



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 70 – Part I

Pre-Judgment Interest

REPORT

AUGUST 1981

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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To: THE HON I G MEDCALF, QC, MLC
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on pre-judgment interest.

(Signed) D K Malcolm, QC
Chairman

4 August 1981

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CHAPTER 1 INTRODUCTION

1. THE COMMISSION'S TERMS OF REFERENCE

1.1 The Commission was asked to consider and report on whether there should be any change to the law relating to the payment of interest on money owed, or recovered in legal proceedings, taking into account the effects of inflation. These terms of reference require the Commission to consider such matters as -

- (a) whether and in what circumstances interest should be payable on debts and other sums of money where the moneys are paid before legal proceedings are brought;¹
- (b) the payment of interest on sums of money recovered in legal proceedings in respect of a period prior to judgment ("pre-judgment interest");²
- (c) the payment of interest on sums of money awarded in legal proceedings for the period between the time judgment is entered and the time it is satisfied (interest on judgment debts);³
- (d) the account to be taken, when an award of damages is made, of fluctuations in currency exchange rates; and
- (e) the effect of inflation on, and the earning capacity of, an award of damages.⁴

¹ The Law Commission for England and Wales has recommended that a statutory right to interest be created which would allow interest to be recovered in cases such as this: see *Report on Interest* (1978) Cmnd 7229. The Commission will consider this matter when dealing with the other parts of its reference.

² The nature of "pre-judgment interest" is described further in paras 1.4 to 1.6 below. Pre-judgment interest is currently payable in a limited number of cases only; these are discussed in Chapter 2 below.

³ In the Supreme Court interest is payable on judgment debts pursuant to s 142(1) of the *Supreme Court Act 1935-1979*. The current rate of interest is 10%. In the District Court interest is payable on judgment debts pursuant to s 56(2) of the *District Court of Western Australia Act 1969-1978*. In Local Courts interest is recoverable on judgment debts where the debt, claim or demand allowed by the judgment exceeds \$750: *Supreme Court Act* s 142(2).

⁴ This matter is currently in a state of flux as a result of the recent judgments in *Barrell Insurances Pty Ltd v Pennant Hills Restaurants Pty Ltd* (1981) 34 ALR 162.

1.2 On 15 May 1981 the Attorney General asked the Commission to give priority to that part of the reference dealing with pre-judgment interest. As it was widely acknowledged that the existing law on this subject was unsatisfactory and urgently in need of reform,⁵ and because the issues involved had been thoroughly examined in other comparable jurisdictions, the Commission decided not to issue a working paper but instead to make a report recommending reforms which could be quickly and easily implemented. However, during the preparation of this report, a draft thereof was distributed for comment to the Chief Justice of Western Australia, the Law Society, the Bar Association, the Law School, Mr D A Forrester of the Crown Law Department, and Messrs E M Heenan Jnr, R J Meadows and R L Le Miere, the three speakers who gave papers at the 1981 Law Society Summer School on aspects of the law relating to interest. The comments on the proposals for reform contained in the draft, received in response to this invitation, all favoured the approach taken by the Commission and, with two minor exceptions,⁶ the recommendations made below.

1.3 The Commission will issue a working paper dealing with the other parts of this project in due course.

2. THE NATURE OF PRE-JUDGMENT INTEREST

1.4 Pre-judgment interest is interest on a sum of money which a court orders the defendant⁷ in legal proceedings to pay to the plaintiff in respect of a period⁸ prior to judgment. It is awarded to compensate the plaintiff for being kept out of money which ought to have been paid to him.⁹ According to Lord Wright, pre-judgment interest is interest that:¹⁰

" ...is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.

⁵ The most recent call for reform was made by Burt CJ in *G Knowles Pty Ltd v Barrett Carpet Company Pty Ltd* (unreported) Supreme Court of Western Australia No 1397 of 1980.

⁶ The Law Society disagreed with two of the Commission's minor recommendations: See footnote 1 page 36 and para 5.10 below.

⁷ Throughout this report the party seeking to recover, and the party sought to be made liable to pay, pre-judgment interest are described as the plaintiff and the defendant respectively. However, pre-judgment interest may also be awarded on a sum the plaintiff is ordered to pay the defendant as a result of the latter making a successful counterclaim.

⁸ The period may commence on the date the money became due to the plaintiff, or on the date proceedings were commenced for the recovery of the money, or some other date.

⁹ *Jefford v Gee* [1970] 1 All ER 1202; *Ruby v Marsh* (1975) 132 CLR 642; *Pheeney v Doolan* [1977] 1 NSWLR 601.

¹⁰ *Riches v Westminster Bank Ltd* [1947] 1 All ER 469, 472.

From that point of view it would seem immaterial whether the money was due to him under a contract, express or implied, or a statute, or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute...or was unliquidated and claimable...The essential quality of the claim for compensation is the same and the compensation is properly described as interest".

1.5 Pre-judgment interest is sometimes¹¹ called "interest as damages", a phrase which emphasises that it is awarded in effect as damages to compensate the plaintiff for being kept out of or deprived of his money, "...loss of interest being the damage which the law supposes a man suffers...for the non-payment of money to him".¹²

1.6 Whether pre-judgment interest is or should be recoverable is a distinct question from whether -

- (a) "interest proper" is payable on a sum of money which, although owed by one person to another, has not been wrongfully withheld because the time for repaying it has not arisen.¹³ As a general rule, interest is not payable on a debt or loan in the absence of an agreement that it be paid;¹⁴ and,

¹¹ For example, the *Supreme Court Act* (Vic) ss 79 and 79A and the *Supreme Court Act 1935-1979* (WA), s 33 refer to pre-judgment interest as "damages in the nature of interest".

¹² *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* [1968] 1 NSW 392, 407 per Sugerman JA. See also *The City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463, esp 467.

¹³ This distinction does not ignore the fact that the essential character of "interest proper" and "damages as interest" is the same. It was because they are essentially the same that the award of interest as damages considered in *Riches v Westminster Bank Ltd* [1947] 1 All ER 469 was held to be taxable under the *Income Tax Act 1918* (UK). See also in this respect *Marshall v Commissioner of Taxes* [1953] NZLR 335.

¹⁴ At common law interest is payable if there is an agreement to do so. An agreement to this effect may be express, incorporated into the contract between the parties by a course of dealing, implied by the nature of the transaction, or implied because of custom or usage in the particular trade or business. In equity, interest is payable where certain relationships exist, even though there is no agreement that it be paid, provided there is no contrary agreement. Examples of such relationships are those of mortgagee and mortgagor (a mortgage debt generally carries interest because it would be inequitable to allow redemption without payment of interest: *Cityland and Property (Holdings), Ltd v Dabrah* [1967] 2 All ER 639,648); principal and agent (Where the agent is a trustee of the principal's money anything earned with that money must be paid to the principal: See generally, F M B Reynolds and B J Davenport, *Bowstead on Agency* 14 ed 1976 Art 56); and vendor and purchaser: *F H Faulding and Co Ltd v Watson* [1969] WAR 63; see also paras 2.8 and 2.9 below.

- (b) whether an interest payment by the plaintiff to a third party, which would not have been made but for the defendant's wrongful conduct, can be recovered as special damages from the defendant.¹⁵

¹⁵ This issue was considered recently in *Compania Financiera Soleada SA v Hamoor Tanker Corpn Inc; The Borag* [1981] 1 All ER 856 and *Wadsworth v Lydall* [1981] 1 WLR 598.

CHAPTER 2

THE EXISTING LAW IN WESTERN AUSTRALIA

2.1 The existing law in Western Australia governing the recovery of pre-judgment interest is a complex mix of common law, equity, admiralty and statute law.

1. COMMON LAW

(a) Breach of contract to pay money

2.2 As a general rule, in the absence of an agreement between the parties,¹ pre-judgment interest cannot be awarded at common law for breach of contract to pay a sum of money.² Thus, for example, interest cannot be recovered on the purchase price of goods³ sold or the sum due under a loan agreement⁴ in respect of the period between the time payment became due and the time of judgment. The rationale for this rule is that such interest is presumed not to be within the contemplation of the parties.⁵ However, there are three notable exceptions to it. First, if an annuity is not paid by the grantor so that the surety has to pay it, the latter can recover interest on the amount paid as well as the amount itself.⁶ Secondly, if a person promises to pay a certain sum on a nominated day with interest at a fixed rate until then, interest will be payable in respect of any period payment is wrongfully withheld, even though the agreement made no provision for this.⁷ Finally, damages for failing to pay a bill of exchange or promissory note can include an award of pre-judgment interest.⁸

(b) Breach of contractual obligations concerning property

2.3 If a person fails to deliver goods (either at all or on time) under a contract of sale or construction, or if a person fails to transfer land under a contract of sale or lease, the innocent party is entitled to recover as damages the loss of the value of the use of the goods or land up

¹ As to interest payable pursuant to an agreement see footnote 2 p 6 above.

² See generally H McGregor, *McGregor on Damages* (14 ed 1980) ("McGregor") para 450.
³ *Gordon v Swan* (1810) 12 East 419.

⁴ *Page v Newman* (1829) 9 B & C 378.

⁵ *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 1 All ER 970, 977.

⁶ *Petre v Duncombe* (1851) 20 LJ QB 242.

⁷ *Cook v Fowler* (1874) LR 7 HL 27.

⁸ This exception has been enacted in s 62(a)(ii) of the *Bills of Exchange Act 1909-1973* (Cth).

until such time as the contract is performed or a substitute obtained.⁹ Such damages in effect take the place of interest. The connection between damages awarded for the loss of the value of use, and interest, is illustrated by *British Columbia and Vancouver' Island Spar, Lumber and Saw Mill Co Ltd v Nettleship*,¹⁰ a case involving the non-delivery of goods by a carrier, in which the value of the use of the goods was fixed by allowing interest on their value. However, in cases in which the rule in *Bain v Fothergill*¹¹ applies, interest on the deposit paid to the vendor can be recovered in an action for the return of the deposit.¹²

(c) Torts affecting goods and land

2.4 At common law interest cannot be awarded on the damages recovered for torts affecting goods¹³ or land. However, it has been argued that where damages are recovered in tort for the value of the use of goods, or the use or occupation of land, this is the equivalent of an award of interest and that therefore interest should in principle not be recoverable because if it were, there would be double recovery.¹⁴

(d) Tort claims for death or personal injury

2.5 Interest cannot be awarded on amounts recovered in personal injury or fatal accident claims.

(e) Fraud

2.6 If money has been obtained or retained by fraud it can be recovered with interest both at common law and in equity.¹⁵

⁹ McGregor, paras 454 to 456.

¹⁰ [1861-73] All ER Rep 339.

¹¹ (1874) LR 7 HL 158. According to this rule, if the vendor of land is unable to complete the contract of sale because of a defect in title, in the absence of fraud, the purchaser cannot recover damages for loss of the bargain. The rule is often excluded by contract in Western Australia: See Law Society of Western Australia (Inc) *Agreement For Sale of Freehold Land* (1980 ed), Clause 19(7).

¹² McGregor, para 456.

¹³ The position concerning goods is modified by statute: see para 2.22 below.

¹⁴ McGregor, paras 459, 461 and 463.

¹⁵ *Johnson v The King* [1904] AC 817 esp 822.

2. EQUITY

(a) Appropriation of trust money by a fiduciary

2.7 A fiduciary who appropriates trust moneys to his own use must replace those moneys and is liable, at his beneficiary's election,¹⁶ to pay interest thereon at a rate of not less than five percent simple interest from the time of appropriation.¹⁷ The object of awarding interest in such a case is not to compensate the beneficiary for loss suffered but to strip the fiduciary of profits made. The award is made on the basis that the fiduciary is irrebuttably presumed to have made a profit of at least five percent.¹⁸

(b) Taking possession before payment

2.8 In the absence of a contrary agreement, if a purchaser of land or goods takes possession before payment, in certain circumstances interest is payable to the seller on the unpaid purchase price from the date of possession until payment.¹⁹ According to Luxmoore LJ speaking for the Privy Council in *International Railway Co v Niagara Parks Commission*:²⁰

“..if, in cases where courts of equity would grant specific performance, the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price, he must, in the absence of an express agreement to the contrary, pay interest on his purchase money as from the date when he gets possession until the date of payment, because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money.”

This rule is not confined to contracts for the sale of land but extends to any contract in respect of which a court of equity would order specific performance. Thus the rule was applied recently by Smith J in *Tom the Cheap (WA) (In liquidation) v Allied Leasing Corporation Pty Ltd*²¹ to award interest, at a rate of eight percent, on the price of goods sold pursuant to a contract for the sale of goods. In this case the defendant/purchaser took possession of the

¹⁶ The beneficiary can elect to claim the profit made by the fiduciary rather than to receive merely an award of interest.

¹⁷ See generally P D Finn, *Fiduciary Obligations*, paras 248-255.

¹⁸ Compound interest with periodic rests will not be awarded unless, in the circumstances of the particular case, it is reasonable to suppose that the trust money used actually earned more than the equivalent in value of the base rate at simple interest: P D Finn op cit para 254.

¹⁹ *F H Faulding and Co Ltd v Watson* [1969] WAR 63.

²⁰ [1941] 2 All ER 456, 463.

²¹ [1980] WAR 47.

goods on 31 October 1976 on which day, according to the contract of sale, the purchase price became payable. The defendant did not pay the purchase price, however, until the second half of 1979 after the plaintiff/seller had successfully brought proceedings to recover the amount owed. In these proceedings, the plaintiff recovered the sum of \$5,206.93 as pre-judgment interest.

2.9 However, in *G Knowles Pty Ltd v Barrett Carpet Company Pty Ltd*,²² a case in which the material facts were very similar to those in the *Tom the Cheap* case, Burt CJ held that interest could not be recovered by the plaintiff/seller because:

"...once such a contract [a contract in respect of which equity will grant specific performance] has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction, and the parties are left to their remedies at law" (quoting from *Maine and New Brunswick Electrical Power Co v Hart* [1929] AC 631, 640).

2.10 The rule under consideration is not restricted to cases in which the purchase price has been wrongfully withheld from the seller. Thus, for example, in *F H Faulding and Co Ltd v Watson*²³ it was applied so as to allow the seller to recover interest on the balance of the purchase price outstanding from time to time under a contract for the sale of land, even though the time for payment under the contract had not arisen.

3. ADMIRALTY

2.11 A Court of Admiralty has the power, independently of statute, to award pre-judgment interest on an award of damages. In the case of the loss of a ship, interest is awarded from the date of loss; if a ship is only damaged, interest is awarded from the date the repair bill is paid; and in the case of personal injury or death, interest is awarded from the date of the registrar's report.²⁴ The amount of interest is affected by whether or not the ship had a cargo on board at the time of the collision.²⁵ Interest is awarded because of the delay which occurs between the time of loss or disbursement and the time damages are awarded.

²² Unreported, Supreme Court of Western Australia No 1397 of 1980.

²³ [1969] WAR 63.

²⁴ *Shaw Savill and Albion Co Ltd v The Commonwealth of Australia* (1953) 88 CLR 164; *R W Miller and Co Pty Ltd v The Ship Paris* [1975] 1 NSWLR 704. The date of the registrar's report has been chosen as the date from which interest is to run in cases of death or personal injury because the amount payable in such cases is not quantified until then.

²⁵ See generally, McGregor, para 460.

4. STATUTE

2.12 The most important statutory provisions²⁶ dealing with the recovery of pre-judgment interest are those contained in sections 31 to 34 of the *Supreme Court Act, 1935-1979* which provide as follows:

"31. (1) Subject to the provisions of the *Money Lenders Act, 1912*, there shall be no limit to the amount of interest which any person may lawfully contract to pay.

(2) In all cases where interest for the loan of money, or upon any other contract, may be lawfully recovered or allowed in any action, suit, or other proceedings in the Supreme Court, or any other court of law or equity, but where the rate of such interest has not been previously agreed upon by or between the parties, it shall not be lawful for the party entitled to interest to recover or be allowed in any such action, suit, or other proceedings above the rate of six dollars for interest of forbearance of one hundred dollars for a year, and so after that rate for a greater or lesser sum or for a longer or shorter time.

32. Upon all debts or sums certain, payable at a certain time or otherwise, in any action the Court at the hearing, or the jury on the trial of any issue, or on an assessment of damages, may if the Court or jury think fit, allow interest to the creditor at a rate not exceeding eight per centum per annum from the time when such debts or sums certain were payable, if such debts or sums are payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment was made in writing, giving notice to the debtor that interest would be claimed from the date of such demand or any later date: Provided that interest shall be payable in all cases in which it is now payable by law.

33. The Court at the hearing, or the jury on any trial or assessment of damages, may, in all actions of trover or trespass concerning goods, give damages in the nature of interest, if the Court or jury think fit, over and above the value of the goods at the time of the conversion or seizure, and over and above the money recoverable in all actions on any policies of insurance.

34. The several rules of law enacted and declared by this Act shall be in force and take effect in all courts whatsoever in Western Australia so far as the matters to which such rules relate shall be respectively cognisable by such courts."²⁷

²⁶ There are a number of other statutory provisions which provide for the payment of interest in situations which are the same as, or which are similar to, those in which pre-judgment interest is an issue. These include the *Partnership Act 1895* s 55(1) which provides for the payment of interest on an outgoing partner's share of partnership assets until the final settlement of accounts; the *Administration Act 1903-1980* s 143A which provides for the payment of interest on legacies; the *Income Tax Assessment Act 1936-1980* (Cth) s 207 which provides for the payment of interest on unpaid income tax and the *Bills of Exchange Act 1909-1973* (Cth) s 62(a)(ii) referred to in para 2.2 above.

²⁷ As a result of this section, the rules of law contained in ss 32 and 33 of the *Supreme Court Act* apply in the District Court and the Local Courts. See also s 57 of the *District Court of Western Australia Act 1969-1978* and s 35 of the *Local Courts Act 1904-1976*.

(a) **Section 32 of the Supreme Court Act**

2.13 This section, which is based on section 28 of the *Civil Procedure Act 1833* of the United Kingdom,²⁸ allows interest to be awarded in cases in which the plaintiff recovers a debt or other ascertained sum owed to him by the defendant. As the right to interest is statutory it is not necessary for there to be an agreement between the parties providing that interest be paid. Although the section provides a means by which interest can be obtained in certain cases of debt, it has received a very narrow and restrictive interpretation which considerably reduces its effectiveness in practice.²⁹ The limits of the section are as follows:

(i) **It applies only to claims for "debts" and "sums certain" and not to claims for damages**

2.14 To be a "sum certain" the sum of money claimed must be due absolutely, and not merely provisionally, from the debtor to the creditor,³⁰ and must be precisely identified on the face of the document or account or be calculable exactly by reference to some formula or other method without the need for any discretion or judgment to be used in the calculation.³¹

2.15 The section therefore does not apply to tort claims or to unliquidated claims for breach of contract.³² This is the most significant difference between the law in Western Australia and the law in the other mainland States of Australia, England and Wales.

(ii) **The debt or sum certain must be payable at a certain time by virtue of some written instrument or, if it is not, the creditor must make a written demand for payment, giving notice that interest is claimed from the date of the demand or any later date.**

2.16 Section 32 allows interest to be recovered in two situations, namely, -

- * where the debt or sum certain is payable at a certain time by virtue of some written instrument, and

²⁸ Known as "Lord Tenterden's Act".

²⁹ See further, paras 3.4 and 3.5 below.

³⁰ *London, Chatham and Dover Railway Company v South Eastern Railway Company* [1893] AC 429, 436.

³¹ *R H Cook Pty Ltd v Mills*, (unreported), Full Court of the Supreme Court of Western Australia, Appeal No 4187/72, Burt J.

³² Examples of the kinds of expenditure by the plaintiff in respect of which interest cannot be recovered are given in para 3.2 below.

- * where the debt or sum certain is payable otherwise than on a certain date and a demand for payment is made with notice that interest will be claimed.

2.17 In relation to the first situation, it has not been resolved whether the phrase "payable by virtue of some written instrument at a certain time" requires that the time for payment be specified in the written instrument or whether it is sufficient if the instrument contains a provision which, on the happening of an event, renders the time certain.³³ Thus, for example, if the price of goods is payable 30 days after they are delivered, when the time for payment arises the debt may not be regarded as being payable at a "certain time" within the meaning of the section.

2.18 It has also been held that if to establish the amount payable it is necessary to make a further finding of fact, the amount will not be payable "by virtue of some written instrument" and therefore interest will be recoverable only, if at all, in the second situation envisaged by the section.³⁴ Therefore, if under a contract of sale the price of goods sold is fixed by reference to their price at the date the order for them was placed, the debt created by the supply of the goods will not be one in respect of which interest can be awarded under the section because to establish the price requires a finding to be made about their price on the day the order was placed.³⁵

2.19 The second situation in which interest is recoverable is where payment of the debt or sum certain is demanded in writing together with a notice that interest is claimed. Thus, if the time for payment of a debt is not fixed by virtue of some written instrument it is necessary for the creditor, once the time for payment has arisen, to make a demand for payment in writing and give notice that interest on the debt is claimed from the date of the demand or some later date. If this is done, interest will be recoverable under the section.

³³ See generally *London, Chatham and Dover Railway Company v South Eastern Railway Company* [1893] AC 429, 435 and *Public Trustee v Schultz* (1964) 111 CLR 482, 498. The former view was adopted in *Hough v Whitty* (1903) 3 SR (NSW) 677 and is supported by dicta *Main and New Brunswick Electrical Power Co v Hart* [1929] AC 631, 639-640 (PC).

³⁴ *G Knowles Pty Ltd v Barrett Carpet Company Pty Ltd* (unreported) Supreme Court of Western Australia No 1397 on 1980.

³⁵ *Ibid.*

2.20 In connection with the requirement that there be a demand for payment and claim for interest it has been held that a demand and claim in the writ or pleadings is not sufficient for this purpose,³⁶ but that notice can be given after proceedings have commenced.³⁷

(iii) There must be a hearing

2.21 Interest can only be awarded under section 32 if proceedings go to a hearing. Thus interest cannot be awarded if -

- * payment of a debt is withheld until immediately prior to proceedings being commenced;
- * a debt is paid immediately after proceedings are commenced;³⁸
- * judgment in favour of the plaintiff is obtained in default of an appearance or of a defence.³⁹

2.22 However, there is no need for there to be an actual trial as such. Any proceeding in which there is judicial consideration of the evidence relating to the claim will be a hearing for the purpose of the section.⁴⁰ Thus interest can be awarded on the return of a summons for summary judgment under Order 14,⁴¹ or in proceedings to set aside a default judgment.

³⁶ *Heel v Bicknell* (1975) 1 SR (WA) 11; *Tom the Cheap (WA) Pty Ltd (In Liquidation) v Allied Leasing Corporation Pty Ltd* [1980] WAR 47; *G Knowles Pty Ltd v Barrett Carpet Company Pty Ltd* (unreported) Supreme Court of Western Australia No 1397 of 1980.

³⁷ *MDS Engineering (WA) Pty Ltd v Multicon Engineering (WA) Pty Ltd* (unreported) Supreme Court of Western Australia No 10390 of 1976.

³⁸ *Newall v Tunstall* [1970] 3 All ER 465.

³⁹ The act of entering judgment in default is regarded as ministerial and not as a hearing: *The City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463, 471. Although Order 13 rule 2 of the *Rules of the Supreme Court 1971* allows interest to be awarded if the defendant fails to enter an appearance, the judgment cannot include interest unless it is pleaded as being due under a contract or by virtue of some statute: Williams, *Supreme Court Practice*, para 13.3.4.

⁴⁰ *Wallersteiner v Moir* (No 2) [1975] 1 All ER 849, 855.

⁴¹ *Melbourne and Metropolitan Board of Works v Bevelon Investments Pty Ltd* [1977] VR 473. This case is also authority for the proposition that if the debtor pays the sum claimed after a summons for final judgment has been issued, the creditor may nevertheless obtain judgment for interest on the return of that summons.

(b) Section 33 of the Supreme Court Act

2. 23 This section allows the Court or jury to award interest in cases of trover⁴² or trespass⁴³ to goods and in cases brought on policies of insurance. The power is discretionary and will only be exercised if justice requires it in the circumstances of the particular case. Thus, for example, in *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd*,⁴⁴ the plaintiff, who, in an action for conversion, recovered the value of the goods converted, was refused interest because it had lost nothing beyond the value of those goods. In cases involving insurance claims it has been held that for an award of interest to be made there must be a wrongful withholding of the proceeds of an insurance policy by the insurer so that if in the circumstances the insurer was justified in investigating the claim and requiring the assured to prove his entitlement, an award of interest will not be made.⁴⁵

⁴² "Trover" was originally an action brought to recover damages from a person who has found another person's goods and wrongfully dealt with them. It has been superseded by the action of conversion which is an action available against a person who has dealt with a chattel in a manner inconsistent with another person's right to possession of it.

⁴³ "Trespass" is an action brought to recover damages for injury done to the plaintiff's goods.

⁴⁴ [1968] 1 NSWLR 392. The plaintiff's claim for interest was made under the *Common Law Procedure Act 1899* (NSW), s 141(a) which was the then equivalent in New South Wales of the *Supreme Court Act 1935-1979* (WA), s 33.

⁴⁵ *Roumeli Food Stores (NSW) Pty Ltd v The New India Assurance Co Ltd* [1972] 227; *Le Mura v The Victoria Insurance Company Limited* [1971] Qd R 198.

CHAPTER 3

DEFECTS IN THE EXISTING LAW

1. INTEREST CANNOT BE OBTAINED ON DAMAGES

3.1 Although interest can be obtained both in equity and under section 32 of the *Supreme Court Act* on debts and ascertained sums of money, interest cannot be obtained, in most cases, on awards of damages.¹ As mentioned above this is the main difference between the law in Western Australia and the law in the other mainland States of Australia, England and Wales.

3.2 In some cases their inability to obtain pre-judgment interest on damages will not unfairly prejudice plaintiffs because special damages will be recoverable which will in effect take the place of such interest.² However, in cases where this is not possible, the inability to recover pre-judgment interest will result in plaintiffs not being fully compensated for the loss they have suffered. The following examples illustrate these kinds of situations where interest cannot be recovered -

- * Expenditure incurred by the plaintiff in rebuilding a factory which had been destroyed as a result of the defendant's breach of contract.³
- * Expenditure incurred in repairing goods damaged as a result of the defendant's negligence.
- * Pecuniary losses such as lost wages and medical expenses, suffered as a result of the defendant negligently causing the plaintiff personal injury.⁴

3.3 Although the actual expenditure or loss in these examples can be recovered as special damages, interest thereon cannot be. As a result, the plaintiffs will not be fully compensated because in each case they will have received nothing to recompense them for not having had the use of their money between the date of expenditure and the date of judgment.

¹ Interest on damages can be recovered under s 33 of the *Supreme Court Act 1935-1979* in cases of trover and trespass to goods. Such cases are, however, comparatively rare. Interest can also be awarded on damages in Admiralty; see para 2.11 above.

² See paras 2.3 and 2.4 above.

³ This example is based on *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 All ER 225. In this case interest was recovered under the *Law Reform (Miscellaneous Provisions) Act 1934* (UK), s 3.

⁴ The recovery of interest in this kind of case under the *Law Reform (Miscellaneous Provisions) Act 1934* (UK), s 3 was discussed in *Jefford v Gee* [1970] 1 All ER 1202, 1208-9.

3.4 In respect of damages for non-economic loss such as pain, suffering and loss of amenities in personal injury cases, it has been argued that pre-judgment interest should not be recoverable because:

“...the process of measurement [in such cases] is in a sense an arbitrary one, in which the court or jury assessing damages exercise a latitude and freedom different in kind from the discretion allowed in the measurement of injuries of a pecuniary sort. Where a jury considers, without any standards except a general standard of reasonableness and restraint, the amount of money to be awarded a plaintiff for the disgrace of being falsely accused of murder, it would serve little purpose to give them specifically a further discretion to add interest, where the figure to be arrived at is almost wholly discretionary or “at large”.⁵

3.5 The Commission, however, does not accept this argument. Although it may be conceded that it is not possible for the courts to quantify non-economic loss with the precision with which economic loss can be quantified, the fact nevertheless remains that had the defendant discharged his liability to pay damages for non-economic loss when the plaintiff’s claim was made, the plaintiff would have enjoyed the benefit of those damages from that earlier date. According to Barwick CJ in *Ruby v Marsh*:⁶

“...the successful plaintiff, who by the verdict has been turned into an investor by the award of a capital sum, and whose claim in the writ has been justified to the extent of the verdict returned, ought in justice to be placed in the position in which he would have been had the amount of the verdict been paid to him at the date of the commencement of the action.”

The Commission also notes that the argument has been rejected in England by the Law Revision Committee⁷ and the Parliament,⁸ in a large number of States in the United States of America,⁹ in Canada¹⁰ and in New South Wales,¹¹ Victoria,¹² Queensland¹³ and South Australia.¹⁴

⁵ McCormick, *Damages* 226.

⁶ (1975) 132 CLR 642, 652.

⁷ *Second Interim Report* (1934) Cmd 4546 para 8.

⁸ The *Administration of Justice Act 1969*, s 22 draws no distinction between economic and non-economic loss and requires the court to award pre-judgment interest in both cases unless there are special reasons why interest should not be awarded in a particular case. See generally para 4. 20 below.

⁹ See generally the Law Revision Commission of New York, *Recommendation and Study relating to the Award of Interest on Causes of Action for Personal Injury* (1966).

¹⁰ See generally Law Reform Commission of British Columbia, *Interim Report on Debtor Creditor Relationships Part 4 Pre-judgment Interest* (1973).

¹¹ See generally paras 4.1 to 4.6.

¹² See generally paras 4.7 to 4.11.

¹³ See generally para 4.12.

¹⁴ See generally paras 4.13 to 4.16.

2. SECTION 32 OF THE SUPREME COURT ACT IS TOO RESTRICTIVE

3.6 Although section 32 allows interest to be recovered in some cases of debt the preconditions to recovery it imposes are such that the situations in which this is possible are kept within narrow limits, limits which have been described as being “...too narrow for the purposes of justice”.¹⁵ These preconditions are that -

- * the amount recovered by the plaintiff must be a debt or sum certain;¹⁶
- * the debt must be payable at a certain time by virtue of some written instrument or if it is not, the creditor must demand payment;¹⁷
- * there must be a hearing.¹⁸

3.7 As a result of the severe restrictions these preconditions impose on the power of the courts to award interest there have been numerous cases in which the courts have been unable to award interest even though they were of the opinion that the plaintiff should have received it.¹⁹ The effect of these preconditions in practice is that interest is not recoverable in many cases even though the plaintiff has been kept out of his money for a considerable time, and even though the defendant had no good reason for withholding payment from him. In such cases the defendant will have had the use of the plaintiff’s money between the date payment was due and the date of recovery, and the real value of the amount eventually recovered will have been reduced as a consequence of inflation.²⁰ Because the power of the courts to award interest is limited “...we see many cases....in which debtors withhold the payment of their debts and force creditors into litigation to recover them simply because they think it to be good business to do so. In this way they obtain, in effect, a free of interest unsecured loan and

¹⁵ *London, Chatham and Dover Railway Company v South-Eastern Railway Company* [1893] AC 429 , 440-441.

¹⁶ Discussed in paras 2.14 and 2.15 above.

¹⁷ Discussed in paras 2.16 to 2.20 above.

¹⁸ Discussed in paras 2.21 and 2.22 above.

¹⁹ See for example, *London, Chatham and Dover Railway Company v South-Eastern Railway Company* [1893] AC 429, 440-441; *R H Cook Pty Ltd v Mills* (unreported) Full Court of the Supreme Court of Western Australia, Appeal 4187/72; *The City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463; *G Knowles Pty Ltd v Barrett Carpet Company Pty Ltd* (unreported) Supreme Court of Western Australia, No 1397 of 1980.

²⁰ Even if there were no inflation there may nevertheless still be injustice if the plaintiff is unable to recover interest on his money as he would have lost the earning power of that money and the defendant would have had, at the plaintiff’s expense, the benefit of an interest free loan.

at prevailing interest rates the benefit they derive by doing so is very considerable as is the loss to the unpaid creditor.²¹

²¹ *G Knowles Pty Ltd v Barrett Carpet Company Pty Ltd* (unreported) Supreme Court of Western Australia No 1397 of 1980, per Burt CJ.

CHAPTER 4

THE LAW IN OTHER JURISDICTIONS

1. NEW SOUTH WALES

4.1 The provisions in New South Wales corresponding to sections 32 and 33 of the West Australian *Supreme Court Act 1935-1979* were repealed in 1970 and replaced by section 94 of the *Supreme Court Act 1970-1980* which provides that:

“(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods), the Court may order that there shall be included, in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect.

(2) This section does not –

- (a) authorise the giving of interest upon interest;¹
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) affect the damages recoverable for the dishonour of a bill of exchange.”

4.2 This provision gives the court a discretion concerning -

- * whether interest is to be awarded at all;
- * the rate of interest (in practice the usual rate is ten percent per annum);²
- * the parts of the award to carry interest;
- * the period for which interest is payable between the date when the cause of action arose and the date when judgment takes effect.

4.3 As a result of the width of this discretion, a successful plaintiff is not automatically entitled to interest but must persuade the Court that it is just, as between himself and the defendant, for an award of interest to be made in his favour.³ Thus, although the discretion has

¹ This proviso is designed to prevent pre-judgment interest being recovered, for example, on that part of a sum recovered which represents contractual interest owed to the plaintiff under an interest bearing debt such as a mortgage; see *Bushwall Properties v Vortex Properties* [1975] 2 All ER 214, 225.

² *R W Miller and Co Pty Ltd v The Ship Patris* [1975] 1 NSWLR 704; *Smith v In Shoppe Pty Ltd* [1976] 2 NSWLR 175. This is also presently the rate of interest recoverable on a judgment debt in Western Australia; see footnote 3 page 3 above.

³ *Pheenev v Doolan* [1977] 1 NSWLR 601.

been said to be “...as unfettered as any discretion can be....”⁴ it has been held to be a wrong approach for a court to “...order interest on the whole judgment, or for the full period, on the basis that the section permits it, and that no reason is shown to the contrary or why the plaintiff should be deprived of it”.⁵ It has also been held that the discretion must be exercised judicially and in relation to the facts of the particular case with the object of compensating the plaintiff, where appropriate, for the delay in the payment of money due to him.⁶

4.4 Section 94 allows interest to be awarded in personal injury and fatal accident cases.⁷ The general principles in accordance with which the courts⁸ have said the discretion to award interest should be exercised in such cases are as follows -

- * interest may be awarded on economic loss up to the date of judgment
 - in the case of out of pocket expenses, from the date these amounts are paid;
 - in the case of loss of earning capacity, where this has produced economic loss at a fairly uniform rate⁹ throughout the period before judgment, it is sufficient to take an average by awarding interest for half that period at current rates, or alternatively, by awarding interest for the whole period at half current rates;

- * interest is not recoverable in respect of any economic loss replaced by workers' compensation payments, even though that loss is recovered as special damage;¹⁰

⁴ *Riches v Westminster Bank Ltd* [1943] 2 All ER 725, 726 per du Parcq LJ speaking of the equivalent English provision.

⁵ *Pheeny v Doolan* [1977] 1 NSWLR 601, 605 per Moffitt P.

⁶ *Pheeny v Doolan* [1977] 1 NSWLR 601; *Bennett v Jones* [1977] 2 NSWLR 355; *Cullen v Trappell* (1980) 29 ALR 1 esp 12-16.

⁷ *Ibid.*

⁸ In particular, *Pheeny v Doolan* [1977] 1 NSWLR 601; *Bennett v Jones* [1977] 2 NSWLR 355; *Fire and All Risks Insurance Co Ltd v Collinan* (1978) 21 ALR 375 (in which the Queensland equivalent to s 94 was considered); *Cookson v Knowles* [1978] 2 All ER 604 (in which the English equivalent to s 94 was considered) and *Cullen v Trappell* (1980) 29 ALR 1.

⁹ Where loss is not fairly uniform, a particular calculation or estimation should be preferred.

¹⁰ This is because to the extent that workers' compensation payments have been received the plaintiff has not been kept out of his money. See further footnote 1 page 34 below.

- * where the date of trial provides the base for discount, interest should not be awarded on those components of an award of damages which relate to economic loss to be suffered in the future;
- * in the case of non-economic loss (pain, suffering and loss of amenities) it may sometimes be appropriate in the circumstances for the Court to allow interest only on that part of the award which relates to past loss. However, a dissection of non-economic loss into past and future loss will not be necessary in all cases;¹¹
- * interest should be awarded as compensation, so as to do what is fair in a pecuniary sense between the parties. It should not be awarded as a penalty;
- * interest should be awarded on the basis that the money paid to the plaintiff had been outstanding for a period during which the defendant had the benefit of not paying it and the plaintiff suffered the detriment of not having it.

4.5 Where interest is allowed, it should be allowed at ordinary commercial rates and no distinction should be drawn in this respect between that part of an award which relates to non-economic loss and that part which relates to economic loss.¹²

4.6 Where interest is awarded, it is included as part of the sum for which judgment is given. However, it has been held that interest awarded pursuant to the English equivalent of

¹¹ The courts acknowledge that it is more difficult to dissect into past and future elements that part of an award of damages which relates to pain, suffering and loss of amenities, than it is to dissect the parts relating to economic loss. Where appropriate, however, a comparison is made between the pain and suffering that has occurred before trial and that which will occur afterwards and the total damages are then divided accordingly for the purpose of making an award of interest: See for example, *Cullen v Trappell* (1980) 29 ALR 1, 16-17.

¹² *Cullen v Trappell* (1980) 29 ALR 1, 15. In this case, the High Court disapproved of the decision of the New South Wales Court of Appeal in *Bennett v Jones* [1977] 2 NSWLR 355 that the rate of interest allowed on damages for non-economic loss should be lower than the commercial rate because damages for non-economic loss, being assessed at the date of judgment, are higher in nominal terms, due to the effects of inflation, than they would have been had they been assessed at the date of the accident. But see H Luntz, *Torts*, in R Baxt (ed) *An Annual Survey of Law 1980*, 309, 344, where the view is expressed that the approach of the NSW Court of Appeal is the better one. Whichever approach is preferable, the Commission is satisfied that the Courts will exercise a wide discretionary power in accordance with the circumstances of the case so as to do justice between the parties, and believes that this is preferable to attempting to impose a rigid statutory scheme which may well require amendment as economic circumstances change.

section 94¹³ is not something in respect of which a defendant can make a payment into court. Therefore, as a general rule, if the plaintiff recovers no more, apart from interest, than the sum paid into court he will not recover his legal costs and will have to pay those of the defendant.¹⁴ Exceptionally, it appears that if after payment into court, the only matter in dispute between the parties is the defendant's liability for interest, then, at least where the plaintiff's claim was for a liquidated sum, if the court awards interest on that sum the plaintiff will recover the whole costs of the action.¹⁵

2. VICTORIA

4.7 A general power to award interest on debts and damages has existed in Victoria since the enactment in 1962 of section 79A of the *Supreme Court Act 1958*. This section, and the others in the Act dealing with pre-judgment interest are reproduced below.

"78. (1) Upon all debts or sums certain hereafter recovered in any action the Judge at the hearing shall upon application unless good cause is shown to the contrary allow interest to the creditor at a rate not exceeding eight per centum per annum or (in respect of any bill of exchange or promissory note) at a rate not exceeding twelve per centum per annum from the time when such debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain); or if payable otherwise then from the time when demand of payment has been made:

Provided that nothing herein contained shall extend to authorise the computation of interest on any bill of exchange or promissory note at a higher rate than eight per centum per annum where there has been no defence pleaded.

(2) A debt or sum payable or a date or time shall be deemed to be certain if upon the expiration of a period or otherwise it has become certain.

79. (1) The Judge upon application shall in all actions of trover or trespass concerning goods give damages in the nature of interest unless good cause is shown to the contrary over and above the value of the goods at the time of the conversion.

(2) The Judge upon application shall in all actions on any policies of insurance give damages in the nature of interest unless good cause is shown to the contrary over and above the money receivable.

79A. (1) The Judge upon application shall in all actions for the recovery of debt or damages give damages as in the nature of interest at such rate not exceeding eight per centum as he thinks fit from the commencement of the action until the entry of the judgment unless good cause is shown to the contrary over and above the debt or damages awarded by the court or jury.

¹³ The *Law Reform (Miscellaneous Provisions) Act 1934* (UK) s 3(1), which is reproduced in para 4.17 below.

¹⁴ *Jefford v Gee* [1970] 1 All ER 1202, 1211. Compare the position in Victoria, para 4.11 below.

¹⁵ *Vehicle and General Insurance Co Ltd (In liquidation) v H and W Christie Ltd* [1967] All ER 747.

- (2) Nothing in this section shall -
- (a) authorise the granting of interest upon interest;
 - (b) apply in relation to any sum upon which interest is recoverable as of right by virtue of any agreement or otherwise;
 - (c) affect the damages recoverable for the dishonour of a negotiable instrument;
 - (d) authorise the allowance of any interest otherwise than by consent upon any sum for which judgment is pronounced or entered by consent;
 - (e) apply in relation to any sum on which interest might be awarded by virtue of section seventy-eight or section seventy-nine of this Act; or
 - (f) limit the operation of any enactment or rule of law which apart from this section provides for the award of interest.
- (3) Where the damages awarded by the court or jury include or where the Judge in his absolute discretion determines that the damages so awarded include any amount for -
- (a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest;
 - (b) compensation for loss or damages to be incurred or suffered after the date of the award; or
 - (c) exemplary or punitive damages.
- the Judge shall not allow interest in respect of any amount so awarded or in respect of so much of the award as in his opinion represents any such damages-
- (4) The Judge may if he thinks fit request a jury to specify in its verdict any amount included in the verdict in respect of the matters referred to in sub-section (3) of this section."

4.8 A notable feature of these provisions is that the local equivalents of the pre-judgment interest provisions in Lord Tenterden's Act have been retained in a modified form¹⁶ rather than repealed as they have been in the other jurisdictions in which a general power to award pre-judgment interest has been introduced. Unfortunately, this, coupled with the express provision¹⁷ that section 79A does not apply in relation to any sum upon which interest might be awarded under sections 78 or 79 of the Act, has had the effect of making the recovery of pre-judgment interest more complicated than it is in other jurisdictions and of creating an additional issue¹⁸ in respect of which there can be a dispute between the parties.

4.9 Although section 78 of the Victorian Act is less restrictive than its counterpart in Western Australia,¹⁹ the power to award pre-judgment interest given by that section and

¹⁶ The restrictions contained in s 32 of the *Supreme Court Act* (WA) and discussed in paras 2.14 and 2.16 to 2.19 above have largely been removed from s 78 of the *Supreme Court Act* (Vic) by the deletion of the requirement that a claim for interest accompany the demand for payment and by the addition of subsection (2).

¹⁷ *Supreme Court Act* 1958 s 79A(2)(e).

¹⁸ Namely, under which section should a claim for interest be made; see for example, *The City Mutual Assurance Society Ltd v Giannarelli* [1977] VR 463.

¹⁹ *Supreme Court Act* s 32.

section 79A is considerably less flexible than that given by section 94 of the New South Wales *Supreme Court Act*. Thus -

- * the judge is required to award interest unless good cause is shown to the contrary;
- * a maximum rate of interest is prescribed;²⁰
- * the time for which interest is to be awarded is fixed; and
- * interest cannot be awarded under section 79A for the period between the time the cause of action arose and the time the plaintiff's action was commenced.²¹

4.10 Section 79A requires a judge to allow interest on damages awarded in personal injury and fatal accident cases unless good cause is shown to the contrary. Although there has been disagreement in the past concerning the principles to be followed when applying the section in such cases²² it seems likely that the principles enunciated recently by the High Court in relation to section 94 of the New South Wales *Supreme Court Act* will now be followed.²³

4.11 As far as the awarding of costs is concerned under Order 22 rule 6 of the *Rules of the Supreme Court of Victoria* (in Western Australia, Order 24 rule 8 of the *Rules of the Supreme Court 1971*), it was held by the Victorian Full Court in *Murphy v Murphy*²⁴ that when determining whether the plaintiff has recovered more than the sum paid into court by the defendant, interest should be included in the calculation. In 1977 the effect of this decision was entrenched by rule 6A of Order 22.²⁵

²⁰ This is eight percent per annum except in the case of a bill of exchange or promissory note in which case it is twelve percent.

²¹ Whereas s 79A allows pre-judgment interest to be awarded "from the commencement of the action", s 94 of the NSW Act allows interest to be awarded "from the date when the cause of action arose". The period in respect of which interest can be awarded is therefore shorter in Victoria than it is in New South Wales, Queensland (see para 4.12 below), South Australia (see para 4.13 below) and England and Wales (see para 4.17 below).

²² In *Ruby v Marsh*, (1975) 132 CLR 642, Barwick CJ decided that s 79A(3)(b) of the Victorian *Supreme Court Act 1958* did not prevent interest being awarded on the total sum recovered by a plaintiff in either a personal injury or a fatal accident claim. Gibbs J, however, said that interest could be awarded on the total sum only in the latter case. In personal injury cases on the other hand, interest, his Honour said, was not recoverable in respect of that part of an award "...intended to compensate the plaintiff for the financial loss that is likely to be produced in the future as a result of the diminution of his earning capacity...": Id 660. This was also the view taken earlier by the Victorian Full Court in *East v Breen* [1975] VR 19. Finally, Stephen and Jacobs JJ were of the View that in both cases interest should not be awarded on that part of the damages attributable to future economic loss.

²³ See paras 4.4 and 4.5 above. See generally, H Luntz, *Torts* in R Baxt, *Annual Survey of Law 1978*, 132, 160 and *Annual Survey of Law 1980*, 309, 344.

²⁴ [1963] VR 610.

²⁵ *Supreme Court (Interlocutory) Proceedings Rules 1977*.

3. QUEENSLAND

4.12 In 1972 a new section 72 was inserted into the Queensland *Common Law Practice Act 1867*. This section, which is reproduced below, confers a power to award pre-judgment interest that is identical in all material respects to that conferred by section 94 of the New South Wales *Supreme Court Act*.

“72. (1) In any proceeding in respect of a cause of action that arises after the commencement of the *Common Law Practice Act Amendment Act 1972* in a court of record for the recovery of money (including proceedings for debt, damages or the value of goods) the court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

(2) The powers conferred on a court of record by subsection (1) may be exercised by an arbitrator or umpire.

(3) This section -

- (a) does not authorise the giving of interest upon interest,
- (b) does not apply in respect of any debt on which interest is payable as of right whether by virtue of an agreement or otherwise;
- (c) does not affect damages recoverable for the dishonour of a bill of exchange.”

4. SOUTH AUSTRALIA

4.13 Section 30C of the South Australian *Supreme Court Act 1935-1975*, reproduced below, requires the court to award interest unless good cause is shown to the contrary.

“30C. (1) Unless good cause is shown to the contrary, the court shall, upon the application of a party in favour of whom a judgment for the payment of damages, compensation or any other pecuniary amount has been, or is to be, pronounced, include in the judgment an award of interest in favour of the judgment creditor in accordance with the provisions of this section.

(2) The interest -

- (a) shall be calculated at such rate of interest as may be fixed by the court ;
- (b) shall be calculated -
 - (i) where the judgment is given upon an unliquidated claim - from the date of the commencement of the proceedings to the date of the judgment;or

- (ii) where the judgment is given upon a liquidated claim - from the date upon which the liability to pay the amount of the claim fell due to the date of the judgment,
- or in respect of such other period as may be fixed by the court;
- and
- (c) shall be payable in respect of the whole or any part of the amount for which judgment is given in accordance with the determination of the court.

(3) Where a party to any proceeding before the court is entitled to an award of interest under this section, the court may, in the exercise of its discretion, and without proceeding to calculate the interest to which that party may be entitled in accordance with subsection (2) of this section, award a lump sum in lieu of that interest.

(4) This section does not -

- (a) authorise the award of interest upon interest;
 - (ab) authorise the award of interest upon exemplary or punitive damages;
 - (b) apply in relation to any sum upon which interest is recoverable as of right by virtue of an agreement or otherwise ;
 - (c) affect the damages recoverable upon the dishonour of a negotiable instrument;
 - (d) authorise the award of any interest otherwise than by consent upon any sum for which judgment is pronounced by consent;
- or
- (e) limit the operation of any other enactment or rule of law providing for the award of interest.”

4.14 This provision was introduced in 1972. Its notable features are that -

- * like the equivalent provision in Victoria, but unlike those in New South Wales and Queensland, the court is required to award interest in favour of a successful party unless good cause is shown to the contrary;
- * suggestions are made concerning the periods in respect of which interest should be awarded;
- * a lump sum may be awarded in lieu of interest.

4.15 Initially, courts in South Australia, unlike those in New South Wales, Queensland and Victoria, declined to dissect awards of damages in personal injury and fatal accident cases into pre-trial and post-trial components for the purpose of awarding interest. Rather, in both types of cases they awarded interest in respect of pre-trial and post-trial loss. However, in

*Thompson v Faraonio*²⁶ the Privy Council disapproved of this approach and advised that henceforth interest should be awarded only in respect of losses occurring before trial. The position in South Australia on this matter is therefore now aligned with that in New South Wales, Queensland and Victoria.²⁷

4.16 However, the position in South Australia concerning the regard to be paid to workers' compensation payments differs from that in New South Wales.²⁸ In New South Wales, interest is not awarded on the total sum recovered as damages but only on the amount by which that sum exceeds any workers' compensation payments previously received by the plaintiff.²⁹ In South Australia, however, only if the defendant, as the plaintiff's employer, has made workers' compensation payments to the plaintiff is interest not awarded on the total amount of damages recovered by the plaintiff. If, on the other hand, the defendant is a third party, no allowance is made for workers' compensation received from the plaintiff's employer on the basis that as the payment of such compensation is a transaction which does not involve the defendant it ought not to be taken into account.³⁰

5. ENGLAND AND WALES

4.17 As a result of general dissatisfaction with sections 28 and 29 of the *Civil Procedure Act 1833*,³¹ and on the recommendations for reform of the Law Revision Committee,³² section 3(1) of the *Law Reform (Miscellaneous Provisions) Act 1934*, was passed. This provision gives the courts in England and Wales a general power to award interest upon debts and damages in the following terms:

"3. (1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of

²⁶ (1979) 24 ALR 1.

²⁷ See generally, *Vincent v Faehrmann* (1979) 21 SASR 503 esp 508 and *Paull v Gloede* (1979) 21 SASR 526.

²⁸ The problem does not arise in Victoria because pursuant to s 79(3)(b) of the *Workers' Compensation Act 1958*, a Court is required to reduce the amount of a judgment in favour of a worker against a third party, for whom the employer is not responsible, by the amount of any workers' compensation payments made by the employer pursuant to the Act.

²⁹ *Bennett v Jones* [1977] 2 NSWLR 355, see also *Murphy v Murphy* [1963] VR 610.

³⁰ *Burke and Burke v Batchelor* (1980) 24 SASR 33. *Grant v Wittman and the State of South Australia* (1980) 25 SASR 544. This is an application of the *res inter alios atca* rule which says that a transaction between two persons should not affect the obligations of persons who are not party to it.

³¹ Reproduced in the *Supreme Court Act 1935-1979* (WA) ss 32 and 33 - see paras 2.12 to 2.23 above.

³² *Second Interim Report*, (1934) Cmd 4546.

the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section -

- (a) shall authorise the giving of interest upon interest; or
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange. "

4.18 Thus the courts in England and Wales possess the same discretions as do the courts in New South Wales.³³

4.19 Although this provision allows pre-judgment interest to be awarded on any claim for debt or damages, without any restriction related to the nature of the cause of action in respect of which the claim is made, and although the Law Revision Committee recommended that for the purpose of awarding interest, no distinction should be drawn between personal injury cases and cases involving liquidated demands:³⁴

" [I]t is a curiosity of legal history that from 1934 to 1969 there appears to have been only one contested personal injury case in England (apart from claims dealt with under the Admiralty jurisdiction) in which interest on damages in respect of the period between the date of the injury and the date of the award was included in the amount of the award."

4.20 To remedy this situation and ensure that pre-judgment interest was awarded in personal injury cases, the 1934 Act was amended in 1969 by the addition of the following provision.³⁵

"3(1A) Where in any such proceedings as are mentioned in subsection (1) of this section, judgment is given for a sum which (apart from interest on damages) exceeds two hundred pounds and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

³³ See para 4.2 above.

³⁴ The Law Commission for England and Wales, working paper No 41 on *Assessment of Damages in Personal Injury Litigation* 133-134 (1971).

³⁵ This amendment was effected by the *Administration of Justice Act 1969*, s 22.

(1B) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section."

As a result, the present position in England and Wales is that in cases involving personal injury and wrongful death, a court must award pre-judgment interest unless satisfied that there are special reasons why such an award should not be made.

4.21 This amendment was apparently passed in response to a recommendation contained in the report of the Committee on Personal Injuries Litigation³⁶ (the Winn Report) that "...all awards of general damages for personal injuries should carry interest on the amount awarded from the date of injury and on six-monthly totals of special damage." One of the reasons the Committee gave for this recommendation was that, if implemented, it would speed up litigation and thus make it easier for the courts to arrive at a just result. A similar explanation for giving courts the power to award pre-judgment interest in personal injury cases was advanced by Barwick CJ in *Ruby v Marsh*.³⁷

4.22 Pre-judgment interest is awarded in personal injury cases at commercial rates. Thus, for example, in *Daly v General Steam Navigation Co Ltd*³⁸ interest was awarded on the sum allowed for pain, suffering and loss of amenity at the short-term investment rate.

³⁶ Cmnd 3691.

³⁷ (1975) 132 CLR 642, 652-653.

³⁸ [1981] 1 WLR 120.

CHAPTER 5 RECOMMENDATIONS

1. THE PRINCIPAL RECOMMENDATION

5.1 The Commission recommends that sections 32 and 33 of the *Supreme Court Act 1935-1979* be repealed and replaced by a new section enacted in similar terms to section 94 of the New South Wales *Supreme Court Act 1970*. This would give the courts in Western Australia a general power to award pre-judgment interest, where they think fit, in cases in which a debt is recovered or damages are awarded.

5.2 The Commission believes that section 94 of the New South Wales *Supreme Court Act* provides the best model for new legislation in Western Australia because as well as remedying the main defects in the existing law in Western Australia relating to pre-judgment interest, the section gives the courts a very wide discretion when considering whether, and the period in respect of which, such interest should be awarded and the appropriate award to be made in the circumstances of the particular case.¹ A wide discretion is desirable because of the many variables that are regarded as relevant to awards of pre-judgment interest. These include -

- * the rate of interest appropriate to the relevant periods, having regard to the time at which damages are assessed² and other matters;
- * whether the defendant has been prejudiced because the plaintiff has been dilatory in bringing the claim;³
- * the component of the damages awarded that relate to economic and non-economic loss, and to past and future loss;
- * whether the plaintiff has received, from other resources, compensation for loss suffered;⁴

¹ The Commission is satisfied that the conditions leading to the enactment in 1969 of s 3(1A) and (1B) of the *Law Reform (Miscellaneous Provisions) Act 1934* (UK) (discussed in paras 4.19 and 4.20 above) do not now apply in Western Australia and that equivalent provisions are therefore not necessary here.

² See footnote 2 on page 23 above.

³ In *Bennett v Jones* [1977] 2 NSWLR 355, 376, the view was expressed that delay on the part of the plaintiff would not ordinarily affect the awarding of interest because the defendant will have had the use of the money ultimately awarded to the plaintiff during the period of delay. In addition, it was noted that procedures are available to the defendant to force the expedition of proceedings. Similar views were expressed in *Honey v Keyhoe* (1973) 6 SASR 466, 470 and *Mayer v Pioneer Concrete Services Ltd and Wright* (1974) 8 SASR 392, 393, cf *Bates v Nelson* (1973) 6 SASR 149, 157 and *Clarke v Damiani* (No 2) (1974) 8 SASR 463, 465.

- * whether the claimant has paid expenses incurred, and if so, at what time;
- * whether there was a legitimate reason why the sum claimed was not paid earlier;⁵
- * whether the parties have agreed that pre-judgment interest should not be recoverable.⁶

5.3 Adopting this section as a model also has the added advantage that there is already in existence a body of case law discussing its operation to which reference can be made by courts in Western Australia called upon to apply the new provision.

2. OTHER RECOMMENDATIONS

(a) Interest should be recoverable where judgment is obtained in default

5.4 It is arguable⁷ that section 94 of the New South Wales *Supreme Court Act* does not allow interest to be recovered where the defendant fails to enter an appearance, or to serve a defence, and the plaintiff obtains judgment in default thereof. In the Commission's opinion interest should be recoverable in such cases because otherwise the plaintiffs involved will not be compensated for the detriment they have suffered as a result of having been out of their money prior to judgment, even though the defendants have had the benefit of that money. To this extent, these plaintiffs would be seriously disadvantaged in comparison to those who

⁴ The difference in attitude of the courts in New South Wales and South Australia to the effect of workers' compensation payments is outlined in para 4.16 above. The Commission believes that the attitude adopted by the courts in New South Wales is preferable to that adopted by those in South Australia as it is more in keeping with the justification for awarding interest, namely, to compensate the plaintiff for the detriment suffered through not having had his money. If, as a result of having received workers' compensation from his employer, the plaintiff has not been kept out of money, interest should not be awarded to him in respect thereof merely because the defendant has had the benefit of not paying it earlier.

⁵ The Commission notes that in *Melbourne and Metropolitan Board of Works v Bevelon Investments Pty Ltd* [1977] VR 473, it was held that a bona fide belief on the part of the defendant that it was not, as a matter of law, liable to pay the plaintiff the debt the latter eventually recovered, was not a reason for refusing to award interest on the debt. It was pointed out that the defendant's belief did not alter the fact that the plaintiff had been kept out of money lawfully due to it, and that the defendant had had the benefit of that money in the meantime.

⁶ It would appear that the court's jurisdiction to make a discretionary award of pre-judgment interest cannot be excluded by agreement between the parties. However, if the parties agree that pre-judgment interest is not to be recoverable this would be a factor for the court to take into account when exercising its discretion in this respect.

⁷ See generally the discussion of s 3(1) of the *Law Reform (Miscellaneous) Provisions Act 1934*, the equivalent in England and Wales of s 94 of the New South Wales *Supreme Court Act*, in *The Supreme Court Practice 1979* (The "White Book") 6/2/7A. The Commission notes that the argument referred to in the text may be stronger in relation to s 3(1) than it is in relation to s 94 because the former, unlike the latter, speaks of "proceedings tried in court" and these words more clearly envisage a judicial, as distinct from an administrative act.

obtain judgment after some form of hearing. As there is no reason in principle why there should be a difference between these cases the Commission recommends that the new statutory provision recommended above allow interest to be recoverable where judgment is obtained in default. A new administrative procedure could then be developed by amendment to the rules of the Local and Supreme Courts⁸ which would allow a plaintiff entitled to obtain a judgment in default to apply to the court for leave to enter judgment for an amount of interest on the claim. This procedure should be simple and inexpensive. It could, for example, take the form of a motion for leave supported by an affidavit, setting out information relevant to the claim for interest. The motion could be accompanied by a draft of the form of judgment. The procedure would be *ex parte* and no appearance should be necessary on behalf of the plaintiff unless the Court so directed. The present right of a defendant to apply to set aside a judgment obtained in default should apply equally to that part of the judgment which comprises an award of interest. The endorsement on initiating process which warns the defendant of the consequences of default should be amended accordingly.⁹

(b) The plaintiff's claim should state that an award or interest will be sought

5.5 In *Pheaney v Doolan*¹⁰ Moffitt P expressed the view that -

“...justice requires that the defendant fairly be made aware that interest is being claimed and of the nature of the claim, so that the defendant has a proper opportunity to adduce evidence, if he thinks fit, in relation thereto, and make submissions thereon.”

5.6 The Commission agrees with this view and therefore recommends that if its principal recommendation is accepted, the rules of the Local and Supreme Courts be amended so as to require plaintiffs to specifically endorse the summons or writ taken out against the defendant with a statement that an award of interest will be sought. The Commission notes that in 1979

⁸ The *Rules of the Supreme Court* are applied in the District Court: See the *District Court of Western Australia Act 1969-1978*, s 57.

⁹ In its submission to the Commission the Law Society argued that there should be an *automatic* right to recover pre-judgment interest where a plaintiff obtains a judgment in default. However, for the reasons expressed in para 5.2 above, the Commission remains of the view that whether pre-judgment interest is recoverable, and the amount thereof, should be left to the discretion of the Court. Whether a statutory scheme should be introduced in Western Australia which would allow interest to be recovered on debts irrespective of whether the debt was paid as a result of legal proceedings being taken, will be considered by the Commission when it deals with the other parts of its reference. The Law Commission for England and Wales has recommended that such a scheme be introduced in England and Wales: See *Report on Interest* (1978) Cmnd 7229.

¹⁰ [1977] 1 NSWLR 601.

the New South Wales *Supreme Court Rules 1970* were amended in this manner and a new rule¹¹ inserted in the following terms -

“An order for interest under section 94 of the Act (which section relates to interest up to judgment) shall be specifically claimed without claiming any amount.”

5.7 Although if this recommendation was accepted an obligation would be imposed upon a plaintiff to state in the summons or writ that interest was claimed, failure to do so would not automatically disqualify him from recovering interest. This is because the existing rules of court¹² permit amendments to be made to a summons or writ, with or without the leave of the court, so that a plaintiff would be able to correct an omission to state that pre-judgment interest was sought.

(c) Interest should be included in the calculation when costs are being considered

5.8 As outlined above,¹³ in Victoria when determining whether the plaintiff has recovered more than the sum paid into court by the defendant, interest is included in the calculation. Generally speaking, however, this appears not to be the position in England.¹⁴ In the absence of an express provision the position in Western Australia in relation to this matter would be unclear. The Commission, therefore, recommends that the matter be clarified by an appropriate amendment to the rules of court. As it agrees with a recent commentator¹⁵ that, of the two positions, the position in Victoria is more consistent with the principles governing the awarding of costs on payment into court, the Commission recommends that this amendment be modelled on rule 6A of Order 22 of the Victorian *Supreme Court Rules*.

(d) Courts to which the recommendations in this report apply

5.9 The Commission recommends that the reforms proposed above apply only to the Supreme Court, District Court and Local Courts. It considers that special considerations apply to proceedings taken under the Commonwealth *Family Law Act 1975-1979*, the *Family Court*

¹¹ Part 7(1)(5), inserted by Amendment 101, *Gazette* 184.

¹² See generally, *Local Courts Act 1904-1976* s 89; *Local Court Rules 1961*, Order 16; *Rules of the Supreme Court 1971*, Orders 2 and 21.

¹³ Para 4.11 above.

¹⁴ See para 4.6 above.

¹⁵ E M Heenan, *Claims For Interest: Demands For Interest Before Actions* (1981), Law Summer School paper No 25.

Act 1975-1979, and the *Workers' Compensation Act 1912-1979* which require separate attention outside the scope of this report. In respect of commercial arbitration, the Commission notes that the payment of pre-judgment interest on awards made by arbitrators is currently under consideration by the Standing Committee of Commonwealth and State Attorneys General as part of a general review of the *Arbitration Act 1895-1979* and its equivalent in other Australian jurisdictions.

5.10 In Local Courts, interest on a judgment debt is presently recoverable only if the judgment exceeds the sum of \$750.¹⁶ For the sake of consistency, the Commission therefore recommends that pre-judgment interest only be recoverable in Local Courts in cases in which the sum for which judgment is entered exceeds that sum. Otherwise, a plaintiff could successfully claim interest up to the moment of judgment but would not be entitled to interest during any period for which the judgment remained unsatisfied. If the figure of \$750 for interest on judgment debts is varied in the future, the sum below which pre-judgment interest is to be irrecoverable should be varied accordingly. Further the Commission notes that interest is not recoverable in proceedings brought before the Small Claims Tribunal and that special circumstances may apply to small consumer claims and to the recovery of debts involving relatively small amounts of money. It will consider again the recovery of pre-judgment interest, and interest on judgment debts, when carrying out its review of the *Local Courts Act* and *Rules*. The Law Society, in its submission, suggested that pre-judgment interest should be recoverable irrespective of the size of the judgment. The Commission will consider this submission again at that time.

David K Malcolm , QC
Chairman

Eric Freeman
Member

H H Jackson
Member

Charles Ogilvie
Member

L L Proksch
Member

4 August 1981

¹⁶ *Supreme Court Act 1935-1979*, s 142(2).