-payment of rent and the tenant seeks relief against forfeiture the court will compel the tenant to pay all the arrears, including statute barred arrears.[44]

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39 *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510. For further discussion see para 14.37 below.

40 *Taylor v Twinberrow* [1930] 2 KB 16.

41 This provision also applies to claims against a guarantor in respect of his undertaking to pay the rent reserved by the lease: *Romain v Scuba TV Ltd* [1996] 3 WLR 117.

42 *Re Jolly* [1900] 2 Ch 616.

43 *Archbold v Scully* (1861) 9 HLC 360,11 ER 769.

44 *Barratt v Richardson* [1930] 1 KB 686.

(b) Land under Torrens title

14.25 All land alienated from the Crown since 1875 has been brought under Torrens title and is subject to the provisions of the *Transfer of Land Act 1893*. In some instances, land alienated from the Crown before 1875 has also been brought under Torrens title, but some "old system land" still remains.

14.26 It is a basic principle of the Torrens system that the statutory owner has absolute indefeasibility of title. Thus the rules in the *Limitation Act* relating to the limitation period in actions for the recovery of land apply primarily to old system land. However, in Western Australia those rules are also capable of application to land under Torrens title, because the *Transfer of Land Act* recognises that title may be acquired by adverse possession even where land has been brought under the Torrens system. Section 68, which provides that the registered proprietor holds the land absolutely free from all encumbrances except those noted on the register, qualifies this by providing that the land is subject to any rights subsisting under adverse possession. Section 222 provides that any person claiming to have acquired an estate in land in fee simple in possession under or by virtue of any statute of limitations can make application to become the registered proprietor of that land.[45]

3. THE LAW ELSEWHERE

(a) The general law

14.27 Other jurisdictions, in Australia and elsewhere, also inherited the legislative provisions in the 19th century English statutes dealing with actions for the recovery of land which are in effect still in force in Western Australia. In a few jurisdictions, the law parallels that in Western Australia, in that these provisions remain in force in their 19th century form. This is the case in South Australia,[46] and in the Canadian provinces of Newfoundland, Nova Scotia

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45 Mr P S Bates, in his comments on the Discussion Paper (1992), referred to the decision in *Petkov v Lucerne Nominees Pty Ltd* (1992) 7 WAR 163 in which Murray J held that where the adverse possessor of land has acquired title, his title is not affected by the subsequent registration of a strata plan under the *Strata Titles Act 1985*. Mr Bates said: "The potential commercial implications of this Decision are, in my submission, considerable. If, as in the present case, adverse possession of land runs from say 1952 to 1964, but in 1988 the registered proprietor strata titles his land and constructs a unit development thereon, does it mean that all the unit holders under the new strata development loose [sic] their title to the land because of the adverse possession that occurred between 1952 and 1964? That certainly appears to be the common law in Western Australia at present," See also P S Bates (1992) 6 *Aust Prop Law Bull* 69.

46 *Limitation of Actions Act 1936* (SA) ss 4-24.

and Ontario.[47] However, all other jurisdictions - England, New Zealand, and a majority of Australian States and Canadian provinces - have modernised the drafting of these provisions. Though the modernisation has brought about little change in substantive effect, the drafting has been greatly improved and this has made them much easier to understand. There appear to have been three successive attempts at modernisation -

(1) The Canadian *Uniform Limitation of Actions Act 1931*. This was adopted in four provinces (Alberta, Manitoba, Prince Edward Island and Saskatchewan) and the two Territories, and also had considerable influence on the New Brunswick statute. The *Uniform Act* simplified and rearranged the provisions on actions relating to land, and eliminated unnecessary provisions.[48] All these jurisdictions except Alberta still have land law provisions in this form.[49]

(2) The English *Limitation Act 1939*[50] effected a considerable simplification of the old provisions, which were repealed. As far as can be discerned, the Canadian *Uniform Act* did not influence the drafters of the 1939 Act in any way: theirs was an independent attempt to modernise the former law. The English 1939 Act was followed in Queensland, Tasmania, Victoria and New Zealand,[51] and the current English Act retains the 1939 provisions with very few alterations, except that some of them have been relegated to a Schedule.[52]

(3) The New South Wales *Limitation Act 1969*, while generally based on the English 1939 Act, makes many improvements to the drafting of, and a small number of substantive changes to, the provisions in question. The New South Wales provisions,[53] therefore, are the most modern version of the real property provisions currently in force in any jurisdiction.

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47 *Limitation of Realty Actions Act 1990* (Nfd) ss 3-18; *Limitation of Actions Act 1989* (NS) ss 10-22; *Limitations Act 1990* (Ont) ss 3-17.

48 See Ontario Report (1969) 65.

49 See eg *Limitation of Actions Act 1987* (Man) ss 25-37; *Limitation of Actions Act 1973* (NB) ss 29-43; *Statute of Limitations 1988* (PEI) ss 16-30; *Limitations of Actions Act 1978* (Sask) ss 17-30. Note also *Limitation of Actions Act 1980* (Alta) ss 18-30, now repealed by *Limitations Act 1996* (Alta) s 16.

50 *Limitation Act 1939* (UK) ss 4-17.

51 *Limitation of Actions Act 1958* (Qld) ss 13-25; *Limitation Act 1974* (Tas) ss 10-22; *Limitation of Actions Act 1958* (Vic) ss 7-19; *Limitation Act 1950* (NZ) ss 6-19.

52 *Limitation Act 1980* (UK) ss 15-19; Sch 1.

53 *Limitation Act 1969* (NSW) ss 27-39.

(b) Land under Torrens title

14.28 The Torrens system is in force in all Australian and Canadian jurisdictions and also in New Zealand.[54] However, there are considerable differences as to the extent to which the title of a registered proprietor can be displaced by a person claiming title by adverse possession. The position in Victoria and Tasmania is similar to that in Western Australia: in all three jurisdictions the principle of acquisition of title by adverse possession applies fully to land under Torrens title. In Queensland and South Australia, its application is more restricted, and title to Torrens land can be only be obtained by adverse possession under specific provisions. In New South Wales, before 1979 the concept of acquisition of title by adverse possession was not applicable to Torrens land under any circumstances. However, it is now possible for an adverse possessor of land under Torrens title to be registered as proprietor, subject to various specific rules.[55] There are similar differences elsewhere. In New Zealand, the *Limitation Act* provides that it is subject to the *Land Transfer Act 1952*,[56] and generally no title to Torrens system land can be acquired by adverse possession.[57] The position is similar in most Canadian jurisdictions.[58] In some cases, for example Saskatchewan,[59] it is expressly provided that the Torrens system prevails over the *Limitation of Actions Act*. In others, for example Ontario, the courts have decided that this is the case.[60] Only in Alberta is the Torrens system subject to the exception of allowing the adverse possessor to be registered as the estate holder at the expiry of the limitation period.[61]

(c) Jurisdictions with no limitation provisions

14.29 The position in British Columbia in 1974 was that there could be no adverse possession of any land in respect of which a certificate of title had been issued after 1905, and

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54 England has a somewhat different system of registered land, governed by the *Land Registration Act 1925* (UK). See E Cooke "Adverse Possession - Problems of Title in Registered Land" (1994) 14 *Leg Stud* 1.

55 See *The Laws of Australia* para 77; D J Whalan *The Torrens System in Australia* (1982) 325-328; A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) paras 15.82-15.86; D K Irving "Should the Law Recognise the Acquisition of Title by Adverse Possession?" (1994) 2 *Aust Prop Law J* 112.

56 *Limitation Act 1950* (NZ) s 6(2).

57 *Land Transfer Act 1952* (NZ) s 64: see New Zealand Report (1988) paras 348-352.

58 See J Williams *Limitation of Actions in Canada* (2nd ed 1980) 115-118.

59 *Limitation of Actions Act 1978* (Sask) s 17. See Saskatchewan Report (1989) 23-25.

60 *Gatz v Kiziw* [1959] SCR 10. However, there is a minor exception: see Ontario Report (1969) 67.

61 See J Williams *Limitation of Actions in Canada* (2nd ed 1980) 117; J S Williams "Title by Limitation in a Registered Conveyancing System" (1967-68) 6 *Alta L Rev* 67. The *Limitations Act 1996* (Alta) does not make any change to the position.

only in a few minor instances was it possible for possessory titles to exist.[62] The Law Reform Commission of British Columbia therefore recommended that the *Limitation Act* should not contain any provision for the extinguishing of title to land, that it should specifically state that title to land cannot be acquired by adverse possession, and that actions to recover land where the owner was dispossessed in circumstances amounting to trespass were not subject to any time limit.[63] The *Limitation Act* enacted in 1975 adopted these recommendations.[64] Similar recommendations have been made in New Zealand and Saskatchewan, though as yet they remain unimplemented.[65]

14.30 The position is basically the same in the Australian Capital Territory and the Northern Territory. All land is registered land, title cannot be acquired by adverse possession and the Limitation Acts therefore contain no provisions on actions for the recovery of land.[66]

4. THE COMMISSION'S APPROACH

(a) Acquisition of title by adverse possession

14.31 The most radical approach to reform which the Commission could adopt would be to recommend that it should no longer be possible to acquire title to land by adverse possession, as was done in British Columbia.[67] However, the situation under the Torrens legislation in Western Australia is very different from that which prevailed in British Columbia in 1974. The Western Australian *Transfer of Land Act 1893*, unlike most other Torrens statutes, allows title to be acquired by adverse possession even where land is Torrens land, so creating a major potential exception to the indefeasibility of Torrens title. Any reform along the suggested lines would require the amendment of the *Transfer of Land Act*. Not only is this outside the Commission's terms of reference, but in the Commission's opinion it is a task which should not be attempted without a thoroughgoing investigation of all aspects of the operation of the Torrens system in Western Australia that bear on possessory title. In the Commission's view, such an investigation would be worthwhile. This paragraph has already referred to some of

62 *British Columbia Report* (1974) 45-48.
63 Id 49-50.
64 See now *Limitation Act 1979* (BC) ss 3(3)(a) (no limitation period for possession of land where person entitled to possession dispossessed in circumstances amounting to trespass), 12 (no title to land can be acquired by adverse possession).
65 *New Zealand Report* (1988) paras 359-362; *Saskatchewan Report* (1989) 24-25.
66 See paras 2.32 n 47 and 2.34 n 51 above.
67 See para 14.29 above.

the anomalies of the present situation. This, plus the fact that some jurisdictions have abolished the doctrine of adverse possession, and others have recommended it,[68] suggests that it is desirable to carry out a similar review in Western Australia.[69] The Commission therefore **recommends** that it should be given a reference to review the system of acquisition of title to property by adverse possession in Western Australia, with particular reference to Torrens title.

(b) Whether the Commission's two general principles should apply

14.32 If actions for the recovery of land are to continue to remain subject to a limitation period, the next issue is whether they should be brought within the two general principles of limitation which the Commission recommends in this report, or whether actions to recover land should be kept outside the operation of those principles and remain subject to their own special rules.

14.33 The Commission has come to the conclusion that actions for the recovery of land should not be governed by the two general principles, but should remain subject to special rules similar to those in the present Act. The reason for this is that 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.[70] 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.

14.34 The two jurisdictions in which similar reforms have been proposed have also refrained from applying the discoverability principle to actions in this category.[71] The Alberta Law Reform Institute originally contemplated recommending the abolition of adverse possession, for reasons not dissimilar to those which led to its abolition in British Columbia,[72] but ultimately refrained from so recommending on the ground that this area should be examined

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68 See eg Law Reform Commissioner of Tasmania *Report on Adverse Possession and Other Possessory Claims to Land* (Report No 73 1995).

69 The question of amending the law relating to adverse possession was recently raised by Hon J A Cowdell in a Parliamentary Question: see - Western Australia *Parliamentary Debates*, 24 October 1995, 9678.

70 The knowledge of the dispossessed owner that dispossession has taken place has always been regarded as irrelevant: *Rains v Buxton* (1880) 14 Ch D 537.

71 The New Zealand Report (1988) para 357 also concluded that it was difficult to apply its standard limitation proposals to land. The New Brunswick Discussion Paper (1988) 4 proposes the retention of a special rule for recovery of possession of land.

72 *Alberta Report for Discussion* (1986) paras 3.67-3.71.

separately. Under its final recommendations,[73] which have been implemented by the *Limitations Act 1996*,[74] remedial orders for the possession of real property are subject to the ultimate period but not the discovery period.[75] The proposed reforms in Ontario contemplate that the provisions of the existing Ontario Act on actions for the recovery of real property will be retained pending a comprehensive review.[76]

14.35 The Commission therefore **recommends** that actions for the recovery of land should be excepted from the two general limitation principles which under its recommendations will apply to most other actions.

(c) Redrafting of the limitation provisions on actions for the recovery of land

14.36 The substance of the law as set out in the existing provisions of the *Limitation Act* is not unsatisfactory, but the fact that they are drafted in 19th century form, employing long sentences and complex language, makes them difficult to understand. A factor which adds to their complexity is the fact that provisions on acknowledgment and part payment are weaved into some of the sections.[77] The difficulties involved in using the Western Australian provisions become evident when they are compared with the more modern sections which have replaced them in most other jurisdictions. In general, the rules are the same, but the drafting has been much improved. The Commission **recommends** that the provisions of the Act on actions for the recovery of land should be redrafted in modern form and made as simple to understand as possible. The best modern equivalents of these provisions are those of the New South Wales *Limitation Act 1969*, which were drafted by the Law Reform Commission of that State against the background of the earlier modern version of these provisions in the English *Limitation Act 1939*.[78] The Commission **recommends** that the New South Wales provisions should be used as the model for those to be inserted in the new Western Australian Act, and that they should be departed from only where there is sufficient reason to do so. In the next section of this chapter the Commission makes detailed recommendations about the adoption of the New South Wales provisions.

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73 Alberta Report (1989) 39.

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

75 The result is that a ten year limitation period applies to such actions, as it did under the former law.

76 Ontario Report (1991) 49-50. The Limitations Bill 1992 (Ont) provides for the Parts of the present Ontario Act which remain unrepealed (principally the real property provisions) to become a separate Act entitled the *Limitations Act (Real Property)*: Limitations Bill 1992 (Ont) cl 26(2).

77 Eg s 15: see paras 18.15-18.17 below.

78 See para 14.27 above.

(d) Reform of the case law on adverse possession

14.37 In the Discussion Paper the Commission raised two issues which had arisen out of the case law on adverse possession.[79] Both had been discussed in the report of the Orr Committee in England in 1977.[80] The first was whether the cases which suggested that, where the true owner had no present purpose for the land in mind but contemplated a particular use in the future, the alleged adverse possessor had an implied licence to be on the land and so was not in adverse possession[81] should be reversed in favour of restoring the more traditional approach of cases such as *Leigh v Jack*[82] and *Treloar v Nute*.[83] The second was whether, as the House of Lords had held in *Fairweather v St Marylebone Property Company Ltd*,[84] a tenant whose own title had been extinguished by adverse possession could, by surrendering the lease, enable the landlord to evict the adverse possessor.[85]

14.38 The Commission, having given these matters further consideration, is of the view that it should not recommend any changes to the case law on adverse possession, but leave it to be developed by the courts. As regards the first issue, which was controversial in 1977 because of the then-recent cases, the Orr Committee recommended legislative change, and accordingly the *Limitation Amendment Act 1980* provided that a licence should not be implied by law to defeat adverse possession.[86] However, a subsequent decision of the English Court of Appea1[87] has restored the traditional doctrine based on *Leigh v Jack* and *Treloar v Nute*, and so it appears that no change is necessary. As for the second issue, the Orr Committee were unable to agree and made no recommendation. This Commission is of the opinion that it should not interfere.

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79 See Discussion Paper (1992) paras 4.12, 4.33.

80 Orr Committee Report (1977) paras 3.44-3.52.

81 *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex & BP Ltd* [1975] QB 94; *Gray v Wykeham-Martin* (unreported) English Court of Appeal, 17 January 1977, No 10A: see para 14.8 n 14 above.

82 (1879) 5 Ex D 264.

83 [1976] 1 WLR 1295.

84 [1963] AC 510.

85 See para 14.22 above.

86 *Limitation Amendment Act 1980* (UK) s 4, adding s 10(4) to the *Limitation Act 1939* (UK). This provision now appears as cl 8(4) of Sch 1 of the *Limitation Act 1980* (UK).

87 *Buckinghamshire County Council v Moran* [1990] Ch 623.

5. THE NEW PROVISIONS IN THE LIMITATION ACT

(a) Adoption of provisions based on the New South Wales Limitation Act

14.39 The Commission **recommends** that provisions based on the sections of the New South Wales *Limitation Act* listed in the second column of the table opposite should be adopted in place of the existing provisions of the *Limitation Act 1935* listed in the third column of the table.

14.40 As an example of the simplification in drafting which will result, section 27(2) of the New South Wales Act, which states the general provision on actions for the recovery of land, provides:

> "...an action on a cause of action to recover land is not maintainable by a person ... if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims."

This can be compared with the present Western Australian provision, section 4 of the *Limitation Act 1935*, which it would replace:

> "No person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

14.41 Comment is required on a number of the New South Wales provisions listed above.

(i) Adverse possession

14.42 Among the provisions recommended for adoption is section 38 of the New South Wales Act. This important section states the general principles of adverse possession:

> "(1) Where, on the date on which, under this Act, a cause of action would, but for this section, accrue, the land is not in adverse possession, the accrual is postponed so

that the cause of action does not accrue until the date on which the land is first in adverse possession.

(2) Subject to subsection (3), where a cause of action accrues to recover land from a person in adverse possession of the land, and the land is afterwards in the adverse possession of a second person, whether the second person claims through the first person or not, the cause of action to recover the land from the second person accrues on the date on which the cause of action to recover the land from the first person first accrues to the plaintiff or to a person through whom he claims.

(3) Where a cause of action to recover land accrues and afterwards, but before the cause of action is barred by this Act, the land ceases to be in adverse possession, for the purposes of this Act:

(a) the former adverse possession has no effect; and

(b) a fresh cause of action accrues on, but not before, the date when the land is first again in adverse possession.

(4) For the purposes of this section:

(a) 'adverse possession' is possession by a person in whose favour the limitation period can run;

(b) possession of land subject to a rentcharge by a person who does not pay the rent is possession by him of the rentcharge; and

(c) in a case to which section 33 applies, receipt of the rent by a person wrongfully claiming to be entitled to the land subject to the lease is, as against the landlord, adverse possession of the land.

(5) Where land is held by joint tenants or tenants in common, possession by a tenant of more than his share, not for the benefit of the other tenant is, as against the other tenant, adverse possession."

14.43 Two provisions in this section have equivalents in the present Western Australian Act. Subsection (1) is the equivalent of the last part of section 5, which provides:

"For the purposes of this section, the right to make an entry, or bring an action to recover any land, has not and shall not be deemed to have first accrued to any person in any case, whether or not such person has been in possession or receipt of the rents and profits of such land, until such land is in the actual possession of some person not entitled to such possession, and any land not in the actual possession of any person shall be deemed to be in the possession of the person entitled to such possession. "

One difference between the two provisions is that section 38 of the New South Wales Act makes reference to *adverse* possession, unlike section 5 which refers to possession only. The

Commission has already suggested that there appears to be no difference of substance here,[88] and is in favour of the legislation referring specifically to adverse possession.

Another difference is that section 5, as drafted, refers only to the provisions on accrual of present and future interests contained in that section, whereas section 38 of the New South Wales Act clearly applies to all the provisions on the recovery of land. This may well bring about a change in the law regarding leasehold interests, since as the Western Australian Act is presently drafted there does not appear to be any room for the concept of adverse possession in sections 9 and 10 dealing with tenancies at will and periodic tenancies.[89] There is some conflict in the English case law on this point.[90] A leading Australian text suggests that Australian Limitation Acts should adhere to the principle that no cause of action should accrue unless the tenant is in adverse possession.[91] This would be achieved by the adoption of section 38.

14.44 The other provision in section 38 with an equivalent in the present Western Australian Act is subsection (5), which parallels section 14 dealing with land in joint ownership. Section 38(5) expresses the relevant principle much more succinctly and omits the reference to coparcenary, a form of joint ownership which has long been obsolete.[92]

14.45 The other provisions in section 38 have no equivalents in the present Western Australian statute law. However, they state settled case law principles.[93] The provisions of subsections (1), (3) and (4) were adopted by the New South Wales Law Reform Commission from section 10 of the English *Limitation Act 1939*.[94]

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88 See para 14.7 above.

89 See para 14.20 above.

90 In *Hayward v Chaloner* [1968] 1 QB 107 a majority of the Court of Appeal (Lord Denning MR dissenting) suggested that the possession of a tenant was to be considered adverse once the period covered by the last payment of rent had expired. A subsequent Court of Appeal decision, *Jessamine Investment Co v Schwartz* [1978] QB 264, by inference doubted the correctness of the decision.

91 A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) para 15.47.

92 See para 2.56 above.

93 S 38(2) states a rule affirmed by a long line of decisions both English and Australian: see *Humphrey v Nowland* (1862) 15 Moo PC 343, 15 ER 524; *May v Martin* (1885) 11 VLR 562; *Willis v Earl Howe* [1893] 2 Ch 545; *Salter v Clarke* (1904) 4 SR(NSW) 280; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078. S 38(3) is likewise amply supported by authority: see *Trustees Executors & Agency Co Ltd v Short* (1888) 13 App Cas 793; *Horton v Briggs* (1903) 6 WALR 26; *Allen v Roughley* (1955) 94 CLR 98, Williams J at 114-115, Fullagar J at 131; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, Bowen CJ at 476.

94 See NSW Report (1967) para 188.

(ii) Accrual: future interests

14.46 The principles relating to accrual of a cause of action to recover a future interest in land are stated in sections 31 and 67 of the New South Wales Act. There is no material difference between section 31 and section 5(d) of the Western Australian Act, but the New South Wales legislation omits the complex qualifications to section 5(d) contained in the three provisions in section 7. The first provision in section 7 merely states that the action is deemed to have accrued on the date stated in section 5(d) even if the person claiming the land was previously in possession or receipt of the profits. The other two provisions in section 7, added to the English legislation of 1833 by the amending Act of 1874,[95] were never adopted in New South Wales. Section 67 of the New South Wales Act states the same principles as section 20 of the Western Australian Act, but in the opinion of the New South Wales Law Reform Commission it was better to state this in terms of extinction of the title rather than barring the remedy: "[W]henever the case arises to which the provisions would apply, the cause of action must necessarily be statute-barred before the estate or interest falls into possession."[96]

(iii) Forfeiture and breach of condition

14.47 Section 32 of the New South Wales Act introduces a difference of substance, in that time runs not from the date of the forfeiture or breach of condition (as it does under section 5(e) of the Western Australian Act) but from the date on which the plaintiff discovers or might with reasonable diligence have discovered the facts. The New South Wales Law Reform Commission commented that under the old law a landlord might neither know nor have the means of knowing that a breach had occurred, but time would nevertheless run against him. It said that the new rule would bring the law of limitation of actions more into line with the ordinary law of landlord and tenant.[97] This Commission agrees that the introduction of discoverability, which is at the centre of its general recommendations, is appropriate in this context.

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95 *Real Property Limitation Act 1874* (UK) s 2.
96 NSW Report (1967) para 329.
97 NSW Report (1967) para 173.

(iv) Tenancies

14.48 Again, the New South Wales provisions introduce a substantive change. Under sections 9 and 10 of the Western Australian *Limitation Act*, where there is a tenancy at will the right to recover is deemed to accrue either at the determination of the tenancy or one year after its creation; where there is a periodic tenancy, the right accrues at the end of the period or at the last time when rent is received, whichever last happens. Under section 34 of the New South Wales Act, in the case of a tenancy at will the determination of the tenancy is omitted as a possible starting point; in the case of a periodic tenancy, time does not begin to run until rent becomes overdue, whether or not the period has come to an end, and the restriction to tenancies without a lease in writing is omitted. All these changes result from recommendations of the New South Wales Law Reform Commission, which thought that time should not begin to run until rent became overdue, and that there was no justification for restricting the section to tenancies without a lease in writing.[98]

(v) Rent wrongly paid

14.49 A further change of substance is made by the New South Wales Act. Under section 11 of the present Western Australian Act the cause of action accrues on the date when rent is first received by the stranger. Under section 33 of the New South Wales Act time does not begin to run until the landlord becomes entitled to recover the land from the tenant by forfeiture or breach of condition. The New South Wales Commission commented on the strangeness of the older provision (then also in force in New South Wales), under which time ran against the landlord and in favour of the stranger receiving the rent even though the landlord had no cause of action against the stranger. In its opinion, the rule it recommended produced a fairer result.[99] This Commission agrees.

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98 Id paras 179-180. The Orr Committee Report (1977) paras 3.53-3.58, by contrast, recommended that in the case of tenancies at will the cause of action should accrue only when the tenancy was determined, and that in the case of periodic tenancies a similar rule should apply. The recommendation regarding tenancies at will was adopted: *Limitation Amendment Act 1980* (UK) s 3(1) provided that *Limitation Act 1939* (UK) s 9(1) should cease to have effect. The recommendation regarding periodic tenancies was not accepted.

99 NSW Report (1967) paras 174-176.

(b) Other recommendations

(i) Crown land

14.50 Under section 36 of the *Limitation Act 1935*, no title by adverse possession may be obtained against the Crown. Notwithstanding that this is not so in New South Wales and some other Australian jurisdictions,[100] the Commission **recommends** that there be no change to this rule in Western Australia. In its view, it is no part of the Commission's brief under this reference to alter the law relating to title to Crown land.

(ii) Entailed interests

14.51 The Commission **recommends** that sections 21 to 23, dealing with accrual in the case of entailed interests, should be repealed without replacement. Entails were rarely used in Australia.[101] It has not been possible to create such interests in Western Australia since 1969, and all existing entailed interests have been converted into fee simple estates.[102]

(iii) Trusts for sale

14.52 In England and in most Australian jurisdictions, equitable property interests in land are generally created either by making the land settled land or creating a trust for sale. Modern Australian Limitation Acts have provisions dealing with accrual in such cases,[103] based on those adopted in England in 1939.[104] In Western Australia, the settled land legislation[105] was repealed in 1962[106] and settled land was assimilated with trust property, so that the powers exercisable by the life tenant of settled land are exercised by the trustees.[107] A similar step has

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100 *Limitation Act 1969* (NSW) s 27(1); *Limitation Act 1974* (Tas) s 10(1); also in South Australia, where the *Crown Suits Act 1769* (UK) (the Nullum Tempus Act) is still in force. The other jurisdictions have the same rule as Western Australia: *Limitation Act 1981* (NT) s 6(4); *Limitation of Actions Act 1974* (Qld) s 6(4); *Limitation of Actions Act 1958* (Vic) s 7.

101 See A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) para 2.21.

102 *Property Law Act 1969* s 23.

103 See *Limitation Act 1974* (NSW) s 37; *Limitation Act 1974* (Tas) s 13; *Limitation of Actions Act 1958* (Vic) s 11.

104 *Limitation Act 1939* (UK) s 7. See now *Limitation Act 1980* (UK) s 18.

105 *Settled Land Act 1892*, modelled, like the settled land legislation of Queensland, Tasmania and Victoria, on the *Settled Land Act 1882* (UK). New South Wales and South Australia adopted earlier English legislation.

106 *Trustees Act 1962* s 4 and 1st Sch.

107 See A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) para 12.07.

been taken in Queensland.[108] The *Limitation Act 1935* contains no provisions dealing either with settled land or trusts for sale.[109] However, the English provisions as they appear in section 16 of the Queensland *Limitation of Actions Act 1974* have been modified to fit the situation which now prevails in Queensland. Section 16 provides:

> "(2) Where land is held by a trustee upon trust including a trust for sale and the period prescribed by this Act for the bringing of an action to recover the land by the trustee has expired, the estate of the trustee shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale has not accrued or has not been barred by this Act; but if and when every such right has been so barred the estate of the trustee shall be extinguished.
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> (3) Where land is held upon trust including a trust for sale, an action to recover the land may be brought by the trustee on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the trustee would, apart from this provision, have been barred by this Act.
>
> (4) Where land held upon trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land shall be deemed for the purposes of this Act not to accrue during such possession to any person in whom the land is vested as trustee or to any person entitled to a beneficial interest in the land or in the proceeds of sale."

The Commission **recommends** that these provisions be adopted in the new Western Australian legislation.

(iv) Position of administrator

14.53 Section 8 of the *Limitation Act 1935* provides that an administrator is deemed to claim as if he obtained the estate without interval after the death of the deceased. Modern Australian Limitation Acts generally contain a similar provision,[110] but the New South Wales Act is an exception.[111] The Commission **recommends** that a provision on the same lines as section 8 be incorporated in the new Western Australian Act.

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108 See *Trusts Act 1973* (Qld) s 3 and Sch 1 Pt 2.

109 Ss 25 and 26, which deal with express trusts of land, are dealt with at paras 13.30 above.

110 See *Limitation of Actions Act 1974* (Qld) s 23; *Limitation Act 1974* (Tas) s 20; *Limitation of Actions Act 1958* (Vic) s 17.

111 In the view of the New South Wales Law Reform Commission, the provision was unnecessary in the light of *Wills, Probate and Administration Act 1898* (NSW) s 44, which provides that real and personal estate vests in the executor or administrator on death: NSW Report (1967) para 15. The Western Australian

(v) Rent

14.54 Section 34 of the *Limitation Act 1935* provides that actions to recover arrears of rent, or damages in respect of such arrears, must be brought within six years of the date the arrears became due, but section 38(1)(d) provides that the period for an action "of debt for rent upon a covenant in an indenture of demise", that is, a lease under seal, is 12 years. Modern Limitation Acts have generally abolished the difference in this respect between leases under seal and other leases, and subjected all actions for the recovery of rent to a six year limitation period. The New South Wales *Limitation Act* has gone one step further by assimilating such claims with other claims for arrears of income. In the Commission's view, actions for the recovery of arrears of rent do not require a separate provision. They should be treated like any other action for the recovery of money, and the general principles recommended earlier in this report should apply. The result will be that an action for arrears of rent will normally be subject to a three year limitation period running from the date the arrears became due (since in such cases the "injury", for the purposes of the discovery period, is the non-performance of an obligation), but in any case where the relevant knowledge does not exist at that point, the discovery period will not commence until it does exist, subject to the 15 year ultimate period which will run from the date the arrears became due, which for this purpose is the date of the breach of duty. The Commission so **recommends**.

14.55 Section 31, which provides that the receipt of rent payable by a tenant is to be deemed the receipt of the profits of the land for the purposes of the Act, has not been adopted in modern Limitation Acts, and in the Commission's view there is no need to preserve it. It **recommends** accordingly.

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equivalent of s 44, *Administration Act 1903* s 8, is less comprehensive than the New South Wales provision.

Chapter 15

MORTGAGES

1. INTRODUCTION

15.1 A number of sections in the *Limitation Act 1935* deal with claims relating to mortgages - actions by the mortgagor to redeem mortgaged property in the possession of the mortgagee, and actions by the mortgagee to recover possession of mortgaged property in the hands of the mortgagor, to foreclose, and to recover principal money secured by the mortgage and interest thereon. As is the case with most other provisions in the *Limitation Act*, and particularly those relating to equitable claims,[1] the Western Australian provisions have been left behind by reforms in other jurisdictions. The first wave of reform was inspired by the recommendations of the Wright Committee[2] and their adoption in England and elsewhere, but since then there have been more far reaching reforms in New South Wales and the two Territories as a result of the recommendations of the New South Wales Law Reform Commission in 1967.[3] There have also been some important developments in Canada. The major signposts of reform include the enactment of statutory limitation periods for all the above causes of action, not only for mortgages of realty but also for mortgages of personalty; in some jurisdictions, the application of the same rules to both realty and personalty; and, where possible, the elimination of the differences between claims relating to mortgages and other kinds of claim.

2. THE PRESENT LAW IN WESTERN AUSTRALIA

15.2 The *Limitation Ac*t provisions on mortgages reproduce those of 19th century English legislation. In each case, there are separate provisions for mortgages of land and mortgages of personalty.

(a) Action by mortgagor to redeem

15.3 As regards mortgages of land, section 29 of the *Limitation Act* provides that where the mortgagee has obtained possession, the mortgagor or any person claiming through him must

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1 See paras 13.11-13.23 above.
2 Wright Committee Report (1936) paras 9-10.
3 NSW Report (1967) paras 194-224.

bring an action to redeem the mortgage within 12 years of the time the mortgagee obtained such possession, unless there is a subsequent acknowledgment.[4] Time therefore runs from the date the mortgagee goes into possession, provided he is in possession in the capacity of mortgagee and not some other capacity.[5] This is the case even if the contractual date for redemption has not arrived.[6] Where the mortgagor remains in possession, no time limit applies.

15.4 In the case of actions to redeem mortgaged personalty, the Act provides no limitation period, and equity will not apply the statutory period by analogy.[7] However, the mortgagor may fail through laches or acquiescence.[8]

(b) Action by mortgagee to recover possession

15.5 As regards mortgages of land, section 35 of the *Limitation Act* provides that it is lawful for any person entitled to or claiming under a mortgage of land to make an entry or bring an action to recover the land within 12 years of the date of the last payment of any part of the principal money or interest, even though more than 12 years has elapsed since the cause of action accrued.[9] A later acknowledgment will delay the running of the period.[10] The mortgagor bears the onus of showing that the limitation period has elapsed.[11] The provision applies not only against the mortgagor, but also against a person who has acquired title by possession against the mortgagor, if the mortgage was created before the mortgagee's

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4 The provision reproduces *Real Property Limitation Act 1833* (UK) s 28, as amended by *Real Property Limitation Act 1874* (UK) s 7. For acknowledgment see para 18.16 below.

5 *Hyde v Dallaway* (1843) 2 Hare 528, 67 ER 218; *Hodgson v Salt* [1936] 1 All ER 95; *Park v Brady* [1976] 2 NSWLR 329. Possession of part of the mortgaged land is sufficient: *Kinsman v Rouse* (1881) 17 Ch D 104. S 29 provides that receipt of rents or profits amounts to possession. It is not clear whether the mortgagor's title is extinguished at the end of the period: see E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 925-927; P M Fox "Redemption and the Statute of Limitations" (1948) 22 *ALJ* 363.

6 *Re Metropolis & Counties Permanent Investment Building Society* [1911] 1 Ch 698.

7 *Charter v Watson* [1899] 1 Ch 175. See also *Australia & New Zealand Banking Group v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478.

8 *Re Stucley* [1906] 1 Ch 67; *Weld v Petrie* [1929] 1 Ch 133. If the security comprises both land and personalty, the limitation period for land apparently applies: *Charter v Watson* [1899] 1 Ch 175, except perhaps where the security is mostly personalty, where redemption after the end of the statutory period may be allowed with regard to the personalty: *Re Jauncey* [1926] Ch 471.

9 The provision reproduces *Real Property Limitation Act 1837* (UK) s 1, as amended by *Real Property Limitation Act 1874* (UK) s 9. As to part payment see para 18.16 below.

10 *Limitation Act 1935* s 15.

11 *Cameron v Blau* [1963] Qd R 421, Gibbs J at 425-426.

possession commenced.[12] If the mortgagee has remained in possession, no limitation period applies.

15.6 No statutory provision deals specifically with mortgages of personalty. However, the right to recover possession is barred in the same way as an ordinary action for conversion or detinue, and so a six year limitation period applies.[13]

(c) Action by mortgagee to foreclose

15.7 An action for foreclosure of a mortgage of land is an action to recover land,[14] and so section 35 applies.[15] The cause of action accrues on the date fixed for redemption of the mortgage,[16] but if the mortgage debt is payable on demand, the right to foreclose accrues when the mortgage is executed.[17] These rules apply even though interest has been paid and accepted since the time in question.[18] Foreclosure results in the extinction of the mortgagor's equity 'of redemption. The mortgagor's personal covenant to pay continues after foreclosure,[19] but will be extinguished on the sale of the property following foreclosure.[20]

15.8 No statutory limitation period applies to the foreclosure of a mortgage of personalty,[21] but the mortgagee may be barred by laches or acquiescence.

(d) Action by mortgagee to recover principal money

15.9 In the case of a mortgage of land, under section 32(1) of the *Limitation Act* an action to recover the sum due is barred 12 years after a present right to receive accrues.[22] The section

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12 *Ludbrook v Ludbrook* [1901] 2 KB 96.

13 *Limitation Act 1935* s 38(1)(c)(iv).

14 *Heath v Pugh* (1881) 6 QBD 345, Lord Selborne LC at 364; *Harlock v Ashberry* (1882) 19 Ch D 539.

15 According to E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 288-289, the remedy of foreclosure is unnecessary in the case of a Torrens title mortgage, since foreclosure orders are made by the Commissioner of Titles, rather than a court, under s 121 of the *Transfer of Land Act 1893*.

16 *Kibble v Fairthorne* [1895] 1 Ch 219.

17 *Wakefield & Barnsley Union Bank v Yates* [1916] 1 Ch 452.

18 *Purnell v Roche* [1927] 2 Ch 142; conversely if the date for redemption has not arisen, foreclosure cannot take place even if the agreed interest has not been paid: *Williams v Morgan* [1906] 1 Ch D 804

19 And if the mortgagee sues the mortgagor on the personal covenants in the mortgage, the right of redemption is revived: *Lockhart v Hardy* (1846) 9 Beav 349, 50 ER 378.

20 *Perry v Barker* (1806) 13 Ves Jun 198, 33 ER 269.

21 *London & Midland Bank v Mitchell* [1899] 2 Ch 161.

22 On the meaning of "present right to receive", see *Mulder v Mulder* (1939) 42 WALR 38. *Ingram v Mohren* (1993) 10 WAR 497.

deals also with judgments and liens, and it expressly refers to the possibility that the running of the period may be delayed by later acknowledgment or payment.[23]

15.10 It should be noted that there is a distinction between the right to sue on the personal covenant in the mortgage and the right to recover money by process against the land (such as an application for the appointment of a receiver). The action referred to in section 32(1) is an action brought against the land. The limitation provisions applicable to the personal covenant to repay depend on whether or not the mortgage is contained in a deed. If it is, the limitation periods for deeds apply and the period is 20 years.[24] If it is not, the limitation period is the six year period applicable to actions in contract.[25] It was held in England that the equivalent of section 32(1) also applied to actions on the personal covenant,[26] but it appears that this is not so in Western Australia, since the deeds provision is expressly made subject to section 32.[27]

15.11 Section 32(1) does not extinguish title, but merely bars the right to sue, and therefore does not affect the right of the mortgagee to sue on the personal covenant to repay.[28] Conversely, title to the land may survive even though the personal covenant is no longer available.[29]

15.12 For mortgages of personalty, the limitation period differs according to whether or not the mortgage is contained in a deed. If it is, the limitation period is the 20 year period which applies to actions on a specialty.[30] Where the mortgage is not contained in a deed, the six year limitation period for actions in contract[31] applies.[32]

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23 S 32(1) is based on *Real Property Limitation Act 1833* (UK) s 40 as amended by *Limitation Act 1874* (UK) s 8. The section "extends to an action or suit on a covenant by a mortgagor in a mortgage deed, or on a collateral bond by the mortgagor securing the mortgage debt; and to an action on a covenant [sic] in a deed to secure the payment of a rent charge": *Limitation Act 1935* s 32(2). See *Metro Industries Ltd v Bussell* (unreported) Supreme Court of Western Australia, 21 January 1982, 1444 of 1979.

24 *Limitation Act 1935* s 38(1)(e)(i).

25 Id s 38(1)(c)(v).

26 *Sutton v Sutton* (1882) 22 Ch D 511, a decision which "surprised the legal world": E I Sykes and S Walker The *Law of Securities* (5th ed 1993) 931.

27 See E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 933-935. *Hipworth v Mahar* (1952) 87 CLR 335, which deals with the position under earlier Victorian legislation, is not conclusive because of the differences in the legislative provisions. The position may be different In South Australia: Sykes and Walker 935.

28 *National Bank of Tasmania Ltd (in liq) v McKenzie* [1920] VLR 411.

29 *Levy v Williams* [1925] VLR 615.

30 *Limitation Act 1935* s 38(1)(e)(i).

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

32 The provisions relating to mortgages of land have no application: *Barnes v Glenton* [1899] 1 QB 885, but see *National Bank of Tasmania Ltd (in liq) v McKenzie* [1920] VLR 411.

(e) Action by mortgagee to recover interest

15.13 Under section 34 of the *Limitation Act*, actions for interest in respect of money charged on land or rent, and damages in respect of such arrears, are barred six years after the interest becomes due.[33] The section also applies to interest on legacies, and provides for the possibility of the running of time being delayed by a later acknowledgment. In Western Australia, it is clear that section 34 applies to the exclusion of section 38(1)(e)(i), which provides a 20 year limitation period for specialty debts and interest thereon.[34]

15.14 In the case of a mortgage of personalty contained in a deed, the limitation period is 20 years, under the provisions which apply to specialty debts.[35] If the mortgage is not contained in a deed, the limitation period is six years.[36]

3. THE LAW ELSEWHERE

15.15 There are a few jurisdictions which, like Western Australia, retain the old English provisions in substantially unaltered form. This is the case in South Australia,[37] and in the three Canadian provinces of Newfoundland,[38] Nova Scotia[39] and Ontario.[40] The only difference of major importance from Western Australia is the length of the limitation period, which varies according to the length of the limitation period for actions for the recovery of land. Thus, instead of the 12 year period in Western Australia, the limitation period is 10

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33 The provision reproduces *Real Property Limitation Act 1833* (UK) s 42.

34 In England the position was unclear. The equivalent provisions were contained in two different Acts passed within three weeks of each other: *Real Property Limitation Act 1833* (UK) s 42; *Civil Procedure Act 1833* (UK) s 3. It was held that they had to be read together, so that the *Civil Procedure Act 1833*, which contained the provision on specialties, was treated as withdrawing the action on the personal covenant from the purview of the *Real Property Limitation Act 1833*: *Hunter v Nockolds* (1850) 1 Mac & G 640, 41 ER 1413; see also *McKillop v McPaul* (1912) 13 SR(NSW) 171. As a result, 20 years' interest was recoverable in an action on the personal covenant. In Western Australia, because s 38(1)(e)(i) is expressly made subject to s 34, the result will be different. In South Australia the position is more complex. See El Sykes and S Walker *The Law of Securities* (5th ed 1993) 938-940.

35 *Limitation Act 1935* s 38(1)(e)(i). See *Weigall v Gaston* (1877) 3 VLR(L) 294.

36 *Limitation Act 1935* s 38(1)(c)(i).

37 *Limitation of Actions Act 1936* (SA) ss 27(1) (redemption of land), 12 (possession of land), 33(1) (recovery of money), 35(e) (interest). The limitation period is 15 years, rather than 12. There are some differences from Western Australia as regards the detailed Interpretation of certain provisions: see nn 27 and 34 above.

38 *Limitation of Realty Actions Act 1990* (Nfd) ss 23 (redemption of land), 24 (recovery of money), 25 (interest). There is no provision on possession of land.

39 *Limitation of Actions Act 1989* (NS) ss 23 (recovery of money), 24 (possession of land), 26 (interest). There is no provision on redemption.

40 *Limitations Act 1990* (Ont) ss 17 (interest), 19 (redemption of land), 22 (possession of land), 23 (recovery of money).

years in Ontario, 15 years in South Australia and 20 years in the other two jurisdictions. Each of these jurisdictions distinguish between mortgages of land and mortgages of personalty, and as regards the latter there are some actions which are not covered by statutory provisions.

15.16 However, most jurisdictions have long since modernised this area of the law. As with other areas of equity, there have been successive waves of reform, each building on the improvements effected by the previous one.

(a) The first wave of reform: England

15.17 The report of the Wright Committee commented on a number of aspects of the old law relating to mortgages then in force in England. It noted that there was no period for the recovery of money charged on personal property, whether for principal or interest, with the result that it was necessary to rely on provisions of the Act dealing with other kinds of debts, which distinguished between specialty and other debts. It also noted that there was no limitation period for a foreclosure action in respect of mortgaged personalty.[41]

15.18 The English *Limitation Act 1939* which implemented the Committee's recommendations provided a single limitation period of 12 years for the recovery of money secured by a mortgage or other charge on property, whether real or personal,[42] and ensured that a six year period applied to actions for interest in all cases.[43] However, as regards all the other provisions, the separation between mortgages of land and mortgages of personalty was maintained -

(a) Possession: As regards mortgages of land, the ordinary provisions relating to the recovery of land[44] applied. The limitation period for mortgages of personalty was the six year period for recovery of chattels.[45]

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41 Wright Committee Report (1936) para 10.

42 *Limitation Act 1939* (UK) s 18(1).

43 Id s 18(5). Even if the promise to pay interest is in the form of a deed, the limitation period is still six years, because the provisions relating to deeds do not apply to an action for which a shorter limitation period is provided by another provision of the Act: *Limitation Act 1939* (UK) s 2(3). The provisions in Tasmania and Victoria are somewhat different. Instead of provisions dealing specifically with interest on mortgages, along the lines of s 18(5), the general provisions on interest in *Limitation Act 1974* (Tas) s 4(5) and *Limitation of Actions Act 1958* (Vic) s 5(7) apply whether the arrears are payable in respect of a specialty, judgment, legacy, mortgage or otherwise. *Limitation of Actions Act 1974* (Qld) s 26(5) follows the English model.

44 *Limitation Act 1939* (UK) s 4(3).

45 Id s 2(1)(a).

(b) Foreclosure: As regards mortgages of land, an action for foreclosure was an action for recovery of land,[46] and therefore the provisions relating to actions for the recovery of land applied. Mortgages of personalty were now subject to a statutory limitation period of 12 years.[47] Mortgages of land and of personalty thus continued to be dealt with separately, even though the length of the applicable limitation period was the same in each case.

(c) Redemption: The section dealing with redemption by a mortgagor continued to be limited to mortgages of land.[48] There was still no statutory limitation period for redemption of mortgaged personalty, which continued to be governed by equitable rules.[49]

The 1939 Act also adopted recommendations of the Wright Committee under which the rights to recover principal money or to foreclose were not deemed to accrue where the mortgaged property comprised a future interest or a life insurance policy which had not matured.[50]

15.19 This legislation, while bringing about considerable improvements, thus retained some of the complications and anomalies of the old law. There has been no change of any significance to the law in England since 1939. The Orr Committee in 1977 did not recommend any changes,[51] and the *Limitation Act* of 1980[52] reproduced the 1939 provisions with only one minor alteration.[53]

15.20 Provisions based on those of the English 1939 Act have also been adopted in Victoria,[54] Queensland,[55] Tasmania[56] and New Zealand.[57] The limitation period is 15 years in

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46 See para 15.7 above.

47 *Limitation Act 1939* (UK) s 18(2). Nothing in the section applied to foreclosure actions in respect of mortgaged land: id s 18(4).

48 Id s 12.

49 In the view of the Wright Committee, imposing a statutory limitation period in such a case would cause difficulties in banking practice: Wright Committee Report (1936) para 10.

50 *Limitation Act 1939* (UK) s 18(3), (5)(b). It is also provided that the mortgage provisions do not apply to any mortgage or charge on a ship: id s 18(6).

51 On Committee Report (1977) paras 3.65-3.70.

52 *Limitation Act 1980* (UK) s 20.

53 The omission of s 18(6) of the *Limitation Act 1939* (UK), providing that s 18 did not apply to any mortgage or charge on a ship.

54 *Limitation of Actions Act 1958* (Vic) ss 15 (redemption of land), 20 (recovery of money, foreclosure). As to interest, see para 15.18 n 43 above.

Victoria and 12 years in the other three jurisdictions. The legislation in Victoria and Tasmania expressly provides that it applies to applications for foreclosure under the Torrens legislation.[58]

(b) The second wave of reform: New South Wales

15.21 The 1967 report of the New South Wales Law Reform Commission commented that the English *Limitation Act 1939* went some way towards simplifying the law, but that the reforms to be recommended by the New South Wales Commission were more far-reaching.[59] Key features of the New South Wales proposals were that the provisions were to apply alike to all mortgages, both of land and of personalty, and that no remedy was to be left without a limitation period. These recommendations have been adopted in New South Wales and also in the Northern Territory and the Australian Capital Territory. In these three jurisdictions the law is as follows -

(a) Redemption: There is a limitation period of 12 years for an action to redeem mortgaged property, whether the property is land or personalty.[60] (Thus, unlike the statutes previously considered, there is a statutory limitation period for actions to redeem mortgaged personalty.) The limitation period is stated to run from the date the mortgagee goes into possession, unless there is a later payment of principal money or interest, in which case the period runs from the date of payment. Thus, as in other jurisdictions, the limitation period only runs while the mortgagee is in possession of the property.

(b) Possession and foreclosure: A limitation period of 12 years applies, whether the property is land or personalty.[61]

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55 *Limitation of Actions Act 1974* (Qld) ss 20 (redemption of land), 26 (recovery of money, foreclosure, interest).

56 *Limitation Act 1974* (Tas) ss 18 (redemption of land), 23 (recovery of money, foreclosure). As to interest, see para 15.18 n 43 above.

57 *Limitation Act 1950* (NZ) ss 16 (redemption of land), 20 (recovery of money, foreclosure, interest).

58 *Limitation of Actions Act 1958* (Vic) s 29; *Limitation Act 1974* (Tas) s 34.

59 NSW Report (1967) para 204.

60 *Limitation Act 1969* (NSW) s 41; *Limitation Act 1981* (NT) s 26; *Limitation Act 1985* (ACT) s 23. In New South Wales, the running of the period extinguishes the mortgagor's title: *Limitation Act 1969* (NSW) s 65 and Sch 4.

61 *Limitation Act 1969* (NSW) s 42(1)(b) and (c); *Limitation Act 1981* (NT) s 27(1)(b) and (c); *Limitation Act 1985* (ACT) s 24(1)(b) and (c). In New South Wales, the running of the limitation period extinguishes the mortgagee's title: *Limitation Act 1969* (NSW) s 65 and Sch 4, but this is not so in the Northern Territory. In the Australian Capital Territory, as a result of *Limitation Act 1985* (ACT) s 43(1), the

(c) Action to recover principal money: A limitation period of 12 years applies to recover principal money secured by mortgage, whether the secured property is land or personalty.[62]

(d) Action to recover interest: There is a specific provision dealing with actions to recover interest secured by a mortgage, whether of land or personalty.[63] The action is not maintainable after a six year period running from the date on which the cause of action accrues, or after the running of the limitation period for the cause of action to recover the principal money, whichever period expires first.[64]

15.22 Some years earlier, the principle that the same rules should apply to all mortgages, whether of land or personalty, had been adopted in part by the Canadian jurisdictions which enacted the Canadian *Uniform Limitation of Actions Act 1931* or used it as a model. In this legislation the provisions on redemption and foreclosure are placed in a separate Part of the Act headed "Mortgages of Real and Personal Property", and the provisions specifically provide that they apply to both real and personal property.[65] However, the provisions on recovery of money are limited to money charged on land and bear a close resemblance to provisions based on the older English legislation such as section 32(1) of the Western Australian *Limitation Act*, particularly in that they apply not only to mortgages but also to

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running of the period extinguishes the mortgagee's title in respect of a mortgage of personalty, but this does not happen in the case of a mortgage of realty: see E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 919-920, 953-954.

62 *Limitation Act 1969* (NSW) s 42(l)(a); *Limitation Act 1981* (NT) s 27(1)(a); *Limitation Act 1985* (ACT) s 24(l)(a). In New South Wales, the running of the limitation period extinguishes the mortgagee's title: *Limitation Act 1969* (NSW) s 65 and Sch 4: see E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 937.

63 *Limitation Act 1969* (NSW) s 43; *Limitation Act 1981* (NT) s 28; *Limitation Act 1985* (ACT) s 25

64 The limitation provision applies not only to interest on a personal action by the mortgagor but also to recovery of interest through sale or appointment of a receiver: see E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 940-941.

65 See eg *Limitation of Actions Act 1987* (Man) ss 40-41; *Statute of Limitations 1988* (PEI) ss 34-35; *Limitation of Actions Act 1978* (Sask) ss 33-34; note also *Limitation of Actions Act 1980* (Alta) ss 33-34, now repealed by *Limitations Act 1996* (Alta) s 16. See also *Limitation of Actions Act 1973* (NB) ss 46-47.

judgments, liens and legacies.[66] The provisions on recovery of interest likewise resemble the equivalent provision in the older English legislation.[67]

(c) The third wave of reform: British Columbia

15.23 Reform of the limitation provisions relating to mortgages has been taken a stage further in the reports of the Law Reform Commissions of Ontario and British Columbia, the recommendations of which became law in British Columbia in 1975. In essence, the aim of these proposals is to reduce the differences between the limitation rules for actions on mortgages and other related actions to the greatest extent possible. A feature of these proposals is the emphasis placed on the propositions that a limitation period only applies in a redemption action when the mortgagee is in possession of the mortgaged property, and in actions to recover possession or foreclose when the mortgagor is in possession. The British Columbia Act specifically provides that a debtor in possession of collateral may bring an action to redeem the collateral, and a secured party in possession of collateral may bring an action to realise on the collateral, at any time and that they are not governed by a limitation period.[68]

15.24 Otherwise, the Act provides a six year limitation period for actions for redemption by a debtor and for realisation of the security by the secured party.[69] The period is exactly the same as that for damages for the conversion or detention of goods, for the recovery of goods wrongfully taken or detained, and for an action by a tenant against a landlord for the possession of land.[70] Actions to recover the money due under a mortgage, or for interest, would be subject to the general six year limitation period.[71] These provisions reflect a general principle that actions to enforce the various obligations created by mortgages do not need to be made subject to a limitation period which is any longer than that for most other kinds of action. In the words of a Canadian author: "A mortgage is simply a debt with a remedy against the property in default and the character of that property should make little

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66 See eg *Statute of Limitations 1988* (PEI) s 11; *Limitation of Actions Act 1978* (Sask) s 12; note also *Limitation of Actions Act 1980* (Alta) s 14, now repealed by *Limitations Act 1996* (Alta) s 16. See also *Limitation of Actions Act 1973* (NB) s 25. *Limitation of Actions Act 1987* (Man) s 21 is an exception, being restricted to the recovery of money charged on land.

67 See eg *Limitation of Actions Act 1987* (Man) s 23; *Limitation of Actions Act 1978* (Sask) s 14; note also *Limitation of Actions Act 1980* (Alta) s 15, now repealed by *Limitations Act 1996* (Alta) s 16. See also *Limitation of Actions Act 1973* (NB) s 27. There is no equivalent in the *Statute of Limitations 1988* (PEI).

68 *Limitation Act 1979* (BC) s 3(3)(d) and (e).

69 Id s 3(5)(a) and (b).

70 Id s 3(5)(c)-(e).

71 Id s 3(4).

difference."[72] Subsequent reform proposals in other Canadian provinces have generally espoused similar views.[73] By way of background to these proposals, it should be noted that the British Columbia Act adopted the recommendation of its Law Reform Commission to abolish the acquisition of title by adverse possession,[74] so that there would ordinarily be no time limit on actions to recover land, and that this has been supported by some other Canadian commissions.[75]

(d) The most recent reform proposals

15.25 The most recent reforms or proposed reforms in Alberta, Ontario and New Zealand apply much of the thinking developed in Ontario and British Columbia. These initiatives have in common the aim of replacing the multiple limitation periods presently existing by a single limitation period (New Zealand) or two limitation periods which each apply to all classes of claim (Alberta and Ontario).

15.26 It appears that the aim of the Alberta reforms is that all mortgage claims should be subject to the discovery and ultimate periods. The Alberta Report for Discussion made exceptions for the two principles found in the British Columbia Act under which no limitation period applies to proceedings by a debtor in possession of collateral to redeem it, or to proceedings by a creditor in possession of collateral to realise it,[76] but otherwise proposed no special provisions for mortgages. The Alberta Report went one step further by eliminating even these two exceptions, though the report is uninformative as to why this was done.[77] The legislative scheme outlined in the report has now been adopted by the *Limitations Act 1996*.

15.27 The Ontario Limitations Bill, on the other hand, retains most of the special rules for mortgages. It adopts the two British Columbia principles referred to in the previous

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72 J Williams *Limitation of Actions in Canada* (2nd ed 1980) 124.

73 See Newfoundland Working Paper (1985) 139-146 and Newfoundland Report (1986); Saskatchewan Report (1987) 25-28.

74 *Limitation Act 1979* (BC) s 12: see British Columbia Report (1974) 45-50.

75 Saskatchewan Report (1987) 23-25; contra, Newfoundland Working Paper (1985) 113-129. The Ontario Law Reform Commission refrained from making a recommendation because the matter was under review at the time of its report: Ontario Report (1969) 67

76 Alberta Report for Discussion (1986) paras 3.74-3.82.

77 As to the redemption of secured property by a debtor, the report says: "[T]he right to redeem is protected by our recommendation for claims added to a proceeding". As to the realisation of a security interest by a security party in rightful possession of secured property it says: "[I]t would be uncommon for a security holder to hold on to the security, and more uncommon still for the security holder to need the court to help him dispose of it": Alberta Report (1989) 39-40.

paragraphs,[78] but retains all the existing mortgage provisions located in Part I of the present Ontario Act.[79]

15.28 The proposals of the New Zealand Report are more radical than any other. The New Zealand Law Commission, which advocates the abolition of adverse possession,[80] recommends the repeal of the provisions on mortgages in the existing Act and instead that claims on mortgages should be governed by the general three year limitation period, subject to the possibility of extension, limited in turn by the 15 year long stop provision. It says that there should be no distinction between secured and unsecured property, or whether or not the mortgage is contained in a deed.[81]

4. THE COMMISSION'S RECOMMENDATIONS

15.29 The Commission has recommended in Chapter 14 that the general principles of limitation recommended in this report should not be applied to actions for the recovery of land, because in relation to such actions the running of the limitation period does not simply bar the right to sue, but has the positive effect of transferring title from one person to another.[82] This reasoning does not apply to actions relating to mortgages. Though the exercise of the remedy will affect the property rights of the parties - thus, for example, an action for redemption will if successful restore to the mortgagor full rights in the property to the exclusion of those of the mortgagee, and if unsuccessful will give the mortgagee full rights to the exclusion of the mortgagor,[83] and foreclosure will make the mortgagee into a full owner[84] - the running of the limitation period in such cases will simply bar the mortgagor's right to redeem or the mortgagee's right to recover possession, foreclose or recover money due under the mortgage, and the property rights of the parties will remain unaffected.

15.30 It is therefore necessary to consider whether it is appropriate for the two general limitation periods recommended by the Commission to apply to the various actions brought

78 Limitations Bill 1992 (Ont) cl 16(f) and (g).

79 Note also id cl 26, under which a new s 43 will be added to the *Limitations Act 1990* (Ont) providing that an action on a covenant contained in an indenture of mortgage made after 1 July 1894 to repay the money secured by a mortgage is subject to a 10 year limitation period, as is an action by a mortgagee against a grantee of the equity of redemption under s 20 of the *Mortgages Act 1990* (Ont). On the Ontario proposals, see Ontario Report (1991) 49-50.

80 New Zealand Report (1988) paras 359-362.

81 Id paras 363-364.

82 See paras 14.32-14.35 above.

83 See E I Sykes and S Walker *The Law of Securities* (5th ed 1993) 81.

84 Id 288.

by a mortgagor and mortgagee. The law in British Columbia has brought mortgage claims within the ambit of the general limitation rules,[85] and a similar reform has been enacted in Alberta and is recommended in New Zealand.[86] However, in British Columbia the standard period which now applies to mortgage claims is a six year period. The effect of applying the Commission's recommendations would be that all actions relating to mortgages - not just those for recovery of money but also those for redemption, recovery of possession or foreclosure -would ordinarily be subject to a three year limitation period, since the discovery period will begin immediately unless the constituent requirements of knowledge are not satisfied.

(a) Mortgages of land

15.31 As regards mortgages of land, this would not be a satisfactory result. Three years is not long enough to achieve a fair balance between the interests of the parties. If the mortgagor only has 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 which was developed many years ago by the Court of Chancery for the mortgagor's protection. 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 either of mortgagors or of society generally. The Commission does not believe it would be right for it to make any recommendation that would increase repossessions and mortgagee sales, at a time when economic circumstances make such events all too common.

15.32 Nor would it be satisfactory to preserve the existing 12 year periods for redemption, recovery of possession and foreclosure while subjecting actions for recovery of principal money and interest to the two general limitation periods. Actions on the personal covenants cannot be divorced from the other remedies in this way. If a mortgagee only has three years in which to bring an action on the personal covenants to compel the repayment of money owed to him, it is likely that he will want to exercise other remedies such as foreclosure at the same time, as a kind of insurance against non-payment. The benefits of longer limitation periods for such remedies would be nullified.

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85 See paras 15.23-15.24 above.

86 See paras 15.25-15.28 above.

15.33 The Commission has therefore concluded that it is not desirable for the full force of its proposed scheme to apply to any of the actions relating to mortgages. One possible alternative is simply to preserve the existing rules, under which a 12 year limitation applies to all the actions in question, save for the recovery of interest to which a six year limitation period applies.[87] However, the Commission is reluctant to preserve another set of special rules unless there is no other satisfactory alternative. Its preference is to create a partial, rather than a total, exception to the standard scheme, and subject mortgage claims to the ultimate period only. As regards claims for redemption, recovery of possession, foreclosure, or recovery of principal, the result of this will be that a 15 year period will apply to such claims rather than the 12 years of the present law. This does not represent a major change, and underlines the point made above[88] that actions on a mortgage are not the same as actions for the recovery of land: there is no necessity to have a 12 year limitation period for actions relating to mortgages of land simply because that is the period which applies to actions for the recovery of real property. As regards claims for interest, the change will be greater, because 15 years' interest will be recoverable rather than the six years' interest allowed under the present law. The Commission has recommended that actions for arrears of interest should be treated in the same way as the obligation to pay the principal debt.[89] In most cases, this will mean that the two standard limitation periods apply. However, if only the ultimate period applies to mortgages, it must logically follow that it should apply to claims for interest due under a mortgage. The Commission therefore **recommends** that in the case of 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.

(b) Mortgages of personalty

15.34 An examination of the provisions on mortgages of personalty in the other jurisdictions analysed above reveals that there are two basic issues which arise. The first is whether it is desirable for all actions relating to mortgaged personalty to be covered by statutory limitation periods. As pointed out above,[90] in Western Australia actions for redemption and foreclosure of mortgages of personalty are not at present subject to any statutory limitation period.

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87 See paras 15.2-15.14 above.
88 Para 15.29.
89 See para 12.60 above.
90 Paras 15.4 and 15.8.

Among Australian jurisdictions, only in New South Wales and the two Territories do the Limitation Acts give comprehensive coverage of all actions relating to mortgages of personalty.[91] In Victoria and the other jurisdictions modelled on the English legislation, there is still no statutory period for redemption actions in such a case.[92] The second issue is whether the limitation periods for mortgages of land and for mortgages of personalty should be the same. The New South Wales Law Reform Commission recommended that the periods should be made uniform in the interests of simplifying the law,[93] but did not provide any further justification for subjecting all claims relating to mortgages of personalty to a 12 year period.

15.35 The Commission is in favour of making actions for redemption and foreclosure of mortgaged personalty subject to a statutory limitation period, and so **recommends**. In this report it has taken the general view that limitation periods ought to apply to all actions of equitable origin which are not presently subject to a statutory period.[94] However, it does not agree that it is appropriate for all kinds of mortgaged property to be governed by the same limitation rules. The considerations that influenced the Commission in making its recommendations about mortgages of realty - the importance of not encouraging the precipitate enforcement of the security, to the detriment of mortgagee occupiers - do not apply with the same force to mortgaged personalty. There is no reason why the limitation period for recovery of a chattel should be any longer where the plaintiff is enforcing a security right than in any other case. In this context, the Commission agrees with the British Columbia Law Reform Commission that the limitation period should be exactly the same as that which applies to actions of detinue and conversion.[95] Accordingly, it **recommends** that there should be no special limitation rules for mortgages of personalty. The effect of this recommendation will be that such actions, like nearly all others, will be governed by the general discovery and ultimate periods.

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91 See para 15.21 above.
92 See para 15.18 above.
93 NSW Report (1967) para 204.
94 See paras 13.61-13.70 above.
95 See paras 15.23-15.24 above.

Chapter 16

ACTIONS FOR THE RECOVERY OF TAX

1. THE PRESENT LAW

16.1 Section 37 A of the *Limitation Act 1935*, added to the Act in 1978,[1] provides that "[a]ll actions, suits, and other proceedings to recover from the Crown or the Government or the State or any Minister of the Crown, or from any body corporate, officer, or person or out of any fund to whom or to which it was paid, the amount or any part of the amount of any tax, fee, charge, or other impost paid under the authority or purported authority of any Act"[2] are to be commenced within 12 months of the date of payment.[3] Where the money was paid before the coming into operation of the section, the Act provided that the limitation period was to be the period within which the action might have been brought but for the coming into operation of the section, or 12 months after the coming into operation of the section, whichever period expired first.[4] Any action brought after the expiration of the relevant period is void.[5] However, the provisions do not apply to an action brought pursuant to any statutory provision providing for the mode of challenge in respect of a liability for, or the recovery of, any tax, fee, charge or other impost actually paid.[6]

16.2 This provision was introduced to protect the State's revenues so as to ensure that, if an impost were held to be beyond its legislative competence, actions for recovery would be limited to 12 months from the date of the payment.[7] It followed similar legislation enacted in Victoria in 1961[8] and New South Wales in 1963.[9]

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1 By the *Limitation Act Amendment Act 1978* s 2.
2 *Limitation Act 1935* s 37 A(1).
3 Id s 37 A(2)(b).
4 Id s 37 A(2)(a).
5 Id s 37 A(3).
6 Id s 37 A(4).
7 See Western Australia *Parliamentary Debates* (1978) vo1 218, 225.
8 *Limitation of Actions Act 1958* (Vic) s 20A, added by the *Limitation of Actions (Recovery of Imposts) Act 1961* (Vic) s 2.
9 *Limitation of Actions (Recovery of Imposts) Act 1963* (NSW), renamed the *Recovery of Imposts Act* by the *Limitation of Actions (Recovery of Imposts) Amendment Act* 1993 (NSW) s 3 and Sch 1 para 2.

2. RECENT DEVELOPMENTS IN OTHER AUSTRALIAN JURISDICTIONS

16.3 In all Australian jurisdictions except Western Australia, provisions were added to the Limitation Acts[10] late in 1993 or early in 1994 to impose a short limitation period for the recovery of money paid by way of tax on the ground of the invalidity or purported invalidity of the statutory provisions imposing the tax in question. These developments came about as a result of the *Capital Duplicators case,*[11] in which the High Court heard argument in April 1993. The issue raised in this case related to the validity of a backdated licensing scheme in the Australian Capital Territory involving X-rated videos. The *Business Franchise ("X" Videos) Act 1990* of the Australian Capital Territory purported to establish a licensing scheme regulating the wholesaling and retailing of X-rated videos. Fees were payable on application for or renewal of a monthly licence, in particular an "advance fee" payable on initial grant or first renewal of a licence, and a "franchise fee" calculated by reference to the month being two months before that in which renewal was sought. This scheme was similar to the backdated licensing or business franchise schemes operated by all States and Territories in respect of tobacco, petroleum products and liquor, schemes which had been approved in a number of High Court cases following on the *Dennis Hotels case*[12] in 1960. In the *Capital Duplicators case*, the appellants in the High Court sought to challenge the validity of the legislation on the ground that it infringed section 90 of the Commonwealth Constitution, which gives the Commonwealth exclusive power to impose duties of customs and excise.

16.4 Following the argument in this case, it was widely believed that the High Court might rule such schemes invalid (as indeed it duly did when judgment was eventually given in December 1993). This caused widespread concern in all States and Territories, because of the possibility that they could be subjected to claims for the repayment of large amounts of money exacted as taxes which were now recognised to have been invalidly levied.[13] It was suggested that the sums involved amounted to some 3.8 billion dollars - 1.389 billion dollars in New South Wales, 249.3 million dollars in the Northern Territory, 60 million dollars in the Australian Capital Territory, and more than two billion dollars in the remaining States. The

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10 In New South Wales, to the *Recovery of Imposts Act 1963* (NSW).

11 *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2) (1993) 178 CLR 561.

12 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529.

13 See South Australia *Parliamentary Debates*, House of Assembly, 4 May 1993, p 3365; Northern Territory *Parliamentary Debates*, Legislative Assembly, 26 May 1993; Victorian *Parliamentary Debates*, Legislative Assembly, 21 October 1993, p 1207; Tasmania *Parliamentary Debates*, House of Assembly, 9 November 1993, p 6230; Queensland *Parliamentary Debates*, 9 November 1993, p 5474; New South Wales *Parliamentary Debates,* Legislative Assembly, 17 November 1993, p 5566; Australian Capital Territory *Parliamentary Debates* 23 November 1993, p 3985.

problem was magnified by another recent High Court decision, *David Securities Pty Ltd v Commonwealth Bank of Australia*,[14] in which the court repudiated the traditional rule that money paid under a mistake of law was irrecoverable[15] and held that a restitutionary claim for the recovery of money paid under a mistake on the ground of unjust enrichment would lie whether the mistake were one of law or of fact. This decision would make it possible for those who had paid tax under the mistaken assumption that it was validly levied to bring actions for its recovery.[16] Accordingly, at a meeting of the Solicitors-General of the Commonwealth, the States and the Northern Territory it was agreed that States and Territories should attempt to minimise the potential impact of these claims by the enactment of a limitation period within which claims for refunds of taxes paid under invalid legislation might be instituted.

16.5 Accordingly, between 5 October and 23 December 1993 New South Wales, Victoria, Queensland, Tasmania and the two Territories passed such legislation.[17] South Australia, which had passed legislation earlier in the year,[18] amended it in mid 1994.[19] The legislative provisions differ in a number of details, but have a common core of provisions, as follows -

(1) An action to recover money paid by way of tax or purported tax[20] cannot be brought more than six months[21] (in New South Wales, Queensland and Victoria, more than 12 months[22]) after the date on which it was paid.

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14 (1992) 175 CLR 353.

15 *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448.

16 Some other recent decisions caused particular concern is some States: the House of Lords decision in *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70 which had ruled that tax payments made pursuant to an ultra vires demand by the tax authority were prima facie recoverable whether or not they were voluntary: see South Australia *Parliamentary Debates*, House of Assembly, 4 May 1993, p 3365; and in Victoria the possibility of the High Court upholding the decision of the Appeal Division of the Victorian Supreme Court in *Royal Insurance Australia Ltd v Comptroller of Stamps* (Vic) (1992) 23 ATR 528 that s 20A of the *Limitation of Actions Act 1958* (Vic) (see para 16.2 above) did not apply to mandamus proceedings: see Victoria *Parliamentary Debates*, Legislative Assembly, 21 October 1993, p 1207. The High Court ultimately upheld the decision of the Victorian Appeal Division, confirming that s 20A did not apply to mandamus proceedings because they were not proceedings for the recovery of money: *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

17 *Limitation Amendment Act 1993* (ACT); *Limitation of Actions (Recovery of Imposts) Amendment Act 1993* (NSW); *Limitation Amendment Act 1993* (NT); *Limitation of Actions Amendment Act 1993* (Qld); *Limitation of Actions (Amendment) Act 1993* (Vic); *Limitation Amendment Act 1993* (Tas).

18 *Limitation of Actions (Mistake of Law or Fact) Amendment Act 1993* (SA).

19 *Limitation of Actions (Recovery of Taxes and Substantive Law) Amendment Act 1994* (SA).

20 Generally defined to include fees, charges and other imposts: *Recovery of Imposts Act 1963* (NSW) s 1A; *Limitation of Actions Act 1974* (Qld) s 10A(6); *Limitation of Actions Act 1958* (Vic) s 20A(5). In the Northern Territory and Tasmania, the legislation refers to "tax, fee, charge or other statutory impost" throughout. There are slightly different definitions in *Limitation Act 1985* (ACT) s 21A(4) and *Limitation of Actions Act 1936* (SA) s 38(4).

21 *Limitation Act 1985* (ACT) s 21A(1); *Limitation Act 1981* (NT) s 35D(1); *Limitation of Actions Act 1936* (SA) s 38(2)(a); *Limitation Act 1974* (Tas) s 25D(2).

(2) These provisions do not apply to an action for recovery of an amount that would have been recoverable as an overpayment if the purported tax had been valid.[23]

(3) There are provisions which provide an essentially similar limitation period for payments made before the commencement of the amending legislation.[24]

(4) The limitation period set by these provisions cannot be extended.[25]

(5) Where an action is not brought within the specified limitation period, the right to recover the money is extinguished.[26]

(6) The provisions apply notwithstanding any other laws which provide the contrary.[27]

(7) These provisions are part of the substantive law.[28]

Some jurisdictions also have a provision, evidently one approved by the meeting of Solicitors General,[29] to the effect that proceedings to recover an amount paid are maintainable only to

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22 *Recovery of Imposts Act 1963* (NSW) s 2(1), and see also ss 2(3) and 3(1)-(3); *Limitation of Actions Act 1974* (Qld) s 10A(1); *Limitation of Actions Act 1958* (Vic) s 20A(1)-(2). In Victoria, where money paid by way of tax under a mistake is recoverable on some ground not involving the invalidity of an Act, a longer period may apply if another Act so provides: id s 20A(1).

23 *Limitation Act 1985* (ACT) s 21A(2); *Recovery of Imposts Act 1963* (NSW) s 3(4); *Limitation Act 1981* (NT) s 35D(2); *Limitation of Actions Act 1974* (Qld) s 10A(2); *Limitation of Actions Act 1936* (SA) s 38(2); *Limitation Act 1974* (Tas) s 25D(3); *Limitation of Actions Act 1958* (Vic) s 20A(3). In New South Wales, the legislation must provide for the refund of the money.

24 *Limitation Amendment Act 1993* (ACT) s 7; *Recovery of Imposts Act 1963* (NSW) s 7(3); *Limitation Act 1981* (NT) s 35C; *Limitation of Actions Act 1974* (Qld) s 44; *Limitation of Actions Act 1936* (SA) s 38(2)(b); *Limitation Act 1974* (Tas) s 25D(1); *Limitation of Actions (Amendment) Act 1993* (Vic) s 6.

25 *Limitation Act 1981* (NT) s 35E; *Limitation of Actions Act 1974* (Qld) s 10A(3); *Limitation of Actions Act 1936* (SA) s 38(3); *Limitation Act 1974* (Tas) s 25E; *Limitation of Actions Act 1958* (Vic) s 20A(4).

26 *Recovery of Imposts Act 1963* (NSW) s 5; *Limitation Act 1981* (NT) s 35D(4); *Limitation of Actions Act 1974* (Qld) s 10A(3); *Limitation of Actions Act 1936* (SA) s 38(3); *Limitation Act 1974* (Tas) s 25D(5).

27 *Recovery of Imposts Act 1963* (NSW) s 7(2); *Limitation Act 1981* (NT) s 35A; *Limitation of Actions Act 1974* (Qld) s 10A(4); *Limitation Act 1974* (Tas) s 25B; contra, *Limitation of Actions Act 1936* (SA) s 38(5).

28 *Limitation Act 1985* (ACT) s 21A(3); *Recovery of Imposts Act 1963* (NSW) s 6; *Limitation Act 1981* (NT) s 35D(3); *Limitation of Actions Act 1974* (Qld) s 10A(5); *Limitation of Actions Act 1936* (SA) s 38A; *Limitation Act 1974* (Tas) s 25D(4).

29 See Tasmania *Parliamentary Debates*, House of Assembly, 9 November 1993, p 6230.

the extent that the claimant satisfies the court that he has not passed on either part or the whole of the amount paid to anyone else.[30]

3. THE COMMISSION'S RECOMMENDATIONS

16.6 No equivalent legislation has yet been enacted in this State. Although section 37A of the *Limitation Act 1935* already provides a one year limitation period for actions to recovery money paid as tax, it does not contain the other provisions enacted elsewhere in 1993, perhaps the most important of which is the distinction between the recovery of an amount which would have been an overpayment had the tax been valid and other cases.

16.7 It is clear to the Commission that it is not appropriate that actions for the recovery of tax which it is later shown has been invalidly levied should be subjected to the two general limitation principles which it has recommended in this report. Considerations relating to the safeguarding of the State's revenues make it necessary to have a short limitation period, and it is desirable that the attitudes of all the Australian States and Territories to this problem should be as uniform as possible. However, there seems no reason why those same considerations of uniformity should not justify adoption of the distinction between cases where the payment has been invalidly levied (which in other jurisdictions are governed by the short limitation period with no possibility of extension) and cases where the payment would have been an overpayment even if the tax had been valid (which in other jurisdictions can be subject to a longer limitation period if the legislation so provides).

16.8 The Commission accordingly **recommends** that -

(1) The one year limitation period for actions for the recovery of money paid as tax presently provided for by section 37A should be retained, but it should be limited, as in other Australian jurisdictions, to cases in which the payment is recoverable on the ground of the invalidity of the legislation in question. It should be expressly provided that this period cannot be extended, and applies notwithstanding any other laws which provide to the contrary.

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30 *Recovery of Imposts Act 1963* (NSW) s 4; *Limitation of Actions Act 1936* (SA) s 38(3a); *Limitation Act 1974* (Tas) s 25C(1).

(2) It should be expressly provided that these provisions should not apply to an action for recovery of an amount that would have been recoverable as an overpayment if the purported tax had been valid, if some other legislative provision provides a longer limitation period for such a case. In the absence of a specific provision in other legislation, the general limitation periods recommended by the Commission in this report would apply.[31]

[31] The position in most other Australian jurisdictions is that the appropriate general limitation periods will apply. New South Wales adds the qualification that the Act imposing the tax must provide for the refund of the money, and Victoria that the Act imposing the tax must provide for the refund or recovery of the money within a period longer than 12 months after the date of the payment: *Recovery of Imposts Act 1963* (NSW) s 3(4); *Limitation of Actions Act 1958* (Vic) s 20A(3).

PART VII: EXTENSION OF THE LIMITATION PERIOD

Chapter 17

DISABILITY

1. INTRODUCTION

17.1 It is a general feature of limitation statutes that where the plaintiff suffers from certain legal disabilities the limitation period will not begin to run until that disability ceases. This concept is as old as the idea of having fixed periods of limitation. The first important limitation statute, the English *Limitation Act 1623*, which set out limitation periods for common law actions, provided that where any person or persons were at the time any such cause of action accrued "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas", the limitation period would not commence until the disability ceased, so that they had "liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done".[1] Disability was extended to admiralty actions in 1707,[2] and to specialty debts[3] and real property actions[4] in 1833. The 1707 provisions covered the same categories of disability as those of 1623, except that the fact that the defendant was beyond the seas also delayed the running of the period. The 1833 provisions on specialty debts specified the same categories of disability as the 1707 Act, including defendants who were beyond the seas. However, the real property provisions enacted in the same year were a little different. As originally enacted in 1833, they referred to "infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas", and instead of delaying the running of the period gave an alternative limitation period of ten years after the plaintiff ceased to be under a disability or died. The 1874 amendment to this provision removed absence of the plaintiff beyond the seas from the list of disabilities and reduced the ten year period to six years.[5]

17.2 These provisions, particularly the original provisions of 1623, suggest general acceptance of the proposition that it is necessary to allow the extension of the limitation

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1 *Limitation Act 1623* (UK) s 7.
2 *Administration of Justice Act 1707* (UK) ss 18-19.
3 *Civil Procedure Act 1833* (UK) s 4.
4 *Real Property Limitation Act 1833* (UK) s 16.
5 *Real Property Limitation Act 1874* (UK) s 3.

period to cover situations where persons are in fact unable to bring actions, either due to the legal impediments consequent on infancy, marriage, unsoundness of mind or being imprisoned, or the practical impediment of being out of the jurisdiction. It also suggests a situation in which there is no machinery to ensure that the interests of persons such as those who are *non compos mentis* are looked after by others.

17.3 Modern Limitation Acts have made some progress in bringing the law relating to disability into line with modern conditions and reducing the number of disabilities covered by the Limitation Acts. Married women have now enjoyed full contractual and property owning rights for over a century: since the passing of the English *Married Women's Property Act 1882*, and similar legislation elsewhere, there are no cases in which marriage disentitles a woman from owning real property or imposes any other form of disability, and so married women can be eliminated from the lists of persons under disability in the Limitation Acts.[6] Starting with 19th century reforms in England, the law in most jurisdictions now no longer prevents persons under sentence of imprisonment from bringing legal proceedings,[7] and so there is no longer any need for limitation legislation to give such persons the benefit of the disability provisions. Modern means of travel and communication have rendered obsolete the provisions extending the limitation period where one party or the other is "beyond the seas". When people can journey from one side of the world to the other in less than a day, and communicate instantaneously with anyone anywhere by telephone, facsimile or electronic mail, there is no need to delay the running of the limitation period just because the plaintiff or the defendant is out of the jurisdiction.

17.4 The result of these developments is that the only categories of disability which merit special treatment as regards the running of the limitation period are infancy and incapacity, mental or otherwise. Even in such cases, it is no longer self-evident that the running of the limitation period should be delayed in all cases. The Commission will return to this question,[8] but it is necessary first to give an account of the present law in Western Australia, and compare it with the law elsewhere.

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6 See L Holcombe *Wives & Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (1983).

7 See paras 17.12 and 17.33 below.

8 See paras 17.35-17.69 below.

2. THE PRESENT LAW IN WESTERN AUSTRALIA

17.5 The disability provisions of the *Limitation Act 1935* are little more than a transcription of the provisions of the old English statutes. There are therefore two sets of rules about disabilities - one applying to actions for land and rent, inherited from the English *Real Property Limitation Acts of 1833 and 1874*, and one applying to the personal actions dealt with by section 38, inherited from the *Limitation Act of 1623* and the *Civil Procedure Act of 1833*.

17.6 As regards actions to recover land or rent, section 16 provides that a person under disability may bring an action at any time within a period of six years after the disability ceased or the person under the disability died, whichever first happens. The disabilities covered by section 16 are "infancy, coverture (except in the case of a married woman entitled to make such entry or distress, or bring such action), idiocy, lunacy, or unsoundness of mind". However, under section 17, absence of the plaintiff "beyond the seas" is not a ground for extension of the time limit. Section 18 provides that the limitation period cannot be extended under section 16 more than 30 years after the right accrued. Section 19 provides that no further time will be allowed for a succession of disabilities, that is to say, where a person under disability dies without ceasing to be under disability and the right of action is inherited by another person under disability.

17.7 In the case of the actions to which section 38 applies, section 40 in effect provides that if the plaintiff was under disability at the time the cause of action accrued, the limitation period runs not from that point but from the time the plaintiff ceases to be under the disability. The disabilities covered by section 40 are infancy and insanity. Section 39 provides that the fact that the plaintiff is "beyond the seas" or imprisoned does not extend the time limit, but under section 41 if the defendant is "beyond the seas" at the time the cause of action accrued the limitation period is deemed to commence from the date of his return. Section 42 helpfully explains that "no part of the Commonwealth of Australia, or of any Territory of the Commonwealth, or Territory governed by the Commonwealth under a mandate" shall be deemed to be "beyond the seas". Under section 43, the fact that one joint debtor is "beyond the seas" is not a ground for an extension of time in an action against another joint debtor who remains within the jurisdiction.

17.8 It will be evident that there are many differences between these two sets of provisions. The disabilities to which they apply are different: apart from the differences that may exist between "idiocy, lunacy, or unsoundness of mind" and insanity, being a married woman remains a disability under section 16 but not section 40, and absence beyond the seas is a defence to an action under section 38 but not to an action to recover land or rent. While section 16 gives a period of six years from the cessation of the disability, subject to a long stop period of 30 years, whatever the length of the disability, section 40 allows the full limitation period to run from cessation of the disability.

17.9 Each of these sets of provisions is limited in the actions to which it applies. There are therefore some sections of the *Limitation Act* to which neither set of provisions apply and as respects which there is no allowance for disabilities. This is the case as respects section 29 (actions to redeem a mortgage),[9] section 33 (actions to recover an intestate's estate), section 34 (actions to recover arrears of interest),[10] section 37 (actions on penal statutes), section 47 (actions against trustees) and section 47A (actions against public authorities).[11]

3. THE LAW ELSEWHERE

17.10 It is useful to compare the Western Australian law on disability with that in other jurisdictions. Though all jurisdictions inherited the English provisions already discussed, most jurisdictions have reformed them in a number of different ways. This confirms the fact that the law in Western Australia is very out of date.

(a) Adoption of uniform provisions

17.11 Like the Western Australian Act, the Limitation Acts of most Canadian provinces also have multiple disability provisions - in some cases because, like Western Australia, they have retained legislation based on the old English statutes,[12] and in others because this is the pattern of the Canadian *Uniform Limitation of Actions Act 1931* which was adopted in six

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9 See *Kinsman v Rouse* (1881) 17 Ch D 104; *Forster v Patterson* (1881) 17 Ch D 132.

10 See *De Beauvoir v Owen* (1850) 5 Ex 166, 155 ER 72; F A Bosanquet and J R V Marchant *Darby and Bosanquet's Statutes of Limitations* (2nd ed 1893) 217. However, it may be that the disability provisions do apply to actions for rent under s 34, since s 16 refers to "the period of twelve years, or six years (as the case may be) for bringing an action to recover land or rent.

11 On the application of the disability provisions to s 47A, see para 10.10 above

12 See *Limitation of Realty Actions Act 1990* (Nfd) ss 15-17; *Limitation of Personal Actions Act 1990* (Nfd) s 4; *Limitations Act 1990* (Ont) ss 36-39, 47-49.

jurisdictions[13] and closely influenced others.[14] Elsewhere, however, reforms to limitation legislation have resulted in the adoption of one set of disability provisions covering all claims for which limitation periods are provided by the *Limitation Act*. This is the case in England,[15] in New Zealand,[16] in all Australian jurisdictions except for Western Australia[17] (even South Australia, which retains legislation based on the old English statutes, has reformed its disability provisions along modern lines), and in the Canadian provinces of Alberta,[18] British Columbia[19] and Manitoba.[20]

(b) Rationalising the categories of disability

17.12 Reforms have also made considerable progress towards rationalising the categories of disability. References to married women as being under disability have been removed practically everywhere. In the Northern Territory and Queensland, imprisonment of the plaintiff still delays the running of the limitation period,[21] and there are a few jurisdictions where the running of time is still postponed when the defendant is "beyond the seas",[22] and one or two instances where the absence of the plaintiff also postpones the running of the limitation period.[23] However, in most jurisdictions it is no longer a ground of disability that a party is imprisoned or beyond the seas. Imprisonment no longer prevents a person from bringing legal proceedings, and modern means of travel and communication make it

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13 See eg *Statute of Limitations 1988* (PEI) ss 5, 48-50; *Limitation of Actions Act 1978* (Sask) ss 6, 48-50; note also *Limitation of Actions Act 1980* (Alta) ss 8, 46-49, 58-59, now repealed by *Limitations Act 1996* (Alta) s 16.

14 *Limitation of Actions Act 1973* (NB) ss 18-20, 63; *Limitation of Actions Act 1989* (NS) ss 4-5, 19-20.

15 *Limitation Act 1980* (UK) s 28, re-enacting *Limitation Act 1939* (UK) s 22.

16 *Limitation Act 1950* (NZ) s 24.

17 *Limitation Act 1985* (ACT) ss 30-31; *Limitation Act 1969* (NSW) ss 52-53; *Limitation Act 1981* (NT) ss 36-40; *Limitation of Actions Act 1974* (Qld) s 29; *Limitation of Actions Act 1936* (SA) ss 45-46; *Limitation Act 1974* (Tas) ss 26-28; *Limitation of Actions Act 1958* (Vic) s 23.

18 *Limitations Act 1996* (Alta) s 5.

19 *Limitation Act 1979* (BC) s 7.

20 *Limitation of Actions Act 1987* (Man) ss 7-8, 56-57.

21 *Limitation Act 1981* (NT) s 4(1); *Limitation of Actions Act 1974* (Qld) s 5(2). Imprisonment was also a ground of disability in Tasmania until 1991: *Limitation Act 1974* (Tas) s 2(2)(c), repealed by the *Prisoners (Removal of Civil Disabilities) Act 1991* (Tas) s 7 and Sch 1 (apparently overlooked by the Tasmania Report (1992) 41).

22 In Australia, only South Australia now has provisions under which the absence of the defendant prolongs the limitation period: see *Limitation of Actions Act 1936* (SA) s 39-40. However, most Canadian jurisdictions have such provisions: *Limitation of Actions Act 1987* (Man) s 56; *Limitation of Actions Act 1973* (NB) s 20; *Limitation of Personal Actions Act 1990* (Nfd) s 4(2); *Limitation of Actions Act 1989* (NS) s 5; *Limitations Act 1990* (Ont) s 48; *Statute of Limitations 1988* (PEI) s 49; *Limitation of Actions Act 1978* (Sask) s 49; note also *Limitation of Actions Act 1980* (Alta) ss 47, 58, now repealed by *Limitations Act 1996* (Alta) s 16.

23 *Limitation of Personal Actions Act 1990* (Nfd) s 4(1); *Limitation of Actions Act 1989* (NS) ss 4,19.

unnecessary for proceedings to be delayed when one or other of the parties is absent from the jurisdiction.

(c) Modernising the definition of incapacity

17.13 Though the Western Australian provisions variously refer to "idiocy, lunacy, or unsoundness of mind"[24] and being "insane",[25] modern Limitation Acts have generally tried to define the mental state or other incapacity which attracts the operation of the disability provisions more precisely. The English *Limitation Act 1939* provided that a person was to be treated as under a disability if he was of unsound mind, and then defined being of unsound mind in terms of the applicable mental health legislation.[26] Legislation in Australia and New Zealand based on this Act has adopted the same approach.[27]

17.14 However, as the New South Wales Law Reform Commission pointed out, unsoundness of mind may be too narrow a concept.[28] In *Kirby v Leather*,[29] the English Court of Appeal considered the meaning of this term for the purposes of the English Act of 1939, and suggested that a person was of unsound mind "when he is, by reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do".[30] The Court of Appeal drew attention to the limitations of the concept of unsoundness of mind by pointing out that a person might be in a state of coma or unconsciousness which in fact prevented him from attending to his affairs but did not amount to unsoundness of mind. In the light of such considerations, the more recent Acts and reform proposals have attempted to find alternative formulae which better encapsulate the kinds of mental or other incapacity which prevent a person attending to his affairs and should therefore delay the running of the limitation period. These attempts can be classified into three groups.

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24 *Limitation Act* s 16.

25 Id s 40.

26 *Limitation Act 1939* (UK) s 31(2)-(3); see now *Limitation Act 1980* (UK) s 38(2)-(3).

27 *Limitation of Actions Act 1958* (Qld) s 5(2)-(3); *Limitation Act 1974* (Tas) s 2(2)-(3); *Limitation of Actions Act 1958* (Vic) s 3(2)-(3); *Limitation Act 1950* (NZ) s 2 (2)-(3).

28 NSW Report (1967) paras 88-89. See also Ontario Report (1969) 99; British Columbia Report (1974) 66.

29 [1965] 2 QB 367.

30 Id, Lord Denning MR at 383. See also *King v Coupland* [1981] Qd R 121. A person who suffers brain injuries as the result of a tort is of unsound mind at the time the cause of action accrued: *Pointon v Walkley* [1951] SASR 121; see also *Keating v Woods* (unreported) Supreme Court of Western Australia, 17 May 1994, 1986 of 1992; *Dawson v Western Mining Corporation Ltd* (unreported) District Court of Western Australia, 19 October 1994, 5915 of 1988.

17.15 The first possible definition is that formulated by the New South Wales Law Reform Commission and adopted in the New South Wales Act. It provides that a person is under a disability:

> "....while he is, for a continuous period of twenty-eight days or upwards, incapable of, or substantially impeded in, the management of his affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of:
>
> (i) any disease or impairment of his physical or mental condition;
>
> (ii) restraint of his person, lawful or unlawful, including detention or custody under the *Mental Health Act 1958*;
>
> (iii) war or warlike operations; or
>
> (iv) circumstances arising out of war or warlike operations."[31]

There is a definition in the same terms in the Australian Capital Territory Act.[32] The New Zealand Law Commission has endorsed the New South Wales definition as the most appropriate model,[33] and a definition along similar lines has been adopted in the Ontario Limitations Bill.[34]

17.16 The New South Wales Report explains its definition in some detail. Subparagraph (i) is designed to be wide enough to include cases of coma or unconsciousness, and subparagraph (ii) to include cases of improper detention and so overcome an unsatisfactory English decision.[35] Subparagraphs (iii) and (iv) are intended to cover operations such as those of Australian forces in Korea, Malaysia and Vietnam, but would only apply to a war or warlike operations in which Australian forces were engaged.[36] The 28 day requirement was included because it was not thought desirable for odd days of disability to interrupt the limitation

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31 *Limitation Act 1969* (NSW) s 11(3).

32 *Limitation Act 1985* (ACT) s 8(3).

33 New Zealand Report (1988) para 258.

34 "[I]s incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition or because of physical restraint, war or war-like conditions": Limitations Bill 1992 (Ont) cl 7(1)(a); see also Ontario Report (1991) 28-30. The Ontario Bill also contains a presumption that victims of certain assaults and sexual assaults are incapable of commencing proceedings earlier than it was commenced: Limitations Bill 1992 (Ont) cl 9(2) -see paras 9.36-9.37 above. The Commission recommends against the adoption of any such presumption: see paras 9.45 and 9.47 above.

35 *Hamett v Fisher* [1927] AC 573, where the plaintiff was improperly detained under mental health legislation but the limitation period was nevertheless held to have run against him.

36 Involvement of the plaintiff in war circumstances is also a head of disability in Tasmania and Victoria: *Limitation Act 1974* (Tas) s 28; *Limitation of Actions Act 1958* (Vic) s 23(2).

period.[37] It is noteworthy that the definition includes physical as well as mental conditions. In England, the Orr Committee Report took the view that physical illness should not be included, suggesting that discretion-based extension provisions could take account of such cases.[38]

17.17 A second definition which has also enjoyed widespread support is one under which a person is "incapable of the management of his affairs because of disease or impairment of his physical or mental condition". This definition was originally formulated by the drafters of the Canadian *Uniform Limitation of Actions Act 1931*. It, or something like it, has been adopted in the legislation in British Columbia[39] and Manitoba,[40] and advocated by the Law Reform Commissions of Ontario, Newfoundland and Saskatchewan.[41] In Australia, the Northern Territory Act adopts a definition along these lines in preference to one based on that of New South Wales.[42]

17.18 The third category comprises various other definitions which have not been directly influenced by the definitions already considered. In South Australia, a person is under disability "while he is subject to a mental deficiency, disease or disorder by reason of which he is incapable of reasoning or acting rationally in relation to the action or proceeding that he is entitled to bring".[43] The Alberta legislation provides that "person under disability proposals endorse a simple formula under which "person under disability" means, inter alia:

> "(ii) a dependent adult pursuant to the *Dependent Adults Act*, or
> (iii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim".[44]

As is evident, this definition is based to some extent on the Alberta *Dependent Adults Act*, which provides that an adult under disability is one who is "unable to make reasonable

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37 NSW Report (1967) para 90. It should be noted that the NSW Report recommended that disability should delay the running of the limitation period not only when it was present on accrual of the cause of action but also if it arose subsequently: see para 17.20 below.

38 Orr Committee Report (1977) para 2.41.

39 *Limitation Act 1979* (BC) s 7(5)(a)(ii).

40 *Limitation of Actions Act 1987* (Man) s 7(1)(b).

41 Ontario Report (1969) 99; Newfoundland Working Paper (1985) 177-178 and Newfoundland Report (1986); Saskatchewan Report (1989) 36; see also New Brunswick Discussion Paper (1988) 9. For the present Saskatchewan provision, see para 17.52 below.

42 *Limitation Act 1981* (NT) s 4(1).

43 *Limitation of Actions Act 1958* (SA) s 45(2), inserted by the *Statutes Amendment (Miscellaneous Provisions) Act 1972* (SA) s 8.

44 *Limitations Act 1996* (Alta) s l(i).

judgments in respect of matters relating to all or any part of his estate".[45] The definitions in the Western Australian *Guardianship and Administration Act 1990* are very similar. Under that Act, a guardianship order may be made if a person who has attained the age of 18 years is, inter alia, unable to make reasonable judgments in respect of matters relating to his person,[46] and an administration order may be made if a person is unable, by reason of mental disorder, intellectual handicap, or other mental disability to make reasonable judgments in respect of matters relating to all or any part of his estate.[47]

(d) Initial disability and supervening disability

17.19 Under the old English statutes, disability only had the effect of delaying the running of the limitation period when it was present at the time the cause of action accrued. Disability which arose subsequently did not stop time running. The position is the same under the *Limitation Act* in Western Australia.[48] This rule owes its origin to the common law principle that once the running of the limitation period had commenced, it could not be stopped.[49] The cases confirmed that even if one party became affected by disability during the running of the period it would make no difference.[50] The issue is not important as regards minority, which if it exists will exist when the cause of action accrues and cannot arise subsequently, but it can be an issue in a case where the plaintiff becomes affected by some other form of disability, such as incapacity, after the limitation period has started to run.

17.20 The modern limitation legislation based on the English 1939 Act remained faithful to the common law principle. The disability provisions in these statutes are limited to disability which exists at the time the cause of action arises. This continues to be the position in England, Queensland, Tasmania, Victoria and New Zealand.[51] However New South Wales and the Australian jurisdictions which have followed its example, South Australia, Alberta,

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45 *Dependent Adults Act 1980* (Alta) s 25. See Alberta Report (1989) 41, departing from the proposal of the Report for Discussion (1986) paras 6.3-6.5 which endorsed a definition even closer to the *Dependent Adults Act*.

46 *Guardianship and Administration Act 1990* s 43(1)(b)(ii).

47 Id s 64(1)(a).

48 *Limitation Act 1935* ss 16, 40.

49 *Rhodes v Smethurst* (1838) 4 M & W 42, 150 ER 1335, Lord Abinger CB at 59; *Jenkins v Jenkins* (1882) 3 LR (NSW) 35; *Re George* [1935] VLR 26.

50 *Owen v De Beauvoir* (1847) 16 M & W 547, 153 ER 1307, Parke B at 567-568; *De Beauvoir v Owen* (1850) 5 Ex 166, 155 ER 72, Patteson J at 181-182.

51 *Limitation Act 1980* (UK) s 28(1), replacing *Limitation Act 1939* (UK) s 22(1)); *Limitation of Actions Act 1974* (Qld) s 29(1); *Limitation Act 1974* (Tas) s 26(1); *Limitation of Actions Act 1958* (Vic) s 23(1); *Limitation Act 1950* (NZ) s 24(1).

British Columbia, Manitoba and Saskatchewan all have provisions which depart from the common law principle and allow the suspension of a limitation period that has already started running.[52] Though the Wright and Orr Committees in England were against any such change, on the ground that it would cause hardship to defendants and that it was preferable to leave the law as it was,[53] law reform commissions in Australia and Canada have endorsed the principle that supervening disability should have the same effect on the limitation period as disability existing when the cause of action accrues.[54] The Ontario Law Reform Commission, for example, said:

> "It seems absurd that time should not run against a person who was of unsound mind when a cause of action accrued to him but that it should run against him if he became unsound of mind the following day."

(e) Effect of disability on the running of the period

17.21 There is a considerable degree of diversity as to the effect disability, initial or subsequent, should have on the running of the limitation period, but four basic approaches can be identified.

(i) A substitute limitation period

17.22 Statutes which take cognisance only of disability in existence when the cause of action accrues generally provide for a substitute limitation period to run from the date on which the disability ceases. The substitute limitation period may or may not be the same as the period which would have applied had there been no disability. This is the approach adopted by section 16 of the Western Australian Act, which provides that in the case of actions for the recovery of land or rent the plaintiff has six years from the cessation of the disability in which to bring an action, even though the ordinary period would be 12 years in some cases and six in others.

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52 *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); *Limitations Act 1996* (Alta) s 5(1); *Limitation Act 1979* (BC) s 7(1) and (3); *Limitation of Actions Act 1987* (Man) s 7(2); *Limitation of Actions Act 1978* (Sask) s 6 (as amended by SS 1983 s 13).

53 Wright Committee Report (1936) para 16; On Committee Report (1977) paras 2.46-2.48. The Orr Committee suggested that the hardship to plaintiffs could be mitigated through the use of the discretionary extension provisions.

54 NSW Report (1967) para 90; Ontario Report (1969) 97; British Columbia Report (1974) 67; Alberta Report for Discussion (1986) para 6.7.

17.23 The statutes based on the English legislation of 1939 all adopt this approach.[55] The plaintiff is given six years from the time the disability ceases, but this is subject to a number of qualifications -

(1) A shorter period applies where the original limitation period is less than six years.[56]

(2) The provisions do not affect a case where the right of action first accrued to a person not under a disability through whom the plaintiff claims.

(3) Where the person under disability dies while under disability, and the right of action accrues to another person under disability, no further extension of time is allowed.[57]

(4) Actions to recover land or money charged on land are subject to an ultimate time bar of 30 years.[58]

(5) The provisions do not apply to actions to recover a penalty or forfeiture under a statutory provision, except where the action is brought by an aggrieved party.

(ii) Suspending the limitation period for the length of the disability

17.24 Clearly, the above approach will not be satisfactory where subsequent as well as initial disability is allowed to affect the limitation period. An approach adopted by some of the jurisdictions which permit this is simply to suspend the running of the limitation period for the duration of the disability. If the disability exists when the cause of action arises, the plaintiff has the full limitation period available after the disability ceases. If the limitation

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55 *Limitation Act 1980* (UK) s 28; *Limitation of Actions Act 1974* (Qld) s 29; *Limitation Act 1974* (Tas) s 26; *Limitation of Actions Act 1958* (Vic) s 23; *Limitation Act 1950* (NZ) s 24.

56 In England, there are a number of different provisions: see *Limitation Act 1980* (UK) s 28(4A), (5), (6), (7) and s 28A. In Queensland, in actions for damages for death or personal injuries the limitation period will be three years: *Limitation of Actions Act 1974* (Qld) s 29(2)(c). In Tasmania and Victoria, the period which applies is the same length as that which would have applied but for the disability: *Limitation Act 1974* (Tas) s 26(1); *Limitation of Actions Act 1958* (Vic) s 23(1). In New Zealand, in cases of death or personal injury the right of action is deemed to have accrued on the cessation of the disability: *Limitation Act 1950* (NZ) s 24(a).

57 There is a similar provision in Western Australia applying to actions for the recovery of land or rent: *Limitation Act 1935* s 19

58 There is a similar provision in Western Australia: id s 18.

period is already running when the disability arises, the balance of the period is available when the plaintiff ceases to be under disability. This approach, which has the great merit of simplicity, is the one adopted by the legislation in South Australia, Alberta, Manitoba and Saskatchewan,[59] and proposed in New Zealand.[60] Section 40 of the Western Australian Act, though it is restricted to disability existing at the time the cause of action arises, in essence adopts the same approach.

17.25 In South Australia and Manitoba, there is a 30 year ultimate limitation period,[61] and Manitoba also retains the rule about a succession of disabilities.[62] Under the Alberta legislation and the New Zealand proposals, there is a general long stop provision[63] and so an ultimate limitation period specific to disability is not required.

(iii) Need for a minimum period after disability ceases

17.26 The legislation in New South Wales, the Northern Territory and the Australian Capital Territory also adopts the general principle that disability should suspend the running of the limitation period, but engrafts onto it a supplementary principle that if disability occurs near the end of the limitation period the plaintiff should be given a minimum period after cessation of the disability in which to bring an action. In New South Wales and the Northern Territory, this period is three years.[64] In the Australian Capital Territory it is two years in certain cases and three years in others.[65] The Ontario Limitations Bill has a basically similar provision, except that the minimum period is six months.[66]

(iv) Alternative periods

17.27 The British Columbia legislation gives the plaintiff the best of all possible worlds. Where disability exists at the beginning of the limitation period, the plaintiff is given the longer of either -

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59 *Limitation of Actions Act 1936* (SA) s 45(1); *Limitations Act 1996* (Alta) s 5(1); *Limitation of Actions Act 1987* (Man) s 7(2); *Limitation of Actions Act* (Sask)s 6.

60 New Zealand Report (1988) para 258.

61 *Limitation of Actions Act 1936* (SA) s 45(3); *Limitation of Actions Act 1987* (Man) s 7(5).

62 *Limitation of Actions Act 1987* (Man) s 7(3).

63 See paras 6.15-6.17 above (Alberta), 6.53 above (New Zealand).

64 *Limitation Act 1969* (NSW) s 52(1)(d)-(e); *Limitation Act 1981* (NT) s 36(1)(d)-(e).

65 *Limitation Act 1985* (ACT) s 30(1)(d)-(f). The two year period applies to actions to recover a penalty or forfeiture and admiralty actions.

66 Limitations Bill 1992 (Ont) cl 7(1) and (3).

(1) the limitation period which would have applied had there been no disability, running from the time the cause of action arose; or

(2) the same period running from the time the disability ceased, subject to the proviso that it must not extend more than six years beyond the cessation of the disability.[67]

Where disability arises after the period has commenced, the plaintiff is given the longer of -

(1) the length of time remaining under the original limitation period at the time the disability came into existence; or

(2) one year from the time that the disability ceased.[68]

This provision was originally developed by the Ontario Law Reform Commission,[69] and has subsequently been supported in Newfoundland.[70]

4. RECOMMENDATIONS: MODERNISING THE LAW OF DISABILITY

17.28 In this section the Commission makes some recommendations of a preliminary nature designed to deal with the most obvious anomalies in the current provisions on disability. This clears the ground for a discussion of the most important issue, which is whether disability should continue to have the effect of extending the length of the limitation period, or whether it can be dealt with in some other way.

(a) A uniform approach

17.29 It does not seem rational for Western Australia to continue to have two different sets of disability provisions, each applying to a particular group of actions, and some other limitation provisions which cannot be extended on the ground of disability at all. Nearly all the other jurisdictions examined in this report now have uniform disability provisions

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67 *Limitation Act 1979* (BC) s 7(2).
68 Id s 7(4).
69 Ontario Report (1969) 97; see also British Columbia Report (1974) 69.
70 Newfoundland Working Paper (1985) 180-181, 189 and Newfoundland Report (1986).

applying to all actions for which the *Limitation Act* provides limitation periods. Law reform reports on limitation of actions have consistently recommended the adoption of one set of provisions covering all cases.[71] The Commission endorses as a general principle the view that the disability rules should be the same for all kinds of claims covered by the *Limitation Act*, but has found it necessary to retain different rules in a few instances where it has recommended that special limitation provisions, and not the two general limitation periods, should apply. It therefore **recommends** that, save for a few exceptional instances, the rules on disability should be the same for all kinds of claims covered by the *Limitation Act*.

(b) Outdated categories of disability

17.30 It is clear that some of the categories of disability found in the present Western Australian Act have long been obsolete and should be removed.

(i) Coverture

17.31 Section 16 provides that the time limit for bringing an action to recover land or rent is extended by "coverture", that is, the state of being a married woman, except in a case where a married woman is entitled to bring such an action. The married women's property legislation was adopted in Western Australia by the *Married Women's Property Act 1892*. There are now no cases in which marriage disentitles a woman from owning real property or imposes any other form of disability. The Commission **recommends** that "coverture" should no longer be a ground of disability under the *Limitation Act* for any purpose.

(ii) Beyond the seas

17.32 The *Limitation Act* contains several references to one or other of the parties being "beyond the seas". The fact that the plaintiff is "beyond the seas" has no effect on the running of the limitation period either for the recovery of land or rent[72] or for a personal action,[73] but in the latter case the fact that the defendant is "beyond the seas" postpones the running of

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71 See particularly Ontario Report (1969) 97; British Columbia Report (1974) 68; see also Newfoundland Working Paper (1985) 177, 189, though this recommendation was omitted from the Newfoundland Report (1986).

72 *Limitation Act 1935* s 17.

73 Id s 39.

time.[74] Even though such provisions survive in some other jurisdictions,[75] modern means of travel and communication have made such provisions obsolete. There is no reason for the limitation period to be delayed by the absence of either party from the jurisdiction, and the Commission therefore **recommends** that all provisions which refer to absence beyond the seas of either party should be repealed without replacement. The obsolete nature of these provisions is emphasised by the retention of the phrase "beyond the seas" found in the English legislation, coupled with the addition of a further provision explaining that other Australian States are not "beyond the seas".[76]

(iii) Imprisonment

17.33 Imprisonment of the plaintiff is not in fact a disability in Western Australia. Section 39 of the *Limitation Act* provides that the running of the limitation period is not delayed, in cases in which imprisonment is a disability, by the fact that the plaintiff is imprisoned at the time the cause of action accrues. The existence of this section is explained by the fact that in England imprisonment was a disability under the early limitation legislation, but ceased to be so in 1856,[77] and the 1856 provision which provided that imprisonment was no longer a disability, like all the other nineteenth century provisions, was reproduced in the *Limitation Act 1935*. Under the present law in Western Australia imprisonment does not prevent a person from bringing legal proceedings.[78] The Commission therefore endorses the approach of section 39, although it sees no reason why the legislation should continue to contain

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74 Id s 41. This provision originates in the *Administration of Justice Act 1705* (UK) s 19.

75 See para 17.12 above.

76 In *Grimth v Bloch* (1878) 4 VLR(L) 294 absence in another Australian colony was held to be absence "beyond the seas", but in *Witten v Lombard Australia Ltd* (1968) 14 FLR 322 the court reached a different conclusion in the light of the federation of the Australian colonies in 1900.

77 *Mercantile Law Amendment Act 1856* (UK) s 10. However, the *Forfeiture Act 1870* (UK) s 8 prevented persons convicted of treason or felony and sentenced to death or penal servitude from bringing any action at law or suit in equity, and the Wright Committee Report (1936) para 17 commented on the unsatisfactory position which resulted, in that convicts were unable to bring legal proceedings and yet the limitation period ran against them. The *Limitation Act* 1939 (UK) s 31(2) addressed the problem by defining "disability" to include a convict subject to the *Forfeiture Act 1870*. The *Criminal Justice Act 1948* (UK) s 83(3) and Sch 10 abolished the provisions in the *Forfeiture Act* which rendered convicts incapable of bringing actions, and the definition of "disability" in s 38(2) of the *Limitation Act 1980* (UK) accordingly excludes the reference to convicts found in the earlier definition.

78 37 Vic No 8 (1873) adopted the *Forfeiture Act 1870* (UK) in Western Australia, including the provision in s 8 referred to in n 77 above under which persons convicted of treason or felony were rendered incapable of bringing actions. However the *Criminal Code Amendment Act 1913* s 20 inserted in the *Criminal Code* a provision (now s 683) that "forfeitures, escheats, attainders and corruptions of blood on account of crime or conviction stand abolished", and s 30 of the same Act repealed the 1873 Act. Curiously, it nevertheless continued to be listed as a statute in force in every volume of the Statutes of Western Australia until 1942-1943, when it was removed.

provisions dealing with grounds which do not prolong the limitation period, and **recommends** that no such provision should appear in the new Limitation Act.

(iv) Conclusion

17.34 The recommendations made above mean that the only categories of disability which remain are minority and incapacity. There is no problem about defining minority: under the *Age of Majority Act 1972*, a person reaches adulthood on attaining the age of 18.[79] The definition of incapacity is a more complex matter. Some possible definitions found in other jurisdictions have already been discussed.[80] The Commission's approach to this question will be discussed in the next section.

5. A NEW APPROACH TO DISABILITY

(a) The problem

17.35 It has already been pointed out that, from the earliest times, the attitude adopted by the law to the problem of disability was to delay the running of the limitation period until the disability had ceased and the potential plaintiff was in a position to bring an action (or to give him a substitute limitation period commencing at that point in time). As a result, in cases where the plaintiff is under disability it may be a considerable number of years before the limitation period eventually expires. It is therefore possible for legal proceedings to be commenced many years after the happening of the events to which they relate. In the case of minors, a minor may in effect have as much as 24 years in which to bring a personal action under the present law, since the six year limitation period only starts running when minority ceases. In the case of a plaintiff affected by mental incapacity, the limitation period for a personal action may never commence running at all and so the defendant's potential liability continues indefinitely. On the other hand an action for the recovery of land is subject to an ultimate 30 year period even where there is disability.

17.36 This problem has been the cause of some concern in recent years, especially for obstetricians, gynaecologists and other medical professionals. Litigation about children born

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79 See *Age of Majority Act 1972* s 5(1). At common law a person became of full age at the beginning of the day before his 18th (formerly 21st) birthday: see *Prowse v Mclntyre* (1963) 111 CLR 264, but this has been reversed by legislation in most jurisdictions: in Western Australia see *Age of Majority Act 1972* s 4(1).

80 See paras 17.13-17.18 above.

defective, allegedly due to negligence of the medical professionals involved in the birth, is on the increase, and insurance premiums for such doctors are rising steeply - to a level which, it is claimed, is making it impossible for many obstetricians and gynaecologists to continue practising in that area.[81] One aspect of this problem that has caused particular concern is the length of time for which potential liability of this kind can continue.

17.37 The problem was highlighted by a recent Western Australian case, *Dissidomino v Newnham*,[82] which was the subject of considerable media attention.[83] The parents of a child born with cerebral palsy, acting in the name of the child, brought an action for negligence against the doctor who delivered the baby and the hospital in which the birth took place. The proceedings were commenced shortly before the child's 24th birthday and by the time of the decision the child was almost 30 years old. The action failed at first instance, the judge holding that there was no negligence on the part of either defendant, and the Full Court dismissed the appeal. Similar issues are raised by a recent English case, *Headford v Bristol and District Health Authority*,[84] where the plaintiff underwent an operation when 11 months old and as a result suffered a cardiac arrest and consequent severe permanent brain damage. It was nearly 25 years before the plaintiff s parents consulted a solicitor, and the writ was not issued until nearly 28 years after the accident. The Court of Appeal overturned a decision to strike out the statement of claim and dismiss the action as an abuse of process.[85]

17.38 It is generally undesirable for cases such as this to be litigated so long after the facts took place. This was one of the issues considered by the Select Committee on Professional and Occupational Liability, which reported in January 1994. Referring to *Dissidomino v Newnham*, the report said:

> "Quite plainly, there was nothing to be gained by extending the period of limitation because the child's position was never going to change. We recommend that the limitation period in such a case be 6 years from the negligent act."[86]

In its summary of recommendations, the Committee recommended:

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81 See eg Legislative Assembly of Western Australia *Select Committee on Intervention in Childbirth: Report* (1995) Ch 10.

82 (Unreported) Supreme Court of Western Australia (Full Court), 12 April 1994, 84 of 1993.

83 See eg "Couple faces huge bill after birth negligence daim loss" *The West Australian* 16 April 1993; "Appeal against doctor fails" *The West Australian* 13 April 1994.

84 [1994] TLR 614.

85 See M A Jones "Limitation Periods and Plaintiffs under a Disability - A Zealous Protection?" (1995) 14 *CJQ* 258.

86 *Select Committee on Professional and Occupational Liability: Final Report* (1994) 48.

> "That the limitation period for periods of disability for commencement of legal proceedings be 6 years where it involves persons permanently mentally impaired."[87]

17.39 The Commission appreciates the Committee's reasons for making this recommendation. However, it would not be a completely satisfactory solution. It is true that it would prevent the extension of the limitation period under the disability rules, which may well be desirable, because if the person is permanently mentally impaired there will never be any change in his condition and there is no reason for delay in bringing the action. However, if enacted in the above terms without any qualification, it would also prevent the extension of the limitation period on any other ground, for example in a case of latent disease or injury,[88] or where there is acknowledgment or part payment.[89] Furthermore, it does not tackle the whole of the problem. As pointed out above, where a child is injured at birth or at a very young age, the limitation period will not expire for anything up to 24 years, and so legal proceedings may be commenced many years after the event. As compared with those suffering permanent mental impairment, such plaintiffs are in a much more favourable position. What is needed is a solution which produces a result that achieves a fair balance between the interest of both plaintiffs and defendants, and treats all cases of disability in the same terms. There is some recognition of this in a recent report of a body set up by the Commonwealth Government to review professional indemnity arrangements for health care professionals, which recommended that in medical negligence cases there should generally be a three year limitation period, and that "in the case of minors or people under a legal disability, the option that there be an absolute limit of six years from the date of injury on the commencement of an action, be explored".[90]

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87 Id 9. Concern that litigation in medical negligence cases may be delayed for many years after the events in question has also been expressed In other recent reports: see Review of Professional Indemnity Arrangements for Health Care Professionals *Compensation and Professional Indemnity in Health Care: An Interim Report* (1994) paras 8.87-8.99; Legislative Assembly of Western Australia *Select Committee on Intervention in Childbirth: Report* (1995) para 10.3.2.

88 Under the present law, such extension is of course only permitted in cases of asbestos-related diseases.

89 See paras 18.8-18.54 below.

90 Review of Professional Indemnity Arrangements for Health Care Professionals *Compensation and Professional Indemnity in Health Care: An Interim Report* (1994) para 8.95.

(b) Attempts to deal with the problem

17.40 The possibility of long limitation periods in cases involving disability has also been seen as a problem in other jurisdictions. At various times, particular Limitation Acts have enacted devices of various kinds for overcoming the problem.

(i) Notice to proceed

17.41 Four Australian jurisdictions (New South Wales, the Australian Capital Territory, Tasmania and the Northern Territory) and two Canadian jurisdictions (British Columbia and Manitoba) have a rule under which, where a person under a disability has a cause of action against another person, that other person may serve a notice to proceed, and when the notice has been served the person under the disability is deemed to have ceased to be a person under disability. The limitation period starts running from the time of service of the notice.[91] Recommendations for the adoption of similar provisions have been made in Saskatchewan,[92] and a similar scheme was originally suggested by the Newfoundland Law Reform Commission,[93] but the Commission ultimately decided not to endorse it.[94] In New South Wales and the Australian Capital Territory, the rule only applies to disabilities other than minority,[95] and assumes that a curator has been appointed who is able to take care of the disabled person's affairs. However, in the other jurisdictions the provision applies to minors also. The various schemes differ somewhat in matters of detail, but there are provisions to ensure that the notice is served on the parents and also on various public officials such as the Public Trustee.

17.42 The chief problem with this alternative (at least when it applies to a minor) is that notice is served on the parents (in the usual case), and this has the effect of starting time running against the minor. But it does not ensure that an action will in fact be commenced. The report of the Ontario *Limitations Act* Consultation Group commented:

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91 *Limitation Act 1985* (ACT) s 31; *Limitation Act 1969* (NSW) s 53; *Limitation Act 1981* (NT) ss 37-40; *Limitation Act 1974* (Tas) s 27; *Limitation Act 1979* (BC) s 7(6)-(8), (10)-(11); *Limitation of Actions Act 1987* (Man) s 8.

92 Saskatchewan Report (1989) 35-36. See also New Brunswick Discussion Paper (1988) 9-13.

93 Newfoundland Working Paper (1985) 184-188.

94 The Newfoundland Report (1986) instead recommends adoption of the custody of a parent rule: see para 17.54 below.

95 The recommendation in the ACT Working Paper (1984) para 184 that it be extended to minority was not accepted.

> "[W]hile this approach solves a difficulty for the defendant, it does so at the expense of the parents, the Official Guardian and the others. They have no legal obligation to commence proceedings but could be held liable to the minor or incapacitated plaintiff if they were served with a notice to proceed but did not sue."[96]

This report also points out that another problem with this approach, not applicable to minors but of considerable importance in relation to incapacity, is that even though a notice to proceed is served, the person served with the notice may have no means of determining whether the potential plaintiff in fact suffers from, for example, a psychological condition and so falls within the category in question, thus giving the person served with the notice power to act.

17.43 These problems led the Ontario *Limitations Act* Consultation Group to recommend[97] that, instead of a notice to proceed provision, Ontario adopt a rule under which a person seeking to start the limitation period running against a person under disability would have to apply to the court for the appointment of a litigation guardian for that person. The limitation period would only commence running when such an appointment was made. The fact that the person under disability had a court-appointed litigation guardian would ensure that his interests were safeguarded. The onus of getting the limitation period to commence, and the cost of the necessary proceedings, would be placed on the defendant. This recommendation was incorporated in the Ontario Limitations Bill, which provides that the discovery and ultimate limitation periods do not run during any time in which the plaintiff is under disability and is not represented by a court-appointed litigation guardian,[98] and that:

> "(1) If a person is represented by a court-appointed litigation guardian, section 5 [the two-year discovery period] applies as if the litigation guardian were the person with the claim.
>
> (2) If the running of a limitation period in respect of a claim is postponed or suspended under section 6 [minors] or 7 [incapable persons], any person may move to have a litigation guardian appointed for the person with the claim."[99]

17.44 In the Commission's view, both the notice to proceed procedure and the variant recommended in Ontario are subject to the basic flaw that it is up to the defendant to set them in motion. While issuing a notice to proceed or requesting the appointment of a litigation

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96 Ontario Report (1991) 34.

97 Id 33-34.

98 Limitations Bill 1992 (Ont) cl s 6 (discovery period: minors), 7(1) (discovery period: incapable persons), 15(7) (ultimate period: incapable persons), 15(8) (ultimate period: minors).

99 Id cl 8.

guardian do not amount to an admission of liability, defendants may well be reluctant to invoke such procedures for fear that their action may be construed as indicating some sort of responsibility.

(ii) The custody of a parent rule

17.45 In Tasmania, under the so-called "custody of a parent rule", the existence of disability does not operate to postpone the running of the limitation period unless the plaintiff is able to show that he was not in the custody of a parent. The Tasmanian *Limitation Act 1974* provides that the rule which postpones the running of the limitation period until the plaintiff ceases to be under a disability:

> "... does not apply ...unless the plaintiff proves that he or (as the case requires) the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent."[100]

17.46 The rule presumes that a person under disability who is in the custody of a parent can expect the parent to look after his interests and bring an action within the limitation period. Time will start running in exactly the same way as if the plaintiff were not under a disability, unless the plaintiff proves that he was not in the custody of a parent at the relevant time. The test of custody is whether there is effective care and control.[101] This does not cease to exist during a temporary separation such as a holiday.[102] The onus of proof is on the person alleging disability.[103]

17.47 The rule was first developed in England in 1939 as a concession to local authorities who were about to lose the benefit of an exceptionally short limitation period (six months),[104] and feared that the standard limitation period would expose local authorities with educational responsibilities to stale claims brought on behalf of schoolchildren.[105] Under the 1939 Act, the general rule was still that time did not run against a person under a disability, but in a claim against a public authority (for which the limitation period was one year) time would start to run if the person under disability was in the custody of a parent at the time when the cause of

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100 *Limitation Act 1974* (Tas) s 26(6).
101 *Verboon v McMahon* [1970] VR 282; *Goerner v Wood* [1974] VR 879.
102 *Tung v Augustine* [1973] VR 616.
103 *Lang v Victoria* [1965] VR 390; *Todd v Davison* [1972] AC 392.
104 See para 10.12 above.
105 See Orr Committee Interim Report (1974) Appendix B.

action accrued.[106] In 1954, when the special limitation periods in actions against public authorities were abolished, the custody of a parent rule was extended to all personal injury claims.[107] The custody of a parent rule was also enacted in New Zealand,[108] Victoria[109] and Tasmania.[110]

17.48 The policy underlying the rule was stated by Lord Pearson in *Todd v Davison*[111] to be that -

(1) Injustice could be caused to a defendant if a claim could be brought by an injured child after the lapse of 15 or 20 years, since the plaintiff would very likely still have some friend or relative who remembered the circumstances, while the defendant's only witnesses were likely to have disappeared or forgotten what had happened.

(2) It would nevertheless be unfair to persons under disability, who were incapable of suing on their own behalf, if time ran against them when they were under disability.

(3) If time did not run against any person under disability, there might be too many stale claims and actions brought many years after the event. It could be assumed that, in the case of a minor or mental patient in the custody of a close relative when the accident occurred, that relative would not only know the circumstances giving rise to the plaintiff's cause of action but would also do something about it, that is to say, would take legal advice and institute proceedings if so advised.

17.49 The rule has not escaped criticism. It is said that it is undesirable for the minor to be required to prove that he was not in the custody of a parent (although the burden of proof of

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106 *Limitation Act 1939* (UK) s 22(d).
107 Id s 22(2)(b), inserted by *Law Reform (Limitation of Actions etc) Act 1954* s 2(2). The original s 22(d) of the 1939 Act was repealed by s 8(3) and Sch of the 1954 Act.
108 *Limitation Act 1950* (NZ) s 24(f).
109 *Limitation of Actions Act 1958* (Vic) s 23(1)(e).
110 *Limitation Act 1974* (Tas) s 26(6).
111 [1972] AC 392 at 411.

disability is generally a matter for the plaintiff[112]). The Orr Committee Interim Report in 1974 criticised the rule on the following additional grounds - [113]

(1) The rule, as interpreted by the courts, puts the child whose parents have abdicated their responsibilities in a better position than the child of parents who make some attempt to discharge those responsibilities.

(2) Restriction of the rule to those in the custody of a parent must necessarily produce arbitrary distinctions. In England "parent" was defined as including a step-parent and grandparent.[114] The Committee commented that it was unreasonable that time should run against a child in the custody of his stepmother or grandmother, but not one in the custody of his aunt or a guardian. The Tasmanian Act does not define parent in the same terms, but simply provides that the term includes a guardian.[115]

(3) The rule does not operate satisfactorily where the parent is himself the tortfeasor who has injured the child. The most obvious case was a road accident, where the parent might not wish to lose his no-claim bonus by suing on behalf of the child, but accidents could occur in other situations, such as in the home, where there was no insurance cover.

(4) The rule did not cater adequately for the situation where the parent, though ready and willing at the time the cause of action accrued to take such steps as were necessary in the interests of the child, himself dies or becomes under a disability before having done so.

(5) The rule made no provision for the case where the parent was himself under a disability at the time the injury to the child occurred.

The Committee also commented that in the case of a mental patient it would be absurd to make the running of time depend on whether the patient was in the custody of a parent.

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112 See para 17.70 below.

113 On Committee Interim Report (1974) para 103.

114 *Limitation Act 1939* (UK) s 31(1), under which "parent" had the same meaning as in the *Fatal Accidents Act 1846* (UK), as extended by s 2 of the *Law Reform (Miscellaneous Provisions) Act 1934* (UK).

115 *Limitation Act 1974* (Tas) s 2(1).

17.50 The Orr Committee recommended that the rule should be abolished,[116] and it was duly abolished in England in 1975.[117] Victoria followed suit in 1983,[118] and Ireland in 1991.[119] New Zealand had already abolished the rule in 1963.[120] In Tasmania, the Law Reform Commissioner has recently recommended that the rule should be abolished.

17.51 Though the custody of a parent rule might be thought to be in decline, it has been retained in a number of Canadian jurisdictions,[121] notably Alberta, where the recent Act adopts a rather more sophisticated version of the rule which meets many of the potential difficulties. The pre-1996 Alberta disability rule provided:

> "(1) Where a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.
>
> (2) Subsection (1) does not apply
>
> (a) if the person under disability is a minor in the actual custody of a parent or guardian, or
>
> (b) if the person under disability is a person in respect of whom
>
> (i) a committee is appointed under the *Mentally Incapacitated Persons Act*, or
>
> (ii) a guardianship order under the *Dependent Adults Act* is in effect and the guardianship order
>
> (A) appoints a plenary guardian in respect of the person under disability , or
>
> (B) appoints a partial guardian who has capacity to commence an action."[122]

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116 Orr Committee Interim Report (1974) paras 104-110.

117 *Limitation Act 1975* (UK) s 2.

118 *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 4.

119 *Statute of Limitations (Amendment) Act 1991* (Ire).

120 *Limitation Amendment Act 1963* (NZ) s 2(c).

121 Though the Ontario Law Reform Commission advocated the introduction of such a rule: Ontario Report (1969) 98-99, it was commented on unfavourably in later reports: British Columb ia Report (1974) 69-70; Saskatchewan Report (1989) 35.

122 *Limitation of Actions Act 1980* (Alta) s 59

17.52 Saskatchewan has a somewhat similar provision, though limited to incapable persons. Prior to 1983, the Saskatchewan disability provision was in the standard form adopted in most jurisdictions. In that year it was replaced by the following provision:

> "The running of time with respect to a limitation period to bring an action fixed by this or any other Act is postponed for a person who is entitled to bring such an action for so long as he is an infant or:
>
> (a) he is by reason of mental disorder not competent to manage his affairs or estate; and
>
> (b) he is not represented by a personal guardian or property guardian appointed pursuant to *The Public Trustee Act* or *The Dependent Adults Act* who:
>
> (i) is aware of the cause of action; and
>
> (ii) has the legal capacity to commence the cause of action on behalf of that person or his estate." [123]

17.53 The new Alberta Act provides that the operation of the two general limitation periods is suspended during any period of time that the claimant is a person under disability.[124] However the custody of a parent rule is retained in the definition of "person under disability", which means:

> "(i) a minor who is not under the actual custody of a parent or guardian,
>
> (ii) a dependent adult pursuant to the *Dependent Adults Act*, or
>
> (iii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim".[125]

17.54 One of the principal problems with the custody of a parent rule, especially given the increasing incidence of claims for child sexual abuse, is that the parent or guardian who has

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123 *Limitation of Actions Act 1978* (Sask) s 6, as amended by SS 1983 c 80 s 13 and SS 1989-90 c 18 s 8.

124 *Limitations Act 1996* (Alta) s 5(1).

125 *Limitations Act 1996* (Alta) s l(i). This rule was not part of the legislative scheme recommended by the Alberta Law Reform Institute: the Model Limitations Act drafted by the Institute provided simply that:

> "The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability" (s 6(1))

and that "person under disability" meant

> "(i) a minor, or
> (ii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim" (s l(h)).

However, as a result of representations made by the insurance industry and its legal representatives, the Bill was amended in Parliament to carry forward the previous provisions relating to minority: letter from Professor P J M Lown QC of the Alberta Law Reform Institute, dated 6 December 1996, on file at the Commission.

custody of the child may be the potential defendant. The Alberta Act deals with the potential conflict of interest arising out of this situation by providing that:

> "Where the 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, the operation of the limitation periods provided by this Act is suspended during the period of time that person was a minor.[126]

A somewhat similar rule was recommended by the Newfoundland Law Reform Commission in 1986. After recommending disability rules similar to the modern rules in force in jurisdictions such as British Columbia,[127] it recommended that these rules should not apply where:

> "(a) an infant is in the custody of a parent or guardian; or
>
> (b) the affairs of a person of unsound mind are being administered by a committee or the Public Trustee, except where an action is being brought by the infant against such parent or guardian or by the person who was of unsound mind (or on his behalf, if he is still of unsound mind) against such committee or the Public Trustee."[128]

17.55 The Alberta Law Reform Institute is of the view that the protection provided by the legislation is still not complete. This Commission agrees: even though the person with custody of the child is not the potential defendant, that person may have some other reason for not wanting the proceedings to be brought, for example where the perpetrator is a spouse, close relative or family friend. The Institute is proposing that the above provision be replaced by a provision under which the operation of the limitation period will be suspended where an action is brought by a claimant against the claimant's parent or guardian, or any other person for a cause of action based on conduct of a sexual nature, including sexual assault, and the cause of action arose when the claimant was a minor.[129]

17.56 In the Commission's opinion the custody of a parent rule, in spite of its chequered career in other jurisdictions, has some value. Such a rule, in a revised and expanded form, may still be able to play a useful part in solving the problems raised by the law of disability.

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126 *Limitations Act 1996* (Alta) s 5(2).

127 See para 17.27 above.

128 Newfoundland Report (1986), as summarised in (1987) 13 *CLB* 922 at 925.

129 Letter from Professor P J M Lown QC of the Alberta Law Reform Institute, dated 6 December 1996, on file at the Commission.

(c) The Commission's recommendations

17.57 The Commission considers that, in view of the problems that can arise when the running of the limitation period is delayed for many years as a result of the effect of the disability provisions, as demonstrated by the case of *Dissidomino v Newnham*,[130] and the concern manifested by the Select Committee on Occupational and Professional Liability and similar bodies,[131] it is time for a new approach to the problem of disability. Hitherto, it has generally been automatically assumed that the only way to redress the imbalance between the parties created by the fact that the plaintiff is under disability is to extend the limitation period so that, following the thinking behind the original *Limitation Act 1623*, the plaintiff is given as long to bring his action after the cessation of disability as a person not under disability would have had. This assumption should no longer be made. What is needed is a new approach which deals fairly with minors and other persons under disability without creating long limitation periods.[132] The approach outlined by the Commission is based on the premise that most persons under disability are in the care of someone else who can take decisions on their behalf, including decisions as whether it is necessary to start legal proceedings. If this is so, the need for limitation periods of longer than the normal length is greatly reduced.

(i) Minors

17.58 Parents are ordinarily the legal guardians of their minor children.[133] 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. This fact is at the base of the custody of a parent rule which, as explained above,

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130 (Unreported) Supreme Court of Western Australia (Full Court), 12 April 1994, 84 of 1993: see para 17.37 above.

131 See paras 17.38-17.39 above.

132 A broadly similar view is reflected in the suggestion reported in the recommendation of the Review of Professional Indemnity Arrangements for Health care Professionals *Compensation and Professional Indemnity in Health Care: An Interim Report* (1994) para 8.95 that minors and persons under a legal disability be subject to an absolute limit of six years from the date of injury: see para 17.39 above.

133 The *Family Law Act 1975* (Cth) s 63F(1) provides: "Subject to any order of a court for the time being in force ... each of the parents of a child who has not attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child".

has been adopted by various jurisdictions at various times, is still in force in Tasmania,[134] and has recently been re-enacted in Alberta.[135] In spite of the criticism to which this rule has been subjected, and its abolition in a number of jurisdictions,[136] the Commission is of the view that the basic idea behind the rule has merit. Some of those criticisms cease to be valid if the rule is not restricted to minors, but applies to all persons under disability, as is the case in Alberta. Other criticisms raise difficulties that can arise in particular situations, such as the parent who is a tortfeasor or himself under disability. If these problems can be taken care of by an exception to the general rule, these criticisms again disappear. It has been suggested that the minor may be disadvantaged if his parents are unwilling or unable for anyone of a number of reasons to begin legal proceedings on his behalf,[137] but it is wrong to conclude on this ground that it is undesirable to have a custody of a parent-type rule, and instead cause the limitation period to be extended in all cases of disability. 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.

17.59 The Commission therefore **recommends** that, in the case of minors, there should be no extension of any applicable limitation period unless the plaintiff proves that he was not in the custody of a parent or guardian. Unless there is such proof, the limitation period or periods would apply in the ordinary way. The discovery period would commence when the damage became discoverable, but it would be the knowledge of the parent or guardian, and not the minor, which would be relevant for this purpose. The ultimate period would run from the date of the act or omission giving rise to the injury in the ordinary way.

17.60 Situations might arise in which, subsequent to the injury but before attaining adulthood, the minor ceased to be in the custody of a parent or guardian. In this situation, the Commission **recommends** that if the discovery period has already commenced it should be suspended until the minor reaches adulthood, and if it has not started to run the minor should have a full discovery period commencing when he becomes 18. The ultimate period should likewise be suspended, recommencing when the minor attains majority.

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134 See para 17.45 above.
135 See paras 17.45-17.47 above.
136 See paras 17.49-17.50 above.
137 See para 17.49 above.

17.61 In the case of minors, there will be a number of exceptional cases where as a result of the Commission's recommended rule the limitation period will commence and yet the interests of the minor may not be adequately protected. This may be the case if the parent or guardian of the minor is a person suffering from intellectual disability or for some other reason is not in a position to take the necessary steps to commence legal proceedings on the minor's behalf, or if it is the parent or guardian who is the wrongdoer against whom the action should be brought. Apart from the cases referred to by the Orr Committee, involving accidents on the road or in the home and so forth,[138] there is the possibility that in cases involving assault or abuse on the child the parent is the perpetrator and will therefore not be bringing legal proceedings on the child's behalf. However, such cases can be taken care of by the discretionary provision recommended by the Commission under which a court, in exceptional circumstances, can allow an action to proceed notwithstanding that either the discovery period or the ultimate period has expired.[139]

(ii) Persons suffering from mental incapacity

17.62 Minors who suffer from some form of mental incapacity, like all other minors, will normally be in the care of a parent or guardian, and the recommendations made above are intended to apply to all minors including those suffering from mental incapacity. In the case of incapacitated adults, it is not possible to make the assumption that there is someone else who is responsible for looking after their affairs. The responsibility of the parents of a mentally incapacitated minor ceases when the minor reaches the age of 18.[140] However, there will be many cases where such persons are in fact in the care of another.[141] In the most serious cases, a guardian or administrator can be appointed under the *Guardianship and Administration Act 1990*. The role of a guardian is to be responsible for the personal

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138 See para 17.49 above.

139 Note the recommendation of the Newfoundland Report (1986) that the custody of a parent rule should not apply where the infant is suing his parent or guardian: see para 17.54 above.

140 S C and R Hayes *Mental Retardation* (1982) 231. Where a child is a ward of court, the court's wardship jurisdiction ceases immediately the ward comes of age: *Bolton v Bolton* [1891] 3 Ch 270.

141 There are between of 30,000 and 35,000 people in Western Australia with some form of decision-making disability: 10,000-14,000 with dementia due to Alzheimer's disease or related disorders, over 8,500 people with an intellectual disability, and approximately 10,000 people who are affected by a psychiatric condition. In addition about 600 people a year sustain permanent brain damage. Between October 1992, when the Guardianship and Administration Board was established, and June 1995, 2,300 applications for the appointment of a guardian or administrator were made on behalf of 1,580 people. A further 510 applications were made during 1995-96. Those on whose behalf such applications are made are likely to be those most severely affected. The others will in most cases be in the care of parents or other relatives. See *Public Guardian's Office Annual Report 1994-1995* 6-7; *Public Guardian's Office Annual Report 1995-1996* 14-15.

wellbeing of the represented person, but decisions about the commencement of legal proceedings would be the responsibility of an administrator. The Act provides that where an application for an administration order is made on behalf of a person, and the Guardianship and Administration Board is satisfied that the person is unable, by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of matters relating to all or any part of his estate, and is in need of an administrator of his estate, the Board may declare the person to be in need of an administrator and make the appointment.[142] Where the Board vests plenary functions in the administrator, he may perform any function that the represented person could himself perform if he were of full legal capacity,[143] including the power to bring legal proceedings on behalf of the represented person should this prove necessary. The powers given by the *Guardianship and Administration Act* replace similar powers formerly given to the Public Trustee by the *Public Trustee Act 1941* and to the Supreme Court under the *Mental Health Act 1962*.[144]

17.63 The Commission's recommendations are based on the principle that 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 other cases, because of the lack of any formal legal relationship between a person suffering from incapacity and those who care for him, it would not be appropriate for the ordinary limitation periods to apply in the same way as they would to a plaintiff with full capacity. However, in such a situation 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, because of problems such as the deterioration of evidence and the difficulty of determining the proper standard of care at the time of the events in question.

17.64 The Commission **recommends** that, where at the time of the injury the plaintiff was a person who is unable by reason of mental disorder, intellectual handicap or other mental disability to make reasonable judgments in respect of his affairs -

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142 *Guardianship and Administration Act 1990* s 64(1).
143 Id s 71(2).
144 Id s 123 and Sch 4.

(1) If an administrator has been appointed to look after his estate under the *Guardianship and Administration Act 1990*, 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. The ultimate period would run from the date of the act or omission giving rise to the injury in the ordinary way.

(2) In all other cases, only the ultimate period and not the discovery period should apply. This would give the person's carers 15 years in which to bring proceedings.

One result of this recommendation is that it associates the definition of incapacity with the definition in the *Guardianship and Administration Act*, rather than adopting any of the alternative definitions reviewed above.[145]

17.65 Mental incapacity, unlike minority, can arise after the commencement of the limitation period. The Commission **recommends** that in such a situation the discovery period should stop running until such time as an administrator is appointed under the *Guardianship and Administration Act*, when it should recommence. If at the time when the administrator is appointed the discovery period has less than a year to run, then it should be extended to one year, so that the administrator is assured of having a minimum period of that length in which to determine whether or not to commence proceedings. The ultimate period should continue to run despite the onset of incapacity. Where there are hard cases, for example where the plaintiff becomes affected by mental incapacity just before the ultimate period is due to expire, and the discovery period is still running, it would be possible to ask the court to exercise its discretion in favour of an extension of the period.

(iii) Other possible cases of disability

17.66 There are some instances which are covered by the wide definition of disability in the New South Wales Act but which would not be covered by the Commission's recommendation

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145 Paras 17.13-17.18.

made above, principally cases of improper detention and persons involved in war or warlike operations.[146] Rather than have additional categories of disability, the Commission is of the view that these rather exceptional instances could be satisfactorily resolved by recourse to the discretionary provision.[147]

(iv) Special limitation periods

17.67 Though under the Commission's recommendations the two general limitation periods will apply to most claims, only the ultimate period will apply to claims relating to mortgages[148] and special limitation provisions will be retained for actions to recover land and tax.[149]

17.68 As regards claims relating to mortgages, the recommendations made above as to the effect of disability on the ultimate period will apply. As regards actions for the recovery of tax, in some cases there is an absolute one year period, which cannot be extended for any reason including disability, but in other cases the two general limitation periods will apply and the disability provisions can operate as recommended above.

17.69 The Commission has recommended that the existing rules as to actions for the recovery of land should be retained. As already stated, these include rules under which the limitation period is extended for disability.[150] The Commission **recommends** that these rules should be retained, but only for the disabilities recognised by the Commission's recommendations, that is, minority and mental incapacity (as defined above[151]). The result of this recommendation will be that in such cases an action for recovery of land may be brought at any time within six years after the disability ceases or the person under disability dies, whichever first happens.[152] The rules that the plaintiff cannot have more than 30 years from the time that the right first accrued,[153] and that no extra time can be allowed for a succession of disabilities,[154] should also be retained.

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146 See para 17.15 above.
147 This was the view of the Orr Committee: see para 17.16 above.
148 See para 15.33 above.
149 See paras 14.32-14.35,16.7-16.8 above.
150 See para 17.6 above.
151 Para 17.64.
152 See *Limitation Act 1935* s 16.
153 Id s 18.
154 Id s 19.

6. BURDEN OF PROOF

17.70 According to the present law, the plaintiff has the burden of establishing the existence of disability, so as to delay the running of the limitation period.[155] Under the Commission's recommendations, disability will not ordinarily have this effect but the burden of establishing the existence of disability, and consequential issues such as that a minor is not under the control of his parents or guardians, will remain on the plaintiff.

17.71 The Commission has recommended that the new Limitation Act which it proposes for Western Australia should contain express provisions allocating the burden of proof of the various matters in issue.[156] There is an express provision to this effect in the legislation of Alberta, British Columbia and Manitoba,[157] and such a provision has been recommended in New Zealand and Ontario.[158] The Commission therefore **recommends** that it should be expressly provided that the plaintiff should bear the burden of proving that he is a person under disability, so that the rules relating to disability recommended by the Commission apply. The legislation should also provide that a minor plaintiff has the burden of proving that he is not in the care of a parent, guardian or other authority, so that the running of the applicable limitation period is delayed.

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155 See *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, Bowen CJ at 478-479; *King v Coupland* [1981] Qd R 121, Macrossan J at 123.

156 See para 8.6 above.

157 *Limitations Act 1996* (Alta) s 5(3); *Limitation Act 1979* (BC) s 7(9); *Limitation of Actions Act 1987* (Man) s 7(6).

158 *Draft Limitation Defences Act* (NZ) ss 8(1), 9(1); Limitations Bill 1992 (Ont) cls 7(2) (under which a person is to be presumed to have been capable of commencing a proceeding unless the contrary is proved), 15(9). See also New Brunswick Discussion Paper (1988) 10.

Chapter 18

AGREEMENT, ACKNOWLEDGMENT AND PART PAYMENT

1. AGREEMENT AND CONNECTED MATTERS

(a) Agreement

18.1 Limitation statutes are generally silent on the question whether parties may by agreement abridge or extend the limitation period that applies in a particular case. However, case law confirms that parties to a contract may stipulate that legal proceedings or arbitration must be commenced within a shorter time than that provided for in the *Limitation Act*, and that such clauses (known in the United States as "tolling agreements") are not contrary to public policy as tending to oust the jurisdiction of the courts.[1] Such clauses are not uncommon in contracts of insurance and for the carriage of goods.[2] There does not seem to be very much authority on the question whether parties should be able to agree to extend the normal limitation period. There could be policy arguments against such extensions: for example, there is already a problem about changing standards of care over a long period of time, and this might be increased by such extensions. However, parties who enter into such agreements are presumably prepared to accept the risk and take steps to ameliorate it. The fact that an agreement not to plead a limitation period will be binding, if supported by consideration, and will have the effect of allowing the plaintiff to proceed after the limitation period has expired,[3] would seem to suggest that an agreement to extend the limitation period would be enforceable.

18.2 Law reform commissions which have considered this issue are agreed that contracts to vary the limitation period should be effective.[4] Some concern has been voiced about

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1 See *Atlantic Shipping Co Ltd v Louis Dreyfus & Co* [1922] 2 A C 250; *Chitty on Contracts* (27th ed 1994) vol 1 para 28-034.

2 See eg *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300; *Celthene Pty Ltd v WKJ Hauliers Ltd* [1981] 1 NSWLR 606.

3 *Lade v Trill* (1842) 11 LJ Ch 102; *S Pearson & Sons Ltd v Lord Mayor of Dublin* [1907] AC 351, Lord Atkinson at 368; *Lubovsky v Snelling* [1944] KB 44; *Newton v State Government Insurance Office (Qld)* [1986] 1 Qd R 431. It is not clear whether this is so by virtue of preventing the defendant from relying on the statute, as suggested in *Lubovsky v Snelling*, or because it gives rise to a separate cause of action in the plaintiff: see *East India Co v Oditchurn Paul* (1849) 7 Moo PC 85, 13 ER 811, Lord Campbell at 111-113*; Waters v Earl of Thanet* (1842) 2 QB 757, 114 ER 295.

4 Orr Committee Report (1977) paras 2.57-2.58; New Zealand Report (1988) paras 265-266; Alberta Report for Discussion (1986) para 8.3; Alberta Report (1989) 42; Ontario Report (1991) 46.

agreements which provide for very short limitation periods. The Orr Committee, for example, asked whether this raised the same problems as exemption clauses, which in England are controlled by a statute passed in the same year as that in which the Committee reported.[5] However, the Committee concluded that consumer protection issues did not fall within the law of limitation of actions.[6] In Australia, there is no equivalent regulation of exemption clauses[7] and this Commission likewise does not see it as part of its brief to impose controls over contracts which provide for very short periods of limitation.

18.3 It has been recommended in New Zealand, Alberta and Ontario that *Limitation Acts* should expressly confirm that the limitation period may be extended or abridged by agreement.[8] The new Alberta *Limitations Act* provides that the limitation period may be extended by agreement, but makes no mention of agreements to abridge the limitation period.[9] The Commission agrees that it is desirable that it should be made clear by statute that it is possible to extend or reduce the limitation period by agreement, and so **recommends**. The Alberta Act and the Ontario recommendations stipulate that the agreement should be in writing,[10] in the same way that acknowledgments have to be in writing,[11] but the New Zealand Law Commission saw no reason to interfere with the present law, and recommended that the ordinary principles of the law of contract should govern the effectiveness of such agreements.[12] This Commission agrees with the New Zealand view, and accordingly **recommends** that there should not be any requirement that such agreements be in writing.

(b) Negotiation

18.4 Another suggestion canvassed by the Orr Committee was whether the running of the limitation period should be suspended during any period in which the parties are conducting negotiations for a settlement.[13] The Committee received little support for such a suggestion,

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5 *Unfair Contract Terms Act 1977* (UK).

6 Orr Committee Report (1977) paras 2.56-2.57.

7 Though there is some control of unfair contract terms: see eg *Contracts Review Act 1980* (NSW).

8 See *Draft Limitation Defences Act* (NZ) s 16; *Model Limitations Act* (Alta) s 8; Limitations Bill 1992 (Ont) cl 20.

9 *Limitations Act 1996* (Alta) s 7

10 *Limitations Act 1996* (Alta) s 7, which provides that it is subject to s 9; Limitations Bill 1992 (Ont) cl 20. See Ontario Report (1991) 46. The Alberta Report (1989) 42 says: "Variation of the limitation provisions by agreement between the persons themselves will be permitted in accordance with normal contract law" but this is out of line with the Alberta Report for Discussion (1986) para 8.31, the *Model Limitations Act* (Alta) s 8 and the *Limitations Act 1996* (Alta) s 7.

11 See para 18.47 below.

12 New Zealand Report (1988) para 267.

13 Orr Committee Report (1977) paras 2.60-2.61. See also New Brunswick Discussion Paper (1988) 19-20.

and recommended against it, on the ground that such a rule would lead to uncertainty, that it would not be practicable to define "negotiations" in terms which made it clear at what precise moment the suspension of proceedings began and ended, and that the present rule was a strong incentive to parties to act with expedition. If parties really wanted to extend the time, they could do so by express agreement. Under the present law, mere negotiations neither suspend the running of time nor prevent the defendant from pleading a defence of limitation, even if the limitation period expires during the negotiations,[14] unless the defendant's conduct is such that he is estopped from relying on the statute.[15] This is an aspect of the more general common law principle that once the limitation period has started running, it cannot be stopped.[16] The Commission agrees with the view of the Orr Committee, and **recommends** that the limitation period should not be suspended during negotiations.

(c) Reference to alternative forum

18.5 The New Zealand Law Commission considered a suggestion that the running of the limitation period should be suspended for any period during which the plaintiff took his complaint to some alternative forum, such as the Ombudsmen, the Human Rights Commission or the Race Relations Conciliator.[17] The New Zealand Commission said that this was different from mere negotiations, which were imprecise and informal, and recommended that in such a case there should be a suspension of the limitation period.

18.6 Though the New Zealand Commission did not refer to the point, something similar happens under provisions of the Limitation Acts of some jurisdictions dealing with arbitration. In Queensland, Tasmania and Victoria, where a court orders that an arbitration award shall be set aside or orders after the commencement of an arbitration that it shall cease to have effect, the court may further order that the period between the commencement of the

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14 *Hewlett v London County Council* (1908) 24 TLR 331; *Re Order 64 Rule 1BB of the Supreme Court Rules* (Qld); *Wyatt v Orrell* (1992) Aust Torts Rep 81-172.

15 *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240. For estoppel preventing reliance on a defence of limitation, see *Commonwealth v Verwayen* (1990) 170 CLR 394; *China Ocean Shipping Co Ltd v P S Chellaram & Co Ltd* (1990) 28 NSWLR 354; *Commonwealth v Clark* [1994] 2 VR 333. Two earlier Western Australian cases are *Lattimer v Shafran* [1983] WAR 273 and *Martinelli v Jankovic* [1983] WAR 287.

16 *Rhodes v Smethurst* (1838) 4 M & W 42, 150 ER 1335, Lord Abinger CB at 59; *Jenkins v Jenkins* (1882) 3 LR(NSW) 35; *Re George* [1935] VLR 26. Contrast the situation under moratorium legislation: *Whitford's Ltd (in liq) v Carter* (1938) 41 WALR 4.

17 New Zealand Report (1988) paras 275-279.

arbitration and the court order shall be excluded in computing the limitation period.[18] In New South Wales, a court has such a power where it removes an arbitrator, restrains a party or an arbitrator from proceeding with an arbitration or sets aside the award,[19] but there is no such power in the Australian Capital Territory.[20] In the Northern Territory, the general power to extend the limitation period applies.[21]

18.7 The Commission **recommends** that the limitation period should not be suspended for any period during which the complaint is being considered by some alternative forum. As far as the New Zealand proposal is concerned, the Commission is of the view that such a rule would detract from the certainty of the scheme it is recommending, which is rather different from that recommended by the New Zealand Report. The New Zealand Report recommends a three year period running from the date of the act or omission, which is capable of extension only where the damage is not discoverable. Under the proposals in the present report, the three year limitation period running from the point of discovery can be extended in exceptional cases at the discretion of the court. There might be a case for the court exercising its discretion in favour of the plaintiff if the principal reason for time running out was that the plaintiff had used some of that time in an attempt to resolve the dispute by reference to some alternative forum. As for the power to suspend the limitation period after an arbitration award has been set aside, the Commission is again of the view that its general recommendations make any such special provision unnecessary. This would seem to receive support from the repeal of the Australian Capital Territory provision and the use of the general extension provision in the Northern Territory.

2. ACKNOWLEDGMENT AND PART PAYMENT

18.8 Under doctrines that have been recognised for many years, an acknowledgment of the claim by the defendant, or part payment of a debt, extends the limitation period by causing it to start running afresh from the date of the acknowledgment or part payment. Part payment is a form of acknowledgment which consists of conduct rather than words. Their effect is that

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18 *Limitation of Actions Act 1974* (Qld) s 41(5); *Limitation Act 1974* (Tas) s 33(5); *Limitation of Actions Act 1958* (Vic) s 28(5); see also *Limitation Act 1980* (UK) s 34(5); *Limitation Act 1950* (NZ) s 29(5).

19 *Limitation Act 1969* (NSW) s 73.

20 *Limitation Act 1985* (ACT) s 50 having been repealed by the *Commercial Arbitration (Amendment) Act 1990* (ACT) s 6.

21 *Limitation Act 1981* (NT) s 44: see para 5.18 above.

"the right [of action] shall be given a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth - and also like the phoenix, it is still itself".[22]

(a) The present law in Western Australia

18.9 Like so much else in the *Limitation Act 1935*, the present law on acknowledgment and part payment reproduces the provisions of English statute law enacted in the early 19th century. As a result, there are no common principles, but rather a series of provisions dealing with particular types of claim, and the rules on acknowledgment and part payment vary from one claim to another. An added source of complication is that most provisions which contain rules about acknowledgment and part payment also contain rules about limitation periods.

18.10 An analysis of the present law must distinguish between ordinary personal actions, specialty debts, actions relating to land, mortgages, actions to recover money charged on land, and some other matters.[23]

(i) Personal actions

18.11 The English *Limitation Act 1623*, which set out limitation periods applicable to personal actions, made no mention of acknowledgment or part payment. However, soon after the passing of the Act, the courts began to develop a doctrine that the acknowledgment of a debt within six years of the accrual of a cause of action took the case out of the statute, "decorously disregarding an Act of Parliament".[24] There was some controversy about whether an express promise to pay was required or a mere admission of the debt was sufficient, but this was ultimately resolved in 1827 by a decision which held that there must be an express promise to pay or an unconditional acknowledgment of the debt from which an express promise could be implied.[25] The cases permitted acknowledgments to be made orally, which,

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22 *Busch v Stevens* [1963] 1 QB 1, Lawton J at 6.

23 The analysis used in these paragraphs follows that used in the British Columbia Report (1974) 86-89 and the Newfoundland Working Paper (1985) 206-212. See also Wright Committee Report (1936) paras 19-20.

24 *Spencer v Hemmerde* [1922] 2 AC 507, Lord Sumner at 519. Note that s 44(1) of the *Limitation Act 1935* provides that except as expressly provided, nothing in s 38 of the Act (which sets out the limitation periods for common law actions originally enacted by the *Limitation Act 1623*) takes away or lessens the effect of any acknowledgment or promise, or any part payment.

25 *Tanner v Smart* (1827) 6 B & C 603, 108 ER 573; see also F A Bosanquet and J R V Marchant *Darby and Bosanquet's Statutes of Limitations* (2nd ed 1893) 66-69; *Spencer v Hemmerde* [1922] 2 AC 507, Lord Sumner at 519. For Australian cases which affirm this principle, see *Hepburn v McDonnell* (1918) 25 CLR 199, Isaacs J at 209; *Bucknell v Commercial Banking Co of Sydney Ltd* (1937) 58 CLR 155;

it was suggested, limited the benefit of having a statutory limitation period.[26] However, section 1 of the *Statute of Frauds Amendment Act 1828* reformed the law by providing that no acknowledgment or promise by words should be effective to take the case out of the 1623 Act unless it was made in writing and signed by the party chargeable or his agent, duly authorised. In Western Australia, this provision is reproduced as section 44(3) of the *Limitation Act 1935*. This provision merely alters the way in which acknowledgments have to be proved: the requirement of a promise to pay still applies.

18.12 Soon after the passing of the 1623 Act, it was held that part payment of a debt would have the same effect as acknowledgment.[27] The payment is an acknowledgment of the existence of the debt, and from it the law raised an implication of a promise to pay.[28] The rules on part payment were expressly excepted from the 1828 statute, an exception again preserved in Western Australia by section 44(3).[29]

(ii) Specialty debts

18.13 There was no limitation period for specialty debts until 1833, and so the common law on acknowledgments and part payments did not apply to such actions. However, section 3 of the English *Civil Procedure Act 1833* imposed a limitation period of 20 years for specialty debts, and section 5 specifically provided that an acknowledgment in writing, signed by the party liable or his agent duly authorised, or a part payment would start time running afresh. In Western Australia, section 3 was incorporated in section 38 of the *Limitation Act* and section 5 became section 44(4). Section 44(4) applies "[i]n actions of debt for rent upon an indenture of demise, in actions of covenant or debt upon any bond or other specialty, and in actions of debt or *scire facias* upon any recognisance". The courts gave this provision a much wider construction than the equivalent common law, holding that an acknowledgment need not

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Motor Terms Co Ltd v Liberty Insurance Ltd (in liq) (1967) 116 CLR 177. Where there is no valid acknowledgment, in order to sue on a debt it would be necessary to show a breach of a new promise based on fresh consideration: *Executor, Trustee & Agency Co of South Australia Ltd v Thompson* (1919) 27 CLR 162.

26 F A Bosanquet and J R V Marchant *Darby and Bosanquet's Statutes of Limitations* (2nd ed 1893) 65.

27 *Fordham v Wallis* (1853) 10 Hare 216, 68 ER 905.

28 *Morgan v Rowlands* (1872) LR 7 QB 493; *Green v Humphreys* (1884) 26 Ch D 474.

29 S 3 of the *Statute of Frauds Amendment Act 1828* (UK) provided that an indorsement or memorandum of a part payment written on a "promissory note, bill of exchange or other writing" was not sufficient proof of a part payment: this provision is reproduced in s 44(2) of the *Limitation Act 1935*, which refers to an indorsement or memorandum on any "bill of exchange, cheque or promissory note".

amount to a promise to pay and would be sufficient even if made to someone other than the creditor or his agent.[30]

(iii) Arrears of interest

18.14 Under the proviso to section 38(1), which is the duplicate of another provision in the *Limitation Act* dealing with interest on money charged on land,[31] in the case of an action for arrears of interest in respect of any sum of money, whether payable under a covenant or otherwise, or damages in respect of such arrears, an acknowledgment in writing, signed by the person by whom the money was payable or his agent and given to the person entitled or his agent, causes the 6 year limitation period to start running afresh from the date of the acknowledgment. This provision does not apply to part payment.

(iv) Actions relating to land

18.15 In 1833 also, the *Real Property Limitation Act* imposed limitation periods for actions for the recovery of land, and section 14 made specific provision for acknowledgments. The equivalent provision in the Western Australian *Limitation Act* is section 15, under which an acknowledgment of the title of a person entitled to land or rent, given in writing signed by the person in possession of the land or in receipt of the profits of the land or of the rent to the person entitled or his agent, has the effect of deeming the right of the latter or any person claiming through him to recover the land to have accrued at the time when the acknowledgment was given. The provision does not apply to part payment.

18.16 Provisions of the same and subsequent legislation dealing with mortgages have also been incorporated in the *Limitation Act 1935*.

* Under section 29,[32] where a mortgagee is in possession or receipt of the profit of any land or rent comprised in the mortgage, if an acknowledgment of the mortgagor's title or right of redemption is given to the mortgagor or some person claiming his estate, or to that person's agent, signed by the mortgagee or

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30 See *Moodie v Bannister* (1859) 4 Drew 432, 62 ER 166; see also F A Bosanquet and J R V Marchant *Darby and Bonsanquet's Statutes of Limitations* (2nd ed 1893) 221-224.

31 *Limitation Act 1934* s 34: see para 18.17 below.

32 Reproducing *Real Property Limitation Act 1833* (UK) s 28 as replaced by *Real Property Limitation Act 1874* (UK) s 7.

some other person claiming through him, the limitation period (12 years) starts running afresh from the date of the acknowledgment. The provision does not make reference to part payment.

* Under section 35,[33] any person entitled to or claiming under a mortgage of land can bring an action to recover the land within 12 years of any payment of principal or interest, even though more than 12 years have elapsed since the right first accrued.

Again the word "acknowledgment" as used in this statute was given a liberal construction by the courts.[34]

(v) Actions to recover money charged on land

18.17 Other provisions in the English *Real Property Limitation Act 1833* dealt with the recovery of money secured on land, judgments, rent and interest in respect of money charged on land. These provisions can now be found in sections 32 and 34 of the Western Australian *Limitation Act.*

* Under section 32(1),[35] in the case of an action to recover money secured by any mortgage, judgment or lien or otherwise charged on any land or rent at law or in equity, or any legacy, a part payment, or an acknowledgment in writing signed by the person by whom the money is payable or his agent and given to the person entitled or his agent, causes the 12 year limitation period to start running afresh from the date of acknowledgment or payment.

* Under section 34,[36] in the case of an action for arrears of rent or interest in respect of money charged on or payable out of any land or rent, or in respect of any legacy, or damages in respect of such arrears of rent or interest, an acknowledgment in writing, signed by the person by whom the money was

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33 Reproducing *Real Property Limitation Act 1837* (UK) s 1, as amended by *Real Property Limitation Act 1874* (UK) s 9.

34 See F A Bosanquet and J R V Marchant *Darby and Bosanquet's Statutes of Limitations* (2nd ed 1893) 383-387.

35 Reproducing *Real Property Limitation Act 1833* (UK) s 40, as replaced by *Real Property Limitation Act 1874* (UK) s 8.

36 Reproducing *Real Property Limitation Act 1833* (UK) s 42.

payable or his agent and given to the person entitled or his agent, causes the 6 year limitation period to start running afresh from the date of the acknowledgment. This provision does not apply to part payment.

(vi) Actions to recover the estate of an intestate

18.18 A later English statute extended the provision now found in section 32(1) of the *Limitation Act* to cover claims to the estate of an intestate.[37] This provision was reproduced in Western Australia as section 33 of the *Limitation Act*. It provides that in the case of an action against a personal representative to recover the estate or any share of the estate of a person dying intestate, a part payment, or an acknowledgment in writing signed by the person accountable or his agent and given to the person entitled or his agent, causes the 12 year limitation period to start running afresh from the date of the acknowledgment or payment.

(vii) The position of co-contractors

18.19 Under the pre-1828 common law, where there were two or more co-debtors, an acknowledgment or part payment by one debtor was sufficient to bind all the others.[38]

Section 1 of the *Statute of Frauds Amendment Act 1828* altered the law, providing that an acknowledgment given by one of two or more joint contractors would bind only the party making the acknowledgment. The Act left the common law relating to part payment unchanged. Subsequently, however, section 14 of the *Mercantile Law Amendment Act 1856* provided that, with respect to personal actions and actions for the recovery of specialty debts, a part payment by one contractor should not bind the others. As regards personal actions, this merely brought the law relating to part payment into line with that relating to acknowledgment, but as regards specialty debts it created a distinction between acknowledgment and part payment, since the common law rule under which one contractor could give an acknowledgment which bound all co-contractors was not affected. In Western Australia, the 1828 provision is reproduced as section 44(3), and the 1856 provision as section 44(5).

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37 *Intestates Estates Act 1860* (UK) s 13 (which specified a 20 year limitation period).

38 British Columbia Report (1974) 87, citing the annotations to *Chitty's Collection of Statutes* (3rd ed 1865) vol 3, 13 n (c), 69 n (h).

18.20 The *Real Property Limitation Act 1833* did not deal with the problem of co-contractors, except for section 28, now reproduced as section 29 of the Western Australian Act. According to section 29, an acknowledgment given to one of several mortgagors operates in favour of them all, but an acknowledgment given by one of several mortgagees is effectual only as against that mortgagee. Where a mortgagee giving an acknowledgment is entitled to a divided part of the land, the mortgagor is entitled to redeem that divided part. In cases where the Act is silent, common law has filled in some of the gaps. An acknowledgment of the title to land by a person in possession of it binds all other persons in possession during the ensuing limitation period.[39] As regards the mortgagor's right to foreclose, a payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property similarly binds all other persons in possession during the ensuing limitation period.[40]

18.21 Section 45, which reproduces a provision in the 1828 Act[41] but by virtue of its position as a separate section in the Western Australian Act would now seem to be of general application, provides that where, in an action against any two or more defendants, it appears that the plaintiff though barred as to some is not barred as to others, judgment may be given for the plaintiff as to those against whom he is entitled and for the defendants in the other cases.

(viii) By whom and to whom acknowledgments may be given

18.22 On these issues, there is no consistency between the various provisions. On the question of the person by whom an acknowledgment may be given, sections 32(1), 33, 34, 44(3) and 44(4) provide that the acknowledgment must be made by the party to be charged or his agent, but section 15 refers only to the person in possession or in receipt of the profits or rent, and section 29 refers only to the mortgagee in possession or a person claiming through him. Neither section makes any reference to an acknowledgment by the agent. According to the case law, unless a statute specifically provides for acknowledgment by an agent, such an acknowledgment is insufficient.[42]

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39 *Goode v Job* (1858) 28 LJQB 1.
40 *Harlock v Ashberry* (1882) 19 Ch D 539.
41 *Statute of Frauds Amendment Act 1828* (UK) s 1.
42 *Ley v Peter* (1858) 3 H & N 101, 157 ER 403.

18.23 As for the person to whom an acknowledgment may be made, sections 15, 29, 32(1), 33 and 34 specifically provide that an acknowledgment may be made to the agent of the person who will benefit, but sections 44(3) and 44(4) are silent on this point. The courts held that in the former situation an acknowledgment made to a third party was ineffective, but that where there was no express provision in the statute an acknowledgment to a third party would be effective.[43]

(ix) Acknowledgment and part payment after expiry of the limitation period

18.24 As a result of distinctions carried over from the old English law, in some cases an acknowledgment or part payment is effective only if given or made before the expiry of the limitation period, but in other cases an acknowledgment or part payment after the period had expired is effective to revive what would otherwise be a statute-barred cause of action. In an action for the recovery of land or rent under section 15, an acknowledgment is not effective unless it is given before the limitation period has expired,[44] because the running of the limitation period extinguishes the title of the claimant.[45] However, as regards actions under section 32(1) to recover money charged on land or rent, or under a judgment or legacy, it appears that the rule is different: an acknowledgment is thought to be effective even if given after the expiration of the limitation period, because in such a case the statute only bars the remedy and does not extinguish the right.[46] Though there is no direct authority, it is thought that the position is the same as regards an action to recover arrears of rent or interest under section 34.[47] In the case of simple contract debts, it appears to be settled law that it is immaterial whether the acknowledgment was given before or after the statute had run,[48] and it seems that in the case of specialty debts also an acknowledgment would be effective even after the expiration of the original limitation period.[49]

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43 *Batchelor v Middleton* (1848) 6 Hare 75, 67 ER 1088. The British Columbia Report (1974) 89 suggests that this is difficult to reconcile with *Tanner v Smart* (1827) 6 B & C 603, 108 ER 573 (para 18.11 above).

44 *Re Alison* (1879) 11 Ch D 284; *Sanders v Sanders* (1881) 19 Ch D 373; *National Bank of Tasmania (in liq) v McKenzie* [1920] VLR 411; *Nicholson v England* [1926] 2 KB 93; *Cameron v Blau* [1963] Qd R 421. An acknowledgment given by a tenant for life, though in general binding on the remainderman, is not binding on him if given after the limitation period has expired: *Gregson v Hindley* (1846) 10 Jur 383. The position is different as regards mortgages: though the plaintiff's action against the land is extinguished, acknowledgment or part payment will revive his personal remedy against the mortgagor: *Beamish v Whitney* [1909] 1 IR 360.

45 *Limitation Act 1935* s 30.

46 *Re Lord Clifden* [1900] 1 Ch 774.

47 Wright Committee Report (1936) para 19(c).

48 *Maber v Maber* (1867) LR 2 Ex 153; Wright Committee Report (1936) para 19(e).

49 Id para 19(d).

(b) The law elsewhere

18.25 Western Australia is not the only jurisdiction where the law on acknowledgment and part payment remains based on the 19th century English statutes. The same is true of South Australia,[50] and of the Canadian provinces of Ontario, Newfoundland and Nova Scotia.[51] In some other Canadian jurisdictions, the law is based on the provisions of the *Uniform Limitation of Actions Act 1931*, but the law on acknowledgment and part payment as redrafted by the *Uniform Act* does not substantially change the traditional provisions.[52] Rather than developing general principles, the *Uniform Act* perpetuated the approach of having separate provisions for each kind of action - and in fact, by having provisions dealing with acknowledgment and part payment in actions by a buyer or seller of land and actions by a seller of goods, increased the number of different provisions.

18.26 However, in most jurisdictions under examination, the law on acknowledgment and part payment has been reformed and modernised, and general principles have replaced the tangled mass of rules found in the old law. As in other areas of limitations law, the reforms have gone through a series of stages.

18.27 The earliest reforms resulted from the report of the Wright Committee in England in 1936.[53] The Committee's report analysed the inconsistencies in the old English statutes and made recommendations designed to eliminate them. Thus, for example, it was recommended that an acknowledgment should not be effective unless given to the person entitled to enforce the claim or his agent, that an acknowledgment signed by an agent should always be effective, and that in simple contract actions acknowledgments and part payments should be effective regardless of whether there was an implied promise to pay. These recommendations were implemented by the English *Limitation Act 1939*,[54] and provisions based on this Act were

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50 *Limitation of Actions Act 1936* (SA) ss 21, 27, 33-34, 41-43.

51 *Limitations Act 1990* (Ont) ss 13, 17, 19-23, 50-54; *Limitation of Realty Actions Act 1990* (Nfd) ss 14, 23-25; *Limitation of Personal Actions Act 1990* (Nfd) ss 5-7; *Limitation of Actions Act 1989* (NS) ss 6, 8-9, 17, 23-24, 26.

52 See eg *Limitation of Actions Act 1987* (Man) ss 9-12, 21-23, 39-40, 42-43, 45, 48; *Statute of Limitations 1988* (PEI) ss 6-9, 11-12, 32, 34, 36-38, 41; *Limitation of Actions Act 1978* (Sask) ss 7-10, 12-14, 32-33, 35-36,38, 41; note also *Limitation of Actions Act 1980* (Alta) ss 9-12, 14-15, 32-33, 35-37, 39, now repealed by *Limitations Act 1996* (Alta) s 16. See also *Limitation of Actions Act 1973* (NB) ss 10-14, 25-27, 45-46, 48-49, 51, 54.

53 Wright Committee Report (1936) paras 19-21.

54 *Limitation Act 1939* (UK) ss 23-25; see now *Limitation Act 1980* (UK) ss 29-31.

adopted in Queensland, Tasmania, Victoria and New Zealand.[55] As a result, the law in these jurisdictions is a considerable improvement on the current Western Australian law. In general, no attempt was made to extend the principles of acknowledgment and part payment to actions to which they did not formerly apply, and so the legislative provisions deal with actions to recover land and foreclosure actions, actions to redeem a mortgage, and actions to recover debts and legacies.

18.28 While the Wright Committee's recommendations were of major importance as a first attempt at reform, some of the complexities of the older law were retained. There was still a distinction between acknowledgment and part payment as regards their effect on co-contractors, in that the Wright Committee recommended that while acknowledgments should only bind the persons making them and their successors in title, part payments should also bind co-debtors. Also, it remained possible in some circumstances for acknowledgment and part payment to start a limitation period running afresh even after it had expired. However, as regards this last point, the law in England (though not in any of the other jurisdictions in question) has subsequently been changed. The Orr Committee Report in 1977 recommended that once a debt had become statute-barred it should remain irrecoverable despite any subsequent acknowledgment or payment,[56] and the English *Limitation Act 1980* now so provides.[57]

18.29 The next step forward was made by the New South Wales Law Reform Commission Report of 1967.[58] It recommended new provisions on acknowledgment and part payment the aim of which was to simplify the English legislation. These recommendations were implemented by the New South Wales *Limitation Act 1969*,[59] and have subsequently been adopted in the Australian Capital Territory and the Northern Territory.[60] Under the New South Wales recommendations, the law on acknowledgment and part payment is fully unified, and a new term, "confirmation", is used to refer compendiously to both acknowledgment and part payment. Confirmation has effect only between the parties or their agents, and in no case can a claim be revived by confirmation after the expiry of the limitation period. But the most

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55 *Limitation of Actions Act 1974* (Qld) ss 35-37; *Limitation Act 1974* (Tas) ss 29-31; *Limitation of Actions Act 1958* (Vic) ss 24-26; *Limitation Act 1950* (NZ) ss 25-27.

56 Orr Committee Report (1977) paras 2.68-2.71.

57 *Limitation Act 1980* (UK) s 29(7).

58 NSW Report (1967) paras 248-267.

59 S 54.

60 *Limitation Act 1985* (ACT) s 32; *Limitation Act 1981* (NT) s 41. See ACT Working Paper (1984) paras 194-195.

important change resulting from the recommendations of the New South Wales Commission was that confirmation was extended to all causes of action, including unliquidated claims such as actions for damages for breach of contract or tort.[61]

18.30 Since 1967 several Canadian law reform commissions have made recommendations for reforming the law relating to acknowledgment and part payment,[62] and in Alberta and British Columbia the recommendations have been implemented.[63] Though these various reports have disagreed about the desirability of adopting the term "confirmation", in general their recommendations follow the same pattern. Most of the New South Wales recommendations are endorsed, with one major exception: the Canadian commissions have not approved the extension of acknowledgment and part payment to unliquidated claims.

18.31 Almost certainly the most radical proposals are those from New Zealand.[64] The New Zealand Law Commission contemplated the total abolition of the acknowledgment and part payment provisions (consequent on its proposal to abolish adverse possession) but ultimately decided that they should be retained and rationalised by extending them to all kinds of disputes, subject to the introduction of a new requirement, based on the analogy between these rules and estoppel, that it should be necessary to prove reliance on the acknowledgment or part payment.

(c) The Commission's approach

18.32 In the Commission's view, the present provisions of the *Limitation Act 1935*, as supplemented by the common law, are greatly in need of reform. Instead of a miscellaneous collection of instances in which in some cases acknowledgment, in others part payment, and in yet others both acknowledgment and part payment cause the limitation period to start running afresh, there should be a uniform rule. Instead of the present situation, under which the rules which apply to each different instance vary considerably, the rules should be the same in each case. Instead of the differences that presently exist between acknowledgment and part payment, their effect should be the same. The Commission's approach is broadly

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61 See paras 18.36-18.37 below.

62 Ontario Report (1969) 116-125; British Columbia Report (1974) 86-93; Newfoundland Working Paper (1985) 205-219 and Newfoundland Report (1986); Alberta Report for Discussion (1986) paras 8.6-8.43; Alberta Report (1989) 42; Saskatchewan Report (1989) 36-41; Ontario Report (1991) 45-46.

63 *Limitations Act 1996* (Alta) ss 8-9; *Limitation Act 1979* (BC) s 5.

64 New Zealand Report (1988) paras 268-274.

consistent with that of most law reform bodies which have examined these issues in the last thirty years, and in particular with the recommendations of the Alberta Law Reform Institute, which have now been implemented by the *Limitations Act 1996*. Like the Alberta provisions, the Commission's recommendations must be appropriate to a system based on two general limitation periods which will apply to nearly all kinds of claim. In addition, they must be capable of application to the small number of specific limitation periods which will be preserved.

18.33 One issue on which commissions have differed is whether or not to adopt the New South Wales initiative under which the word "confirmation" is used to refer to both acknowledgments and part payments.[65] The Commission has come to the conclusion that no real advantage is to be gained by adopting such terminology. It agrees with the view of the Alberta Law Reform Institute that:

> "[I]t is easier, and less confusing, for legislation to provide that acknowledgment and part payment both produce the same result, rather than to provide that they both constitute a confirmation which in turn produces a particular result."[66]

The Commission's recommendations therefore continue to refer to "acknowledgment" and "part payment". It does not seek to define what constitutes an acknowledgment or a part payment.[67] In its view, it is preferable to leave this to the common law, where there is ample authority on the meaning of both terms.[68] All modern legislation adopts this approach.

18.34 With these general considerations in mind, the Commission **recommends** that there should be one set of rules on acknowledgment and part payment, which will apply to all cases in which those doctrines operate. Recommendations made below deal with the details of the rules, and the cases in which they apply. However, there should be a provision which states the general effect of acknowledgment and part payment. It should provide that if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the

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65 In favour of "confirmation": NSW Report (1967) para 248; British Columbia Report (1974) 92; ACT Working Paper (1984) paras 194-195; Newfoundland Working Paper (1985) 205 (noting that the term was used in the *Uniform Limitation of Actions Act 1982*) and Newfoundland Report (1986); Saskatchewan Report (1989) 38. Against: Ontario Report (1969) 123; Alberta Report for Discussion (1986) paras 8.21-8.23. Note that the Ontario Report (1991) 45 and the *Draft Limitation Defences Act* (NZ) s 11(3) use the device of defining "acknowledgment" to include part payment.

66 Alberta Report for Discussion (1986) para 8.23.

67 Save for recommending that an acknowledgment should be effective whether or not there is an implied promise to pay: see para 18.46 below.

68 See *The Laws of Australia* paras 116 and 118.

claim, both the discovery period and the ultimate period will begin anew at the time of the acknowledgment or part payment.[69] It should also be made clear that the same principle applies to those specific limitation periods which the Commission has recommended for preservation, such as actions for the recovery of land.

(d) Claims which should be affected by acknowledgment and part payment

18.35 An issue debated by all law reform reports issued since 1967 is whether acknowledgment and part payment should apply only in limited instances, as is the case under the present law, or whether they should be extended so as to apply to all claims. If there is not to be such an extension, the question arises whether there is any alternative to simply listing the cases in which they apply.

(i) Should acknowledgment and part payment apply to all claims?

18.36 In 1967 the New South Wales Law Reform Commission recommended that every limitation period to which the *Limitation Act* applied ought to be susceptible of enlargement by acknowledgment and part payment.[70] This recommendation was implemented by the New South Wales *Limitation Act 1969*.[71] The New South Wales Law Reform Commission gave two illustrations to justify its recommendation, which may be summarised as follows -[72]

> (1) X steals Y's car. This is not a case where an acknowledgment by X would affect the running of time. If X then sells the car to Z, there would then be a promise imputed by X to turn over the proceeds to Y and an acknowledgment of that promise would start time running afresh. On the other hand, if the car had not been stolen at all but sold by Y to Q without the price being paid, an acknowledgment by Q is, of course, effective. Why should a thief (before he sells) not be bound by an acknowledgment if an ordinary debtor is?

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69 Note the general principle in s 8(2) of the *Limitations Act 1996* (Alta) which is similar in effect except that it specifies that the acknowledgment or part payment must be made before the expiration of the limitation period applicable to the claim. The Commission recommends in para 18.54 below that it should also be possible to make an acknowledgment or part payment after the expiry of the limitation period, within certain limits.

70 NSW Report (1967) paras 250-254.

71 S 54.

72 This summary closely follows that of the Ontario Report (1969) 121-122.

(2) M is insured with P Co against claims for personal injuries to third parties. A third party, T, is injured so as to give M a claim against P Co, which M makes. P Co admits liability in writing to M and, as the agent of M, to T. The admission will start time running afresh as between M and P Co but will have no effect so far as T is concerned.

The New South Wales Commission pointed out that in *Lubovsky v Snelling*,[73] in the circumstances of the second example, the court allowed T to have the benefit of the acknowledgment, since the evidence disclosed a promise by P Co not to plead the limitation period. The New South Wales Commission regarded this case as a step towards the development of a common law doctrine of acknowledgment of claims for unliquidated damages analogous to the common law doctrine of acknowledgment of debts.[74]

18.37 The New South Wales Commission raised two potential arguments against its proposal: that the facts relating to a claim for unliquidated damages, either in contract or in tort, were likely to be more complicated and less the subject of written record than claims for debts and other liquidated sums, and that the decision whether a writing amounted to an acknowledgment would present undue difficulties in the case of claims for unliquidated damages.[75] The New South Wales Commission did not see either of these as presenting insuperable objections, suggesting that the second difficulty had been reduced by the reforms introduced by the English Act of 1939, and as to the first that in the probably unusual circumstance where an acknowledgment was given carelessly then the loss should be borne by the person giving it rather than the other party. It concluded that considerations of fairness and simplicity justified its recommendation.

18.38 Some additional arguments in favour of the proposal have been provided by the Saskatchewan Law Reform Commission, which suggested that the courts have created what amounts to a "confirmation rule" in some cases involving unliquidated damages by estopping a defendant from pleading a limitation period once he has accepted liability and the only remaining issue is the quantum of damages.[76] It suggested that the realities of the process of

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73 [1944] KB 44.

74 NSW Report (1967) para 251.

75 Id paras 252-254.

76 Saskatchewan Report (1989) 39, citing *Phillips v Canadian National Ry* (1914) 6 WWR 1220; *McLuskie v Sakai* [1985] 6 WWR 258.

negotiation in contract and tort cases makes extension of acknowledgment and part payment to all causes of action attractive.

18.39 Four Canadian commissions have dissented from the New South Wales proposal, recommending that the scope of acknowledgment and part payment should not be extended to unliquidated claims,[77] and in Alberta this view has been accepted in the new *Limitations Act*.[78] The Ontario Commission thought that the objections raised by the New South Wales Report outweighed the disadvantages and that the proposal would create more difficulties than it would resolve. The British Columbia Commission, while not as persuaded by the argument of complexity, came to the conclusion that the inability to confirm unliquidated claims was not a serious deficiency and that the anomalous situations referred to in the New South Wales Report would arise only rarely.

18.40 Perhaps the most important arguments against the extension of these doctrines to all claims are those of the Alberta Law Reform Institute. In its Report for Discussion the Institute sought to identify the policy basis of the rules of acknowledgment and part payment. As regards acknowledgment, the debtor, by admitting his indebtedness and his duty to pay, has renounced his need for protection by a limitations system, and the renewal of the limitation period is justifiable.[79] As regards part payment, the making of such a payment will induce the creditor to believe that prompt litigation is not necessary, and will also support an inference that the defendant does not need the protection of a limitations system until the expiration of a new limitation period.[80] Under the common law (still in force in Western Australia) there is an additional justification for the acknowledgment rule: since a promise to pay is necessary in order to constitute a valid acknowledgment, the debtor, by analogy with the doctrine of estoppel, should be permitted to rely on this new promise.[81] According to the Institute, these considerations explain why acknowledgment does not apply to a claim for unliquidated damages, whether based on tort or contract. Until a duty to pay a certain or ascertainable sum

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77 See Ontario Report (1969) 124-125; British Columbia Report (1974) 90-92; Newfoundland Working Paper (1985) 214-217 and Newfoundland Report (1986); Alberta Report for Discussion (1986) para 8.33. Apart from Saskatchewan, the only support for the proposal is provided by the rather brief comments in the ACT Working Paper (1984) paras 194-195 and the New Zealand Report (1988) para 273.

78 See the definition of a "claim" for the purposes of the section: *Limitations Act 1996* (Alta) s 8(1) quoted in para 18.43 below.

79 Alberta Report for Discussion (1986) para 8.8.

80 Id para 8.16.

81 Id para 8.8.

has been imposed on a person, he will have no legal duty to admit, much less promise to perform by payment.[82]

18.41 Though the arguments are finely balanced, the Commission has come to the conclusion that the doctrines of acknowledgment and part payment should not be extended to unliquidated claims, even though it creates a need to distinguish between different kinds of claims which the Commission has generally sought to avoid. It **recommends** accordingly.

The principal reasons for the Commission's conclusion are the justifications put forward by the Alberta Institute and the fact that it has not been shown that there are any serious deficiencies in the present law, whereas it has been suggested that the proposed change may give rise to a number of difficulties.

(ii) General principle defining claims to which the doctrines apply

18.42 The Commission having recommended that acknowledgment and part payment should not be extended to all claims, the next question is whether there is any realistic alternative to the technique of the present *Limitation Act*, which has a series of separate provisions dealing with the various cases in which acknowledgment and part payment cause the limitation period to start running afresh. One modern draft which has gone back to this approach is the Ontario Limitations Bill, which has departed from earlier attempts in Ontario to set out the law on acknowledgment and part payment in the form of general principles.[83] This may perhaps be a reflection of the difficulties which appear to have been encountered in the drafting of the British Columbia Act, which lists the causes of action to which the confirmation rule applies and concludes: "Except as specifically provided, this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before July 1, 1975".[84]

18.43 However, the Commission sees no reason to resort to such an approach. In its view, the applicable instances can be satisfactorily stated in the form of a general principle. The

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82 Ibid.

83 Limitations Bill 1992 (Ont) cl 13. Compare (Ont) Bill 160 of 1977, and the recommendations in Ontario Report (1991) 45-46 which follow that Bill almost verbatim.

84 *Limitation Act 1979* (BC) s 5(10). There has been some criticism of the British Columbia provision in this respect: see Alberta Report for Discussion (1986) para 8.25. The New Brunswick Discussion Paper (1988) 19 provisionally proposes a provision similar to that in British Columbia.

provisions of the Alberta *Limitations Act* on acknowledgment and part payment refer to a "claim", and a claim for this purpose is defined as "a daim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them".[85] It will be noted that the basis of this provision is a claim for an accrued liquidated pecuniary sum, and unliquidated claims are therefore clearly excluded.

18.44 The Commission **recommends** that a provision along similar lines should be included in the new Western Australian *Limitation Act*. Its purpose would be to identify all claims to which the general discovery and ultimate limitation periods apply which are capable of being affected by acknowledgment or part payment. In addition, however, it should be made clear that the doctrines of acknowledgment and part payment apply to actions to recover land, which under the Commission's recommendations are not subject to the two general limitation periods, but to a specific limitation period.[86]

18.45 One effect of this recommendation is to make it clear that a part payment, as well as an acknowledgment, is effective to cause the limitation period to start running afresh in actions for redemption brought by a mortgagor and actions for possession or foreclosure brought by a mortgagee. The equivalent provisions in the present Act are limited to acknowledgment.[87] All the modern limitation statutes, from the English Act of 1939 onwards, in such a case cause the limitation period to start running again as a result of part payment as well as acknowledgment.[88] This puts into practice the principle that acknowledgment and part payment should be treated alike.

(e) Rules governing acknowledgment and part payment

18.46 The Commission **recommends**, following a recommendation of the Wright Committee never since dissented from,[89] that an acknowledgment should be effective in all cases even though it does not disclose a promise to pay. This will dispose of the difficulty of

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85 *Limitations Act 1996* (Alta) s 8(1).

86 See paras 14.32-14.35 above.

87 See paras 18.15-18.16 above.

88 See *Limitation Act 1980* (UK) s 29(3)-(4); *Limitation of Actions Act 1974* (Qld) s 35(1)-(2); *Limitation Act 1974* (Tas) s 29(1) and (3); *Limitation of Actions Act 1958* (Vic) s 24(1)-(2); *Limitation Act 1950* (NZ) s 25(1) and (3); *Limitation Act 1979* (BC) s 5(1)-(4).

89 Wright Committee Report (1936) para 19(e). For subsequent affirmation see Ontario Report (1969) 125; British Columbia Report (1974) 89; Newfoundland Working Paper (1985) 213 and Newfoundland Report (1986).

determining whether such a promise can be implied from an acknowledgment, and put an end to the different interpretations of what constitutes an acknowledgment found in the present law. It will bring the law in Western Australia into line with all jurisdictions which have modern limitation legislation.[90] Following the Alberta *Limitation Act*, it recommends that this principle should be the subject of an express provision.[91]

18.47 The Commission further **recommends**, following the recommendations of earlier reports and provisions in most modern Acts, that –

(1) An acknowledgment should be in writing and signed by the maker.[92] This continues the position under the present law.

(2) An acknowledgment or a part payment made by or to an agent should have the same effect as if made by or to the principal.[93] Under the present law, there are a number of exceptions to this principle: in an action for the recovery of land, acknowledgment by the agent is insufficient,[94] and the provision on specialty debts[95] does not require the acknowledgment or part payment to be given to the debtor or his agent.

(3) Where a claim is for the recovery of both a primary sum and interest on that sum, an acknowledgment of either obligation, or a part payment in respect of

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90 See *Stage Club Ltd v Millers Hotels Pty Ltd* (1981) 150 CLR 535, Gibbs CJ at 544, Wilson J at 564 (Murphy J concurring).

91 See *Limitations Act 1996* (Alta) s 8(3); see also *Limitation Act 1979* (BC) s 5(2)(b).

92 See *Limitations Act* (Alta) s 9(1). For similar provisions see *Limitation Act 1985* (ACT) s 32(4); *Limitation Act 1969* (NSW) s 54(4); *Limitation Act 1981* (NT) s 41(2)(a)(i); *Limitation of Actions Act 1974* (Qld) s 36(1); *Limitation Act 1974* (Tas) s 30(1); *Limitation of Actions Act 1958* (Vic) s 25(1); *Limitation Act 1980* (UK) s 30(1); *Limitation Act 1950* (NZ) s 26(1); *Limitation Act 1979* (BC) s 5(5). For recommendations by law reform commissions see Ontario Report (1974) 125; British Columbia Report (1974) 92; Orr Committee Report (1977) paras 2.65-2.67; Newfoundland Working Paper (1985) 218 and Newfoundland Report (1986); Alberta Report for Discussion (1986) para 8.31; Saskatchewan Report (1989) 40; Ontario Report (1991) 45.

93 See *Limitations Act 1996* (Alta) s 9(2)(b). For similar provisions see *Limitation Act 1985* (ACT) s 8(2)(b); *Limitation Act 1969* (NSW) s 11(2)(c); *Limitation of Actions Act 1974* (Qld) s 36(2); *Limitation Act 1974* (Tas) s 30(2); *Limitation of Actions Act 1958* (Vic) s 25(2); *Limitation Act 1980* (UK) s 30(2); *Limitation Act 1950* (NZ) s 26(2); *Limitation Act 1979* (BC) s 5(9). For recommendations by law reform commissions see Wright Committee Report (1936) para 19(d); NSW Report (1967) para 260; Ontario Report (1974) 125; British Columbia Report (1974) 92; Newfoundland Working Paper (1985) 218 and Newfoundland Report (1986); Alberta Report for Discussion (1986) para 8.34; Ontario Report (1991) 45. The New Zealand Report (1988) para 274 suggests that no express provision is necessary and that the matter can be left to the ordinary principles of agency law.

94 *Limitation Act 1935* s 15: see para 18.15 above.

95 Id s 44(4): see para 18.13 above.

either obligation, should be an acknowledgment of, or a part payment in respect of, the other obligation.[96]

(4) Where there is a claim for the recovery of income falling due at any time, an acknowledgment or part payment of that claim is an acknowledgment or part payment of a claim to recover income falling due at a later time on the same account.[97] The effect of this provision is to extend the limitation period not only for the particular item concerned but also for subsequent items on the same account due at the time of confirmation. In the words of the New South Wales Law Reform Commission:

> "We have made this provision on the view that the confirmation of one item of income is a recognition that the question of liability for that item is not closed and that, in the ordinary course of affairs, where liabilities arise in succession, the liability of earlier accrual is likely to be discharged before the liability of later accrual; so that it is a fair inference that the question of liability for a subsequent item is also not closed."[98]

This goes further than the provisions based on the English *Limitation Act of 1939*,[99] under which the limitation period would only be extended for the particular item concerned.

(f) Who should benefit or be bound by acknowledgment and part payment

18.48 As has been demonstrated above,[100] the current law on this issue contains many inconsistencies. The Wright Committee, reviewing the similar position that then existed in England, came to the conclusion that acknowledgments should only bind the maker and

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96 This provision follows *Limitations Act 1996* (Alta) s 8(4). For similar provisions see *Limitation Act 1985* (ACT) s 32(2)(D); *Limitation Act 1969* (NSW) s 54(2)(b); *Limitation Act 1981* (NT) s 41(2)(b); *Limitation Act 1979* (BC) s 5(2)(c). See also *Limitation of Actions Act 1974* (Qld) s 35(4); *Limitation Act 1974* (Tas) s 29(5); *Limitation of Actions Act 1958* (Vic) s 24(3); *Limitation Act 1980* (UK) s 29(6); *Limitation Act 1950* (NZ) s 25(4). For law reform commission recommendations see British Columbia Report (1974) 92; Newfoundland Working Paper (1985) 218 and Newfoundland Report (1986); New Zealand Report (1988) para 274.

97 For similar provisions see *Limitation Act 1985* (ACT) s 32(2)(c); *Limitation Act 1969* (NSW) s 54(2)(c); *Limitation Act 1981* (NT) s 41(2)(c); *Limitation Act 1979* (BC) s 5(2)(d). For law reform commission recommendations see NSW Report (1967) paras 261-265; British Columbia Report (1974) 93; Newfoundland Working Paper (1985) 218 and Newfoundland Report (1986).

98 See NSW Report (1967) para 263.

99 See *Limitation Act 1980* (UK) s 29(6); *Limitation of Actions Act 1974* (Qld) s 35(4); *Limitation Act 1974* (Tas) s 29(5); *Limitation of Actions Act 1958* (Vic) s 24(3); *Limitation Act 1950* (NZ) s 25(4).

100 Paras 18.9-18.24.

persons claiming through him, but that part payments should bind co-debtors, on the basis that a part payment operates for the benefit of all persons liable, and that if such persons take that benefit they should also accept the accompanying disadvantages. However, the Committee qualified this rule in one respect, recommending that a part payment after the expiration of the limitation period should bind the maker and his personal representatives and no one else.[101] This recommendation was implemented by the 1939 Act,[102] and similar provisions appear in the current legislation in England, Victoria, Queensland, Tasmania and New Zealand.[103] In these jurisdictions, therefore, the law on who is bound by an acknowledgment or a part payment remains complex. This can be demonstrated by quoting the provisions in question:

> "(1) An acknowledgment of the title to any land or mortgaged personalty by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.
>
> (2) A payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property shall, so far as the right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.
>
> (3) Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption or right to discharge of the mortgage by one of the mortgagees shall only bind him and his successors and shall not bind any other mortgagee or his successors; and where the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt, the mortgagor shall be entitled to redeem or to compel discharge of the mortgage of that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.
>
> (4) Where there are two or more mortgagors and the title or right to redemption or to discharge of the mortgage of one of the mortgagors is acknowledged as aforesaid the acknowledgment shall be deemed to have been made to all mortgagors.
>
> (5) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person:
>
> Provided that an acknowledgment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgment.

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101 Wright Committee Report (1936) para 21.

102 *Limitation Act 1939* (UK) s 25.

103 *Limitation Act 1980* (UK) s 31; *Limitation of Actions Act 1974* (Qld) s 37; *Limitation Act 1974* (Tas) s 31; *Limitation of Actions Act 1958* (Vic) s 26; *Limitation Act 1950* (NZ) s 27.

> (6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:
>
> Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment and his successors, and shall not bind any successor on whom the liability devolved on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.
>
> (7) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person or to any share or interest therein, or a payment by one of several personal representatives in respect of any such claim shall bind the estate of the deceased person.
>
> (8) In this section the expression 'successor' in relation to any mortgagee or person liable in respect of any debt or claim means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise. "[104]

18.49 The New South Wales Law Reform Commission was of the view that these provisions, though simpler than the previous law, were still unduly complex. It did not find the distinction between acknowledgment and part payment identified by the Wright Committee persuasive, and could not see why one joint debtor, by making a small part payment, should be able to postpone the limitation period running against another. It recommended that there should be a simple rule that acknowledgment and part payment should have effect only between the parties or their agents, subject to special rules for proprietary causes of action which should also bind persons afterwards in possession of the property concerned.[105] These recommendations have been endorsed by subsequent law reform commissions[106] and form the basis of the present law in the Australian Capital Territory, New South Wales, the Northern Territory, Alberta and British Columbia.[107]

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104 *Limitation of Actions Act 1958* (Vic) s 26.

105 NSW Report (1967) paras 257-259, 266-267. It effected a further simplification by recommending that an acknowledgment or part payment should only be effective if made before the expiry of the limitation period: see para 18.52 below.

106 See Ontario Report (1969) 123-124; British Columbia Report (1974) 89-90; ACT Working Paper (1984) paras 194-195; Newfoundland Working Paper (1985) 213-214 and Newfoundland Report (1986); Alberta Report for Discussion (1986) paras 8.35-8.43.

107 *Limitation Act 1985* (ACT) s 32(5)-(7); *Limitation Act 1969* (NSW) s 54(5)-(7); *Limitation Act 1981* (NT) s 41(4)-(5); *Limitations Act 1996* (Alta) s 9(4)-(5); *Limitation Act 1979* (BC) s 5(6)-(8). The Northern Territory and Australian Capital Territory provisions have been modified to take account of the fact that in those jurisdictions there are no limitation periods for actions to recover land or redeem mortgaged land: see paras 2.32 n 47 and 2.34 n 51 above. In the British Columbia Act there is an exception to the general

18.50 The Commission is of the same view. It therefore **recommends** that -

(1) A person should have the benefit of an acknowledgment or part payment only if it is made to him, or to a person through whom he claims;

(2) A person should be bound by an acknowledgment or part payment only if

(a) he is a maker of it; or

(b) he is liable in respect of a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable in respect of the claim.[108]

(g) Acknowledgment or part payment after the expiry of the limitation period

18.51 Under the present law, it is possible in some circumstances for an acknowledgment or part payment made after the expiry of the limitation period to revive a claim. This cannot happen in an action for the recovery of the land, since the running of the period extinguishes the right of action, but it is possible in other cases. The Wright Committee's recommendations did not make any change to this position.

18.52 However, the New South Wales Law Reform Commission was of the view that acknowledgments and part payments should only ever be effective if made before the limitation period had expired, and recommended accordingly.[109] This recommendation was consistent with the general principle endorsed by the New South Wales Report that the running of a limitation period should extinguish the cause of action, rather than merely barring it.[110] All subsequent law reform commission reports have followed the New South Wales Commission in recommending that acknowledgment and part payment should only be

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principle whereby a person may take the benefit of an acknowledgment or part payment even where it is not made to him or his agent if it is made in the course of bankruptcy proceedings: *Limitation Act 1979* (BC) s 5(6), as to which see British Columbia Report (1974) 90.

108 The formulation of this recommendation generally follows *Limitations Act 1996* (Alta) s 9(4)-(5), the drafting of which is simpler than *Limitation Act 1969* (NSW) s 54(5)-(7), but the bankruptcy exception found in the Alberta provision (similar to that in British Columbia: see para 18.49 n 107 above) has been omitted.

109 NSW Report (1967) paras 255-256.

110 See paras 7.58-7.59 above.

effective if made before the expiry of the limitation period,[111] and in the Australian Capital Territory, New South Wales, the Northern Territory, Alberta and British Columbia this principle is now set out in statute.[112] In some cases, the commissions which made this recommendation also adopted the New South Wales view that the expiry of the period should extinguish the cause of action,[113] but this is not true of either the Orr Committee Report or the Alberta Report. The Orr Committee said that the rule that an acknowledgment or part payment made after the expiry of the limitation period could revive the right of action was somewhat unreal and served no useful purpose. Its recommendation that once a debt became statute-barred it should remain irrecoverable was accepted by the 1980 Act.[114] The Alberta Report, which adopts the general principle that the running of a limitation period should provide a defence, rather than extinguishing rights, also recommends that acknowledgment and part payment should in no case be effective after the expiry of the limitation period.[115] It justifies this view by saying that the running of the period should be seen as a recognition that the defendant is now immune from liability. The benefits of this would be denied if he remained vulnerable because of the possibility of revival of a claim.

18.53 The Commission accepts that, where the expiry of the limitation period extinguishes the right of action (as is the case in an action for the recovery of land), it would be impossible for the claim to be revived by acknowledgment or part payment. However, in other cases, despite the consistent recommendations of other law reform commissions to the contrary, the Commission sees no reason why a claim should not be revived by acknowledgment or part payment made after the expiry of the period. If a party can choose not to plead a limitation defence, there seems no reason why he cannot revive a right that would otherwise be statute-barred by making an acknowledgment or part payment. The fact that most law reform commissions have made a contrary recommendation is not conclusive. Most of those commissions were recommending that the running of the limitation period should extinguish rights in all cases. Though the Alberta Law Reform Institute did not make such a recommendation, its recommendations are based on the principle that once either of the two

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111 Ontario Report (1969) 124; British Columbia Report (1974) 92; Orr Committee Report (1977) paras 2.68-2.71; ACT Working Paper (1984) paras 194-195; Newfoundland Working Paper (1985) 217 and Newfoundland Report (1986); Alberta Report for Discussion (1986) paras 8.27-8.30; Saskatchewan Report (1989) 40-41.

112 *Limitation Act 1985* (ACT) s 32(1); *Limitation Act 1969* (NSW) s 54(1); *Limitation Act 1981* (NT) s 41(1); *Limitations Act 1996* (Alta) s 8(2); *Limitation Act 1979* (BC) s 5(1).

113 Ontario Report (1969); British Columbia Report (1974); Newfoundland Working Paper (1985) and Newfoundland Report (1986). See para 7.58 above.

114 *Limitation Act 1980* (UK) s 29(7).

115 *Model Limitations Act* (Alta) s 9(2).

general limitation periods has expired the defendant should have an absolute guarantee of future immunity from suit. Under the Commission's recommendations this will not necessarily be so, because the court will have a narrow discretion to extend either the discovery period or the ultimate period in appropriate cases.

18.54 The Commission therefore **recommends** that, except in cases where the running of the limitation period extinguishes the plaintiff's rights, it should be possible for a claim to be revived by acknowledgment or part payment even after the limitation period has expired. This endorses the position under the present law. This principle will apply to all claims governed by the two general limitation periods, and also to all claims governed by special rules in the *Limitation Act*, except actions for the recovery of land.

3. THE RULE IN *SEAGRAM v KNIGHT*

18.55 The Orr Committee Report drew attention to the rule known as the rule in *Seagram v Knight*[116] under which the running of time is suspended in relation to a debtor who becomes the administrator of his creditor (but not in relation to the debtor who becomes executor of his creditor).[117] This is one of the very few exceptions to the fundamental principle that once time has started running it continues to run no matter what may happen.[118] According to the Orr Committee, the origin of the rule is historical: the action for debt was suspended when the debtor became the executor of the creditor's estate, because the debtor could not sue himself. Since suspension of a personal action as a result of the voluntary act of the creditor prevented the revival of the action, the effect was that the creditor by appointing the debtor to be his executor extinguished the debt as from the date when that appointment became effective. Since the appointment of an administrator was not the voluntary act of the creditor, it fell outside the rule barring revival of the action. The debt was therefore not extinguished, but suspended for the duration of the administration. In the case of the debtor-executor, equity intervened to override the common law rule by treating him as if he had paid the debt to himself, so that he became accountable for the amount of the debt as being an asset of the estate.[119] However, equity did not intervene in the case of the debtor-administrator, whose

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116 (1867) LR 2 Ch App 628.
117 On Committee Report (1977) paras 3.85-3.93.
118 See para 18.14 above.
119 *Re Greg* [1921] 2 Ch 243.

liability was merely suspended during the period of administration, but the limitation period was suspended as long as the action was suspended.

18.56 The Orr Committee recommended that this anomaly should be eliminated by making the debtor-administrator accountable to the estate for the amount of his debt, so making his position the same as that of the debtor-executor. In its view, this was preferable to allowing the suspension of the limitation period whenever a personal representative was either the creditor or the debtor of the estate. The recommendation was implemented by an amendment to the *Administration of Estates Act 1925*.[120]

18.57 This matter is not dealt with in any other law reform report on limitation. However, there seems no reason to doubt that the rule in *Seagram v Knight* is operative in Western Australia, in spite of the absence of direct authority to this effect. On that basis, the Commission **recommends** that a provision similar to that adopted in England should be inserted in the *Administration Act 1903*.

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120 *Administration of Estates Act 1925* (UK) s 21A, added by the *Limitation Amendment Act 1980* (UK) s 10.

PART VIII: THE SCOPE OF THE LIMITATION ACT

Chapter 19

LIMITS OF APPLICATION

1. INTRODUCTION TO PART VIII

19.1 Two issues are discussed in this chapter -

(1) the limits, if any, imposed by the *Limitation Act* on the kinds of actions to which it applies;

(2) whether the *Limitation Act* should apply to arbitrations as well as to actions.

19.2 Chapter 20 discusses the scope of the *Limitation Act* from a procedural perspective. The obligation imposed on a plaintiff by limitation rules is to commence proceedings within a set time, and those rules are generally irrelevant to the subsequent procedural steps taken in the action.

2. ACTIONS NOT SUBJECT TO THE *LIMITATION ACT*

19.3 In this report the Commission has distinguished between the claims which should be subject to its recommended two general limitation periods (the great majority) and those exceptional categories of claims which should be governed by special rules in the *Limitation Act*. However, there remains the issue of the outer limits of the *Limitation Act*. The question is whether there are actions which should not be subject to the *Limitation Act* at all, and how the Act should seek to identify those claims which are to be excluded.

(a) The present law

19.4 The *Limitation Act* says little about the claims to which it applies. Apart from section 48, which provides that the Act does not bind the Crown,[1] there are only two provisions which make any general statement about the ambit of the *Limitation Act* -

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[1] For proceedings against the Crown, see paras 23.4-23.8 below.

(1) The definition of "action" in section 3, which means a civil proceeding commenced in the Supreme Court by writ or in such other manner as may be prescribed by Rules of Court, or in a Local Court or other inferior court in the manner prescribed by the Act conferring jurisdiction on such court. This means that criminal proceedings are excluded from the Act.

(2) Section 49, which provides that nothing in the Act applies to any action, suit or other proceeding the time for commencing which is limited by "any enactment specially limiting the time for commencing any action, suit or other proceeding thereunder".[2]

19.5 The modern Limitation Acts in force in most other jurisdictions do not generally say much more than this. All Australian Acts, except that of South Australia, contain a provision similar to section 49 under which the *Limitation Act* does not apply to any claim for which a limitation period is provided in some other Act.[3] All define "action" to include any proceedings in a court of law.[4] This rules out some other kinds of proceedings, such as those in a tribunal,[5] but otherwise is a wide inclusive definition, showing an intention to bring within the ambit of the Act proceedings to which the term would not normally be appropriate.[6] In addition, there are provisions in particular Acts which exclude criminal proceedings[7] and claims by the Crown for the recovery of a tax or duty or interest thereon,[8] for the forfeiture of a ship,[9] and involving prerogative rights to minerals.[10]

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2 S 49 provides that this is subject to s 47A, which does affect the provisions of other statutes: see para 10.4 above.

3 *Limitation Act 1985* (ACT) s 4(a); *Limitation Act 1969* (NSW) s 7(a); *Limitation Act 1981* (NT) s 5; *Limitation of Actions Act 1974* (Qld) s 7; *Limitation Act 1974* (Tas) s 38; *Limitation of Actions Act 1958* (Vic) s 33. In South Australia, provisions in other legislation are affected to a limited extent. Limitation periods of less than 12 months are extended to 12 months: *Limitation of Actions Act 1935* (SA) s 47. Notice periods may be dispensed with: s 50. A further extension of time may be granted under s 48: see *R v Stanley; ex parte Redapple Restaurants Pty Ltd* (1976) 13 SASR 290; *General Motors-Holden's Ltd v Di Fazio* (1979) 141 CLR 659; *Cummins Diesel Sales & Service Pty Ltd v State Government Insurance Commission* (1982) 49 SAIR (Pt 11) 817*; Re Litchfield* (1989) 51 SASR 87. There are similar provisions in other jurisdictions: see *Limitation Act 1980* (UK) s 39; *Limitation Act 1950* (NZ) s 33(1); *Limitation of Actions Act 1973* (NB) s 24. In some Canadian provinces, the sections dealing with common law actions provide that nothing in that section extends to an action where the time for bringing the action is specially limited by statute: *Limitation of Personal Actions Act 1990* (Nfd) s 2(5); *Limitation of Actions Act 1989* (NS) s 2(3); *Limitations Act 1990* (Ont) s 45(2); *Statute of Limitations 1988* (PEl) s 2(2); *Limitation of Actions Act 1978* (Sask) s 3(2); note also *Limitation of Actions Act 1980* (Alta) s 4(2), now repealed by *Limitations Act 1996* (Alta) s 16.

4 *Limitation Act 1985* (ACT) s 8(1); *Limitation Act 1969* (NSW) s 11(1); *Limitation Act 1981* (NT) s 4(1); *Limitation of Actions Act 1974* (Qld) s 5(1); *Limitation of Actions Act 1935* (SA) s 3(1); *Limitation Act 1974* (Tas) s 2(1); *Limitation of Actions Act 1958* (Vic) s 3(1).

5 See eg *R v Police Appeal Board; ex parte McGee* (1984) 36 SASR 455.

6 See *China v Harrow Urban District Council* [1954] 1 QB 178, Sellers J at 187, Havers J at 191.

7 *Limitation Act 1981* (NT) s 6(3)(b); *Limitation of Actions Act 1974* (Qld) s 6(3)(a).

19.6 In the absence of any statements of general principle, other than those already referred to, the only way to determine the ambit of the Act is to say that it applies to all claims for which it makes specific provision. Where no provision of the *Limitation Act* or any other statute applies, there will be no applicable limitation period. This is the case, for example, with probate actions.[11]

19.7 However, as noted in earlier chapters,[12] some Limitation Acts have adopted a different attitude to the problem of claims not covered by any specific statutory provision. These Acts incorporate a "catchall provision" setting out a general limitation period which applies to any action for which no limitation period is provided in any other legislation. The only Australian example is section 11(1) of the Australian Capital Territory *Limitation Act 1985*, which provides:

> " [A]n action on any cause of action is not maintainable if brought after the expiration of a limitation period of 6 years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he or she claims."

This does not apply to a cause of action in respect of which another limitation period is provided by the Act[13] or any other Act.[14] There are several further examples in Canadian legislation. All jurisdictions which adopted the *Uniform Act* as a model have a catchall provision,[15] and there is also a provision of this kind in the legislation in British Columbia.[16]

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8 *Limitation Act 1985* (ACT) s 7(3)(a); *Limitation Act 1969* (NSW) s 10(3)(a); *Limitation Act 1981* (NT) s 6(3)(a)(i); *Limitation of Actions Act 1974* (Qld) s 6(3)(b)(i); *Limitation Act 1974* (Tas) s 37(1); *Limitation of Actions Act 1958* (Vic) s 32(1).

9 *Limitation Act 1985* (ACT) s 7(3)(b); *Limitation Act 1969* (NSW) s 10(3)(b); *Limitation Act 1981* (NT) s 6(3)(a)(ii); *Limitation of Actions Act 1974* (Qld) s 6(3)(b)(ii).

10 *Limitation Act 1985* (ACT) s 7(4); *Limitation Act 1969* (NSW) s 10(4).

11 No Australian Limitation Act has a limitation period for such actions. However, in New Zealand an action to have a will declared invalid on the ground of want of testamentary capacity or undue influence must be brought within 12 years of the date of the grant of probate or administration: *Limitation Act 1950* (NZ) s 4(6).

12 See paras 4.44-4.47, 13.23 above.

13 *Limitation Act 1985* (ACT) s 11(2).

14 Id s 4(a).

15 Eg *Limitation of Actions Act 1987* (Man) s 2(1)(n); *Statute of Limitations 1988* (PEI) s 2(1)(g); *Limitation of Actions Act 1978* (Sask) s 3(1)(j); note also *Limitation of Actions Act 1980* (Alta) s 4(1)(g), now repealed by *Limitations Act 1996* (Alta) s 16. See also *Limitation of Actions Act 1973* (NB) s 9.

16 *Limitation Act 1979* (BC) s 3(4).

(b) Suggested distinction between remedial and other orders

(i) The Alberta scheme

19.8 The Alberta Law Reform Institute undertook a comprehensive examination of the types of claims which ought to be subject to the limitations system.[17] The Institute found the provisions in the Alberta *Limitation of Actions Act 1980*, which are similar to those discussed above, to be unsatisfactory. It commented:

> "[O]ne of the problems with the present Alberta Act is that it does not expressly describe and exclude from its coverage many claims which are probably not intended to be covered."[18]

The Institute sought to put this right by erecting a theoretical framework in the light of which the proper sphere of application of the *Limitation Act* would become clear.

19.9 The Institute suggested that a court in a civil proceeding is usually engaged in three distinct processes -

(1) making a declaration as to the existence or extent of a particular right-duty relationship;

(2) making a remedial order for the breach of a duty (such orders being either performance oriented, such as specific performance, or substitutionary, such as damages);

(3) issuing an enforcement order to enforce compliance with a remedial order .

On this analysis, the Alberta Law Reform Institute concluded that limitation rules were properly appropriate only to claims for remedial orders. Claims for declarations were not and should not be subject to a limitations system, since the claimant was not requesting the court to do anything other than declare the position as between the parties, and enforcement orders

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17 See Alberta Report for Discussion (1986) ch 3; Alberta Report (1989) 37-40.

18 Alberta Report for Discussion (1986) para 3.3.

should not be subject to limitation rules, since the claimant who had obtained a remedial order could not have done so without complying with limitation rules.[19]

19.10 The Institute thus endorsed the general principle that the *Limitation Act* should apply to any civil judicial claim requesting a remedial order, other than a claim within this definition which was expressly excluded from the application of the Act. It followed from the definition of the scope of the Act in terms of a civil judicial claim for a remedial order that certain types of proceedings were necessarily excluded. These included criminal proceedings, claims in ministerial or administrative proceedings, and any time limitations applying to stages in civil proceedings subsequent to commencement, such as interlocutory motions and appeals. There were also certain claims which it was thought advisable to exclude even though they fell within the category of remedial orders. These included claims requesting judicial review, habeas corpus, and limitation provisions in other enactments.[20]

Accordingly, the Alberta *Limitations Act 1996*, which implements these recommendations, provides that it applies to remedial orders.[21] A remedial order is defined as follows:

> "'remedial order' means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes
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> (i) a declaration of rights and duties, legal relations or personal status,
>
> (ii) the enforcement of a remedial order,
>
> (iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or
>
> (iv) a writ of *habeas corpus*".[22]

The Act also incorporates a further exclusion which had not been the subject of a recommendation by the Institute. Actions by an aboriginal people against the Crown based on

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19 As to actions to enforce judgments and arbitration awards, see paras 12.38-12.47 above.

20 In addition, the Alberta Report excluded claims for the possession of real property from some provisions of the proposed *Limitation Act*: see paras 6.21 and 14.34 above. The Report for Discussion proposed to exclude a number of other claims involving property and security interests, but this proposal was abandoned in the final report: see Alberta Report for Discussion (1986) paras 3.63-3.92; Alberta Report (1989) 39-40.

21 *Limitations Act 1996* (Alta) ss 2, 3(1).

22 Id s 1(j)).

a breach of a fiduciary duty alleged to be owed by the Crown to those people are to be governed by the provisions of the previous *Limitation Act*.[23]

19.11 Much of the thinking in the Alberta Report was carried forward into the Ontario Limitations Bill.[24] The Bill defines a claim as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission",[25] and provides that the Act applies to claims pursued in court proceedings.[26] It is specifically provided that there is no limitation period in respect of proceedings for judicial review, proceedings for a declaration if no consequential relief is sought, and proceedings to enforce an order of the court.[27]

(ii) The Commission's view

19.12 The Commission does not favour the adoption of the Alberta concept of remedial orders as a principle for determining which claims should be subject to the *Limitation Act*. It is not convinced that a distinction can properly be made between remedial orders on the one hand and declaratory and enforcement orders on the other. In theory it may be possible to distinguish declaratory orders from other remedies on the basis that they merely declare the position between the parties and do not force the defendant to take any action, but in practice they are used very much like other remedies such as specific performance or injunctions. Like such remedies, under the present law they are subject to the equitable limitation principle of laches, and like such remedies they should therefore be governed by the general limitation principles which the Commission is recommending.[28]

19.13 As for enforcement orders, the Alberta Law Reform Institute itself admitted the necessity for a limitation period applying to actions on a judgment to pay money. It sought to

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23 Id s 13. The intention of this provision, added to the Bill during its passage through Parliament, was merely to preserve the status quo, so as to avoid a landslide of aboriginal claims before the legislation came into force: letter from Professor P J M Lown QC of the Alberta Law Reform Institute, dated 6 December 1996, on file at the Commission.

24 Note also the discussion in New Zealand Report (1988) ch 11.

25 Limitations Bill 1992 (Ont) cl 1.

26 Id cl 2, subject to certain exceptions, including proceedings involving real property and proceedings in the nature of an appeal or review.

27 Id cl 16. This clause also contains other exclusions which have no parallel under the *Limitations Act 1996* (Alta): proceedings to enforce provisions in a domestic contract or paternity agreement, proceedings to enforce arbitral awards, proceedings for the redemption or realisation of collateral and certain proceedings arising from sexual assault. As to the last of these, see paras 9.34-9.35 above.

28 The Commission, in discussing the question of time limits in the context of administrative law remedies, placed declarations in the same category as injunctions: *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons* (Project No 26 Part II 1986) para 3.5.

make a distinction between enforcement of a judgment by action, which it classified as a remedial order, and enforcement by execution, which it placed in the category of enforcement orders.[29] In accordance with these views, the Alberta *Limitations Act* now provides a specific limitation period for a claim based on a judgment or order for the payment of money.[30] However, orders such as writs of execution are themselves subject to limitation provisions.[31] For such reasons, in the Commission's view it is not possible to support any division of this kind between remedial orders and enforcement orders.

(c) The Commission's recommendations

19.14 The Commission **recommends** that the new *Limitation Act*, like the present Act, should provide that nothing in the Act applies to an action for which a limitation period is fixed by another Act.[32] It also **recommends** that the Act should provide expressly that it does not apply to criminal proceedings, as the present Acts in Queensland and the Northern Territory do.[33]

19.15 The Commission's rejection of the proposed distinction between remedial, declaratory and enforcement orders means that it would not be appropriate for it to recommend the exclusion of such orders after the manner of the Alberta legislation. However, it has given consideration to the question whether there should be an express provision excluding proceedings for the judicial review of administrative decisions and habeas corpus. It agrees with the Alberta Law Reform Institute that such proceedings are different from ordinary civil proceedings in that they have a public law character[34] and in some ways are more akin to

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29 Alberta Report (1989) 42-43. The Institute abandoned its earlier view that the common law action on a judgment should be abolished: see Alberta Report for Discussion (1986) paras 3.25-3.51.

30 *Limitations Act 1996* (Alta) s 11.

31 In Western Australia, execution must issue within six years from the recovery of the judgment or the date of the order unless the court grants leave: *Supreme Court Act 1935* s 141.

32 It is not within the Commission's terms of reference to make recommendations about limitation periods in statutes other than the *Limitation Act*, except for those dealt with in Chs 21-23 below. However, it notes the proposal of the Ontario Limitations Act Consultation Group that limitation and notice provisions set out in statutes other than the *Limitation Act* should have no effect unless they are also set out in a Schedule to the *Limitation Act*: Ontario Report (1991) 48; see also Limitations Bill 1992 (Ont) cl 18, and the similar proposal in Saskatchewan Report (1989) 63. Such a reform would ensure that those seeking information about limitation periods would be aware of the existence of any special limitation period, whether their research commenced with the *Limitation Act* or the particular statute in question.

33 See para 19.5 above.

34 Alberta Report (1989) 39.

appeals,[35] and as respects habeas corpus that the imposition of a time limit would be inconsistent with its essential nature.[36]

19.16 The Commission pointed out in its report on judicial review of administrative decisions[37] that under the present law certiorari must be commenced within six months of the date on which the decision sought to be reviewed was made, unless the delay is accounted for to the satisfaction of the court,[38] and mandamus within two months,[39] but that prohibition was not subject to any express time limit. The Commission recommended that these three remedies should be governed by a uniform limitation rule. A person seeking relief in the nature of certiorari, prohibition or mandamus should be required to commence proceedings promptly and in any event within six months of the date when grounds for the action first arose. However, the court should have a discretion to extend the six month period, either before or after it had expired, if there was a good reason for doing so.[40]

19.17 It could be argued that since certiorari and mandamus are subject to existing limitation provisions in the *Supreme Court Rules* (which are made under the *Supreme Court Act*), there is no need to have an express exclusion in the *Limitation Act*, in view of the fact that both under the existing law and the Commission's earlier recommendation[41] limitation periods in other Acts will be excluded. However, prohibition and habeas corpus, to which no limitation period presently applies, would be subject to the Commission's general recommendations. It seems anomalous to make such distinctions. The Commission has recommended that certiorari, prohibition and mandamus should be treated alike, and it is doubtful whether habeas corpus should be subject to any limitation period. The Commission therefore **recommends** that the new *Limitation Act* should expressly provide that certiorari, mandamus, prohibition and habeas corpus should be expressly excluded.

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35 Alberta Report for Discussion (1986) para 3.57.

36 Alberta Report (1989) 39.

37 *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons* (Project No 26 Part II 1986) para 3.5.

38 *Rules of the Supreme Court 1971* O 56 r 11(1).

39 Id O 56 r2 7.

40 *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons* (Project No 26 Part II 1986) para 5.7.

41 See para 19.16 above.

3. ARBITRATIONS

19.18 It is common for Limitation Acts to provide that they apply to arbitrations in the same way as they apply to actions. Provisions to this effect are found in most Australian jurisdictions[42] and in the Acts of England and New Zealand.[43] As a result, an arbitration is not maintainable if commenced after the expiration of the limitation period fixed by the *Limitation Act* for a cause of action in respect of the same matter,[44] and some Limitation Acts expressly so provide.[45] The Acts also contain provisions determining when an arbitration is deemed to be commenced: this occurs when one party serves on the other a notice requiring the other to appoint, or agree to the appointment of, an arbitrator or (where the arbitration agreement provides that the reference shall be to a named or designated person) requiring the other to submit the dispute to that person.[46] The rules regarding when an arbitration is deemed to be commenced apply notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue until an award is made.[47]

19.19 There are no provisions about arbitration in the Western Australian *Limitation Act*.[48] In the Commission's view it is desirable to provide expressly that the provisions of the

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42 *Limitation Act 1985* (ACT) s 47(1); *Limitation Act 1969* (NSW) s 70(1); *Limitation Act 1981* (NT) s 46(1); *Limitation of Actions Act 1974* (Qld) s 41(1); *Limitation Act 1974* (Tas) s 33(1); *Limitation of Actions Act 1958* (Vic) s 28(1).

43 *Limitation Act 1980* (UK) s 34(1); *Limitation Act 1950* (NZ) s 29(1). It should be noted that Canadian Limitation Acts do not contain provisions relating to arbitration.

44 See *Re Astley & Tyldesley Coal & Salt Co* (1899) 68 LJQB 252. The parties can contract for a shorter period: *H Ford & Co Ltd v Compagnie Furness (France)* [1922] 12 KB 797.

45 *Limitation Act 1985* (ACT) s 47(2); *Limitation Act 1969* (NSW) s 70(2); *Limitation Act 1981* (NT) s 46(2).

46 *Limitation Act 1985* (ACT) s 49(1)(a); *Limitation Act 1969* (NSW) s 72(1)(a); *Limitation Act 1981* (NT) s 48(1)(a); *Limitation of Actions Act 1974* (Qld) s 41(3); *Limitation Act 1974* (Tas) s 33(3); *Limitation of Actions Act 1958* (Vic) s 28(3); *Limitation Act 1980* (UK) s 34(3); *Limitation Act 1950* (NZ) s 29(3). Other means of commencing an arbitration are not excluded: *The Agios Lazaros* [1976] 2 Lloyd's Rep 47, Shaw LJ at 58; *Jedranska Slobodna Plovidba v Oleagine SA (The Luka Botic)* [1984] 1 WLR 300. As to the situation where the arbitration provision does not require or permit the giving of notice, see *Limitation Act 1985* (ACT) s 49(1)(b); *Limitation Act 1969* (NSW) s 72(1)(b); *Limitation Act 1981* (NT) s 48(1)(b). In the other jurisdictions the question when an arbitration accrues is to be treated the same way as the question when a cause of action arises: *Layen v London Passenger Transport Board* [1944] 1 All ER 432; *Pegler v Railway Executive* [1948] AC 332; *West Riding County Council v Huddersfield Corporation* [1957] 1 QB 540.

47 *Limitation Act 1985* (ACT) s 48; *Limitation Act 1969* (NSW) s 71; *Limitation Act 1981* (NT) s 47; *Limitation of Actions Act 1974* (Qld) s 41(2); *Limitation Act 1974* (Tas) s 33(2); *Limitation of Actions Act 1958* (Vic) s 28(2); *Limitation Act 1980* (UK) s 34(2); *Limitation Act 1950* (NZ) s 29(2). For illustrations see *Polimich Pty Ltd v Argent* [1977] 2 NSWLR 439; *Leoform Pty Ltd v Watts Construction Division Pty Ltd* [1983] 1 Qd R 408. Formerly a *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121 clause (providing that arbitration was a condition precedent to the bringing of an action) had the effect that time did not begin to run until an award was made: *Board of Trade v Cayzer Irvine & Co Ltd* [1927] AC 610.

48 Nor in the South Australian Act.

Limitation Act apply to arbitrations. The Commission therefore **recommends** that the new *Limitation Act* should provide that -

(1) the Act applies to arbitrations in the same way as to actions;

(2) the appropriate limitation period is that which under the Act applies to a cause of action in respect of the same matter;

(3) an arbitration is deemed to be commenced as set out above.

Chapter 20

THE LIMITATION ACT AND PROCEDURAL RULES

1. THE RUNNING OF THE LIMITATION PERIOD

(a) Terminated by commencement of proceedings

20.1 The running of the limitation period is stopped by the commencement of proceedings. Subsequent delays are then immaterial for the purposes of the law of limitation of actions.[49]

20.2 Under the present law, proceedings are commenced when the originating process is issued, that is, when it is sealed in the court registry. Though it is necessary for process, once issued, to be served on the defendant, it is not necessary for service to take place within the limitation period. The rule that it is the issue of proceedings, rather than service, which stops the running of the limitation period is a standard rule which applies in all jurisdictions in Australia and most other common law jurisdictions.

20.3 Some reform bodies have asked whether the limitation period should stop running when proceedings are served, rather than when they are issued, as is the case at present. Some years ago, the matter was considered by the Orr Committee in England.[50] The Committee said that ideally, the institution of proceedings for the purpose of stopping the running of the limitation period should be a step taken by the plaintiff which fulfilled three conditions -

(1) it should be unmistakeable, so that there could be no argument about whether or when it had been taken;
(2) it should be simple, so that a plaintiff against whom time had nearly run could act immediately and effectively to preserve his rights;
(3) on being taken, it should come at once to the notice of the defendant.

20.4 Issue of process satisfied the first two conditions, but not the third. The Committee therefore considered suggestions which had been made to it that the "terminus ad quem" (to use the term used by the Committee) should be service of process, rather than its issue. This

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49 However, in certain circumstances, the running of the limitation period may affect subsequent procedural steps: see paras 20.13-20.16 below.

50 Orr Committee Report (1977) paras 2.72-2.81.

alternative offered the advantage that the limitation period would not stop running until proceedings had come to the notice of the defendant so that the defendant, once the period had run, could safely destroy his records and arrange his affairs on the basis that there could be no question of liability on his part. However, the Committee saw a problem in that whether process has been served is a question that cannot always be answered as precisely as the question whether it has been issued, particularly where it has been served by post and it would also be necessary to have a special rule covering substituted service and orders for dispensing with service. A further difficulty might be experienced where a defendant attempted to evade service by moving and leaving no address, or by going abroad (since process cannot be served on a defendant who is out of the country without leave of the court). The Committee came to the conclusion that the rules that would be necessary to deal with such situations would result in such complexity that it was better to leave the existing rule undisturbed.

20.5 Other bodies have reached different conclusions. The New Zealand Law Commission came to the conclusion that the law should be changed so that limitation periods continued to run until proceedings were served on the defendant. They explained their reasoning as follows:

> " At present, the position is that time stops running when a statement of claim or other formal document containing a claim is filed or lodged with the court, and it is possible (although unusual) for there to be a delay of many months before it is actually served on the defendant. We believe that the essence of the limitation regime is to bring the claim to the attention of the defendant at an early date, and accordingly recommend that the limitation period should be considered in terms of measurement back from the date of service."[51]

20.6 As the New Zealand Commission noted, a similar recommendation was made by the Review Body on Civil Justice in England in 1988. The Review Body pointed out that the period of one year which was allowed for service effectively added a year to the limitation period, and that it was difficult to see the justification for this.[52] The Review Body and the New Zealand Law Commission both noted that the rule in Scotland was that proceedings had to be not merely issued but also served within the limitation period. There are other arguments which can be mounted in favour of the New Zealand recommendation: for example, those Limitation Acts which have provisions on arbitrations provide that an arbitration is

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51 New Zealand Report (1988) para 174.

52 *Report of the Review Body on Civil Justice* (1988 Cm 394) para 204.

commenced when one party serves on the other a notice requiring the appointment of an arbitrator.[53]

20.7 This Commission agrees with the views of the Orr Committee, and accordingly **recommends** that it should continue to be the issue of proceedings, rather than service of proceedings on the defendant, which stops time running. In the Commission's view, what matters most is that the point at which time stops running should be absolutely certain. This can only be achieved by maintaining the present rule which looks to the issue of proceedings as marking that point. For the following reasons, the proposed alternative is not desirable -

(1) As the Orr Committee demonstrated, determining whether service has taken place in any given case is an exceedingly complex matter.

(2) The attraction of the service alternative is said to be that it ensures that the limitation period continues to run until the proceedings are actually brought to the defendant's notice, but this would not be true in a case in which it was necessary to resort to substituted service.

(3) Looking at the question in the context of the Commission's recommended scheme, if the three year discovery period continued running until proceedings were served, then in practice plaintiffs would have to commence proceedings some time before the end of that period, to allow for the difficulties of service. This would mean that the period a plaintiff has available before having to initiate proceedings might well be nearer two years than three. Not only is this too short a period for the plaintiff to explore the possibilities of a settlement or alternative dispute resolution before commencing proceedings; because he could not know with certainty how long it would take to serve proceedings once issued, he would be deprived of the advantages of knowing that he has a fixed period after the injury becomes discoverable in which to commence proceedings.

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53 *Limitation Act 1985* (ACT) s 49(1)(a); *Limitation Act 1969* (NSW) s 72(1)(a); *Limitation Act 1981* (NT) s 48(1)(a); *Limitation of Actions Act 1974* (Qld) s 41(3); *Limitation Act 1974* (Tas) s 33(3); *Limitation of Actions Act* 1958 (Vic) s 28(3); *Limitation Act 1980* (UK) s 34(3); *Limitation Act 1950* (NZ) s 29(3).

(b) Cause of action affected by commencement of proceedings

20.8 The commencement of proceedings stops time running only in respect of the cause of action sought to be enforced in those proceedings. Time continues to run in respect of other causes of action.

20.9 One issue that arises in this context is whether a set-off or counterclaim is a separate action for this purpose. If it is, commencement of proceedings in respect of the main claim will not affect the running of the limitation period with respect to the set-off or counterclaim. The *Limitation Act* in Western Australia does not answer this question. It provides merely that the provisions of the Act "shall apply to any counter-claim or set-off alleged by the defendant in all cases, and to the like extent, and for the same purpose in, to or for which they respectively would apply if the defendant had instituted an action against the plaintiff or plaintiffs in respect of the same matter".[54] This provision, which has its origins in the old English legislation,[55] can also be found in the legislation of South Australia and some Canadian jurisdictions.[56]

20.10 Accordingly, it is necessary to refer to case law principles to determine the relationship between a set-off or counterclaim and the main action. The cases determine that a claim by way of set-off is deemed to commence on the same date as the action,[57] but the limitation period for counterclaims is deemed to run until the counterclaim is made.[58] It is important to distinguish cases of set-off and counterclaim from independent defences (for example, in an action for the price of goods sold, a claim by the defendant for loss of or damage to goods) which cannot be defeated by reliance on any limitation period applying to the action.[59]

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54 *Limitation Act 1935* s 46.

55 *Statute of Frauds Amendment Act 1828* (UK) s 4 provided that the Limitation Acts applied to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

56 *Limitation of Actions Act 1936* (SA) s 44; *Limitation of Actions Act 1973* (NB) s 16; *Limitation of Actions Act 1989* (NS) s 38. In other Canadian jurisdictions, the provision is limited to the Part of the Act dealing with common law actions: *Limitation of Actions Act 1987* (Man) s 13, and see also s 18; *Statute of Limitations 1978* (PEI) s 10; *Limitation of Actions Act 1978* (Sask) s 11; note also *Limitation of Actions Act 1980* (Alta) s 13, now repealed by *Limitations Act 1996* (Alta) s 16; See also *Limitation of Personal Actions Act 1990* (Nfd) s 8 and *Limitations Act 1990* (Ont) s 55, which apply to set-off only.

57 *Walker v Clements* (1850) 15 QB 1046, 117 ER 755; *Lowe v Bentley* (1928) 44 TLR 388.

58 *Lowe v Bentley* (1928) 44 TLR 388; *McDonnel1 & East Ltd v McGregor* (1936) 56 CLR 50.

59 *Henriksens Rederi A/S v THZ Rolimpex (The Brede)* [1974] QB 233; *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185. However, these cases also affirm that the rule has no application to a

20.11 The modern Limitation Acts are much more specific in stating the relationship between counterclaims or set-off and the running of time in the main action. In the Northern Territory, Queensland, Tasmania, Victoria and New Zealand, the legislation follows the English *Limitation Act 1939*[60] in stating that a claim by way of set-off or counterclaim is deemed to be a separate action and to have commenced on the same date as the action in which the set-off or counterclaim is pleaded.[61] Time therefore stops running on this date.[62] However, this legislation was criticised by the New South Wales Law Reform Commission on the ground that in some cases a defendant might counterclaim against a person who was not a party to the original action: in such a case it was not right that the running of the limitation period should be stopped by the commencement of proceedings to which that person was not a party.[63] In line with the recommendations of that Commission, the New South Wales Limitation Act now provides as follows:

> "Where, in an action (in this section called the principal action), a claim is made by way of set off, counterclaim or cross action, the claim, for the purposes of this Act:
>
> (a) is a separate action; and
>
> (b) is, as against a person against whom the claim is made, brought on the only or earlier of such of the following dates as are applicable:
>
> (i) the date on which he becomes a party to the principal action; and
> (ii) the date on which he becomes a party to the claim."[64]

20.12 The current English legislation not only cures the defect to which attention was drawn by the New South Wales Law Reform Commission but also goes much further, dealing generally with the adding of new claims to proceedings.[65] The same is true of the legislation in British Columbia,[66] which results from the recommendations of the Ontario and British Columbia Law Reform Commissions.[67] In Western Australia, such matters are dealt with in

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claim for freight. *Henriksens Rederi A/S v THZ Rolimpex* was followed in *Sanders Bros v Marshall* [1996] 2 Qd R 534.

60 *Limitation Act 1939* (UK) s 28.

61 *Limitation Act 1981* (NT) s 8; *Limitation of Actions Act 1974* (Qld) s 42; *Limitation Act 1974* (Tas) s 35; *Limitation of Actions Act 1958* (Vic) s 30; *Limitation Act 1950* (NZ) s 30.

62 *Webster Ltd v Roberts* [1989] Tas R 37.

63 NSW Report (1967) para 341.

64 *Limitation Act 1969* (NSW) s 74.

65 *Limitation Act 1980* (UK) s 35. For commentary see A McGee Limitation Periods (2nd ed 1994) ch 23; T Prime & G P Scanlan *The Modern Law of Limitation* (1993) 260-264.

66 *Limitation Act 1979* (BC) s 4.

67 Ontario Report (1969) 111-113; British Columbia Report (1974) 83-86.

the *Rules of the Supreme Court* and not in the *Limitation Act*.[68] Suggestions made in the Australian Capital Territory that somewhat similar provisions might be adopted in that jurisdiction[69] were not adopted, and the *Limitation Act 1985* follows the New South Wales provision.[70] The Commission likewise **recommends** that the new Western Australia Act should adopt the New South Wales provision.

2. EFFECT OF LIMITATION RULES ON SUBSEQUENT PROCEDURAL STEPS

20.13 In general, the running of the limitation period relates only to the commencement of proceedings. Time limits imposed by statute or rules of court for the taking of subsequent steps in an action are not the concern of the *Limitation Act*. However, in three instances, the running of the limitation period may be relevant to subsequent procedural steps, and these matters are briefly dealt with below. Since these issues are dealt with in the *Rules of the Supreme Court*, rather than the *Limitation Act*, the Commission has taken the view that it is generally not appropriate for it to consider possible reforms in this report, but it makes a recommendation on one issue.

(a) Renewal of originating process

20.14 The court may, in the exercise of its discretion, refuse to renew a writ or other originating process after the expiry of the limitation period. A writ expires one year after the date of issue. If it has not been served within that period, it will be necessary to renew it or issue a fresh writ.[71] Courts have a discretion to extend the period of validity of the initial writ for up to one year from the day it would otherwise expire.[72] This discretion may be exercised either before or after the writ has expired. Thus, the court may renew the writ notwithstanding

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68 See para 20.16 below.

69 ACT Working Paper (1984) paras 224-230.

70 *Limitation Act 1985* (ACT) s 51.

71 Issuing a second writ while the original one is still current is not of itself an abuse of the process of the court. However, the limitation period will continue to run until the issue of the second writ, rather than the issue of the original one: *Pratt v Hawkins* (1846) 15 M & W 399, 153 ER 905; see also *Seabridge v H Cox & Sons (Plant Hire) Ltd* [1968] 2 QB 46; *Gawthrop v Boulton* [1979] 1 WLR 268.

72 *Rules of the Supreme Court 1971* O 7 r 1. The position is similar in all other Australian jurisdictions except New South Wales: see *Supreme Court Rules* (ACT) O 9 r 1; *Rules of the Supreme Court* (NT) O 5 r 12; *Rules of the Supreme Court* (Qld) O 9 r 1; *Supreme Court Rules 1987* (SA) R 10.03; *Rules of the Supreme Court 1965* (Tas) O 8 r 1; *General Rules of Procedure in Civil Proceedings 1986* (Vic) r 5.12. In New South Wales, an originating process is valid for two years and may not be renewed: *Supreme Court Rules 1970* (NSW) Pt 7 r 7. However, the court may waive service of an expired originating process: *Rust v Barnes* [1980] 2 NSWLR 726.

that the limitation period has run out since it was issued.[73] If the writ has expired without being renewed, the court may extend the period for renewal and renew the writ even though the limitation period has expired.[74] There are no provisions in the rules giving the court guidance on the exercise of its discretion, but the general trend in recent cases has been to relax rigid time limits and grant the extension if there is good cause.[75] The court considers the balance of hardship to the plaintiff if the extension is refused, and to the defendant if it is allowed.[76]

(b) Amendment of originating process

20.15 It is frequently necessary to amend a writ or other originating process. However, amendment after the running of the limitation period was originally not possible. Under the rule in *Weldon v Neal*,[77] a plaintiff was not allowed to amend a writ or pleading to introduce a claim that had become barred by the running of the limitation period because it would prejudice the rights of the other party. This would be the case if it "involves a new departure, a new head of claim, or a new cause of action".[78]

20.16 All Australian jurisdictions, apart from Tasmania, now have modern rules which allow amendment of any document at any stage of a proceeding.[79] In most jurisdictions, the general power which the court possesses by virtue of these rules is expressed so as to allow the determination of the real question in controversy between the parties, to correct an error or defect in the proceeding or to avoid a multiplicity of proceedings.[80] The Western Australian

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73 *Crawford v Brisbane Gas Co Ltd* [1979] Qd R 226; *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337.

74 *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337.

75 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597. See also *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337; *Ramsay v Madgwicks (a firm)* [1989] VR 1. Exceptional circumstances are no longer required: see *Krawszyk v Graham* [1966] SASR 73; *Crawford v Brisbane Gas Co Ltd* [1979] Qd R 226; *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337.

76 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597. See also *Victa Ltd v Johnson* (1975) 10 SASR 496; *Licul v Corney* (1976) 180 CLR 213, Gibbs J at 227-229; Irving v Carbines [1982] VR 861; *Soper v Matsukawa* [1982] VR 948; *Foxe v Brown* (1984) 59 ALJR 186. Previous cases do no more than illustrate the circumstances that might be relevant: *McKenna v McKenna* [1984] VR 665, McGarvie J at 674-675.

77 (1887) 19 QBD 394.

78 *Marshall v London Passenger Transport Board* [1936] 3 All ER 83, Lord Wright MR at 87. See B C Cairns *Australian Civil Procedure* (3rd ed 1992) 221-225; S Campbell "Amendments and Limitations: The Rule in *Weldon v Neal*" (1980) 54 ALJ 643.

79 Tasmania retains an older form of the rule: *Rules of the Supreme Court 1965* (Tas) O 31 r 1.

80 *High Court Rules* O 29 r 1; *Federal Court Rules* O 13 r 2; *Supreme Court Rules* (ACT) O 32 r 1; *Supreme Court Rules 1970* (NSW) Pt 20 r 1; *Rules of the Supreme Court* (NT) O 36 r 1; *Rules of the Supreme Court* (Qld) O 32 r 1; *Supreme Court Rules 1987* (SA) R 53.01; *General Rules of Procedure in Civil Proceedings 1986* (Vic) r 36.01. On the interpretation of these provisions see *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

Rules are similar: they provide that the court may allow amendment at any stage "on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct".[81] In relation to amendments after the running of the limitation period, the Western Australian Rules provide that a court may allow amendments to correct the name of a party, to alter the capacity in which a plaintiff sues, or to add a cause of action after the commencement of the proceeding.[82] The *Federal Court Rules* and the Rules in New South Wales, Queensland and South Australia also contain these more specific provisions.[83] The Rules in the Australian Capital Territory, the Northern Territory and Victoria do not have these specific rules (apart from one allowing the correction of the name of a party after expiry of the limitation period) but rely on the general power to amend.

20.17 In most of these jurisdictions, it seems that the rule in *Weldon v Neal* no longer applies. In New South Wales, where the Rules contain provisions allowing the amendment of a writ after expiry of the limitation period in specific circumstances (as they do in Western Australia), the general provisions relating to amendment have nevertheless been interpreted as abolishing the rule in *Weldon v Neal* rather than simply creating particular exceptions to it,[84] even though in New South Wales the running of the limitation period does not merely bar the remedy but extinguishes the right.[85] In the Federal Court and in Queensland and South Australia, where the Rules are in the same terms as those in New South Wales, it seems clear that the rule in *Weldon v Neal*, if not abolished, has been substantially modified.[86] In the Australian Capital Territory, where the wider rules have been adopted only recently, they presumably have the same effect. In the Northern Territory and Victoria, the rule in *Weldon v Neal* has been specifically abolished by the Limitation Acts.[87]

20.18 In Western Australia, however, the Full Court in *Stone James (a firm) v Pioneer Concrete (WA) Pty Ltd*[88] left the matter open.[89] Burt CJ (Brinsden J concurring) said:

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81 *Rules of the Supreme Court 1971* O 21 r 5(1).

82 Id O 21 r 5(3)-(5).

83 *Federal Court Rules* O 13 r 2; *Supreme Court Rules 1970* (NSW) Pt 20 r 4; *Rules of the Supreme Court* (Qld) O 32 r 1; *Supreme Court Rules 1987* (SA) R 53.03.

84 *McGee v Yeomans* [1977] 1 NSWLR 273; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166.

85 *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166.

86 *Harris v Western Australian Exim Corporation* (1994) 129 ALR 387 (Federal Court); *Adam v Shiavon* [1985] 1 Qd R 1; *Crafter v Webster* (1979) 23 SASR 61; *Karasaridis v Kastoria Fur Products* (1984) 37 SASR 345.

87 *Limitation Act 1981* (NT) s 48A; *Limitation of Actions Act 1958* (Vic) s 34.

88 [1985] WAR 233.

89 P Seaman *Civil Procedure in Western Australia* (1990) para 21.5.36 says that the issue "remains to be decided". See also *Bramwell v Spotless Catering Services Ltd* (unreported) District Court of Western Australia, 17 July 1990, 396 of 1989, where the court appeared to treat the rule as still operative.

> "It seems to be as yet undecided whether subr (1) of [O 21 r 5] gives authority to the court to allow an amendment to a statement of claim notwithstanding the expiry of a period of limitation in a case which does not fall within the subrules which follow it. ...I am prepared to proceed upon the basis but without deciding the point that unless for present purposes this case can be brought within subr (5) then 'the settled rule of practice' as stated by Lord Esher in *Weldon v Neal*... remains and should be applied and that its application to this case would lead to the amendment being disallowed."[90]

Franklyn J also referred to the cases which suggested that the rule in *Weldon v Neal* should be discarded, but was content to base his judgment on the fact that the amendments requested could be made under the specific provisions.[91]

20.19 In jurisdictions where the rule in *Weldon v Neal* no longer exists, the court, in exercising its general power to amend, may in its discretion permit amendments after the expiry of the limitation period. Such an amendment may add a new cause of action,[92] if the court in its discretion considers that it is just to do so.[93] However, there are limits to the extent to which an amendment after the running of the limitation period may allow the addition of new parties. It has now been decided[94] that such an amendment is permissible only to the extent that it is permitted under the rules relating to change of parties:[95] there is a rule of practice that a court will not order joinder of a party against whom a cause of action would be statute barred.[96] Otherwise, limitation rules might be too easily defeated by the addition of new parties by amendment, since an amendment, once made, takes effect from the date of the document amended, rather than from the date of the amendment.[97]

20.20 In the view of the Commission, the law in Western Australia should allow amendment after expiry of the limitation period on as wide a basis as the law in all other Australian

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90 [1985] WAR 233 at 240.

91 Id at 249.

92 *McGee v Yeomans* [1977] 1 NSWLR 273; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166.

93 See *Adam v Shiavon* [1985] 1 Qd R 1. Leave will not be granted where the claim must unarguably fail: *Ratcliffe v VS & B Border Homes Ltd* (1987) 9 NSWLR 390.

94 *Lynch v Keddell* (No 2) [1990] 1 Qd R 10, not following *Neilson v Bundaberg Sugar Co Ltd* [1985] 1 Qd R 313. See also *Archie v Archie* [1980] Qd R 546; *Lynch v Keddell* [1985] 2 Qd R 103.

95 For these rules see: *Federal Court Rules* O 6 r 8; *Supreme Court Rules* (ACT) O 19 r 3; *Supreme Court Rules* (NSW) Pt 8 r 8; *Rules of the Supreme Court* (NT) O 9 r 6; *Rules of the Supreme Court* (Qld) O 3 r 11; *Supreme Court Rules 1987* (SA) R 27.05; *General Rules of Procedure in Civil Proceedings 1986* (Vic) r 9.06.

96 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231; *Philip Morris Ltd v Bridge Shipping Pty Ltd* [1994] 2 VR 1; see also *Ketteman v Hansel Properties Ltd* [1987] AC 189.

97 *Ariadne Properties Ltd v Russell* [1989] 1 Qd R 491; *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231; see also *Baldry v Jackson* [1976] 2 NSWLR 415, Samuels JA at 419; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, Moffitt P at 174-175, Priestley JA at 183; *Brook v Flinders University of South Australia* (1988) 47 SASR 119, von Doussa J at 122.

jurisdictions referred to above. It is significant that in jurisdictions which have rules in much the same terms as those in Western Australia, such as New South Wales, the courts have interpreted them as abolishing the rule in *Weldon v Neal*, and that in other jurisdictions the rule has been specifically abolished by statute. The uncertain situation in Western Australia aside, it is only in Tasmania that the rule in *Weldon v Neal* continues to operate, and this is because Tasmania does not have the modern rules now adopted everywhere else. The Commission **recommends** that the new Limitation Act should contain a provision similar to those in Victoria and the Northern Territory specifically abolishing the rule for all purposes.[98]

(c) Dismissal for want of prosecution

20.21 The running of the limitation period may be relevant in considering an application to dismiss an action for want of prosecution, even though such an action is concerned with delay after commencement of the action rather than before it.

20.22 An application to dismiss an action for want of prosecution within the limitation period will generally not be granted, since the plaintiff would not be prevented from issuing a second writ.[99] However, in exceptional circumstances, such applications will be granted even though the limitation period has not expired: for example, because of the plaintiff's behaviour in representing to the defendant that the action is being abandoned, or if the plaintiff's delay and default in prosecuting the action is intentional and contumelious, that is, disrespectful to the court.[100]

20.23 Even when the limitation period has expired, an application to dismiss the action for want of prosecution will not be readily granted. Here, however, what must be shown is not exceptional circumstances, but that the prejudice which the defendant would suffer if the action were allowed to proceed exceeds the prejudice which the plaintiff would suffer in

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98 The Commission has not considered more fundamental changes to the rules relating to amendments after the running of the limitation period, such as those adopted in England by the *Limitation Act 1980* (UK) s 35 (see Orr Committee Report (1977) paras 5.1-5.29) or now enacted in Alberta by the *Limitations Act 1996* (Alta) s 6 (see Alberta Report for Discussion (1986) ch 5; Alberta Report (1989) 41-42) because they would involve amendment of the *Rules of the Supreme Court*, which the Commission does not consider to be within its terms of reference.

99 *Birkett v James* [1978] AC 297; *Tolley v Morris* [1979] 1 WLR 592; *De Nier v Beicht* [1982] VR 331; *Bailey v Bailey* [1983] 1 WLR 1129; *Madden v Kirkegard Ellwood & Partners* [1983] 1 Qd R 649; *Williams v Zupps Motors Pty Ltd* [1990] 2 Qd R 493; but see *Tolley v Morris* [1979] 1 WLR 592, Lord Diplock at 603; *Janov v Morris* [1981] 1 WLR 1389.

100 *Birkett v James* [1978] AC 297; *Department of Transport v Chris Smaller (Transport) Ltd* [1989] AC 1197.

being deprived of the opportunity to purse the remedy.[101] The effectiveness of an alternative claim by the plaintiff against his solicitor may be a relevant consideration.[102] The fact that the defendant deliberately waited until the end of the limitation period before making the application to dismiss does not disentitle him from getting an order, unless the defendant's conduct is misleading or in breach of an undertaking.[103]

20.24 Where the limitation period has expired but the possibility remains that it may be extended (for example, under the present law in Western Australia, in a case involving asbestos-related disease) the action will be regarded, for the purposes of any subsequent application for dismissal for want of prosecution, as having been brought within the primary limitation period.[104] Also, when the plaintiff is entitled to an extension on the ground of disability and the extended period has not expired, the action will not be struck out.[105]

20.25 A court can strike out an action for want of prosecution even when the plaintiff seeks equitable relief to which the *Limitation Act* does not at present apply.[106]

20.26 Under the Commission's recommendations, the scope for some of these rules to operate will be narrowed. The fact that under the proposed general principles, it will be theoretically possible for a court, in exceptional circumstances, to exercise its discretion to disregard either the discovery or the ultimate period means that the test that will ordinarily apply to applications to dismiss for want of prosecution will be the exceptional circumstances test. There will not be any cases of equitable relief to which the Limitation Acts do not apply.

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101 See *Witten v Lombard Australia Ltd* (1968) 88 WN (Pt 1) (NSW) 405, Walsh JA at 412-413; *Goldie v Johnston* [1968] VR 651; *Ulowski v Miller* [1968] SASR 277; *Duncan v Lowenthal* [1969] VR 180; *Berrigan v McIver* [1974] VR 811; *Van Reesema v Giameos* (1979) 27 ALR 525; *Stollznow v Calvert* [1980] 2 NSWLR 749; *McKenna v McKenna* [1984] VR 665, McGarvie J at 674-677. The test as laid down by the Australian cases is different from the approach taken by the English courts as laid down in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 and *Birkett v James* [1978] AC 297.

102 *McKenna v McKenna* [1984] VR 665, McGarvie J at 677-680. See also *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229.

103 *McKanna v Aspect Homes Pty Ltd* (1983) 72 FLR 476.

104 *Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382. See also *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606.

105 *Tolley v Morris* [1979] 1 WLR 592; *Turner v WH Malcolm Ltd* [1992] TLR 417.

106 *Joyce v Joyce* [1978] 1 WLR 1170.

PART IX: OTHER LIMITATION LEGISLATION

Chapter 21

ADMIRALTY ACTIONS

1. INTRODUCTION

21.1 As a matter of history, it appears that the Admiralty Court did not apply any rule which fixed the time limits applicable to the claims with which it dealt. Instead, it adopted a doctrine of laches similar to that developed by courts of equity.[1] However, by a process similar to that by which limitation legislation was progressively extended to equitable claims,[2] statutes now impose limitation periods on most kinds of admiralty actions.

21.2 As a result of this development, the following legislative provisions require examination -

(1) the limitation period for actions to recover seamen's wages, which in Western Australia is still governed by the provisions of a United Kingdom Act received in 1829;

(2) the limitation periods applicable to ship collisions, which in Western Australia are governed by provisions in the *Supreme Court Act 1935*;

(3) the applicability to other admiralty actions of the general provisions of the *Limitation Act 1935*.

2. SEAMEN'S WAGES

(a) The law in Western Australia

21.3 Under the provisions of a United Kingdom Act passed in the reign of Queen Anne:

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1 See *The Alletta* [1974] 1 Lloyd's Rep 40, Mocatta J at 44-45; Australian Law Reform Commission *Civil Admiralty Jurisdiction* (Report No 33 1986) para 249.

2 See paras 13.9-13.10 above.

> "All suits and actions in the Court of Admiralty for seamen's wages... shall be commenced and sued within six years next after the cause of such suits or actions shall accrue and not after."[3]

The Act also provides for an extension of time where the plaintiff is, at the time the cause of action accrued, "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas".[4] In a case where the plaintiff is beyond the seas, the statute provides that the time runs from the day of his return.[5]

21.4 This Act was received in Western Australia on the foundation of the State in 1829 and is still in force, never having been superseded by modern legislation.[6]

(b) The law elsewhere

21.5 Most other Australian jurisdictions provide a limitation period of some kind for actions for seamen's wages. In South Australia, there is a specific limitation period of six years.[7] In New South Wales, the Northern Territory and Tasmania, it is specifically provided that the limitation period for contract actions applies:[8] this is six years in New South Wales and Tasmania, and three years in the Northern Territory. In the Australian Capital Territory, there is no specific provision, but there can be no doubt that such claims would fall under the general six year limitation provision which applies to most common law actions.[9] In Victoria, there is no specific provision, and so it would appear that the limitation period for actions for breach of contract applies: again, this is a six year period.[10] Queensland may be the exception: the *Limitation of Actions Act* provides that it does not apply to Admiralty actions *in rem*,[11] and unlike the similar provisions in other jurisdictions already referred to[12] there is no exception for actions for seamen's wages.

21.6 In the result, the limitation period in most jurisdictions is the same as in Western Australia. However, the means by which this is achieved varies. It may be questioned whether

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3 *Administration of Justice Act 1705* (UK) s 17.
4 Id s 18: see para 17.1 above.
5 Id s 19.
6 See the Commission's Report on *United Kingdom Statutes in Force in Western Australia* (Project No 75 1994) Appendix I.
7 *Limitation of Actions Act 1936* (SA) s 35(g).
8 *Limitation Act 1969* (NSW) s 22(1); *Limitation Act 1981* (NT) s 20(2); *Limitation Act 1974* (Tas) s 8(1).
9 *Limitation Act 1985* (ACT) s 11(1).
10 *Limitation of Actions Act 1958* (Vic) s 5(1)(a).
11 *Limitation of Actions Act 1974* (Qld) s 10(6)(a).
12 See n 8 above.

a separate provision is necessary. It seems preferable for such claims to be subject to the same legislative provision as that which regulates all other actions for breach of contract. Even if a separate provision is thought preferable, there is a strong case for enacting it in modern legislation, rather than relying on the provisions of an Imperial Act.

3. SHIP COLLISIONS

(a) The present law in Western Australia

21.7 Section 29 of the *Supreme Court Act 1935* provides:

> "No action or other proceeding shall be maintainable to enforce any claim against the owner of a vessel in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel is wholly or partly in fault, unless proceedings are commenced within 2 years from the date when the damage or loss or injury was caused; and an action shall not be maintainable to enforce any contribution in respect of an overpaid proportion of any damage for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:
>
> Provided that the Court or a Judge may, in accordance with the Rules of the Court, extend any such period to such extent and on such conditions as it or he thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of enforcing the claim, extend such period to an extent sufficient to give such reasonable opportunity. "

The Act thus provides a limitation period of two years from the date of accrual, but given the court a wide discretion to extend it.[13]

21.8 There are similar provisions in section 396 of the Commonwealth *Navigation Act 1912*: the wording is practically identical except that the Commonwealth Act also includes claims in respect of any salvage services. The Act applies to ships on interstate or overseas voyages.[14] The State legislation applies to all ships to which the Commonwealth Act does not apply, which in broad terms means ships on intrastate voyages, pleasure craft and inland

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13 On the principles to be applied in exercising the discretion, see *The Gaz Fountain* [1987] 2 Lloyd's Rep 151; *Asianic International Panama SA v Transocean Ro-Ro Corporation (The Seaspeed America)* [1990] 1 Lloyd's Rep 150.

14 See *Navigation Act 1912* (Cth) s 2.

waterways vessels. The legislation was passed to implement the Brussels *Collision Convention of 1910*.[15]

(b) The law elsewhere

21.9 Four other Australian jurisdictions (New South Wales, Tasmania, the Australian Capital Territory and the Northern Territory) have legislation in similar terms to the Commonwealth Act - that is, the provisions are almost identical to the Western Australian Act except that they include salvage claims. In each case, the provisions in question are contained in the Limitation Acts.[16] There is similar legislation in England and New Zealand, though it is contained in legislation dealing with shipping.[17]

21.10 In the remaining three jurisdictions (Victoria, Queensland and South Australia), there is no legislation at State level. This means that in cases to which the Commonwealth Act does not apply, the limitation periods which would ordinarily be applicable to actions for damage resulting from ship collisions are the general limitation periods in the Limitation Act, to the extent that they are appropriate for admiralty claims. In certain instances, for example claims relating to salvage, no provision of the Limitation Act may be appropriate.[18] In Queensland, the *Limitation of Actions Act* specifically provides that it does not apply to admiralty actions *in rem*.[19] The result of this is that in Queensland no limitation period applies to any of the claims under discussion.

4. APPLICABILITY OF LIMITATION ACT PROVISIONS

(a) The present law in Western Australia

21.11 There are a number of admiralty claims to which the legislative provisions described above would not apply. For example, in an action for death or personal injury suffered on board ship, or damage to property on a ship, the provisions in the *Supreme Court Act* would

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15 See Australian Law Reform Commission *Civil Admiralty Jurisdiction* (Report No 33 1986) para 249 nn 49-50.

16 *Limitation Act 1985* (ACT) s 19; *Limitation Act 1969* (NSW) s 22; *Limitation Act 1981* (NT) s 20; *Limitation Act 1974* (Tas) s 8.

17 *Maritime Conventions Act 1911* (UK) s 8; *Maritime Transport Act 1994* (NZ) s 97. See also *Canada Shipping Act 1970* (Can) s 645: there are no equivalent provisions in the limitation legislation of any Canadian province.

18 See para 21.16 below.

19 *Limitation of Actions Act 1974* (Qld) s 10(6)(a).

not apply to claims against the ship on which the damage was suffered.[20] Most Limitation Acts provide that they do not apply where there are specific limitation provisions in other statutes,[21] and so would ordinarily apply where there is no such provision. However, in Western Australia, it appears that this will only be the case where the action concerned is in the nature of an action at common law: section 38(3) of the *Limitation Act*, which defines the word "actions" for the purposes of that section, says that the word "means such actions as are in the nature of actions at common law".

(b) The law elsewhere

21.12 The Limitation Acts in four Australian jurisdictions specifically provide that the ordinary rules relating to limitation periods in common law actions do not apply to admiralty actions *in rem*.[22] There is a similar provision in New Zealand.[23] The result presumably is that no limitation period applies.

21.13 In the remaining jurisdictions there is no such provision. The result presumably is that the Limitation Acts must apply. In the Australian Capital Territory, this was the result of a deliberate policy choice,[24] but it is not clear whether this is true of the Acts in Victoria and Queensland. In South Australia there is a specific provision for seamen's wages,[25] and the question may be raised whether there was in fact an intention to exclude other admiralty claims.[26]

(c) Reform of the law in England

21.14 The English *Limitation Act* of 1939, like the Australian Acts on which it was based, provided that limitation provisions on contract, tort and so forth did not apply to any cause of action within the admiralty jurisdiction of the High Court enforceable in rem.[27] In this, it

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20 *Bums Philp & Co Ltd v Nelson and Robertson Pty Ltd* (1958) 98 CLR 495, Taylor J at 506; *Navarro v Larrinaga Steamship Co Ltd (The Niceto de Larrinaga*) [1966] p 80. However, an action brought by the owner of cargo damaged on the ship is usually subject to the one year limitation period in the Hague Rules: see *Sea-Carriage of Goods Act 1924* (Cth), Sch, Art III r 6.

21 See para 19.5 above.

22 *Limitation Act 1969* (NSW) s 22(1); *Limitation Act 1981* (NT) s 20(2); *Limitation of Actions Act 1974* (Qld) s 10(6)(a); *Limitation Act 1974* (Tas) s 8(1).

23 *Limitation Act 1950* (NZ) s 4(8).

24 See para 21.15 below.

25 *Limitation of Actions Act 1936* (SA) s 35(g).

26 Australian Law Reform Commission *Civil Admiralty Jurisdiction* (Report No 33 1986) para 249.

27 *Limitation Act 1939* (UK) s 2(6).

restated earlier law.[28] However, the Orr Committee in its 1977 Report concluded that there was no reason why this exception should be retained:

> "Our consultation showed... that there is no good reason for the retention of this exception from the normal rules of limitation. Indeed, it may well be that the reason for the exception is no more than that the Statutes of Limitation were originally drafted in terms of the common law forms of action. We doubt whether abolition of the exception would create any difficulties in practice, and those whom we consulted were generally agreed that it would be desirable to apply the general law to Admiralty proceedings, whether *in personam* or *in rem*."[29]

Later reports in Australia and New Zealand have expressed their agreement.[30]

21.15 As a result of the Orr Committee's recommendation, the provisions in question were removed from the 1939 Act.[31] The current English Act, the *Limitation Act* of 1980, contains no exempting provisions and clearly applies to admiralty actions. The Orr Committee's view also influenced the law in the Australian Capital Territory.[32] The *Limitation Act 1985* contains no exemption for admiralty actions, and the general limitation provision in section 11(1), which applies to all actions for which no limitation provision is provided either by the *Limitation Act* or another Act,[33] applies to most admiralty claims.[34]

(d) Reform in Australia: the Admiralty Act 1988

21.16 If the Limitation Acts are to apply to proceedings in admiralty, as they do in England and the Australian Capital Territory, and as they appear to do in South Australia and Victoria, there may still be problems in cases where the action in question does not fit comfortably into a Limitation Act category. This matter was examined by the Australian Law Reform Commission in its reference on Civil Admiralty Jurisdiction in 1986:

> "[L]imitation of actions legislation operates by reference to categories of actions based on common law concepts such as contract, tort, mortgage and so forth. While these are

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28 See *The Kong Magnus* [1891] p 223, Sir James Hannen P at 228.

29 Orr Committee Report (1977) para 4.4.

30 Australian Law Reform Commission *Civil Admiralty Jurisdiction* (Report No 33 1986) para 253; New Zealand Report (1988) para 338.

31 *Limitation Amendment Act 1980* (UK) ss 9, 13, Sch 2.

32 See ACT Working Paper (1984) para 118.

33 *Limitation Act 1985* (ACT) ss 11(2), 4(a).

34 It would be wrong to suppose that these provisions apply only to pleasure boats on Lake Burley Griffin. The laws of the Australian Capital Territory apply in various other places, for example in the Australian Antarctic Territory.

> appropriate to describe the vast majority of actions which fit within either the present or an expanded admiralty jurisdiction, there are some exceptions to this. The most significant is salvage. Salvage may be contractual but need not be. Hence a limitation Act purporting to cover the field may not in fact do so if it relies entirely on non-admiralty terminology."[35]

21.17 The Commission recommended that there should be a three year limitation period to cover any case where State or Territory legislation failed to deal with a particular category of admiralty action.[36] This recommendation was implemented by the Commonwealth *Admiralty Act 1988*, which provides that proceedings on a maritime claim[37] or on a claim on a maritime lien or other charge may be brought at any time before the end of:

> "(a) the limitation period that would have been applicable in relation to the claim if a proceeding on the claim had been brought otherwise than under this Act; or
>
> (b) if no proceeding on the claim could have been so brought - a period of 3 years after the cause of action arose."[38]

This provision does not apply if a limitation period is fixed in relation to the claim by a Commonwealth Act, an Act of a State or Territory, or a United Kingdom statute still in force.[39]

5. THE COMMISSION'S RECOMMENDATIONS

21.18 The general view of most recent reports which deal with the applicability of limitation legislation to admiralty claims is that the ordinary limitation provisions which apply to all other claims should also apply in admiralty cases. Any cases for which the ordinary limitation provisions are not appropriate will now be subject to the three year period provided by the Commonwealth *Admiralty Act*. Thus, in the Commission's view the best option is to recommend that the new Limitation Act to be adopted in Western Australia should make it clear that it applies to admiralty claims. This would be consistent with the Commission's

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35 Australian Law Reform Commission *Civil Admiralty Jurisdiction* (Report No 33 1986) para 249.

36 Id para 253.

37 A "maritime claim " is defined by s 4. Maritime claims may be either proprietary maritime claims or general maritime claims. Together, these two categories provide comprehensive coverage of all actions relating to ships.

38 *Admiralty Act 1988* (Cth) s 37(1).

39 Id s 37(2).

general approach, according to which classification problems should be eliminated unless they are unavoidable.[40]

21.19 The Commission considered, but rejected, a possible alternative recommendation that the *Limitation Act* should not apply to admiralty claims. The result of this would be that the limitation period in the Commonwealth Act would apply in all cases. However, it appears to the Commission that this would be inconsistent with the aims of the Australian Law Reform Commission Report, which espoused the view that State legislation should apply to admiralty claims if at all possible, and was concerned merely to provide a fallback provision.[41] It would also make it necessary to identify admiralty claims, so that the appropriate rule could be applied. This seems a retrograde step, since it is now more than a hundred years since the Judicature Acts put an end to the separation between admiralty and common law jurisdiction.[42]

21.20 The Commission therefore **recommends** that the new Limitation Act to be adopted in Western Australia should be drafted so as to make clear that it applies to admiralty claims. This would include claims for seamen's wages, which would be dealt with like any other action for breach of contract.[43] There is no sense in retaining a separate limitation provision for such actions, still less one which was enacted in England nearly three hundred years ago.

21.21 There remain the provisions of the *Supreme Court Act* dealing with ship collisions. The Commission **recommends** that this legislation should be retained, since most other jurisdictions have similar legislation and it was passed to implement an international convention. Though the Commission is in favour of having limitation principles of general application, it recognises that there are cases where it is preferable for special provisions to

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40 See paras 7.2-7.3 above.

41 Australian Law Reform Commission *Civil Admiralty Jurisdiction* (Report No 33 1986) para 253.

42 In England, admiralty jurisdiction was formerly exercised by the High Court of Admiralty, and there was much competition between it and the common law courts, particularly during the time when Coke was Chief Justice of the Court of King's Bench: see J H Baker *Introduction to English Legal History* (3rd ed 1990) 142-143. The *Supreme Court of Judicature Act 1873* (UK) abolished most courts previously existing, including the High Court of Admiralty, and created a High Court with separate divisions, one of which was the Probate, Divorce and Admiralty Division. However, each Division could exercise all the powers of the Court, whatever their origin: see eg *Re L (an infant)* [1968] P 119. The *Administration of Justice Act 1970* (UK) abolished the Probate, Divorce and Admiralty Division and transferred admiralty jurisdiction to the Queen's Bench Division. Baker at 143 sees this as "Coke's final victory", but notes that the silver oar of the Admiralty, used by the Probate, Divorce and Admiralty Division when trying maritime cases, remains in use for admiralty sittings in the Queen's Bench Division.

43 The Law Society of Western Australia in its comments on the Discussion Paper (1992) agreed.

apply to particular causes of action.[44] This is one such case. However, the Commission **recommends** that -

(1) the Western Australian legislation should be brought fully into line with section 396 of the Commonwealth *Navigation Act 1912* and similar provisions in State and Territory legislation by amending it to include the provision relating to claims in respect of salvage services found in that legislation;

(2) the provisions should be relocated in the *Limitation Act*,[45] since the *Supreme Court Act* is not the most obvious place in which to locate limitation provisions dealing with ship collisions.[46]

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44 See paras 14.32-14.35, 15.31-15.33, 16.7-16.8 above.

45 The Law Society of Western Australia in its comments on the Discussion Paper (1992) agreed.

46 The Commission suspects that this is the reason why these provisions were overlooked both by the Australian Law Reform Commission Report on *Civil Admiralty Jurisdiction* para 249 n 49 and by the leading Australian text, M Davies and A Dickey *Shipping Law* (2nd ed 1994) 443-444.

Chapter 22

WRONGFUL DEATH; SURVIVAL OF ACTIONS

1. INTRODUCTION

22.1 In this chapter the Commission deals with limitation periods in actions under the *Fatal Accidents Act 1959*, which creates a cause of action for the benefit of specified relatives when death is caused by tortious conduct, and in actions which survive for the benefit of or against a deceased estate under the *Law Reform (Miscellaneous Provisions) Act 1941*. The issues which arise in such cases are very similar to those which arise in ordinary personal injury actions. It is, in a sense, accidental that the relevant limitation periods are set out in the above Acts rather than the *Limitation Act*. In most Australian jurisdictions the limitation periods for such actions are set out in the *Limitation Act* itself.[1]

2. THE FATAL ACCIDENTS ACT

(a) Introduction

22.2 At common law, a tort that resulted in the death of another person did not give rise to any civil liability, either to the estate of the deceased[2] or to his relatives.[3] However, as regards relatives the law was reformed by statute in England in 1846, the growth of railways and the consequent increase in fatal accidents having made the position intolerable.[4] This legislation, the *Fatal Accidents Act* of 1846, generally known as Lord Campbell's Act after the lawyer (subsequently Lord Chief Justice and then Lord Chancellor) responsible for getting it through Parliament, provided that where death was caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the victim to bring an action and recover damages, an action would lie against the actor at the suit of

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1 See paras 22.8-22.9 below (fatal accidents), 22.29 below (survival of actions against deceased estates).

2 See para 22.15 below.

3 *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033, in which a husband recovered damages for loss of his wife's consortium for the month that she survived after a stagecoach accident, but nothing further consequent on her death. The rule survives in cases not affected by fatal accidents legislation: see *Osborne v Gillett* (1873) LR 8 Ex 88; *Admiralty Commissioners v SS Amerika* [1917] AC 38. For a recent discussion see *Swan v Williams (Demolition) Ply Ltd* (1987) 9 NSWLR 172.

4 The railways "killed any object from a Minister of State to a wandering cow": P H Winfield "The History of Negligence in the Law of Torts" (1926) 42 LQR 184 at 195. The Minister was William Huskisson, President of the Board of Trade, who was knocked down and killed by a passing locomotive at the opening of the Liverpool - Manchester Railway in 1830.

various listed relatives.[5] The action is ordinarily brought by the deceased's personal representative,[6] but where there is no such representative, or he does not bring an action within six months, a relative may bring the action.[7] The damages recoverable are generally limited to pecuniary loss.[8] This legislation was speedily copied in Australia, Canada and other common law jurisdictions.[9] In Western Australia, the English Act was adopted by an Act of 1849,[10] which applied until it was repealed and replaced by the *Fatal Accidents Act 1959*. This Act, as subsequently amended, sets out the current law.[11]

22.3 Though the Act creates a new cause of action,[12] the availability of a claim is dependent upon the victim having been able to sue the tortfeasor had he survived. Thus, if the victim would have been unable to establish one of the constituent elements of negligence, or if some defence were available to the tortfeasor such as voluntary assumption of risk, no action will lie under the *Fatal Accidents Act*. This also applies if the limitation period had run against the deceased before his death.[13] However, in other respects, the action does not obey the normal rules of negligence. In particular, by way of exception to the general principle that the plaintiff must show a duty of care owed to himself, there is no requirement that the relatives have to show a duty of care owed to them[14] - the action is simply attached to the duty of care owed to the victim.[15]

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5 *Fatal Accidents Act 1846* (UK) ss 1-2. See now *Fatal Accidents Act 1976* (UK) s 1.

6 *Fatal Accidents Act 1976* (UK) s 2(1).

7 Id s 2(2).

8 *Gillard v Lancashire & Yorkshire Railway Co* (1848) 12 LT 356; *Blake v Midland Railway Co* (1852) 18 QB 93, 118 ER 35. Relatives must therefore show a reasonable expectation of pecuniary benefit, a requirement first stated by Pollock CB in *Franklin v South Eastern Railway Co* (1858) 3 H & N 211, 157 ER 448 at 449. Some jurisdictions now allow damages for non-pecuniary elements such as "bereavement": see *Fatal Accidents Act 1980* (Alta) s 8; *Civil Liability Act 1961* (Ire) s 49; *Compensation (Fatal Injuries) Act 1974* (NT) s 10; *Wrongs Act 1936* (SA) ss 23a-23c; *Fatal Accidents Act 1976* (UK) s 1A.

9 In Australia, see *Compensation (Fatal Injuries) Act 1968* (ACT); *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *Common Law Practice Act 1867* (Qld) ss 12-15C; *Wrongs Act 1936* (SA) Part II; *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic) Part III; *Fatal Accidents Act 1959* (WA). In New Zealand, see *Deaths by Accident Compensation Act 1952* (NZ). In Canada, see *Fatal Accidents Act 1980* (Alta); *Family Compensation Act 1979* (BC); *Fatal Accidents Act 1987* (Man); *Fatal Accidents Act 1973* (NB); *Fatal Accidents Act 1990* (Nfd); *Fatal Accidents Ordinance 1974* (NWT); *Fatal Injuries Act 1989* (NS); *Family Law Act 1990* (Ont) ss 61-63; *Fatal Accidents Act 1988* (PEI); *Fatal Accidents Act 1978* (Sask); *Fatal Accidents Act 1986* (YT).

10 12 Vic No 21 (1849).

11 See particularly s 4 (liability for death caused wrongfully) and s 6 (effect of action and mode of bringing it). The relatives who are within the Act are listed in Sch 2.

12 "[N]ew in its species, new in its quality, new in its principle, in every way new": *Seward v Owner of the 'Vera Cruz'* (1884) 10 App Cas 59, Lord Blackburn at 70-71.

13 *Williams v Mersey Docks & Harbour Board* [1905] 1 KB 804.

14 *Smith v London & South Western Railway Co* (1870) LR 6 CP 14.

15 See P Handford "Relatives' Rights and *Best v Samuel Fox*" (1979) 14 UWAL Rev 79, especially at 98-101; N J Mullany & P R Handford *Tort Liability for Psychiatric Damage* (1993) 96-97.

(b) The present law in Western Australia

22.4 The limitation period which applies to claims under the *Fatal Accidents Act* is set out in section 7, which provides that "every action brought under this Act shall be commenced within twelve months after the death of the person in respect of whose death the cause of action arose".[16] However, this period is subject to the possibility of extension to six years from the date of the death in two circumstances -[17]

(1) Where the tortfeasor consents in writing to the bringing of an action against him at any time before the expiration of six years from the date of the death.[18]

(2) Where application is made to the court for leave to bring an action at any time before the expiration of six years from the date of the death.[19] When the court considers that the delay in bring the action was occasioned by mistake or any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the delay, the court may, if it thinks it is just to do so, grant leave to bring the action subject to such conditions an it thinks it is just to impose.[20] At least 14 days before an application is made, notice in writing of the proposed application and the grounds on which it is made must be given to the prospective defendant.[21]

22.5 In a case where the cause of action arose from the suffering of a latent injury attributable to the inhalation of asbestos, there are circumstances in which the ordinary limitation period applying in a personal injury case can be disregarded. If in such a case the injured person has died from the injury, an action under the *Fatal Accidents Act* may be brought notwithstanding the expiration of the limitation period, but the damages will be limited in amount.[22] Further provisions deal with cases where a person suffering from an asbestos-related disease died before 19 January 1984.[23]

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16 *Fatal Accidents Act 1959* s 7(1).

17 Once the action is extinguished by the running of the six year period, it cannot be resuscitated: *Stevens v Motor Vehicle Insurance Trust* [1978] WAR 232; *McArthur v Atwood Oceanics Australia Pty Ltd* (unreported) Supreme Court of Western Australia (Full Court), 29 July 1993, 67 of 1993.

18 *Fatal Accidents Act 1959* s 7(2)(b).

19 Id s 7(2)(c).

20 Id s 7(2)(d). See *Duke v CSR Ltd* (unreported) Supreme Court, 6 December 1990, 2819 of 1990.

21 Id s 7(2)(e).

22 Id s 7(5), which provides that if the death occurred on or after 19 January 1984, damages are recoverable under the *Fatal Accidents Act* if damages would have been recoverable by the deceased under s 38A of

22.6 The position in Western Australia, therefore, is that the limitation period applying to actions under the *Fatal Accidents Act* is one year from the deceased's death - much shorter than the six year period applying to ordinary personal injury actions, even though it is possible for the period to be extended to six years in special circumstances. The limitation provisions in the *Fatal Accidents Act* closely resemble the special limitation periods which apply in actions against public authorities, the Crown and local government authorities.[24]

(c) Criticisms of the present law

22.7 The criticisms which the Commission has levelled at such special limitation periods also apply to the limitation period in the *Fatal Accidents Act*. There seems to be no reason why the limitation period that applies in such cases should not be exactly the same as that which applies in ordinary personal injury actions. In addition, the limitation provision in the *Fatal Accidents Act* is deficient in that it cannot be extended beyond the one year period unless special conditions are satisfied, and it cannot be extended beyond the six year period at all (except in cases involving asbestos-related diseases) - and in this respect the provisions of the *Limitation Act* which apply to personal injury actions are equally as deficient. The limitation period in the *Fatal Accidents Act* may operate harshly and unjustly. The identity of a potential defendant may not emerge until the limitation period has expired, as in the English case of *Lucy v W T Henleys Telegraph Works Co Ltd*,[25] where the deceased died as a result of bladder cancer caused by being exposed to a certain chemical in the course of his employment. He died in ignorance of facts on the basis of which the manufacturer could have been held liable for his death. His widow did not discover these facts for nearly three years

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the *Limitation Act 1935* had he survived. If these provisions would have limited damages to pecuniary loss and to a total amount of $120,000, the relatives' rights of recovery under the *Fatal Accidents Act* are subject to the same limitation. In such cases, the knowledge referred to in s 38A must be that of the deceased, not another person: *Scott v Western Australia* (1994) 11 WAR 382.

23 If the death occurred before 1 January 1984, the limitation period would be three years from the date the amending Act came into operation (19 January 1984): s 7(la); if the old limitation period would have expired against the deceased at the time of death, damages were not to be awarded except in respect of pecuniary loss and were not to exceed $120,000: s 7(4). If the death occurred between 1 January 1984 and 18 January 1984, the action could be commenced in accordance with s 7(1) or (2): s 7(3); if the old limitation period would have expired against the deceased at the time of death, damages were not to be awarded except in respect of pecuniary loss and were not to exceed $120,000: s 7(4). On the asbestos-related diseases provisions in the *Fatal Accidents Act*, see P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 UWAL Rev 63, 83 - 85.

24 See Ch 10 above (public authorities); Ch 23 below (the Crown, local government authorities). In a case where the relatives bring a fatal accident claim against the Crown under s 6 of the *Crown Suits Act 1947*, or against a public authority or a local government authority under s 47 A of the *Limitation Act 1935*, the limitation periods in those Acts apply to the exclusion of s 7 of the *Fatal Accidents Act: Fatal Accidents Act 1959* s 7(2)(a).

25 [1970] 1 QB 393.

after his death. Consequently, she was unable to sue the manufacturer because her application to do so was brought more than one year after the deceased's death, which was the limitation period laid down by the English legislation at that time. It is true that in Western Australia it would have been possible to bring an application to extend the limitation period, but the case nevertheless shows the potential injustice that may be caused by short limitation periods which are not capable of extension, if the plaintiff does not acquire the necessary knowledge until some time after the death. It is even possible to envisage cases where the plaintiff does not become aware of the death until the limitation period has expired.[26]

(d) The law elsewhere

22.8 The imposition of a one year limitation period for fatal accident claims can be traced back to the original English legislation of 1846,[27] and most jurisdictions when they copied the English legislation also copied the one year limitation period. This was the case in Western Australia, where the possibility of extension to six years was not introduced until 1959. However, five years before that date, the English Act was reformed so as to provide that the limitation period which applied in actions under the *Fatal Accidents Act* should be exactly the same as that which applied in ordinary personal injury actions, namely three years.[28] In 1963, when English legislation for the first time made it possible for the ordinary limitation period in a personal injury case to be extended in certain circumstances, this provision was applied to *Fatal Accidents Act* actions also.[29] In the current English legislation, the *Fatal Accidents Act 1976* contains no limitation provisions; limitation provisions for such actions are set out in the *Limitation Act 1980*, which provides that such actions must be brought within three years of the date of the deceased's death, or the "date of knowledge" if later.[30] This is the same rule as applies in personal injury cases,[31] except that the three year period runs from the date of death rather than the date of injury. The definition of "date of knowledge"[32] is the same for both.

22.9 The principle that the limitation period in a fatal accident action should be the same as in a personal injury case has now been adopted by all other Australian jurisdictions. New

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26 These criticisms were made in British Columbia Report (1974) 80, and in Part I Report (1982) paras 2.34-2.35.

27 *Fatal Accidents Act 1846* (UK) s 3.

28 *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 3.

29 *Limitation Act 1963* (UK) s 3(2).

30 *Limitation Act 1980* (UK) s 12.

31 Id s 11.

32 Id s 14.

South Wales was the first to do so, in 1953.[33] It was followed by Victoria in 1955,[34] Queensland[35] and South Australia[36] in 1956, Tasmania in 1965[37] and the Northern Territory in 1981.[38] In most cases, the new limitation period was three years, but in New South Wales it was six years until further amendment in 1990,[39] and in Victoria a six year period was substituted for the three year period in 1983.[40] In the Australian Capital Territory the limitation period for fatal accident actions differs from that applicable to personal injury actions (which is six years[41]) but is as long as that in the other jurisdictions - the action must be brought within three years of the death or six years of the act, neglect or default, whichever is the longer.[42] In all these jurisdictions, the ordinary limitation period for personal injury actions is capable of being extended, and this is true also of fatal accident actions. Thus in Queensland, the limitation period can be extended if material facts of a decisive character are not within the plaintiff's means of knowledge at the relevant time.[43] In Victoria,[44] the Australian Capital Territory,[45] New South Wales[46] and Tasmania,[47] the court can extend the limitation period if it is just and reasonable to do so - in Victoria and the Australian Capital Territory without limit, in New South Wales ordinarily for five years, and in Tasmania from three years to six. In South Australia and the Northern Territory an action under the fatal accidents legislation, like any other, can be extended if material facts were not ascertained by the plaintiff at the relevant time and in all the circumstances it is just to grant the extension.[48]

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33 *Compensation to Relatives (Amendment) Act 1953* (NSW) s 2, amending *Compensation to Relatives Act 1897* (NSW) s 5.

34 *Limitation of Actions Act 1955* (Vic) s 33(2), amending *Wrongs Act 1928* (Vic) s 19. See now *Wrongs Act 1958* (Vic) s 20 (but see n 40 below).

35 *Law Reform (Limitation of Actions) Act 1956* (Qld) s 6, amending *Common Law Practice Act 1867* (Qld) s 14. See now *Limitation of Actions Act 1974* (Qld) s 11.

36 *Limitation of Actions and Wrongs Acts Amendment Act 1956* (SA) s 5, amending *Wrongs Act 1936* (SA) s 21.

37 *Fatal Accidents Act 1965* (Tas) s 2, amending *Fatal Accidents Act 1934* (Tas) s 6. See now *Limitation Act 1974* (Tas) s 5(2).

38 *Limitation Act 1981* (NT) s 17.

39 *Limitation Act 1969* (NSW) s 19. S 4(3) and Sch 2 amended the *Compensation to Relatives Act 1897* (NSW) s 5.

40 *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 6, amending *Wrongs Act 1958* (Vic) s 20.

41 *Limitation Act 1985* (ACT) s 11(1).

42 Id s 16.

43 The personal injury provision applies: *Limitation of Actions Act 1974* (Qld) s 31(1), as amended by *Common Law Practice and Limitation of Actions Acts Amendment Act 1981* (Qld) s 11. This reversed *Ex parte Revis* [1981] Qd R 10, in which it had been held that the limitation period in fatal accident actions could not be extended under s 31. As to evidence of the means of knowledge of a deceased person, see *Limitation of Actions Act 1974* (Qld) s 34(2).

44 *Wrongs Act 1958* (Vic) s 20.

45 *Limitation Act 1985* (ACT) s 39.

46 *Limitation Act 1969* (NSW) s 60D. It is noteworthy that this provision provides that either the limitation period applying to the deceased's cause of action, or that applying to the applicant's cause of action in the fatal accident claim, or both, can be extended.

47 The personal injury provision applies: *Limitation Act 1974* (Tas) s 5(2).

48 *Limitation of Actions Act 1936* (SA) s 48; *Limitation Act 1981* (NT) s 44.

22.10 In Canada also, the principle that the limitation period for fatal accident actions should be the same as that for personal injury actions is firmly established. In British Columbia, Manitoba, New Brunswick and Prince Edward Island - in all of which the limitation period in actions for personal injury is two years - fatal accident actions must be brought within two years of the death.[49] (The older one year provision survives in Newfoundland, Nova Scotia, Ontario and Saskatchewan.[50]) The pre-1996 Alberta legislation also prescribed a two year period for both personal injury and fatal accident actions,[51] and the 1996 Act preserves the principle that the limitation periods for such actions must be consistent.[52] In British Columbia and Manitoba, where the personal injury limitation period may be extended in certain circumstances, this applies also to actions under the fatal accidents legislation.[53]

22.11 The situation in the other jurisdictions described above contrasts starkly with that in Western Australia, where the limitation period is rather more limited than for ordinary personal injury actions, and in neither situation is extension possible except in cases involving asbestos-related diseases. In the Commission's view, there is a clear case for reform.

(e) The Commission's recommendation

22.12 There is a clear principle running through the legislation in the other jurisdictions referred to above: the limitation period in a *Fatal Accidents Act* action should be the same as, and should be capable of extension to the same extent as, a personal injury action. These principles have to be borne in mind in examining how the Commission's recommendations, which involve two general limitation periods, a discovery period and an ultimate period, are to be applied to actions under the *Fatal Accidents Act*. On this, some guidance can be obtained from the new legislation in Alberta and the reform proposals in Ontario.

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49 *Limitation Act 1979* (BC) s 3(1)(g); *Limitation of Actions Act 1987* (Man) s 2(1)(m), and see also *Fatal Accidents Act 1987* (Man) s 7(4); *Fatal Accidents Act 1973* (NB) s 8(4); *Fatal Accidents Act 1988* (PEI) s 9.

50 *Fatal Accidents Act 1990* (Nfd) s 5; *Fatal Injuries Act 1989* (NS) s 10; *Family Law Act 1990* (Ont) s 61(4); *Fatal Accidents Act 1978* (Sask) s 6.

51 *Limitation of Actions Act 1980* (Alta) s 54.

52 By applying the two general limitation periods to all actions, including actions under the *Fatal Accidents Act*: see in particular *Limitations Act 1996* (Alta) s 3(3)(d), referred to in para 22.14 below.

53 *Limitation Act 1979* (BC) s 6(3)(g); *Limitation of Actions Act 1987* (Man) ss 14(1) and 16(2).

22.13 The Commission therefore **recommends** that section 7 of the *Fatal Accidents Act 1959* should be repealed,[54] and that the provisions of the new Limitation Act should apply to fatal accident actions.[55] Applying the discovery period, the limitation period ordinarily applying in such an action will be three years from the date of the deceased's death, since in most cases the claimant (in this case, the personal representative or other person who brings the action on behalf of the relatives) will have knowledge that the injury has occurred, that it is attributable to the conduct of the defendant, and that it was sufficiently serious to have warranted bringing a proceeding. However, in cases where the claimant does not have such knowledge, the discovery period will not commence until he acquires it.

22.14 As regards the ultimate period, the Commission **recommends** that it should be measured from the date of the act or omission which caused the death of the deceased, rather than from the death itself. This is the view adopted in the Alberta legislation and the Ontario proposals.[56] Such a provision would deal with the situation where death does not ensue until some time after the careless conduct in question, and would avoid the possibility that in such a case the plaintiffs may still have 15 years after the death in which to bring an action.[57] This rule goes back to one of the essential principles on which the fatal accidents legislation has been built: that the deceased must have been able to sue had he survived.[58]

3. SURVIVAL OF ACTIONS

(a) Introduction

22.15 At common law, once a person died, the action died with him: *actio personalis moritur cum persona*. No cause of action survived for the benefit of the estate of a deceased plaintiff, or against that of a deceased defendant. However, with the coming of the motor vehicle, this proved inconvenient, since in the common case where a negligent driver died in the accident and injured his passengers, they had no cause of action, even though the deceased had an insurance policy which was available to compensate the injured parties. A committee

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54 Except for the introductory words which provide that not more than one action lies under the Act in respect of the same subject matter of complaint.

55 In their comments on the Discussion Paper (1992), the Law Society of Western Australia and Mr C Phillips (legal practitioner) said that there should be no special limitation periods for actions under the *Fatal Accidents Act*.

56 *Limitations Act 1996* (Alta) s 3(3)(d); Limitations Bill 1992 (Ont) cl 15(2).

57 Alberta Report for Discussion (1986) para 2.205; Alberta Report (1989) 71.

58 See para 22.3 above.

set up in England to examine the problem recommended that actions should survive against deceased estates.[59] The resulting legislation, the *Law Reform (Miscellaneous Provisions) Act 1934*, provided also that actions should survive in their favour.[60] A number of torts in which the loss is personal in nature, such as defamation, were excluded.[61] This legislation, like the Fatal Accidents Act, was quickly copied in Australia, Canada and other common law jurisdictions[62] - in Western Australia, by the *Law Reform (Miscellaneous Provisions) Act 1941*.[63]

22.16 In England, there were no limitations on the kinds of damages for which an estate could recover,[64] and so claims for non-pecuniary loss survived,[65] but the Australian legislation provided that the damages should not include claims for pain and suffering, bodily or mental harm or curtailment of expectation of life.[66] Given that the proceeds of a claim made by the estate would normally pass to the relatives under the deceased's will or on intestacy, there would be a possibility of double recovery, since those same relatives would also be making a Fatal Accidents Act claim, but this is prevented by appropriate deductions.[67]

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59 Law Revision Committee *First Interim Report* (*Actio Personalis Moritur Cum Persona*) (1934 Cmd 4540).

60 *Law Reform (Miscellaneous Provisions) Act 1934* (UK) s 1.

61 The other actions excluded were seduction, inducing one spouse to leave or remain apart from the other or for damages for adultery - all now obsolete and abolished in most jurisdictions.

62 In Australia, see *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) Part II; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) Part II; *Succession Act 1981* (Qld) s 66; *Survival of Causes of Action Act 1940* (SA); *Administration and Probate Act 1935* (Tas) s 27; *Administration and Probate Act 1958* (Vic) s 29; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4. In New Zealand, see *Law Reform Act 1936* (NZ) s 3. In Canada, see *Survival of Actions Act 1980* (Alta); *Estate Administration Act 1979* (BC) s 66; *Trustee Act 1987* (Man) s 53; *Survival of Actions Act 1973* (NB); *Survival of Actions Act 1990* (Nfd); *Trustee Ordinance* (NWT) s 33; *Survival of Actions Act 1989* (NS); *Trustee Act 1990* (Ont) s 38; *Survival of Actions Act 1988* (PEI); *Trustee Act 1978* (Sask) s 58; *Survival of Actions Act 1986* (YT).

63 S 4.

64 Apart from provisions such as that barring recovery of exemplary damages.

65 *Rose v Ford* [1937] AC 826.

66 See eg *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2)(d).

67 See eg *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601; *Murray v Shuter* [1976] QB 972. For some of the complications arising from the overlap of the two statutes, see eg *Pitch v Hyde-Cates* (1982) 150 CLR 482, now reversed by statute in all Australian jurisdictions (in Western Australia, by *Law Reform (Miscellaneous Provisions) Act 1941* s 4(2)(e), added by *Law Reform (Miscellaneous Provisions) Amendment Act 1982* s 2); *Kandalla v British European Airways Corporation* [1981] QB 158; *Gammell v Wilson* [1982] AC 27; *Administration of Justice Act 1982* (UK) s 4(2); S M Waddams "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 MLR 437.

(b) Survival of actions for the benefit of a deceased estate

22.17 As regards the survival of causes of action for the benefit of a deceased estate, the *Law Reform (Miscellaneous Provisions) Act 1941* does not provide for any special limitation period. This means that the ordinary limitation period applies. As the cause of action is the same as that which would apply had the deceased not died, the limitation period starts to run when the cause of action accrues and not on the deceased's death.[68]

22.18 In cases where a personal injury claim survives for the benefit of the estate, this means that the ordinary six year limitation period for personal injury actions applies. However, because of the limitations of the current Western Australian law in this respect, the six year period cannot be extended except in cases involving asbestos-related diseases.[69] Where, in such cases, the Limitation Act places a limit on the amount of damages that may be awarded, the same limitation applies to actions brought for the benefit of the deceased's estate.[70]

22.19 The survival of actions legislation in the other Australian jurisdictions is the same as that of Western Australia in not providing any special limitation period for actions surviving for the benefit of a deceased estate, so again the position is analogous to ordinary personal injury actions. It is in relation to the possibility of extending the ordinary period that the differences between Western Australia and the other jurisdictions become obvious, because the extension provisions in the other jurisdictions are much wider. Thus, in actions brought on behalf of an estate -

(1) In Queensland, the limitation period (ordinarily three years) can be extended if material facts of a decisive character are not within the means of knowledge of either the deceased or the applicant at the relevant time.[71]

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68 *Martinus v Kidd* (1982) 150 CLR 648, Gibbs CJ, Murphy and Wilson JJ at 653-654. See eg *Cotton v General Electric Co Ltd* (1979) 129 New LJ 737; *T v H* [1995] 3 NZLR 37.

69 *Limitation Act 1935* s 38A: see para 5.5 above. In *Sinclair v Minister for Works* (unreported) Supreme Court of Western Australia (Full Court), 11 August 1992, Appeal 164 of 1991, the injured person died before gaining knowledge of the relevant facts. The Full Court (reversing the decision of the Master (1990) 2 WAR 371) held that in such a case "person" in s 38A(6) was to be interpreted as applying to the deceased's personal representative.

70 *Law Reform (Miscellaneous Provisions) Act 1941* s 4(2)(ca): see P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 UWAL Rev 63, 83.

71 *Limitation of Actions Act 1974* (Qld) s 32.

(2) In Victoria, the court can extend the limitation period (ordinarily six years) if it is just and reasonable to do so. There is no limit on how far it may be extended.[72]

(3) In New South Wales, the court can extend the limitation period (ordinarily three years) if it is just and reasonable to do so. Except in cases of latent injury, the period may only be extended for a maximum of five years.[73]

(4) In Tasmania, the court can extend the three year limitation period to six years, if it is just and reasonable to do so.[74]

(5) In the Northern Territory, the court can extend the limitation period if material facts were not ascertained by the plaintiff at the relevant time and in all the circumstances it is just to grant the extension.[75]

(6) In South Australia it appears that there are two applicable provisions. Section 46a of the *Limitation of Actions Act 1936* provides that the limitation period may be extended by a period equal to the period between the deceased's death and the grant of probate, or 12 months, whichever is the lesser. However, it seems that the ordinary limitation period in such actions can be further extended under the general extension provision in section 48, which is similar to that in the Northern Territory.[76] This section does not derogate from other provisions under which a court may extend time.[77]

(7) The Australian Capital Territory also allows its extension provisions to apply to actions brought on behalf of deceased estates, and so the court can extend the period (ordinarily six years) if it is just and reasonable to do so - but the period may not be extended for longer than six years from the date of death.[78]

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72 The personal injury provision applies: *Limitation Act 1958* (Vic) s 23A.

73 *Limitation Act 1969* (NSW) ss 60C and 60G.

74 The personal injury provision applies: *Limitation Act 1974* (Tas) s 5(1).

75 *Limitation Act 1981* (NT) s 44.

76 See para 5.18 above.

77 *Limitation of Actions Act 1936* (SA) s 48(6). The Law Reform Committee of South Australia, in its Report relating to *Claims for Injuries from Toxic Substances and Radiation Effects* (87th Report 1985) at 29, recommended that it should be made clear that the extension of time under s 46a should be capable of further extension under s 48.

78 *Limitation Act 1985* (ACT) s 38.

22.20 In England, the position is the same as in the majority of Australian jurisdictions. An action on behalf of a deceased estate may be brought within three years of the death, or within three years of the date of the personal representative's knowledge, whichever is the later.[79]

22.21 Again in Canada, the position in a substantial number of jurisdictions is that the limitation period in survival actions is to be the same as that in personal injury actions.[80] In British Columbia and Manitoba, it appears that the extension provisions also apply in such cases.[81]

22.22 In its 1982 report, the Commission argued that the law in Western Australia needed to be reformed in order to overcome the injustice of cases involving latent personal injury, which might not become apparent until the limitation period had expired or substantially expired. The rule preventing extension of the ordinary limitation period would prevent the victim commencing action in person and if the victim died before being able to bring proceedings it would equally prevent the estate from bringing proceedings on his behalf.[82] Though this argument was raised in the context of asbestos-related diseases, as regards which the law has now been altered, it remains equally valid in cases of other latent injuries. The arguments for having a proper extension provision in personal injury cases - and indeed other cases too - apply equally to the situation where the action is brought on behalf of a deceased estate. This will bring the law in Western Australia into line with other jurisdictions.

22.23 The principle that an action which survives for the benefit of the estate should be treated in exactly the same way as an action brought by the injured party in person needs to be applied to the Commission's general recommendation for two limitation periods, a discovery period and an ultimate period. The new Alberta legislation and the Ontario proposals both

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79 *Limitation Act 1980* (UK) s 11(5).

80 The limitation period for survival actions is two years from death (two years being also the period for personal injury actions) In British Columbia, Manitoba, Nova Scotia and Prince Edward Island: *Estate Administration Act 1979* (BC) s 66(2); *Trustee Act 1987* (Man) s 53(2); *Survival of Actions Act 1989* (NS) s 5; *Survival of Actions Act 1988* (PEI) s 21; it is also two years in Ontario: *Trustee Act 1990* (Ont) s 38(7). The pre-1996 Alberta legislation also prescribed a two year period for survival actions: see *Limitation of Actions Act 1980* (Alta) s 53; for the present position, see para 22.23 below. There is a one year period for survival actions in New Brunswick, Newfoundland and Saskatchewan: *Survival of Actions Act 1973* (NB) s 9 (notwithstanding *Limitation of Actions Act 1973* (NB) s 23, which provides for a six month period); *Trustee Act 1990* (Nfd) s 23(1); *Trustee Act 1978* (Sask) s 58(3).

81 *Estate Administration Act 1979* (BC) s 66(2) provides that a personal representative can continue the action with the same rights as the deceased; *Limitation of Actions Act 1987* (Man) s 14(1) provides that it applies notwithstanding the provisions of that or any other Act.

82 Part I Report (1982) para 2.22.

make specific provision for actions by personal representatives, but they differ somewhat from each other. The situation is simply one aspect of the situation which can arise in a number of contexts where a proceeding is commenced by a person claiming through a predecessor in right, title or interest - called by the Alberta Act the successor owner of a claim. The Commission has already made recommendations which cover such cases.[83] Under the Alberta legislation, the discovery limitation period begins against a personal representative as a successor owner of a claim at the earliest of the following times -

(1) when the deceased owner first acquired or ought to have acquired the necessary knowledge, if he acquired the knowledge more than two years before his death (two years being the length of the discovery period in the Alberta Act);

(2) when the personal representative was appointed, if he had the necessary knowledge at that time;

(3) when the personal representative first acquired or ought to have acquired the necessary knowledge, if he acquired the knowledge after being appointed. [84]

The policy objective behind these proposals is to give either the deceased or the personal representative a full discovery period.[85] The Ontario Limitations Bill adopts a possibly simpler alternative: it provides that the personal representative, like other successor owners, is deemed to have acquired the knowledge on the day that the deceased first knew or ought to have known of the matters in question.[86] As regards situation (2), this appears to be less favourable to the personal representative than the Alberta Act, and no specific provision is made for situation (3). However, the Ontario Bill does provide that if a person with a claim dies and the discovery period would expire within a year of the death, the limitation period is lengthened to one year from the death.[87]

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83 See paras 8.12-8.31 above.

84 *Limitations Act 1996* (Alta) s 3(2)(c).

85 Alberta Report for Discussion (1986) paras 2.189-2.192; Alberta Report (1989) 67-69. The proposals in the New Zealand Report (1988) are generally similar: see paras 226-229, *Draft Limitation Defences Act* (NZ) s 12.

86 Limitations Bill 1992 (Ont) cl 11.

87 Id cl 12.

22.24 The Commission **recommends** that the new Western Australian Limitation Act should adopt legislation modelled on the Alberta provisions on personal representatives as successor owners of a claim. They comprehensively cover all the situations that are likely to arise and ensure that either the deceased or the personal representative will have a full discovery period.

(c) Survival of actions against a deceased estate

22.25 Section 4(3) of the *Law Reform (Miscellaneous Provisions) Act 1941* provides that:

> "No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either-
>
> (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
>
> (b) the cause of action arose not earlier than twelve months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation, or twelve months after his death, whichever is the later. Provided, however, that a judge of the Supreme Court may extend the time for instituting proceedings as the justice of the case may require although the application for extension be not made until after the expiration of the aforementioned times."

22.26 Except for the proviso to paragraph (b), which allows a judge to extend the time beyond the six month limit,[88] this provision is in substance very similar to that in the English *Law Reform (Miscellaneous Provisions) Act 1934*, which Act for the first time allowed claims to survive against a deceased estate. In its original form, this Act provided that the cause of action had to arise not earlier than six months before the death and proceedings had to be taken not later than six months after the personal representative took out representation.[89] In 1954 the *Law Reform (Limitation of Actions etc) Act* widened the scope of the rule by

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88 The provision does not allow a court to vary the requirement that the cause of action must arise not earlier than 12 months before the deceased's death: *Corsey v Monaco* (unreported) Supreme Court, 3 June 1993, 1519 of 1993.

89 *Law Reform (Miscellaneous Provisions) Act 1934* (UK) s 1(3). See C Hare *Tragedy at Law* (1942), the plot of which hinges on this provision. Barber J is murdered exactly six months after causing a serious road accident when driving while uninsured. The action, if brought, would have ruined the judge financially, but the injured person had been persuaded to delay issuing a writ, and no writ had been issued at the date of the judge's death. The murderer, who turns out to be the judge's wife, commits suicide, leaving in her handbag a note which reads "[1938] 2 KB 202". This is a reference to *Daniels v Vaux*, according to which if the defendant survived the accident for longer than six months, and then died before the writ was issued, no cause of action lay against the estate.

abolishing the requirement that the cause of action should have arisen not earlier than six months before the death.[90]

22.27 As a result of the recommendations of the Law Commission in its report on Proceedings against Estates in 1969,[91] the special limitation period for actions against deceased estates was abolished in 1970.[92] The *Law Reform (Miscellaneous) Provisions Act* thus now contains no limitation provisions and the ordinary provisions of the *Limitation Act* apply to all actions brought against deceased estates. The Law Commission[93] pointed out that -

(1) The six months limitation period could be too short if the tortfeasor died at the time of the accident or soon afterwards, since in a case in which the injury was slow to manifest itself the limitation period might have expired before a writ could be issued.

(2) A limitation period brought into play merely because of the death of the deceased could work hardship or injustice. The plaintiff might not know anything of the defendant or his affairs, and if he did not learn of the defendant's death might lose his remedy through no fault of his own.

(3) In practice, the six months rule did little to hasten the completion of administration of estates.

(4) In one instance, the existing rule could have the surprising result that the right of action would revive long after the normal limitation period had expired. In *Airey v Airey*,[94] the deceased was killed and the plaintiff injured in a car accident. More than six years after the accident (by which time the limitation period had run against the plaintiff), the defendant took out letters of administration of the deceased's estate. The plaintiff commenced proceedings within six months of that date. It was held that the plaintiff was entitled to do

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90 *Law Reform (Limitation of Actions etc) Act 1954* (UK) s 4.
91 Law Commission *Proceedings against Estates* (Law Com No 19 1969).
92 *Proceedings Against Estates Act 1970* (UK) s 1.
93 Law Commission *Proceedings against Estates* (Law Com No 19 1969) para 14.
94 [1958] 1 WLR 729.

this, since the limitation period in the 1934 Act, and not that in the *Limitation Act*, governed the case.

22.28 In its 1982 report, the Commission recommended that Western Australia should follow the English reform and abolish the special limitation period applicable to tort actions against deceased estates.[95] Though, as the Commission pointed out, the hardship caused by the rule was mitigated somewhat in Western Australia by the inclusion in section 4(3) of a judicial discretion to extend the time for commencing proceedings, there was still a need to amend the rule because -

(1) a defence of limitation can arise without warning;

(2) where the normal six year limitation period had not expired, it was discriminatory to require plaintiffs caught by this rule to obtain an extension of time for commencing proceedings;

(3) the law would be simpler if the limitation provisions applicable to claims brought against an estate were the same as those for claims brought by an estate.

The Commission pointed out that, subject to the possibility of granting an extension of time, the points made by the Law Commission applied equally to the law in Western Australia.[96]

22.29 A reform similar to that effected in England in 1970 has been adopted in four Australian jurisdictions. In New South Wales and Queensland, the reform preceded the English reform. In New South Wales, the Limitation Act 1969[97] repealed the special limitation provision in the New South Wales *Law Reform (Miscellaneous Provisions) Act 1944*[98] because it was inconsistent with the general principles of statutes of limitation, since the limitation period might be shortened by events which were of no concern to the plaintiff.[99] In Queensland, on the introduction of a three year limitation period in personal injury cases in

95 Part I Report (1982) paras 4.57-4.59.
96 Id paras 2.23-2.30.
97 S 4(3) and Sch 2.
98 S 2(3).
99 NSW Report (1967) paras 39-41.

1956,[100] special limitation periods in other Acts were repealed,[101] and the courts held that the three year period accordingly superseded the special period,[102] which was eventually repealed in 1981.[103] Following the English reform, the special period was repealed in Victoria in 1983[104] and in the Australian Capital Territory in 1985.[105] The remaining three jurisdictions retain the special limitation period, but in each case, as in Western Australia, there is some possibility of extension.[106]

22.30 There are some differences among the reformed jurisdictions with regard to whether the ordinary limitation period which now applies in actions against deceased estates can be extended when the plaintiff does not acquire full knowledge until some time after the cause of action accrues. In Victoria, the court can decide to extend the limitation period for such longer period as it decides is just and reasonable.[107] In the Australian Capital Territory, however, the court cannot extend the limitation period unless the estate is entitled to be indemnified by another person or estate.[108] In New South Wales and Queensland there are no legislative provisions which allow for the extension of the ordinary limitation period applying to actions against deceased estates.[109]

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100 By the *Law Reform (Limitation of Actions) Act 1956* (Qld) s 5.

101 Id s 4.

102 *Minchin v Public Curator of Queensland* [1964] Qd R 545; *Parente v Bell* (1968) 116 CLR 528.

103 *Succession Act 1981* (Qld) s 3 and 1st Sch, repealing *Common Law Practice Act 1867* (Qld) s 15D.

104 *Limitation of Actions (Personal Injury Claims) Act 1983* (Vic) s 10, amending *Administration and Probate Act 1958* (Vic) s 29(3). See Victorian Chief Justice's Law Reform Committee *Further Report on Limitation of Actions in Personal Injury Claims (Survival of Actions)* (1982).

105 *Limitation Act 1985* (ACT) s 2(6) and Sch, repealing *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 6. See ACT Working Paper (1984) paras 94-97.

106 *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 7(1); *Survival of Causes of Action Act 1940* (SA) s 4; *Administration and Probate Act 1935* (Tas) s 27(5). In the Northern Territory and South Australia, the cause of action may be extended under the general extension provisions: *Limitation Act 1981* (NT) s 44; *Limitation of Actions Act 1936* (SA) s 48; see *Blomme v Sutton* (1989) 52 SASR 576. For the extension provision in Tasmania, see *Administration and Probate Act 1935* (Tas) s 27(6).

107 *Administration and Probate Act 1958* (Vic) s 29(3)(b)(ii).

108 *Limitation Act 1985* (ACT) s 37.

109 In New South Wales before 1990 it appeared that the limitation period in an action against a deceased estate could not be extended. *Limitation Act 1969* (NSW) s 59 (headed "surviving actions") was confined to causes of action which had survived for the benefit of a deceased estate, and so a cause of action which had survived against a deceased estate could be extended, if at all, only under the provisions of s 58 dealing with ordinary personal injury actions. In the case of a cause of action which accrued on or after 1 September 1990, the court may extend the limitation period if it is just and reasonable to do so under s 60C, which according to its heading applies to an "ordinary action (including surviving action)". However, if "surviving action" means the same as in s 59, a cause of action against a deceased estate can only be extended under s 60C if it is classified as an ordinary action. In Queensland, the position is similar to the pre-1990 position in New South Wales. *Limitation of Actions Act 1974* (Qld) s 32, which is headed "surviving actions", only permits the extension of the ordinary limitation period in an action on behalf of a deceased estate. S 31, which permits the extension of the limitation period in ordinary actions" for personal injury, may apply to actions which survive against a deceased estate, but it makes no express provision for such a situation.

22.31 Elsewhere in the common law world, the picture is less clear. Some Canadian jurisdictions adopt the principle that the ordinary limitation period ought to apply in actions against deceased estates,[110] but others retain a special rule.[111] New Zealand also has a special rule.[112]

22.32 The Commission maintains the view expressed in its 1982 report that the special limitation provision ought to be abolished. The reasons there expressed remain valid. The death of the tortfeasor should not affect the limitation period that applies to a tort which was committed in his lifetime. In the context of the Commission's general recommendations, the three year discovery period should run from the date of knowledge, and the 15 year ultimate period from the date of the act or omission in question, and the death of the defendant should not have any impact. The Commission accordingly **recommends** that the special limitation period in section 4(3) of the *Law Reform (Miscellaneous Provisions) Act 1941* should be abolished.[113]

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110 *Limitations Act 1996* (Alta) s 3(3)(c); *Survival of Actions Act 1973* (NB) s 9 (which applies notwithstanding *Limitation of Actions Act 1973* (NB) s 23); *Survival of Actions Act 1989* (NS) s 5; *Survival of Actions Act 1988* (PEI) s 21; *Limitation of Actions Act 1978* (Sask) s 3(4) (though note also *Trustee Act 1978* (Sask) s 59).

111 *Estate Administration Act 1979* (BC) s 66(4); *Trustee Act* (Man) s 53(2); *Trustee Act 1990* (Ont) s 38(7).

112 *Law Reform Act 1936* (NZ) s 3(3).

113 The Law Society of Western Australia in its comments on the Discussion Paper (1992) agreed.

Chapter 23

ACTIONS AGAINST THE CROWN AND LOCAL GOVERNMENT AUTHORITIES

1. INTRODUCTION

23.1 Actions against the Crown in right of Western Australia are not governed by the *Limitation Act 1935*, but by the limitation provision in section 6 of the *Crown Suits Act 1947*.[1] This provision is substantially identical to section 47A of the *Limitation Act*, which deals with actions against public authorities. Each of these provisions imposes a one-year limitation period and requires the giving of notice within a specified period, and if they are not complied with it is necessary to apply for leave before issuing a writ.

23.2 Until the coming into force of the *Local Government Act 1995* on 1 July 1996, certain actions against local government authorities were governed by a limitation provision of the same kind as those referred to in the previous paragraph, section 660 of the *Local Government Act 1960*.[2] Section 660 was not carried forward into the new Act, and so as from the date in question actions against local government authorities are regulated by section 47A of the *Limitation Act 1935*.

23.3 In Chapter 10 the Commission recommended that section 47A should be repealed and that the ordinary limitation rules should apply to actions against public authorities. In this chapter the Commission makes similar recommendations in respect of actions against the Crown and local government authorities.

2. ACTIONS AGAINST THE CROWN

23.4 Section 6 of the *Crown Suits Act 1947* provides that no right of action lies against the Crown unless -

(a) the plaintiff gives notice in writing to the Crown Solicitor, as soon as practicable or within three months (whichever is the longer) after the cause of

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1 See generally J F Young "An Examination of Legislation Requiring Notice before Commencing Action" in Law Society of Western Australia *Causes of Action and Time Limitations* (1985), 1-18.

2 See generally id 36-42.

action accrues, providing reasonable information of the circumstances on which the action will be based and various other details; and

(b) the action is commenced within one year of the date on which the cause of action accrued.[3]

However, even if neither of these provisions have been complied with, the action may be brought within six years if the Attorney General consents in writing,[4] or if on application to the court it grants leave to bring the action.[5] The court may grant leave if it considers that the failure to give notice or the delay in bringing the action is occasioned by mistake or any other reasonable cause, or that the Crown is not materially prejudiced in its defence or otherwise by the failure or delay, and that it is just to grant leave.[6] Before making an application for leave, 14 days' notice in writing must be given of the proposed application.[7] Special rules apply in the case of asbestos-related diseases.[8]

23.5 Prior to the enactment of Crown proceedings legislation, proceedings could not be taken against the Crown except by petition of right, in which case the Crown could protect itself against stale claims by refusing to endorse the petition. The *Ordinance of 1861*,[9] and the *Crown Suits Act 1898* which replaced it, continued the petition of right procedure, and the 1898 Act required petitions to be filed within twelve months.[10] The *Crown Suits Act 1947*

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3 *Crown Suits Act 1947* s 6(1). The subsection also provides that where the act, neglect or default is a continuing one, no cause of action accrues until it ceases, though notice may be given and an action brought while it continues.

4 Id s 6(2).

5 Id s 6(3)(a).

6 Id s 6(3)(b).

7 Id s 6(3)(c).

8 Id s 6(4)-(8). Where the plaintiff did not have knowledge of the relevant facts before 1 January 1984, the limitation period set by s 6 runs not from the point where the cause of action accrued but from the time when the plaintiff had the knowledge referred to in s 38A of the *Limitation Act 1935*: s 6(6). (For s 38A see para 5.5 above.) Where the plaintiff did have such knowledge before 1 January 1984, if the six year limitation period had expired before the action was commenced, the limitation period was to run from the time the amending Act came into operation (19 January 1984): s 6(4), and damages were limited to pecuniary loss and were not to exceed $120,000: s 6(5). If the period had not expired before the action was commenced, the limitation period was again to run from the date on which the amending Act came into operation: s 6(4), but there were no limits on damages. Even though the limitation period applicable before the coming into operation of the amending Act had expired before the date on which the Act came into operation, notice could be given, an action could be commenced, and consent could be given or leave granted to bring an action, in accordance with these provisions: s 6(7). See P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 23 UWAL Rev 63, 86-88.

9 31 Vic No 7: "An Ordinance to facilitate proceedings by persons having claims against the Government."

10 *Crown Suits Act 1898* s 37. On the history of Crown proceedings legislation in Western Australia, see *Biljabu v Western Australia* (1993) 11 WAR 372, Owen J at 375-376.

abolished the petition of right procedure but imposed the limitation and notice requirements set out above.

23.6 The provisions of section 6 are practically identical to those of section 47A of the *Limitation Act*.[11] The only real differences are that -

(1) Section 6 provides that "no right of action lies", whereas section 47A provides that "no action shall be brought".

(2) Section 47A is limited to actions "for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority", [12] whereas there is no such limitation in section 6 of the *Crown Suits Act*.

As a number of judges have commented, the difference in wording noted in the first point above reflects the fact that the *Crown Suits Act* confers a new cause of action, whereas section 47A regulates the time within which an action available at common law may be commenced.[13] However, it has not been suggested that there are any material differences in the way the two sections operate:[14] cases on section 47A often cite cases on section 6 of the Crown Suits Act, and vice versa. Thus, for example, it is accepted that the rule in *Pilbara Iron Ltd v Bonotto*[15] according to which an application for leave cannot retrospectively validate the issue of a writ without obtaining such leave, applies with equal force to section 6 of the Crown Suits Act.[16] In *Judamia v State of Western Australia*[17] the Full Court held that section 6 of the *Crown Suits Act* applies to proceedings to enforce a provision of the *Constitution Act*

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11 See para 10.4 above.

12 *Limitation Act 1935* s 47 A(1).

13 *Kelly v Minister for Education* (1987) 4 SR(WA) 6, Keall DCJ at 8; *Kennedy v State of Western Australia* (unreported), District Court of Western Australia, 24 June 1993 2298 of 1992, Keall DCJ at 7; *Burke v State of Western Australia* (1994) 10 SR(WA) 381, L A Jackson QC DCJ at 383; *Marshall v West Australian Government Railways Commission* (1994) 11 SR(WA) 148, L A Jackson QC DCJ at 150; *Irrera v State of Western Australia* (1994) 11 SR(WA) 360, Barlow DCJ at 362.

14 See eg *Milentis v State of Western Australia* (unreported) Supreme Court of Western Australia, 30 August 1991, 1122 of 1991 and *Markotich v State of Western Australia* (unreported) Supreme Court of Western Australia, 8 September 1994, 1492 of 1994, where both provisions were in issue.

15 (1994) 11 WAR 348.

16 See *Irrera v State of Western Australia* (1994) 11 SR(WA) 360; see also *Kennedy v State of Western Australia* (unreported) District Court of Western Australia, 24 June 1993, 2298 of 1992 (decided before *Pilbara Iron Ltd v Banotto* (1994) 11 WAR 348).

17 (Unreported) Supreme Court of Western Australia (Full Court), 1 March 1996, Appeal FUL 34 of 1995.

1899 in the same way as any other statute. It also held that the provision covered all forms of proceedings of a justiciable nature, and was not limited to a "cause of action" in the traditional sense of one of the old forms of action. This would include an action for a declaration against the Attorney General as a representative of the Crown. On appeal to the High Court, the High Court held that it was not appropriate to deal with these issues on a strikeout application, and remitted the matter to the State court for further hearing.[18]

23.7 The Commission **recommends** that the special limitation period and notice requirements in section 6 of the *Crown Suits Act* be abolished, for the same reasons it has used to justify its similar recommendation as respects section 47A.[19] There is no sufficient reason why the limitation and notice rules which apply in actions against the Crown should be different from those which apply in actions against private defendants. No other Australian jurisdiction has special limitation and notice provisions in such cases. The Limitation Acts of New South Wales, the Northern Territory, Queensland, Tasmania and Victoria state that they apply to proceedings by and against the Crown.[20] The Crown Proceedings Acts of South Australia and the Australian Capital Territory contain provisions to the same effect.[21] The position is the same in England, New Zealand and most Canadian jurisdictions.[22]

23.8 A further reason which supports the Commission's recommendation is that section 6 is inconsistent with the policy behind other provisions of the *Crown Suits Act*, for example those which provide that the Crown may sue and be sued in any court in the same manner as a

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18 See "Court lets elders fight for $600m" *The West Australian*, 10 October 1996.

19 See paras 10.18-10.25 above. All commentators on the Discussion Paper (1992) who commented on this issue agreed. They included the Law Society of Western Australia and two legal practitioners, Mr P S Bates and Mr C Phillips.

20 *Limitation Act 1969* (NSW) s 10(1); *Limitation Act 1981* (NT) s 6(1); *Limitation of Actions Act 1974* (Qld) s 6(1); *Limitation Act 1974* (Tas) s 37(1); *Limitation of Actions Act 1958* (Vic) s 32(1). In each case, there are a few exceptions, for example proceedings by the Crown for the recovery of any tax, or interest thereon: *Limitation Act 1969* (NSW) s 10(3)-(4); *Limitation Act 1981* (NT) s 6(3); *Limitation of Actions Act 1974* (Qld) s 6(3); *Limitation Act 1974* (Tas) s 37(1); *Limitation of Actions Act 1958* (Vic) s 32(1); see also *Limitation Act 1985* (ACT) s 7(3)-(4).

21 *Crown Proceedings Act 1972* (SA) s 11(1) (the time for bringing proceedings against the Crown in tort or contract shall be the same as in the case of proceedings between subject and subject); *Crown Proceedings Act 1992* (ACT) s 5(1) (the same law applies to proceedings by and against the Crown as in the case of proceedings between subjects). The provision in s 7(1) of the *Limitation Act 1985* (ACT) to the effect that the Act bound the Crown was repealed by the *Acts Revision (Position of Crown) Act 1993* (ACT) s 3 and Sch 1.

22 *Limitation Act 1980* (UK) s 37(1); *Limitation Act 1950* (NZ) s 32. Again, there are some exceptions, for example proceedings for the recovery of tax or interest thereon: *Limitation Act 1980* (UK) s 37(2); *Limitation Act 1930* (NZ) s 32, proviso. In Canada, the *Crown Liability Act 1970* (Can) s 19(1) makes the principal statutes of limitation binding on the Crown: see P W Hogg *Liability of the Crown* (2nd ed 1989) 43. However, this is not so in Ontario: see *Attorney General (Ont) v Watkins* (1975) 8 OR (2d) 513. The Ontario Report (1969) 137 recommended that the *Limitation Act* should apply to proceedings by and against the Crown.

subject[23] and that the same process shall be available both to the Crown and to the subject for determination and enforcement of claims in the courts.[24]

3. ACTIONS AGAINST LOCAL GOVERNMENT AUTHORITIES

23.9 Until 30 June 1996, when it was repealed by the *Local Government Act 1995*, section 660 of the *Local Government Act 1960* provided that no action was maintainable against a municipality, or a member, officer or servant of a municipality acting in that capacity, in respect of a tort, the provisions of section 47A of the *Limitation Act* notwithstanding, unless -

(1) the action was commenced within twelve months after the cause of action arose;

(2) at least 35 days before the action was commenced, the council was served with a notice giving particulars of the cause of action, the claim, and the name and address of the plaintiff;

(3) as soon as practicable after the cause of action arose, notice in writing was served on the council giving particulars of the cause of action, in cases of personal injury and damage to property various particulars relating to the injury or damage, particulars of the claim being made and an intimation that action is about to be commenced.[25]

There were further provisions under which the council could require the medical examination of the victim of personal injury, and an examination of property which had been damaged.[26] Notwithstanding the failure to bring the action within a year, or serve either of the notices referred to above, application for leave to commence the action could be made to a Judge[27] at any time before the expiration of six years from the date when the cause of action arose. The grounds on which such application could be granted were the same as for section 47A of the *Limitation Act* and section 6 of the *Crown Suits Act*, namely that if the failure was occasioned

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23 *Crown Suits Act 1947* s 5.
24 Id s 9.
25 *Local Government Act 1960* s 660(1)(a)-(c).
26 Id s 660(1)(d)-(e).
27 This means a Judge of the Supreme Court: *Interpretation Act 1984* s 5. However it also includes a District Court Judge: *Baker v Shire of Albany* (1994) 14 WAR 46.

by mistake or other reasonable cause, or if the prospective defendant was not materially prejudiced in his defence or otherwise, the court could grant leave if it was thought just to do so. As with the other provisions, special rules applied in cases involving asbestos-related diseases.[28]

23.10 There were a number of minor differences between section 660 and section 47A of the *Limitation Act*. Section 660 was limited to actions in tort;[29] there were two separate notice requirements to be satisfied prior to the bringing of an action within one year,[30] but no additional notice requirement prior to applying for leave to bring an action within the six year period; there were provisions about requiring medical and other examinations which do not appear in section 47A; and there was no provision under which consent could be given to the bringing of the action within six years, as an alternative to applying for leave. However, in its essentials - the one and six year limitation periods, the need to apply for leave once the one year period has passed, and the grounds on which leave may be granted - the two provisions were almost identical. Before 1994, there was some controversy in the cases about whether it was necessary when suing a local authority to obtain leave under section 47A as well as section 660.[31] This was settled by *Baker v Shire of Albany*,[32] in which the Full Court held that section 660 was a complete code. Kennedy J, giving the judgment of the court, said:

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28 Id s 660(3)-(7). Where the plaintiff did not have knowledge of the relevant facts before 1 January 1984, the limitation period set by s 660 runs not from the point where the cause of action accrued but from the time when the plaintiff had the knowledge referred to in s 38A of the *Limitation Act 1935*: s 660(5). (For s 38A see para 5.5 above.) Where the plaintiff did have such knowledge before 1 January 1984, if the six year limitation period had expired before the action was commenced, the limitation period was to run from the time the amending Act came into operation (19 January 1984): s 660(3), and damages were limited to pecuniary loss and were not to exceed $120,000: s 660(4). If the period had not expired before the action was commenced, the limitation period was again to run from the date on which the amending Act came into operation: s 660(3), but there were no limits on damages. Even though the limitation period applicable before the coming into operation of the amending Act had expired before the date on which the Act came into operation, notice could be given, an action could be commenced, and consent could be given or leave granted to bring an action, in accordance with these provisions: s 660(6). See P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 23 UWAL Rev 63, 86-88.

29 See *Hambley v Shire of Plantagenet* (1994) 12 SR(WA) 262.

30 *Local Government Act 1960* s 660(1)(b) and (c).

31 In *Davies v City of Cockburn* (unreported) Supreme Court of Western Australia, 6 April 1992, 1332 of 1992, Acting Master Hawkins at 8 said there was much to be said for the view that s 660 was a complete code. However, in *Stanko v Canning City Council* (1992) 7 WAR 542, *Bonotto v Pilbara Iron Ltd* (1993) 9 SR(WA) 159 and *Snowden v City of Melville* (1994) 11 SR(WA) 228 it was accepted that both sections had to be complied with. In the latter case, the Full Court left the point open: *Pilbara Iron Co v Bonotto* (1994) 11 WAR 348. In other cases, it was simply accepted that both sections applied, neither party raising any objection to this: see eg *Ridgeway v Shire of Moora* (1986) Aust Torts Rep 80-033; *Hennessey v City of Fremantle* (unreported) Supreme Court of Western Australia, 7 April 1993, 2407 of 1992; *Farr v Shire of Manjimup* (unreported) Supreme Court of Western Australia, 15 June 1993, 1584 of 1993.

32 (1994) 14 WAR 46, followed in *Hambley v Shire of Plantagenet* (1994) 12 SR(WA) 262; *City of Gosnells v Ahmed* (unreported) Supreme Court of Western Australia (Full Court), 6 October 1995, Appeal FUL 130 of 1994; *Watson v Shire of Esperance* (unreported) District Court of Western Australia, 15 November 1995, 6474 of 1994.

> "I do not consider that the legislature was intending to, nor did it, impose upon prospective plaintiffs a second hurdle to be surmounted and requiring them to give four written notices (or endeavour to incorporate the varying requirements as to time and content into a lesser number of notices) and after the expiration of one year imposing a requirement for two sets of leave. Section 660 is a later provision and far more limited in its scope than s 47A, covering only actions in respect of torts. In my opinion, it was intended that s 660 be substituted for s 47A to the extent that it applied, and for this reason the phrase 'the provisions of section forty-seven A of the *Limitation Act 1935* notwithstanding' was included in s 660(1). It signified that a prospective plaintiff could not maintain an action by complying with s 47A, but that the more stringent requirements of s 660 had to be complied with in an action in tort against a municipality or any of the other persons mentioned in the section."[33]

23.11 Some earlier cases had suggested that section 660 was to be interpreted differently from section 47A, in that under section 660 the writ could be issued after the six-year period had expired providing the application for leave had been made within that period, whereas under section 47A the issue of the writ following the granting of leave also had to take place within the six-year period.[34] Other cases had rejected this interpretation and held that the criteria under both sections were the same.[35] However, the former view must now be regarded as without foundation, in the light of more recent decisions on section 47A (particularly the Full Court decision in *Pilbara Iron Co v Bonotto*[36]*)* and the clear indication by Kennedy J in *Baker v Shire of Albany*[37] that this decision also applied to section 660.[38]

23.12 In 1994 the Department of Local Government prepared a draft Bill for a new *Local Government Act*[39] which omitted section 660, and this Bill was introduced into Parliament and passed in December 1995. It came into force on 1 July 1996. The Commission was informed that the Department took the view that section 660 was unnecessary, because local authorities could instead rely on section 47A of the *Limitation Act*. This appears to be correct. Kennedy J's decision in *Baker v Shire of Albany*[40] that where section 660 was complied with there was no need also to comply with section 47A recognised that section 660 was more

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33 (1994) 14 WAR 46 at 55.

34 *Stanko v Canning City Council* (1992) 7 WAR 542; *Davies v City of Cockburn* (unreported) Supreme Court of Western Australia, 6 April 1992, 1332 of 1992.

35 *Ridgway v Shire of Moora* (1986) Aust Torts Rep 80-033; *Bonotto v Pilbara Iron Ltd* (1993) 9 SR(WA) 159; see also *Irwin v Board of Management of Royal Perth Hospital* (1994) 11 SR(WA) 140, Healy DCJ at 146.

36 (1994) 11 WAR 348: see paras 10.19-10.21 above.

37 (1994) 14 WAR 46 at 57.

38 See also *Power v City of Perth* (1994) 12 SR(WA) 83; *Hambley v Shire of Plantagenet* (1994) 12 SR(WA) 262.

39 A Draft Bill for a *New Local Government Act* (December 1994).

40 (1994) 14 WAR 46.

narrowly circumscribed than section 47A, since it applied only to actions in tort, and appeared to recognise that section 47A would apply to other causes of action brought against a local authority. He pointed out that the predecessors of section 660 were repealed in 1954 when section 47A was enacted, and that between then and 1960 when section 660 was enacted section 47A would have been the only applicable section.[41]

23.13 The present position, therefore, is that local government authorities can no longer rely on section 660, but are entitled to rely on section 47A to the same extent as all other public authorities, and that they will now presumably rely on this provision in all cases, including those in which they would formerly have relied on section 660 in addition to or as an alternative to section 47A.[42] This at least effects some simplification in the law. There cannot now be any confusion about whether the requirements of both statutes have to be satisfied, or about whether there were differences between them as to whether the writ could be issued after the six year period had expired provided the application for leave had been made before the expiry of that period, although as noted above these problems had been set at rest by the Full Court in *Baker v Shire of Albany*. There is now no distinction between tort and other cases, since whereas section 660 was limited to actions in tort, leaving local authorities to plead section 47A in any other case, section 47A applies to all actions against public authorities which satisfy the criteria there set out.

23.14 It seems that the reform brought about by the *Local Government Act 1995* has alleviated the position of plaintiffs in a few minor ways. According to Kennedy J in *Baker v Shire of Albany*, the requirements of section 660 were more stringent for plaintiffs than those of section 47A.[43] This appears to be correct in at least three respects:

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41 Id, Kennedy J at 61,584-61,586.

42 The *Local Government Act 1995* does not contain any express provision dealing with the question whether there is still a need to comply with section 660 (a) in cases where the cause of action arose before 1 July 1996, and (b) in cases where proceedings have been instituted, or an application for leave made, before 1 July 1996. However, s 47A and the former s 660 both operate merely to bar the cause of action, and are therefore procedural rather than substantive. This seems to suggest that after 1 July 1996, s 47A rather than s 660 will be the applicable provision, even where the cause of action arose before 1 July 1996. Presumably, if an application for leave has been made under s 660 before 1 July 1996, there is no need to satisfy the requirements of s 47A instead, or to make a fresh application under s 47A. The *Interpretation Act 1984* s 37(1)(d) provides that a repeal does not, unless the contrary intention appears, affect any duty, obligation or liability imposed, created or accrued prior to the repeal. S 37(1)(f) adds that the repeal does not affect any legal proceeding in respect of such duty, obligation or liability, and any such proceeding may be instituted or continued as if such repeal had not been passed.

43 (1994) 14 WAR 46 at 55.

(1) There is only one notice requirement under section 47A, not two as there were in section 660.

(2) Under section 47A, the defendant can consent to the bringing of the action within the six-year period, as an alternative to an application for leave. There was no such alternative under section 660, which required an application to be made in all cases.

(3) The provisions in section 660 giving the council power to require medical examinations of persons who had suffered personal injury, or examinations of damaged property, are absent from section 47A.

23.15 Despite these minor changes, the overall effect of the new Act is to maintain the position that it is appropriate for local authorities to be governed by a more favourable limitation period than that which applies to ordinary actions between private litigants. The Commission has already stated that it is inappropriate to have a special limitation period for actions against public authorities, and has recommended the abolition of section 47A.[44] The same applies to actions against local government authorities, whether the applicable provision is section 660 of the *Local Government Act 1960* or section 47A of the *Limitation Act 1935*. The Commission accordingly **recommends** that the limitation rules which apply in actions against local authorities should be the same as those which apply in actions against other defendants.[45] Some jurisdictions have never had special limitation and notice rules applying to actions against local authorities;[46] others have abolished them.[47] Western Australia is alone in retaining special rules.

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44 See paras 10.18-10.25 above.

45 All commentators on the Discussion Paper (1992) who commented on this issue agreed. They included the Law Society of Western Australia and two legal practitioners, Mr P S Bates and Mr C Phillips.

46 This is the case in England and Victoria: the equivalents of section 47 A of the *Limitation Act* formerly applied, but have now been repealed: see paras 10.13-10.14 above.

47 Special limitation and notice provisions applicable to local authorities were formerly in force in New South Wales, the Northern Territory, Queensland, South Australia and Tasmania, but have now been abolished: (NSW) Local Government Act 1919 s 580, repealed by the *Notice of Action and Other Privileges Abolition Act 1977* (NSW) s 4 and Sch 1; *Local Government Ordinance 1954* (NT) s 404(1), repealed by the *Limitation Act 1981* (NT) s 3 and Sch Part IV; *Local Government Act 1936* (Qld) s 52(10)(i)(a) (limited to property damage), repealed by *Limitation of Actions Act 1974* (Qld) s 4 and Sch; *Local Government Act 1934* (SA) s 719, repealed by the *Statutes Amendment (Miscellaneous Provisions) Act 1972* (SA) s 11; *Local Government Act 1906* (Tas) s 231(2) I-II, repealed by the *Limitation of Actions Act 1954* (Tas) s 3.

P G CREIGHTON

R E COCK

W S MARTIN

14 January 1997

Appendix I

COMMENTATORS ON THE DISCUSSION PAPER

Anonymous

Mr P S Bates (Legal Practitioner)

Mr G G Blue (Law Reform Commission of British Columbia)

Mr L P T Greenwood

Mr J T Hillis

Law Society of Western Australia

Mr J R Lee

Mr C Phillips (Legal Practitioner)

Mr L Wakeman

Western Australian AIDS Council

Hon H Zelling (Law Reform Committee of South Australia)

Appendix II

ALBERTA LIMITATIONS ACT 1996

Chapter L-15.1

(Assented to May 1, 1996)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions **1** In this Act,

(a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;

(b) "claimant" means the person who seeks a remedial order;

(c) "defendant" means a person against whom a remedial order is sought;

(d) "duty" means any duty under the law;

(e) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;

(f) "injury" means

(i) personal injury,
(ii) property damage,
(iii) economic loss,
(iv) non-performance of an obligation, or
(v) in the absence of any of the above, the breach of a duty;

(g) "law" means the law in force in the Province, and includes

(i) statutes,
(ii) judicial precedents, and
(iii) regulations;

(h) "limitation provision" includes a limitation period or notice provision that has the effect of a limitation period;

(i) "person under disability" means

(i) a minor who is not under the actual custody of a parent or guardian,
(ii) a dependent adult pursuant to the *Dependent*

Adults Act, or

(iii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim;

(j) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,
(ii) the enforcement of a remedial order,
(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or
(iv) a writ of *habeas corpus*;

(k) "right" means any right under the law;

(l) "security interest" means an interest in property that secures the payment or other performance of an obligation.

Application

2(1) Except as provided in subsection (2), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

(a) the remedial order is sought in a proceeding before a court created by the Province, or
(b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.

(2) This Act does not apply where a claimant seeks

(a) a remedial order based on adverse possession of real property owned by the Crown, or
(b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

(3) The Crown is bound by this Act.

Limitation periods

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury 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 defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2) The limitation period provided by subsection (l)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (l)(a);

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) to the principal first actually acquired that knowledge,

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death,

(ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) at that time, or

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (l)(a), if the representative acquired the knowledge after being appointed.

(3) For the purposes of subsection (1)(b),

(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 a duty 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) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct which causes the death, upon which the claim is based, occurs;

(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.

(4) The limitation period provided by subsection 3(1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 60 of the *Law of Property Act*.

(5) Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (l)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).

Concealment

4(1) The operation of the limitation period provided by section 3(1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

(2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) was suspended.

Persons under disability

5(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant is a person under disability.

(2) Where 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, the operation of the limitation periods provided by this Act is suspended during the period of time that the person was a minor.

(3) Under this section, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

Claims added to a proceeding

6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

(2) When the added claim

(a) is made by a defendant in the proceeding against a claimant in the proceeding, or

(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

(a) the added claim must be related to the conduct,

transaction or events described in the original pleading in the proceeding, and

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or 4(b), if in issue, was not satisfied.

Agreement

7 Subject to section 9, if an agreement provides for the reduction or extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

Acknowledgment and part payment

8(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.

(2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins again at the time of the acknowledgment or part payment.

(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective

(a) whether or not a promise to pay can be implied from it, and

(b) whether or not it is accompanied by a refusal to pay.

(4) When a claim is for the recovery of both a primary sum and

interest on it, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

Persons affected by exceptions for agreement, acknowledgment and part payment

9(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(2) An agreement made by or with an agent has the same effect as if made by or with the principal.

(3) An acknowledgement or a part payment made by or to an agent has the same effect as if it were made by or to the principal.

(4) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

(a) with or to the person,
(b) with or to a person through whom the person derives a claim, or
(c) in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy and Insolvency Act* (Canada).

(5) A person is bound by an agreement, an acknowledgement or a part payment only if

(a) the person is a maker of it, or
(b) the person is liable in respect of a claim

(i) as a successor of a maker, or
(ii) through the acquisition of an interest in property from or through a maker

who was liable in respect of the claim.

Acquiescence or Laches

10 Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

Judgment for payment of money

11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Conflict of laws

12 The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

Actions by aboriginal people

13 An action brought, after the coming into force of this Act, by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the *Limitation of Actions Act* had not been repealed and this Act were not in force.

Transitional

14(1) *Subject to subsection (2), this Act applies where a claimant seeks a remedial order in a proceeding commenced after the date this Act comes into force.*

(2) A defendant is not entitled to immunity from liability in respect of a claim of which the claimant knew, or in the circumstances ought to have known, before this Act came into force and in respect of which a remedial order is sought

(a) in time to satisfy the provisions of law governing the commencement of actions which would have been applicable but for this Act, and

(b) within 2 years after the date this Act comes into force.

Consequential

15 *Section 60 of the Law of Property Act is amended by adding the following after subsection (2):*

(3) No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and no such right is deemed to have ever been so acquired.

Repeal

16 *The Limitation of Actions Act is repealed.*

Coming into force

17 *This Act comes into force on Proclamation.*

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Appendix III

NEW ZEALAND DRAFT LIMITATION DEFENCES ACT

(New Zealand Report (1988) 152-179)

PART 1

PURPOSE AND APPLICATION

1 Purpose of the Act

The purpose of this Act is to provide defences against stale claims made in civil proceedings, and in so doing

(a) provide a fair balance between the interests of claimants in having access to adjudication of their claims and the interests of defendants in being protected from claims in respect of long past acts or omissions;

(b) encourage claims to be brought without undue delay;

(c) provide a degree of certainty that a limitation defence will be successful if claims are not served within the times described in the Act.

2 Scheme of the Act

(1) The Act has the following central features:

(a) a standard limitation defence which may be raised to defeat a claim served more than 3 years after the date of the act or omission on which the claim is based;

(b) provision for extension of that 3 year period if a claimant proves an inability to bring a claim (for example, as a result of lack of knowledge, incapacity or youth of the claimant);

(c) a long stop defence which, in most cases, may be raised to defeat a claim when 15 years have passed between an act or omission and the service of a resulting claim.

(2) Part 4 (sections 18 to 20) defines

"claim";

"claimant";

"defendant";

"limitation defence";

"date on which the defendant was served with the claim" (in relation to both court and arbitration proceedings);

"date of the act or omission" when used in connection with

(a) claims based on an obligation that is not enforceable until a demand is made;

(b) claims for conversion;

(c) claims for wrongful detention of personal property;

(d) certain claims for contribution or indemnity;

(e) certain claims for infringement of designs, patents or trade marks.

3 Application of the Act

(1) The defences in this Act may be raised in respect of

(a) any claim commenced in the High Court, a District Court or the Labour Court; or

(b) any claim submitted to arbitration,

except those described in subsection (2).

(2) The defences in this Act may not be raised in respect of

(a) a claim to enforce a judgement or order of a court (including a judgement or order of a court outside New Zealand) or any decision or award which may be enforced as if it were an order or judgement of a court; or

(b) a claim that is or could be brought in an application for review under the *Judicature Amendment Act 1972*; or

(c) a claim under the *Declaratory Judgements Act 1908*; or

(d) a claim for recovery of possession of land when the person entitled to possession has been dispossessed in circumstances amounting to trespass; or

(e) proceedings commenced in the Maori Land Court and removed from hearing to the High Court or a District Court; or

(f) a claim in respect of which another Act prescribes the time within which a claim must be brought or the manner in which the time is to be fixed or determined.

(3) This Act binds the Crown.

PART 2

LIMITATION DEFENCES

Division 1
Statutory Defences

4 Standard limitation defence

It is a defence to a claim if the defendant proves that 3 years or more have passed between

(a) the date of the act or omission on which the claim is based; and

(b) the date on which the defendant was served with the claim,

unless the claimant proves that the date on which the defendant was served with the claim was within a time extension described in Division 2.

5 Long stop defence

(1) It is also a defence to a claim if the defendant proves that the date on which the defendant was served with the claim was

(a) 15 years or more after the date of the act or omission on which the claim is based; or
(b) if a later date described in subsection (2) applies to the claim, after that later date.

(2) The later dates are

(a) 3 years after the date the claimant gains knowledge of any fact described in section 6(1) that was deliberately concealed by the defendant; or

(b) when an act or omission occurs while a claimant is under 18 years old, 3 years after the claimant becomes 18 years old; or

(c) in the case of 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 a party, 3 years after the date of the claimant gains knowledge of the fraudulent breach of trust; or

(d) in the case of a claim by a beneficiary against a trustee for

(i) the recovery of trust property in the possession of the trustee or previously received by the trustee and converted to the trustee's use; or
(ii) the proceeds of trust property described in sub-paragraph (i),

3 years after the date the claimant gains knowledge of the breach of trust or conversion.

Division 2
Time Extensions

6 Extension when knowledge is delayed

(1) a claimant who gains knowledge

(a) of the occurrence of the act or omission on which the claim is based; or

(b) of the identity of the person to whom the act or omission is wholly or partly attributable, whether as principal, agent, employee or otherwise; or

(c) of the harm suffered by the claimant as a result of the act or omission; or

(d) that the harm was significant,

after the date of the act or omission on which the claim is based, may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years after the latest date the claimant gains knowledge of any of the facts described in subsection (1).

(3) In subsection (2), the phrase "date the claimant gains knowledge" means the date the claimant gains knowledge of the facts described or any earlier date on which the claimant, in the claimant's circumstances and with the claimant's abilities, should have known of those facts.

7 Extension when alternative dispute resolution is sought

(1) If a claimant proves that, on or after the date of the act or omission on which the claim is based, there was a period or periods during which

(a) the act or omission, or the consequences of it, was investigated or considered by an Ombudsman; or

(b) there was an attempt to effect a resolution of the dispute relating to the act or omission, or the consequences of it, by a person or body having statutory authority to seek resolution of disputes; or

(c) the act or omission, or the consequences of it, was previously raised between the claimant and defendant before another court or arbitrator (whether in New Zealand or elsewhere),

the claimant or the person bringing the claim on behalf of the claimant, may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years after the date of the act or omission on which the claim is based, plus any period or periods described in subsection (1).

(3) If 2 or more of the periods referred to in subsection (1) overlap, the period of the overlap shall not be counted twice.

8 Extension for persons under 18 years old

(1) If a claimant, or a person bringing a claim on behalf of the claimant, proves that the act or omission on which the claim is based occurred before the claimant became 18 years old, the claim may be brought within the time extension described in subsection (2).

(2) The time extension is 3 years after the claimant becomes 18 years old.

9 Extension because of incapacity or impairment

(1) If a claimant, or a person bringing a claim on behalf of the claimant, proves that on or after the date of the act or omission on which the claim is based the claimant was incapable of, or substantially impeded in, managing the claimant's affairs with respect to the act or omission on which the claim is based for any period or periods of 28 consecutive days or more because of

(a) physical or mental condition; or

(b) lawful or unlawful detention; or

(c) war or warlike operations or circumstances arising from them,

the claimant, or person bringing the claim on the claimant's behalf, may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years after the date of the act or omission on which the claim is based, plus the period or periods described in subsection (1).

(3) If 2 or more of the periods referred to in subsection (1) overlap, the period of the overlap shall not be counted twice.

10 Cumulative time extension

(1) A claimant may establish a time extension by adding together any 2 or more of the following periods:

(a) the period before which a claimant gained knowledge of the facts described in section 6(1);

(b) the period or periods described in sections 7 and 9 that may be added to the 3 year period;

(c) the period between the date of an act or omission on which a claim is based and the date on which the claimant became 18;

(d) the 3 year period following the date of the act or omission on which a claim is based.

(2) If 2 or more of the periods referred to in subsection (1) overlap, the period of the overlap shall not be counted twice.

11 Acknowledgement and part payment

(1) If a claimant proves that the defendant

(a) acknowledged, to the claimant, a liability to, or the right or title of, the claimant; or

(b) made a payment, to the claimant, in respect of liability to, or the right or title of, the claimant,

in reliance on which the claimant did not bring a claim, or did not bring a claim in sufficient time to defeat a standard limitation defence raised under section 4, the claimant may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years from the date of the acknowledgement or payment described in subsection (1).

(3) For the purposes of this section, payment or part payment of interest shall be deemed to be an acknowledgement of liability to pay both the interest and the principal in respect of which the interest was paid.

12 Claims by a personal representative

(1) In this section, "personal representative" means the personal representative of the estate of a deceased person who brings a claim on behalf of the estate.

(2) A personal representative may take advantage of any unexpired balance of a time extension described in section 6 of which the deceased could have taken advantage had he or she not died.

(3) If a personal representative gains knowledge of any of the facts described in section 6(1) of which the deceased was unaware, the personal representative may take advantage of a time extension under section 6 in respect of that acquired knowledge.

(4) A personal representative may take advantage of a time extension described in section 7 or 9 of which the deceased could have taken advantage had he or she not died, but only with respect to any period or periods between the date of the act or omission on which the claim is based and the date of death of the deceased.

(5) If a personal representative proves that, after the death of the deceased,

(a) there was a period during which any of the circumstances described in section 7(1)(a) to (c) applied; or

(b) the personal representative was incapable of, or substantially impeded in, managing the estate of the deceased for any period or periods of 28 consecutive days or more because of any of the circumstances described in section 9(1)(a) to (c),

the personal representative may bring the claim within the time extension of 3 years from the date of the act or omission on which the claim is based, plus any period or periods described in paragraph (a) or (b) or both, but if 2 or more of the periods overlap, the period of the overlap shall not be counted twice.

(6) A personal representative may take advantage of any time extension described in section 8 of which the deceased could have taken advantage had he or she not died, but only for that period of time between the date of the act or omission on which the claim is based and the date of death of the deceased, plus 3 years.

(7) If a deceased person could have taken advantage of any time extension described in section 10 had he or she not died, the personal representative may take advantage of any unexpired balance of that period together with any period or periods described in this section, but if 2 or more of the periods overlap, the period of the overlap shall not be counted twice.

(8) A personal representative is in the same position with respect to an acknowledgement or payment described in section 11, whether acting as claimant or defendant, as the deceased would have been had he or she not died.

PART 3

MATTERS RELATED TO THE LIMITATION DEFENCES

13 Self help remedies

(1) In this section "self help remedy" means the acquisition by a person, without an order or judgement of a court or award of an arbitrator, of possession of, or title to, land or personal property of another person as a consequence of a default in the performance of statutory or contractual obligations by that other person.

(2) A person against whom a self help remedy is exercised may apply to the court for an order setting aside the self help remedy and if the applicant proves that, had a claim been brought by the person exercising the self help remedy, the applicant would have raised a successful limitation defence, the court

(a) shall make an order setting aside the self help remedy; and

(b) may grant to the claimant such relief by way of restitution, compensation or otherwise as the court in its discretion thinks fit.

14 Ancillary claims

(1) In this section "ancillary claim" means

(a) a claim arising from or resulting in the addition of one or more parties to a claim; or

(b) a counterclaim; or

(c) a claim by way of set off; or

(d) a claim added to or substituted for any other claim in a civil proceeding,

that relates to or is connected with the act or omission on which the original claim is based.

(2) When an ancillary claim is brought in a proceeding a limitation defence to the ancillary claim may be considered by the court or arbitrator only if

(a) the defendant to the original claim raises a successful limitation defence or could have raised a successful defence but failed to do so; or

(b) it is a long stop defence under section 5.

15 Bona fide purchaser

Neither a time extension described in sections 6 to 12, nor the provisions of section 14, shall operate to the detriment of the title of a bona fide purchaser for value.

16 Agreement to vary time for limitation defences

Nothing in this Act prevents the enforcement of an agreement

(a) altering the time at which a defendant may raise a limitation defence or the time within which a claimant may bring a claim without a limitation defence being raised; or

(b) varying or adding to the circumstances under which a claimant may bring a claim without a limitation defence being raised at all or within a specified period; or

(c) not to raise a limitation defence,

but this section does not affect the operation of any other Act.

17 Adverse possession of unregistered land abolished

No right or title to land that has not been brought under the *Land Transfer Act 1952*, nor any right or interest in that land, may be acquired or extinguished by adverse possession or use.

PART 4

INTERPRETATION

18 Definitions

In this Act,

"claim" means a claim in a civil proceeding;

"claimant" means a person who brings a claim before a court or arbitrator;

"defendant" means a person against whom a claim is brought;

"limitation defence" means a defence under this Act.

19 Definitions of "served" in court and arbitration proceedings

(1) In this Act, "date on which the defendant was served with the claim" means, in relation to court proceedings, the date described in subsection (2) or the date on which a statement of claim (or other document filed or lodged in court containing the claim), was

(a) personally served, or when rules of court provide a means by which personal service may be or is deemed to be effected, served by that means; or

(b) when rules of court provide some other means by which a statement of claim or document may be served (other than by direction of the court), served by that other means; or

(c) when an Act provides a means by which a statement of claim or document is to be or considered to be served, served by that means; or

(d) if the claimant and defendant agree as to the means of service of a statement of claim or document, served by that means.

(2) If directions are sought from the court as to service of a statement of claim or other document filed or lodged in court containing the claim, the "date on which the defendant was serviced [sic] with the claim" means the date on which an application for directions as to service is filed with the court.

(3) In this Act, "date on which the defendant was served with the claim" means, in relation to arbitration proceedings, the date on which a notice described in subsection (4) was:

(a) personally served; or

(b) left at the usual or last known place of residence in New Zealand of the defendant; or

(c) sent by registered post to the defendant's usual or last known place of residence in New Zealand; or

(d) served in accordance with any other Act providing for the means of service of the notice; or

(e) served by the means provided for in the arbitration agreement.

(4) The notice must in writing and

(a) require the other party to appoint an arbitrator or to agree on the appointment of an arbitrator; or

(b) if the arbitration agreement provides that the arbitrator be a person named or designated in the agreement, require the other party to submit the dispute to the person so named or designated.

20 Date of an act or omission in special cases

(1) When a claim is based on an obligation that is not enforceable until a demand is made, the "date of the act or omission", for the purposes of this Act, is the date on which the defendant defaulted after demand was made.

(2) When a claim is brought for conversion or wrongful detention of personal property, the "date of the act or omission", for the purposes of this Act, is the date of the original conversion of the property or the date of the first wrongful detention of the property, as the case requires.

(3) When a claim for a sum of money by way of contribution or indemnity is made, the "date of the act or omission" on which the claim is based, for the purposes of this Act, is the date on which the sum of money in respect of which the claim is made is quantified by a decision of a court or arbitrator or by agreement.

(4) Subsection (3) does not apply to claims to which section 14 applies.

(5) When a claim is made in respect of

(a) an infringement of a design under the *Designs Act 1953*; and

(b) the infringement is alleged to have occurred between the date of the application for registration of the design and the date on which the registration was granted,

the "date of the act or omission", for the purposes of this Act, is the date on which the certificate of registration was issued.

(6) When a claim is made in respect of

(a) an infringement of a patent sealed under the *Patents Act 1953*; and

(b) the infringement is alleged to have occurred between the date of the publication of a complete specification described in section 20 of the *Patents Act 1953* and the date the patent is sealed,

the "date of the act or omission", for the purposes of this Act, is the date the patent was sealed.

(7) When a claim is made in respect of

(a) an infringement of a trade mark registered under the *Trade Marks Act 1953*; and

(b) the infringement is alleged to have occurred between the date of the application for registration of the trade mark and the date a certificate of registration is actually issued, the "date of the act or omission", for the purposes of this Act, is the date the certificate of registration of the trade mark was issued.

PART 5

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

Division 1
Transitional Provisions

21 Former proceedings

Court or arbitration proceedings commenced before this Act comes into force shall be continued to their conclusion as if this Act had not come into force and the *Limitation Act 1950* had remained in force.

22 Cause of action arising before the Act comes into force

If

(a) an act or omission occurs before this Act comes into force; and

(b) the claim would not have been statute barred under the *Limitation Act 1950* if it had remained in force; and

(c) a claim in respect of that act or omission is commenced on or within 3 years after the date this Act comes into force,

the claim cannot be defeated by a standard limitation defence raised under section 4.

23 Application of section 13 limited to future agreements

No application may be brought to set aside a self help remedy under section 13(2) when the agreement under which the self help remedy is exercised was made before the commencement of this Act.

. . .

Division 3
Repeal and Commencement

47 Repeal

The *Limitation Act 1950* is repealed.

48 Commencement

This Act comes into force on (……)

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Appendix IV

ONTARIO LIMITATIONS (GENERAL) BILL 1992

Definitions

1. In this Act,
"assault" includes a battery; ("voies de fait")
"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. ("demande en justice")

APPLICATION

Application

2. This Act applies to claims pursued in court proceedings other than,

(a) proceedings to which the *Limitations Act (Real Property)* applies;

(b) proceedings in the nature of an appeal or review if the time for commencing them is governed by an Act or rule of court; and

(c) proceedings to which the *Provincial Offences Act* applies.

Crown

3. This Act binds the Crown.

BASIC LIMITATION PERIOD

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5.- (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (l)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Minors

6. The limitation period established by section 4 does not run during any time in which the person with the claim is a minor and is not represented by

a court-appointed litigation guardian.

Incapable persons

7.-(1) The limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition or because of physical restraint, war or war-like conditions; and

(b) is not represented by a court-appointed litigation guardian.

Presumption

(2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

Extension

(3) If the running of a limitation period is postponed or suspended under this section and the period has less than six months to run when the postponement or suspension ends, the period is extended to include the day that is six months after the day on which the postponement or suspension ends.

Exception

(4) This section does not apply in respect of a claim referred to in section 9.

Litigation guardians

8.-(1) If a person is represented by a court-appointed litigation guardian, section 5 applies as if the litigation guardian were the person with the claim

Appointment

(2) If the running of a limitation period in respect of a claim is postponed or suspended under section 6 or 7, any person may move to have a litigation guardian appointed for the person with the claim.

Assaults and sexual assaults

9.-(1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

Presumption

(2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been 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 person or was someone on whom the person was dependent, whether or not financially.

Same

(3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.

Attempted resolution

10. If a person with a claim and a person against whom the claim is made have agreed to submit the claim to a independent third party for resolution, the limitation period established by section 4 does not run from the date the parties agree to submit the claim to the independent third party until the date the claim is resolved or a party terminates or withdraws from the agreement.

Successors

11.-(1) For the purpose of clause 5(1)(a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or

commenced by a person claiming through a predecessor in right, title or interest, if the predecessor knew or ought to have known of the matters referred to in that clause before the person claiming knew of them, the person claiming shall be deemed to have acquired the knowledge on the day that the predecessor first knew or ought to have known of them.

Same

(2) The day on which a predecessor first ought to have known of the matters referred to in clause 5(1)(a) is the day on which a reasonable person in the predecessor's circumstances and with the predecessor's abilities first ought to have known of them.

Personal representative

(3) For the purpose of this section, a deceased person who had a claim is a predecessor of his or her personal representative.

Deceased persons

12. If a person with a claim dies and the limitation period established by section 4 would expire within one year of the person's death, the limitation period is extended to include the first anniversary of the day on which the person died.

Acknowledgments

13.-(1) If a person acknowledges the existence of a claim for payment of a liquidated sum, the recovery of property, the endorsement of a charge on property or relief from enforcement of a charge on property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made.

Interest

(2) An acknowledgment of the existence of a claim for interest is an acknowledgment of a claim for the principal and for interest falling due after the acknowledgment is made.

Collateral

(3) An acknowledgment of the existence of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral is an acknowledgment by any other person who later comes into possession of it.

Realization

(4) A debtor's performance of an obligation under or in respect of a security agreement is an acknowledgment by the debtor of the existence of a claim by the creditor for realization on the collateral under the agreement.

Redemption

(5) A creditor's acceptance of a debtor's payment or performance of an obligation under or in respect of a security agreement is an acknowledgment by the creditor of the existence of a claim by the debtor for redemption of the collateral under the agreement.

Trustee

(6) An acknowledgment by a trustee is an acknowledgment by any other person who is or who later becomes a trustee of the same trust.

Property

(7) An acknowledgment of the existence of a claim to recover or enforce an equitable interest in property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

Liquidated sum

(8) Subject to subsections (9) and (10), this section applies to an acknowledgment of the existence of a claim for payment of a liquidated

acknowledgment of the existence of a claim for payment of a liquidated sum even though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing.

Restricted application

(9) This section does not apply unless the acknowledgment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the *Bankruptcy Act* (Canada) before the expiry of the limitation period applicable to the claim.

Same

(10) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent, or, in the case of a claim for payment of a liquidated sum, is in the form of a part payment of the sum.

Notice of possible claim

14.-(1) A person against whom another person may have a claim may serve a notice of possible claim on the other person.

Contents

(2) A notice of possible claim shall be in writing and signed by the person issuing it or the issuing person's solicitor, and shall,

(a) describe the injury, loss or damage that the issuing person suspects may have occurred;

(b) identify the act or omission giving rise to the injury, loss or damage;

(c) indicate the extent to which the issuing person suspects that the injury, loss or damage may have been caused by the issuing person;

(d) state that any claim that the other person has could be extinguished because of the expiry of a limitation period; and

(e) state the issuing person's name and address for service.

Effect

(3) The fact that a notice of possible claim has been served on a person may be considered by a court in determining when the limitation period in respect of the person's claim began to run.

Exceptions

(4) Subsection (3) does not apply to a person who is not represented by a court-appointed litigation guardian and who, when served with the notice,

(a) is a minor; or

(b) is incapable of commencing a proceeding because of his or her physical, mental or psychological condition or because of physical restraint, war or war-like conditions.

Acknowledgment

(5) A notice of possible claim is not an acknowledgment for the purpose of section 13.

Admission

(6) A notice of possible claim is not an admission of the validity of the claim.

ULTIMATE LIMITATION PERIODS

Ultimate limitation periods

15.-(1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

General

(2) No proceeding shall be commenced in respect of any claim after the thirtieth anniversary of the day on which the act or omission on which the claim is based took place.

Health facilities

(3) No proceeding shall be commenced in respect of a claim based on the negligent act or omission of a health facility or a health facility employee after the tenth anniversary of the day on which the act or omission took place.

Health practitioners

(4) No proceeding shall be commenced in respect of a claim based on the malpractice or negligent act or omission of a health practitioner after the tenth anniversary of the day on which the malpractice or negligent act or omission took place.

Exception

(5) Subsection (3) and (4) do not apply if the claim is based on the leaving of a foreign object having no therapeutic or diagnostic purpose in the body of the person with the claim.

Improvements

(6) In the case of an improvement to real property carried out under a contract, no proceeding shall be commenced in respect of a claim based on a deficiency in the design, construction or general review of the improvement after the tenth anniversary of the first day on which the contract was substantially performed within the meaning of the *Construction Lien Act*.

Periods not to run

(7) The limitation periods established by subsections (2), (3), (4) and (6) do not run in respect of a claim during any time in which,

(a) the person with the claim,

(i) is capable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition or because of physical restraint, war or war-like conditions, and

(ii) is not represented by a court-appointed litigation guardian; or

(b) the person against whom the claim is made,

(i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or

(ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

(8) The limitation periods established by subsections (3), (4) and (6) do not run in respect of a claim during any time in which the person with the claim is a minor and is not represented by a court-appointed litigation guardian.

Burden

(9) Subject to section 9, the burden of proving that subsection (7) or (8) applies is on the person with the claim.

Purchasers for value

(10) No proceeding against a purchaser of property for value acting in good faith shall be commenced in respect of conversion of the property after the second anniversary of the day on which the property was converted.

Day of occurrence

(11) For the purposes of this section, the day an act or omission on which a claim is based takes place is,

(a) in the case of a continuous act or omission, the day on which the act or omission ceases;

(b) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;

(c) in the case of a default in performing a demand obligation, the day on which the default occurs.

Claim extinguished

(12) Upon the expiry of a limitation period established by this section, the claim and any right, title or interest on which it is based are extinguished.

Definitions

(13) For the purposes of this section,

"design" means a plan, field notes of survey, sketch, drawing, graphic representation or specification intended to govern the construction of an improvement to real property, ("conception")

"general review" means an examination of an improvement to real property to determine whether the construction of it is in general conformity with the design; ("examen de conformite")

"health facility" means,

(a) a hospital as defined in the *Public Hospitals Act*,
(b) a private hospital licensed under the *Private Hospitals Act*,
(c) a home for special care established, approved or licensed under the *Homes for Special Care Act*,
(d) an independent health facility licensed under the *Independent Health Facilities Act*,
(e) a nursing home licensed under the *Nursing Homes Act*,
(f) a facility designated as a psychiatric facility under the *Mental Health Act*,

Health Act,

(g) a community psychiatric hospital established or approved under the *Community Psychiatric Hospitals Act*,

(h) an institution under the *Mental Hospitals Act*,

(i) the Ontario Cancer Institute under the *Cancer Act*, or

(j) a health care unit in a correctional institution or a place of secure custody or detention established or continued under the *Ministry of Correctional Services Act*: ("établissement de santé")

"health practitioner" means health practitioner as defined in the *Consent to Treatment Act*, 1992; ("practicien de la sante") (*Note: See Bill 109/92 given first reading on May 27th 1991*.)

"improvement" means any alteration, addition or repair to or construction, erection or installation on land, and includes the demolition or removal of any structure or part of a structure on land. ("amelioration")

NO LIMITATION PERIOD

No limitation period

16. There is no limitation period in respect of,

(a) a proceeding for judicial review;

(b) a proceeding for a declaration if no consequential relief is sought;

(c) a proceeding to enforce an order of a court;

(d) a proceeding to enforce a provision in a domestic contract or paternity agreement for the payment of support that is enforceable under section 35 of the *Family Law Act*;

(e) a proceeding to enforce an award in an arbitration to which the *Arbitrations Act* applies;

(f) a proceeding by a debtor in possession of collateral to redeem it;

(g) a proceeding by a creditor in possession of collateral to realize on it; or

(h) a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether or not financially.

GENERAL RULES

Contribution and indemnity

17.-(1) For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with notice of the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which the alleged wrongdoer's claim is based took place.

Application

(2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

Other Acts

18.-(1) A limitation period set out in another Act that applies to a claim as defined in this Act is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it incorporates by reference a provision listed in the Schedule to this Act.

Same

(2) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.

Period not to run

(3) A limitation period established by a provision referred to in subsection (1) does not run in respect of a claim during any time in which,

(a) the person with the claim is not represented by a court-appointed litigation guardian and,

(i) is a minor, or

(ii) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition or because of physical restraint, war or war-like conditions; or

(b) the person with the claim and the person against whom the claim is made are both awaiting its resolution by an independent third party.

Adding party

19.-(1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

Misdescription

(2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

Agreement

20. A limitation period under this Act or any other Act may be reduced or extended by a written agreement.

Notice

21.-(1) Despite any other Act, where notice of a claim has been given before expiry of the limitation period, failure to comply with the time for giving notice prescribed by that Act does not bar the claim, unless the person against whom the claim is made has been prejudiced by the failure to comply.

Exception: Proceedings against the Crown

(2) Subsection (1) does not apply to subsection 7(1) of the *Proceedings Against the Crown Act*.

Conflict of laws

22. For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law.

limitations law of Ontario or any other jurisdiction is substantive law.

Definitions

23.-(1) In this section,

"effective date" means the day on which this Act comes into force; ("date de l'entrée en vigueur")

"former limitation period" means the limitation period that applied in respect of the claim before the coming into force of this Act. ("ancien delai de prescription")

Application

(2) This section applies to claims based on acts and omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

Former limitation period expired

(3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim.

Former limitation period unexpired

(4) If the former limitation period did not expire before the effective date, the following rules apply:

1. If no limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, there is no limitation period.

2. If the former limitation period was less than two years and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, no proceeding shall be commenced after the second anniversary of the act or omission.

3. If the former limitation period was two years or more and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, no proceeding shall be commenced after the expiry of the former limitation period or the second anniversary of the effective date, whichever is earlier.

No former limitation period

(5) If there was no former limitation period and the claim was discovered before the effective date, no proceeding shall be commenced after the second anniversary of the effective date.

Debts to Crown

(6) In the case of a claim for payment of a debt owed to the Crown that was due before the effective date, no proceeding shall be commenced after the sixth anniversary of the effective date.

Assault and sexual Assault

(7) In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before the effective date:

1. If section 9 would apply were the claim based on an assault or sexual assault that took place on or after the effective date, section 9 applies to the claim, with necessary modifications.

2. If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after the effective date, there is no limitation period.

. . .

Commencement

38. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

39. The short title of this Act is the *Limitations Act (General), 1992*.

The Commission is advised that the Crown in right of Ontario does not assert any copyright interests it may have in the reproduction of Ontario legislation in publications such as law reform commission reports (letter from Mr Allan Shipley of the Ministry of the Attorney General, dated 13 December 1996, on file at the Commission). The Commission nonetheless gratefully acknowledges the ability to reproduce this legislation. In the version of the Bill set out above, sections 24 to 37, dealing with amendments and repeals, the parallel French text and the schedule are omitted.