

Pre-Judgment Interest

Terms of Reference

In 1977 the Commission was asked to consider whether the law and practice relating to interest on judgments was adequate or whether it was in need of reform.

Background of Reference

In May 1981 the Attorney-General asked the Commission to furnish a priority report on pre-judgment interest. For this reason the reference was divided into two parts: Part I dealing with pre-judgment interest and Part II dealing with subsidiary matters.

“Pre-judgment interest” is interest on a sum of money which a court orders a defendant in legal proceedings to pay to the plaintiff in respect of a period prior to judgment. It is awarded to compensate the plaintiff for being kept out of money which ought to have been paid at an earlier date. At the time of the reference pre-judgment interest could only be recovered in a limited number of cases¹ and often the complexity and technicality of the rules involved would prevent such recovery. It was recognised that this could lead to great injustice where a person was kept out of their money for a long period of time. In such cases, the person retaining the money had the benefit of being able to use it between the date payment was due and the date of recovery. Further, the real value of the amount eventually recovered would reduce as a consequence of inflation. Because the power of the courts to award interest was limited, there were cases in which debtors would withhold payment and force their creditors to litigate to recover the debt, simply because it was considered to be good business to do so.²

Nature and Extent of Consultation

Due to the urgency of reform and because the issues involved had been thoroughly examined in other comparable jurisdictions,³ the Commission decided not to issue a working paper. However, a draft report was completed in June 1981 and sent to various law reform agencies and experts for comment. The Commission delivered its final report to the Attorney-General in August 1981.⁴

Recommendations

In order to overcome the problems perceived in the existing law the Commission recommended that:

- Sections 32 and 33 of the *Supreme Court Act 1935* (WA) should be amended so that the court has discretion to award pre-judgment interest if they were persuaded that the circumstances of the case warranted it.⁵
- The court's discretion should extend to the character of the award, for example the rate of interest and the period over which interest is calculated.
- Interest should be recoverable where judgment is obtained in default.
- A plaintiff's claim should state that an award of interest will be sought.
- Interest should be included in the calculation when costs are being considered.

¹ For instance, under the *Supreme Court Act 1935* (WA) ss 32 and 33.

² Law Reform Commission of Western Australia, *Annual Report 1980–1981*, 40.

³ New South Wales made extensive reform in this area in 1970 and, amongst other things, gave the Supreme Court a general discretion to award interest on any award for the recovery of any money (including debt or damages or the recovery of goods). In Victoria there has been a general discretion to award interest on debts or damages since 1962. In 1972 Queensland enacted legislative change which mirrored the New South Wales legislation in all material aspects. The United Kingdom enacted a general discretion to award damages in 1934.

⁴ Law Reform Commission of Western Australia, *Pre-Judgment Interest*, Project No 70(I) (1981).

⁵ The Commission recommended that the provision be enacted in terms similar to the *Supreme Court Act 1970* (NSW) s 94.

◀ Pre-Judgment Interest

- The recommendations in the report should apply only to the Supreme Court, District Court and Local Courts.⁶

Legislative or Other Action Undertaken

Excepting the recommendation concerning judgments obtained in default, all of the Commission's recommendations were implemented by the *Supreme Court Amendment Act 1982* (WA). The Hansard report indicated that the Parliament believed that pre-judgment interest would be recoverable for judgments obtained in default however this was not expressly provided for in the Act.⁷ In its Annual Report for the year 1981–1982, the Commission reported that implementation of this outstanding recommendation would now appear unnecessary as recent case law suggested that pre-judgment interest was already recoverable in cases of default judgments under statutory provisions similar to those suggested by the Commission.⁸

⁶ In Local Courts this was to be restricted to awards over \$750.

⁷ Western Australia, *Parliamentary Debates*, Legislative Council, 17 August 1982, 2367 (Mr Rushton, Deputy Premier).

⁸ *Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd* [1981] 3 All ER 658. See Law Reform Commission of Western Australia, *Annual Report 1981–1982*, 7.