



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 36 Part II**

**Limitation and Notice of Actions**

**DISCUSSION PAPER**

**JANUARY 1985**

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

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This Discussion Paper was prepared with the special assistance of Mr N J Mullany LLB (Hons) (WA) BCL (Oxon), Barrister and Solicitor of the Supreme Court of Western Australia. The Commission is much indebted to him for his valuable work on the Discussion Paper.

## PREFACE

The Commission has been asked to review the law relating to limitation and notice of actions.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by **30 June 1992**.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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The Limitation Acts of Western Australia and other jurisdictions have not been reproduced. Particular sections are quoted or summarised in the text. The full text of the limitation Acts of all Australian jurisdictions can be conveniently found in the CCH publications *Australian Statutes of Limitation* (1986) and *Australian Torts Reporter*.

# CONTENTS

Paragraph

## ABBREVIATIONS

## CHAPTER 1 - GENERAL

- |    |                                       |     |
|----|---------------------------------------|-----|
| 1. | Introduction                          | 1.1 |
| 2. | Reasons for having limitation periods | 1.6 |
| 3. | Civil and criminal law compared       | 1.7 |

## PART I: THE LIMITATION ACT

## CHAPTER 2 - THE LIMITATION ACTS IN WESTERN AUSTRALIA AND ELSEWHERE

- |    |   |      |
|----|---|------|
| 1. | The law in England                            |      |
|    | (a) The old law                               | 2.1  |
|    | (b) The modern law                            | 2.4  |
| 2. | The law in Western Australia                  | 2.8  |
| 3. | The law elsewhere                             |      |
|    | (a) Australia                                 | 2.14 |
|    | (i) Victoria                                  | 2.15 |
|    | (ii) Queensland                               | 2.18 |
|    | (iii) Tasmania                                | 2.20 |
|    | (iv) New South Wales                          | 2.22 |
|    | (v) Northern Territory                        | 2.26 |
|    | (vi) Australian Capital Territory             | 2.27 |
|    | (vii) South Australia                         | 2.29 |
|    | (b) New Zealand                               | 2.31 |
|    | (c) Canada                                    | 2.33 |
|    | (d) Other jurisdictions                       | 2.38 |
| 4. | Defects of the present Western Australian law | 2.40 |
|    | (a) Archaic language                          | 2.41 |
|    | (b) Use of out-of-date concepts               | 2.43 |
|    | (c) Conclusion                                | 2.51 |
| 5. | The direction of reform                       | 2.54 |

### **CHAPTER 3 - LIMITATION PERIODS: COMMON LAW**

1.	General limitation period for common law actions	3.1
2.	Actions for personal injury	3.9
3.	Other provisions relating to tort	3.11
	(a) Successive conversions	3.12
	(b) Contribution between tortfeasors	3.13
4.	Actions for an account	3.14
5.	Actions on a deed	3.16
6.	Actions on a judgment	3.18
7.	Actions on an arbitral award	3.21
8.	Actions to recover a penalty or forfeiture	3.22
9.	Admiralty actions	3.24
10.	Arbitrations	3.27

### **CHAPTER 4 - LIMITATION PERIODS: PROPERTY AND EQUITY**

1.	Actions relating to land generally	4.1
2.	Freehold land	
	(a) Introduction	4.5
	(b) Present interests	4.7
	(i) Discontinuance or dispossession	4.8
	(ii) Person entitled to possession never obtained it	4.13
	(c) Future interests	4.14
	(d) Co-ownership	4.19
3.	Leasehold land	4.20
	(a) Actions by the landlord against the tenant	
	(i) Leases for a fixed term	4.21
	(ii) Tenancies at will	4.25
	(iii) Periodic tenancies	4.27
	(iv) Adverse possession	4.29
	(b) Actions by the tenant or the landlord against third parties	4.30
4.	Trusts relating to land	
	(a) The present law in Western Australia	4.34
	(b) Reform of the law in other jurisdictions	4.38
	(c) Conclusion	4.42
5.	Equitable claims	4.43
6.	Mortgages	

(a)	The present law in Western Australia	4.50
(b)	Reform of the law in England	4.52
(c)	Reform of the law in New South Wales	4.58
7.	Trusts	
(a)	The original position	4.61
(b)	The <i>Trustee Act</i> reforms	4.63
(c)	The present position in Western Australia	4.67
(d)	Reform in other jurisdictions	4.69
8.	Deceased estates	
(a)	The present law in Western Australia	4.72
(b)	Reform of the law in other jurisdictions	4.73

## **CHAPTER 5 - EXTENSION OR POSTPONEMENT OF THE LIMITATION PERIOD**

1.	Disabilities	
(a)	The present law in Western Australia	5.1
(b)	Reform of the law elsewhere	5.6
(c)	Who is a person under disability	5.9
(d)	The effect of disability	5.11
2.	Acknowledgment and part payment	
(a)	The present law in Western Australia	5.15
(i)	Actions to recover land	5.18
(ii)	Actions to redeem a mortgage	5.20
(iii)	Actions to recover money	5.21
(iv)	Inconsistencies	5.28
(b)	Reform of the law in England	5.29
(c)	Reform of the law in New South Wales	5.32
3.	Fraud	5.35
4.	Mistake	5.42

## **CHAPTER 6 - EFFECT OF RUNNING OF THE LIMITATION PERIOD** 6.1

## **CHAPTER 7 - LATENT DAMAGE**

1.	Introduction	7.1
2.	Latent personal injury	7.3
3.	Latent property damage and economic loss: the present law	
(a)	Introduction	7.10
(b)	The decision in <i>Pirelli</i>	7.12

(c)	Problems in the application of <i>Pirelli</i> : building and construction cases	
(i)	When actionable damage occurs	7.15
(ii)	Liability for discovered latent defects	7.18
(iii)	Classification of the loss	7.19
(iv)	The "doomed from the start" exception	7.22
(v)	Successive purchasers	7.25
(vi)	Successive damage	7.28
(d)	Professional advisers	7.29
4.	Latent property damage and economic loss: alternatives for reform	7.34
(a)	England	7.37
(i)	Preservation of the accrual rule in <i>Pirelli</i>	7.40
(ii)	The knowledge provisions	7.41
(iii)	The relationship between the two limitation periods	7.43
(iv)	The long stop provision	7.44
(v)	Successive purchasers	7.47
(vi)	The ambit of the Act	7.51
(vii)	Conclusion	7.52
(b)	British Columbia and similar schemes	7.54
(i)	British Columbia	7.55
(ii)	Similar schemes	7.60
(c)	South Australia and similar schemes	
(i)	South Australia	7.65
(ii)	Similar schemes	7.70
(d)	Australian Capital Territory	7.72
(e)	Conclusion	7.77

## **CHAPTER 8 - A POSSIBLE ALTERNATIVE: THE ALBERTA PROPOSALS**

1.	Introduction	8.1
2.	The alternative strategies	8.4
3.	Options for reform	8.6
4.	Recommendations	
(a)	The basic rules	8.10
(i)	The discovery period	8.11
(ii)	The ultimate period	8.14
(b)	The application of the rules	8.15
(c)	Special rules	8.17

5.	Discussion	
	(a) The operation of the basic limitation periods	8.19
	(b) The question of discretion	8.21
6.	Conclusion	8.22

## **PART II: OTHER LIMITATION LEGISLATION**

<b>CHAPTER 9 - INTRODUCTION</b>	9.1
---------------------------------	-----

### **CHAPTER 10 - ACTIONS INVOLVING DEATH**

1.	Introduction	10.1
2.	<i>Fatal Accidents Act 1959</i>	10.3
3.	<i>Law Reform (Miscellaneous Provisions) Act 1941</i>	10.7

### **CHAPTER 11 - ACTIONS INVOLVING THE CROWN, PUBLIC AND LOCAL GOVERNMENT AUTHORITIES**

1.	Introduction	11.1
2.	Actions against the Crown	11.5
3.	Actions by the Crown	11.8
4.	Actions against public authorities	11.10
5.	Actions against local government authorities	11.19

## **PART III: QUESTIONS AT ISSUE**

### **CHAPTER 12 - QUESTIONS AT ISSUE**

#### **APPENDICES**

I DERIVATION OF SECTIONS OF WESTERN AUSTRALIAN LIMITATION ACT

II THE ALBERTA MODEL LIMITATIONS ACT

## ABBREVIATIONS

Wright Committee Report	(UK) Law Revision Committee <i>Fifth Interim Report (Statutes of Limitation)</i> 1936 Cmd 5334
Report on Part I	Law Reform Commission of Western Australia <i>Report on Limitation and Notice of Actions: Latent Injury and Disease</i> (Project No 36 Part I 1982)
NSWLRC Report	New South Wales Law Reform Commission <i>First Report on the Limitation of Actions</i> (1967)
Orr Committee Report	(UK) Law Reform Committee <i>Twenty-First Report (Final Report on Limitations of Actions)</i> 1977 Cmnd 6923



# Chapter 1

## GENERAL

*"Limitation of Actions - a subject I used to think dull, but never will again."*<sup>1</sup>

### 1. INTRODUCTION

1.1 The Commission has been asked to review the law of limitation and notice of actions.

1.2 The *Limitation Act 1935* is the major source of the law on this topic. The Act has a number of specific defects, but the heart of the problem is that the Act as a whole is out of date. It is a literal transcription of English Acts passed between 1623 and 1874, archaic in language and making reference to many concepts and categories that are now obsolete. In England, comprehensive reforms were recommended by the Law Revision Committee, under the chairmanship of Lord Wright, in 1936,<sup>2</sup> and enacted in the *Limitation Act 1939*.<sup>3</sup> Every other Australian jurisdiction except South Australia has adopted a modern Limitation Act based, directly or indirectly, on these recommendations, as have many other common law jurisdictions.

1.3 In general, the modern Limitation Acts enacted in other jurisdictions have worked satisfactorily. However these other jurisdictions have still had to contend with the special problems of limitation that have become prominent in recent years - latent personal injury, latent property damage and latent economic loss. Virtually all the amendments to the modern Limitation Acts in England and Australia referred to above have been passed to make provision for latent personal injury, and several law reform commissions have reported on this issue.<sup>4</sup> This Commission, at the request of the then Attorney General, gave priority to the

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<sup>1</sup> Francis Pettigrew MA LLB, sometime Fellow of All Souls College, Oxford, of the Outer Temple, Barrister-at-Law, in C Hare *Tragedy at Law* (1942). The plot of this novel hinges on s 1(3) of the *Law Reform (Miscellaneous Provisions) Act 1943* (Eng), as to which see para 10.7 below.

<sup>2</sup> Wright Committee Report.

<sup>3</sup> English legislation on limitation of actions does not apply in Scotland. It is therefore referred to as English rather than United Kingdom legislation.

<sup>4</sup> See *Report of the Committee on Limitation of Actions* 1949 Cmd 7740 (the Tucker Committee); *Report of the Committee on Limitation of Actions in Cases of Personal Injury* 1962 Cmnd 1829 (the Edmund Davies Committee); Law Reform Committee *Twentieth Report (Interim Report on Limitation of Actions in Personal Injury Claims)* 1974 Cmnd 5630; Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions for Personal Injuries* (1972); South Australian Law Reform Committee *Report on*

issue of latent injury and disease, and submitted a report in 1982.<sup>5</sup> The legislation which resulted from this report<sup>6</sup> was, however, confined to asbestos-related diseases and did not implement the wider reforms recommended by the Commission. Some jurisdictions have also tackled other aspects of the latent damage problem, such as latent property damage, as highlighted by the *Pirelli*<sup>7</sup> case. Legislation already exists in England and some Australian jurisdictions. Chapter 7 of this paper therefore gives special consideration to the problem of latent damage.

1.4 Limitation provisions can be found in many Western Australian statutes apart from the *Limitation Act*.<sup>8</sup> This paper makes no attempt to deal comprehensively with these provisions.<sup>9</sup> Apart from the *Limitation Act*, it deals only with statutory provisions of two particular types - the special limitation provisions in actions involving death to be found in the *Fatal Accidents Act 1959* and the *Law Reform (Miscellaneous Provisions) Act 1941*, and the limitation and notice provisions applicable to actions involving the Crown and actions against public authorities and local authorities under the provisions of, respectively, the *Crown Suits Act 1947* section 6, the *Limitation Act 1935* section 47A and the *Local Government Act 1960* section 660.

1.5 The Commission gratefully acknowledges the assistance given to it on this reference by Nicholas Mullany, who prepared a Research Paper on which much of the material in Chapters 7 and 8 is based. The Commission also extends its thanks to the Law Society of Western Australia, the Hon Justice P L Seaman of the Supreme Court of Western Australia and Mr J F Young of the Western Australian Crown Law Department for their comments on a draft version of this paper, which were of great assistance to the Commission.

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*Limitation of Time for Bringing Actions* (1970); New South Wales Law Reform Commission *Limitation of Actions for Personal Injury Claims* (LRC 50 1986).

<sup>5</sup> *Report on Limitation and Notice of Actions: Latent Injury and Disease* (Project No 36 Part I), hereafter referred to as Report on Part I.

<sup>6</sup> *Acts Amendment (Asbestos Related Diseases) Act 1983*.

<sup>7</sup> *Pirelli General Cable Works v Oscar Faber & Partners* [1983] 2 AC 1.

<sup>8</sup> See the list of limitation provisions contained in *Causes of Action and Time Limitations* (1985), a Seminar presented by the Law Society of Western Australia. This list is an updated version of one originally prepared by the Commission.

<sup>9</sup> There are also many limitation provisions in Commonwealth statutes, which likewise are not dealt with in this paper.

## 2. REASONS FOR HAVING LIMITATION PERIODS

1.6 All common law jurisdictions have rules prescribing the period within which civil actions must be commenced. As the Commission stated in its Report on Part I,<sup>10</sup> the reasons for having limitation periods are -

- (1) to 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;
- (2) 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;
- (3) 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";
- (4) to enable persons to arrange their affairs on the basis that a claim can no longer be made against them after a certain time.

## 3. CIVIL AND CRIMINAL LAW COMPARED

1.7 In contrast to the civil law, there are generally no limitation periods applying to the prosecution of serious criminal offences. Prosecutions for crimes such as murder and sexual assault can be commenced many years after the offence was committed.<sup>11</sup> The position is different for simple offences. The *Justices Act 1902*<sup>12</sup> provides that unless some other time for making a complaint is prescribed by the law relating to the particular case, complaints must be made within six months from the time when the matter of complaint arose.

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<sup>10</sup> Para 1.10.

<sup>11</sup> There are a few exceptional cases, however. Under s 189 of the *Criminal Code*, prosecutions for indecent dealing must be commenced within three months after the offence was committed.

<sup>12</sup> S 51.

# PART I: THE LIMITATION ACT

## Chapter 2

### THE LIMITATION ACTS IN WESTERN AUSTRALIA AND ELSEWHERE

#### 1. THE LAW IN ENGLAND

##### (a) The old law

2.1 The idea of making an action subject to a limitation period within which it must be enforced is very ancient. Originally, however, the periods were not set periods, as they are in the present law, but were fixed by reference to a particular date, the date being changed every few years. Thus, for the writ of right to recover freehold land, the oldest form of action recognised by the common law, the plaintiff originally had to show a disseisin by the defendant after 1135, but in 1237 the date was changed to 1154 and in 1275 it was changed again to 1189. No further change was made, and so by 1540 what was originally a comparatively short period had lengthened to over three hundred years.<sup>1</sup> The same happened in the case of other early actions.<sup>2</sup>

2.2 A new era began with the passing of the *Limitation Act 1540*, which laid down fixed time periods in actions to recover property. This set the pattern for later legislation. By 1934, when the question of limitation of actions was referred to the Wright Committee, there were a number of statutes which dealt with the law of limitation of actions in various contexts. The most important of these were:

The *Limitation Act 1623* (21 James I c 16),<sup>3</sup> which set out the limitation periods which applied in common law actions such as contract and tort. This had been amended by the *Administration of Justice Act 1705* (4 & 5 Anne c 3), the *Statute of Frauds*

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<sup>1</sup> F Pollock & F W Maitland *The History of English Law* (2nd ed 1968) vol 2, 81.

<sup>2</sup> Eg novel disseisin (date fixed at 1216), mort d'ancestor (date fixed at 1242): id 51.

<sup>3</sup> 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.

*Amendment Act 1828* (9 Geo 4 c 14) and the *Mercantile Law Amendment Act 1856* (19 & 20 Vic c 97).

The *Crown Suits Act 1769* (9 Geo 3 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 4 c 42), which prescribed limitation periods for certain actions of debt and for statutory penalties.

The *Real Property Limitation Acts 1833* (3 & 4 Will 4 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.

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.

2.3 As was inevitable as the result of having several different statutes passed over a period of over 250 years, the law of limitation of actions in 1934 was in an unsatisfactory state - often couched in archaic language, difficult to understand, and clouded by a diversity of statutory provisions. Even in the 19th century, Sir Frederick Pollock, the editor of the *Law Quarterly Review*, had asked: "Is it not time that this piecemeal legislation with regard to the limitations of time within which action should be brought should come to an end?",<sup>4</sup> and had stated that "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

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<sup>4</sup> (1893) 9 LQR 107.

actions".<sup>5</sup> In 1923 he was still saying that "The Statutes of Limitation ought to be systematically revised as a whole".<sup>6</sup>

**(b) The modern law**

2.4 The Wright Committee, which had been appointed in 1934, submitted its report in 1936. This report conducted a thorough examination of all aspects of the law of limitation and made many proposals for reform. Three years later the *Limitation Act 1939* implemented these proposals.<sup>7</sup> This Act was more than just a reforming Act, however. All the old statutes were repealed and the law of limitation was completely redrafted in a simple modern form in a statute of 34 sections.

2.5 This statute proved to be a very satisfactory solution to the problems of limitation of actions. Preston and Newsom, in their book 'Limitation of Actions', first written when the Act was first passed, commented in the preface to the third edition, in 1953: "The Act works simply and is a success." 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 limitations of actions".<sup>8</sup>

2.6 The success of the Act can be demonstrated by the fact that very little amendment proved necessary. The amendments effected by the *Law Reform (Limitation of Actions etc) Act 1954*, the *Limitation Act 1963* and the *Limitation Act 1975*<sup>9</sup> were all confined to personal injury. The 1954 Act also removed the special periods applicable in fatal accident actions and actions against public authorities, and the *Proceedings against Estates Act 1970*<sup>10</sup> did likewise for survival actions - both having the effect of making the provisions of the 1939 Act more generally applicable.

2.7 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.<sup>11</sup> In

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<sup>5</sup> (1899) 15 LQR 225.

<sup>6</sup> F Pollock *Torts* (12th ed 1923) 211.

<sup>7</sup> In one or two instances, the Act went further than the Report: see J Unger (1940) 4 MLR 45.

<sup>8</sup> NSWLRC Report para 10.

<sup>9</sup> Accepting the recommendations of, respectively, the Tucker Committee, the Edmund Davies Committee, and the Law Reform Committee's Twentieth Report: see ch 1 note 4 above.

<sup>10</sup> Accepting the recommendations of the Law Commission report on *Proceedings against Estates* (1970).

<sup>11</sup> Orr Committee Report.

general, the changes recommended were very minor, and many of its 50 recommendations simply say that the law on a particular point should remain the same. The changes suggested by the Committee were implemented by the *Limitation Amendment Act 1980*, and the *Limitation Acts of 1939-1980* were then consolidated by the *Limitation Act 1980*. There are some drafting amendments and re-ordering of sections, but in general the 1980 Act, when compared with the 1939 Act, does not represent any fundamental change.

## 2. THE LAW IN WESTERN AUSTRALIA

2.8 The law in Western Australia contrasts sharply with the story of reform and codification in England. In Western Australia there has never been any reform - the old pre-1939 English law is still in force. The present Act, the *Limitation Act 1935*, contains all the major statutory provisions on limitation but unlike the English Act is in no sense a codifying statute, merely a consolidation of earlier enactments.

2.9 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 an *Imperial Acts Adoption Act in 1837* (6 Will 4 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 70).

2.10 In 1935 the Western Australian Parliament passed the *Limitation Act 1935*. This was seen as a supplementary measure to the *Supreme Court Act 1935* and the intention behind it was simply to consolidate all the statutory provisions in force in Western Australia.<sup>12</sup> This measure encountered some opposition in Parliament from the Hon N Keenan, MLA for Nedlands, who objected to being asked to re-enact all these old provisions instead of simply 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 . . . . For one single amendment, one of no great

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<sup>12</sup> Western Australia *Parliamentary Debates* (1935) Vol 96 2398.

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 common-sense whatever."<sup>13</sup>

2.11 The truth of these statements can be seen when the Act is analysed.<sup>14</sup> After the introductory sections, sections 3 to 35 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*.<sup>15</sup> Sections 36 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*. Section 47 is based on the provisions of the Western Australian *Trustees Act 1900*, which were taken from the English *Trustee Act 1888*. The Victorian consolidating legislation of 1928<sup>16</sup> was also used by the drafters, and in at least one instance a change of substance from the English provisions resulted,<sup>17</sup> but in general the *Limitation Act 1935* is simply a copying out of old provisions into a new statute.

2.12 The Act has been amended on several occasions since 1935. Section 47A, dealing with actions against public authorities, was added in 1954, partly based on the English *Public Authorities Protection Act 1893* (which the United Kingdom Parliament repealed in the same year), and section 37A, dealing with actions to recover taxes, was added in 1978. The latest amendments are those to be found in the *Acts Amendment (Asbestos-Related Diseases) Act 1983*.<sup>18</sup>

2.13 In summary, therefore, the old, unreformed law of limitation is still in force in Western Australia. This contrasts not only with the position in England but also with the law in most other Australian jurisdictions and also in countries such as New Zealand and Canada.

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<sup>13</sup> Id 1970-1971.

<sup>14</sup> For an analysis of the derivation of each section of the Act, see Appendix I.

<sup>15</sup> With the exception of the following sections of the 1833 Act: 13, 15, 19, 29-33, 36, 38-39, 41, 43.

<sup>16</sup> *Supreme Court Act 1928* (Vic) (No 3783) ss 80-90; *Property Law Act 1928* (Vic) (No 3754) ss 274-306.

<sup>17</sup> See *Limitation Act 1935* s 38 proviso, derived from *Supreme Court Act 1928* (Vic) s 83.

<sup>18</sup> As to which see para 1.3 above, and para 7.8 below.

### **3. THE LAW ELSEWHERE**

#### **(a) Australia**

2.14 Like Western Australia, the other Australian jurisdictions inherited the old English legislation on limitation of actions. Unlike Western Australia, in six 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*

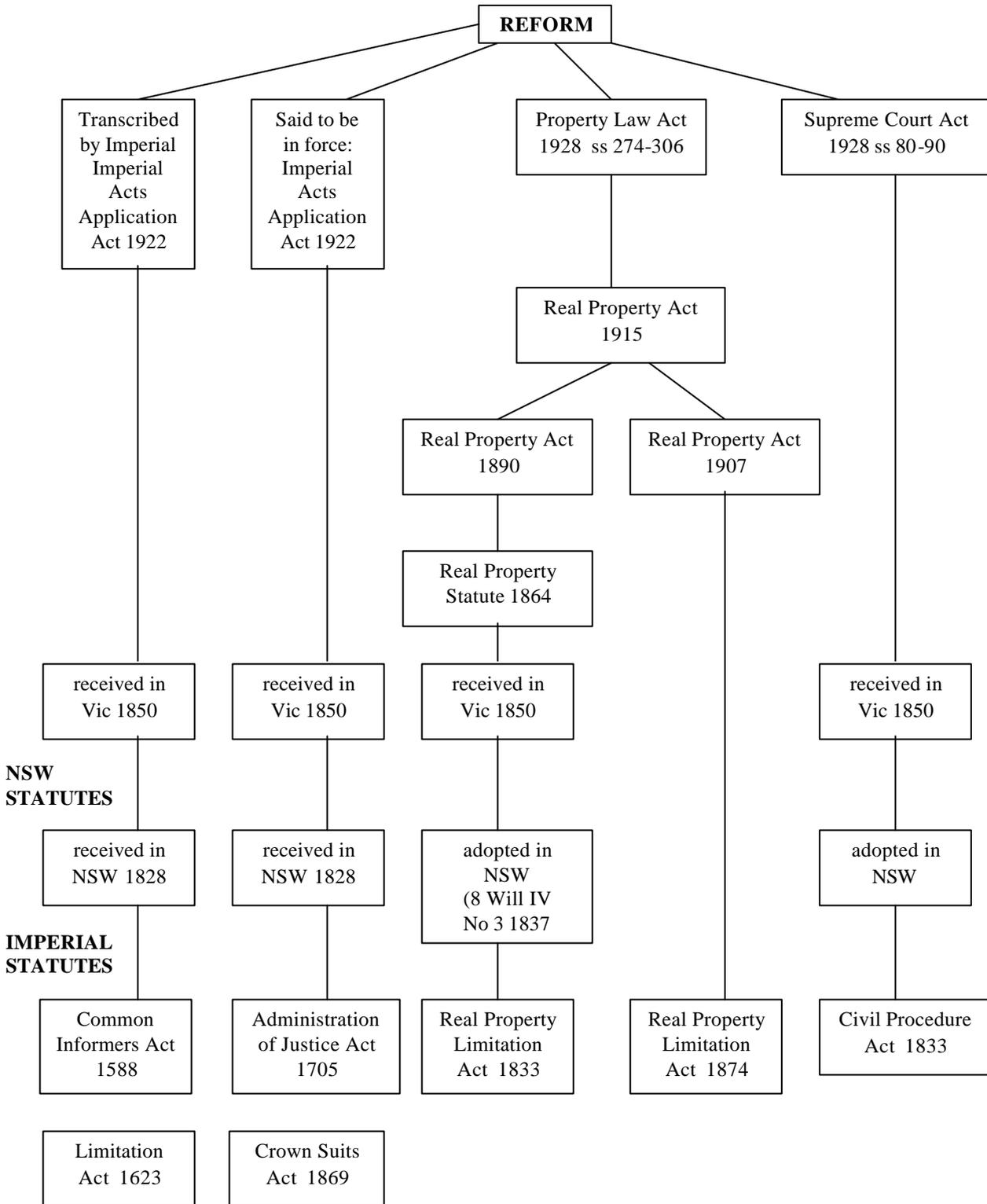
2.15 Victoria inherited the old English legislation on limitation of actions. Some of these statutes were received in 1850 when Victoria separated from New South Wales, having already been received or adopted in New South Wales. In most cases, they

## The history of limitation of actions legislation in Victoria

**VIC  
STATUTES**

**Limitation of Actions Act 1958**

**Limitation of Actions Act 1955**



were eventually transcribed into Victorian statutes: thus, for example, the *Real Property Limitation Act 1874* was copied by the Victorian *Real Property Act 1907*. The details appear in the diagram on the previous page.

2.16 In 1949 the Victorian Statute Law Revision Committee produced a report which recommended the adoption of the English 1939 reforms.<sup>19</sup> 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*, and 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.

2.17 Amendments since 1958 have also followed the English pattern. The *Limitation of Actions (Notice of Action) Act 1966* repealed the notice requirements in actions against public authorities,<sup>20</sup> and the *Limitation of Actions (Personal Injury) Act 1972* introduced the reforms of the English *Limitation Act 1963* relating to personal injuries<sup>21</sup> - the latter now superseded by the *Limitation of Actions (Personal Injury Claims) Act 1983*<sup>22</sup> which introduces a provision very similar to that recommended by this Commission in its Report on Part I.

(ii) *Queensland*

2.18 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. This legislation was quickly transcribed into Queensland statutes. The *Distress Replevin and Ejectment Act 1867* copied the provisions of the *Real Property Limitation Act 1833*, with a slight rearrangement of sections. The *Statute of Frauds and Limitations Act 1867* incorporated provisions from the *Limitation Act 1623*, the *Civil Procedure Act 1833* and the *Mercantile Law Amendment Act 1856*, together with two more provisions from the *Real Property Limitation Act 1833*.

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<sup>19</sup> Victorian Statute Law Reform Committee *Report on Limitation of Actions* (1949), and note also two further reports by this Committee, *Limitation of Actions* (1950) and *Limitation of Actions Bill 1955* (1955).

<sup>20</sup> Implementing the recommendations of the Victorian Chief Justice's Law Reform Committee *Report on the Limitation of Actions Act 1958* s 34 (1959).

<sup>21</sup> Implementing the recommendations of the Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions for Personal Injuries* (1972).

<sup>22</sup> Implementing the recommendations of the Victorian Chief Justice's Law Reform Committee *Report on Limitation of Actions in Personal Injury Claims* (1981).

2.19 The *Limitation Act 1960* adopted the English 1939 reforms - the *Law Reform (Limitation of Actions) Act 1956* having already adopted the reforms of the English *Law Reform (Limitation of Actions etc) Act 1954*.<sup>23</sup> As a result of the recommendations of the Queensland *Law Reform Commission in 1972*,<sup>24</sup> 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. This 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*

2.20 Tasmania inherited the English Act of 1623 and the other Acts passed prior to 1828. In 1836 the *Limitation of Actions Act* was passed to adopt the *Real Property Limitation Act 1833* and the *Civil Procedure Act 1833*, the provisions of which were set out in a schedule. The *Limitation of Actions Act 1875* reproduced the provisions of the *Real Property Limitation Act 1874*, 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* of 1935 incorporated in Tasmanian law the provisions of the English *Limitation Act 1623* and *Mercantile Law Amendment Act 1856*.

2.21 Following a report of the Tasmanian Law Reform Commission in 1973,<sup>25</sup> 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.

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<sup>23</sup> The fact that reform in the area of personal injury preceded the general reform made it necessary for the *Limitation (Persons under Disability) Act 1962* (Qld) to be passed to bring the law on personal injury into line in a number of incidental respects.

<sup>24</sup> Queensland Law Reform Commission *Report on a Bill to Amend and Consolidate the Law Relating to Limitation of Actions* (1972).

<sup>25</sup> Tasmanian Law Reform Commission *Report on Limitation of Actions* (1973).

*(iv) New South Wales*

2.22 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 (8 Will 4 No 3), and the *Civil Procedure Act* by the *Supreme Court Act 1841*. However, in New South Wales, unlike Victoria and Queensland, no attempt was ever made to set out these provisions in local legislation, and so the old English statutes remained in force. In the 1950's the Australian Law Journal more than once commented on the seriously unsatisfactory state of the law in New South Wales.<sup>26</sup>

2.23 The matter was eventually referred to the New South Wales Law Reform Commission, which reported in 1967.<sup>27</sup> 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 characterises 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."<sup>28</sup>

2.24 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.<sup>29</sup> Other important differences are the rather more complete coverage of causes of action related to mortgages<sup>30</sup> and the much simpler provisions on acknowledgment and part payment.<sup>31</sup> There has also been much rethinking of the arrangement of the various sections.

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<sup>26</sup> See (1952) 26 ALJ 375; (1958) 32 ALJ 169.

<sup>27</sup> NSWLRC Report.

<sup>28</sup> (1968) 41 ALJ 407.

<sup>29</sup> Ss 63-68A: see paras 6.5-6.6 below.

<sup>30</sup> Ss 40-46.

<sup>31</sup> S 54.

2.25 The Act has been amended since 1969 in a number of minor respects. The latest amendment, in 1990,<sup>32</sup> introduces new provisions dealing with personal injury cases which are very similar to those recommended by this Commission in its Report on Part I.

(v) *Northern Territory*

2.26 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. All these Acts were replaced by the *Limitation Act 1981*. The Act is modelled on the New South Wales Act, and copies 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, are both omitted.<sup>33</sup>

(vi) *Australian Capital Territory*

2.27 Until 1985, the position 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 was the English *Limitation Act 1623*, the New South Wales *Real Property (Limitation of Actions) Act 1837* (which adopted the English *Real Property Limitation Act 1833*) and various other New South Wales Acts.

2.28 In 1985, however, a new Limitation Ordinance was enacted.<sup>34</sup> In 1990 this was renamed the *Limitation Act*. This statute was generally based on the New South Wales Act, but had special provisions dealing with latent personal injury and latent property damage.

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<sup>32</sup> *Limitation Amendment Act 1990* (NSW). This resulted from the Report of the New South Wales Law Reform Commission on *Limitation of Actions for Personal Injury Claims* (LRC 50 1986).

<sup>33</sup> In the Northern Territory (and also in the Australian Capital Territory), the title of the registered proprietor of land is not extinguished by adverse possession: *Real Property Act 1856* (NT) s 251; *Real Property Act 1925* (ACT) s 69. The Limitation Acts therefore contain no provisions dealing with actions in relation to land. Nearly all interests in land are leasehold, registered under the above legislation. On the land law in these jurisdictions, see A J Bradbrook, S V McCallum and A P Moore *Australian Real Property Law* (1991) paras 19.12-19.16.

<sup>34</sup> It was preceded by a Working Paper prepared by the Commonwealth Attorney General's Department *Proposals for the Reform and Modernization of the Laws of Limitation in the Australian Capital Territory* (1984).

The Australian Capital Territory, therefore, instead of having the most antiquated limitation legislation in the whole of Australia, now has the most modern statute law.<sup>35</sup>

(vii) *South Australia*

2.29 South Australia is the only jurisdiction, apart from Western Australia, which retains the old law. All the leading English limitation statutes were received 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*. This Act 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.

2.30 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 *Real Property Limitation Act 1833* - but unamended by the *Real Property Limitation Act 1874*. Subsequent sections reproduce, in turn, the provisions of the *Trustee Act 1888*, the *Limitation Act 1623* and the *Administration of Justice Act 1705*. The only aspect of the Act which gives it a slightly more modern look than the Western Australian Act is that 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. There have been several amendments since 1936, notably the *Limitation of Actions and Wrongs Act Amendment Act 1956*, which followed the example of the English 1954 Act in reducing the limitation period for personal injury cases to three years.

**(b) New Zealand**

2.31 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* is 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.

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<sup>35</sup> As in the Northern Territory, the *Limitation Act 1985* (ACT) contains no provisions on actions relating to land: see n 33 above.

2.32 In 1988 the New Zealand Law Commission submitted a report recommending reform of the 1950 Act.<sup>36</sup> Though the report recommends the repeal of the Act and its replacement by a new Limitation Defences Act, the most important changes recommended relate to the problems of latent personal injury and latent property damage.<sup>37</sup>

(c) **Canada**<sup>38</sup>

2.33 In some Canadian jurisdictions, reforms were initiated before the English reforms of 1939. The Uniform Law Conference of Canada approved a *Uniform Limitation of Actions Act in 1931*, which was adopted in the two territories (North-West Territory and Yukon) and four provinces, Alberta, Manitoba, Saskatchewan and Prince Edward Island. The New Brunswick Act is also fairly similar to the *Uniform Act*. There has, however, been considerable reforming activity in recent years, much of which was inspired by the reforms in England and Australian jurisdictions such as New South Wales.

2.34 In Ontario, the Ontario Law Reform Commission submitted a report on Limitation in 1969.<sup>39</sup> The report noted that the Ontario *Limitation Act 1960* was basically a consolidation of the old English statutes as they applied in Ontario. In the same way as the report of the Wright Committee in 1936, it listed the 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. The report acknowledged its indebtedness to the reports of the Wright Committee and the New South Wales Law Reform Commission. Most of its recommendations were adopted by the Ontario *Limitation Act 1970*.

2.35 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<sup>40</sup> 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

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<sup>36</sup> New Zealand Law Commission *Limitation Defences in Civil Proceedings* (Report No 6 1988).

<sup>37</sup> In 1991 a Building Bill introduced into the New Zealand Parliament was amended in committee to incorporate a 15-year limitation period for negligent building cases. The Bill has not yet been passed.

<sup>38</sup> See generally J D Falconbridge "The Disorder of the Statutes of Limitation" (1943) 21 *Can BR* 669.

<sup>39</sup> Ontario Law Reform Commission *Report on Limitation of Actions* (1969).

<sup>40</sup> British Columbia Law Reform Commission *Report on Limitations* (1974).

South Wales and Ontario. These proposals were adopted by the British Columbia *Limitation Act 1975*.

2.36 In recent years there have been similar developments in other jurisdictions. Nova Scotia<sup>41</sup> and Manitoba<sup>42</sup> now have modern Limitation Acts based on similar principles to those in Ontario and British Columbia, and such legislation has been recommended by law reform commissions in Newfoundland<sup>43</sup> and Saskatchewan.<sup>44</sup>

2.37 The most important development, however, is in Alberta. In a recent report,<sup>45</sup> the Alberta Law Reform Institute has recommended a new Limitation Act based on principles entirely different from those which underlie all the other reforms enacted or proposed since the English legislation of 1939.<sup>46</sup>

**(d) Other jurisdictions<sup>47</sup>**

2.38 Other legal systems, whether they are part of the common law legal family or belong to some other legal tradition, adopt a variety of solutions to the problem of limitation of actions. In most civil law systems there is a general period of limitation after the expiry of which all claims of whatever kind are barred. This contrasts with common law systems, where particular periods are generally laid down for different classes of case. Some of these limitation periods are quite long, for example 30 years in France,<sup>48</sup> Germany,<sup>49</sup> Belgium,<sup>50</sup> Holland<sup>51</sup> and South Africa,<sup>52</sup> and 10 years in Italy<sup>53</sup> and Switzerland.<sup>54</sup> In many of these countries, however, shorter periods are laid down for particular classes of case. In Germany<sup>55</sup>

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<sup>41</sup> *Limitation Act 1982* (Nova Scotia).

<sup>42</sup> *Limitation Act 1987* (Manitoba).

<sup>43</sup> Newfoundland Law Reform Commission *Report on Limitation of Actions* (Report No 1 1986).

<sup>44</sup> Saskatchewan Law Reform Commission *Proposals for a New Limitation of Actions Act* (1989).

<sup>45</sup> *Limitations* (Report No 55 1989).

<sup>46</sup> See ch 8 below. Note also similar proposals in Ontario: see *Recommendations for a New Limitations Act: Report of the Limitations Act Consultative Group* (1991).

<sup>47</sup> See generally J A Jolowicz *Procedural Questions* (International Encyclopaedia of Comparative Law vol xi ch 13) paras 59-79.

<sup>48</sup> *French Civil Code* art 2262.

<sup>49</sup> *German Civil Code* art 195.

<sup>50</sup> *Belgian Civil Code* art 2262.

<sup>51</sup> *Dutch Civil Code* art 2004.

<sup>52</sup> *Prescription Act 1943* (South Africa) s 3(2)(c).

<sup>53</sup> *Italian Civil Code* art 2934.

<sup>54</sup> *Swiss Code of Obligations* art 127.

<sup>55</sup> *German Civil Code* art 852.

and South Africa,<sup>56</sup> for example, the limitation period for most tort actions is three years; in Italy<sup>57</sup> it is five years and in Switzerland<sup>58</sup> it is one year.

2.39 A key problem in any legal system is the determination of the point at which the limitation period begins to run, and whether the period can commence without the plaintiff being aware of the existence of the cause of action. In most common law systems, the basic limitation period begins to run from the moment the cause of action accrues, irrespective of the plaintiff's knowledge, but there are various supplementary rules to deal with the problem of latent damage.<sup>59</sup> Outside such systems, it is common for the law to provide two limitation periods: a shorter period which does not begin to run until the injured person knows of the injury and the identity of the wrongdoer, and a longer period running from the date on which the damage occurred, which acts as an ultimate bar. In Germany, for example, the general three-year period for tort claims does not begin to run until the plaintiff knows of the injury and the identity of the defendant, but the claim will be barred 30 years after the date of the act giving rise to the liability.<sup>60</sup> The position in France is exceptional: the normal 30-year period does not begin to run until the damage is apparent.<sup>61</sup>

#### 4. DEFECTS OF THE PRESENT WESTERN AUSTRALIAN LAW

2.40 From the foregoing survey, it should be apparent that the *Limitation Act 1935*, when compared with the modern Limitation Acts which most other jurisdictions have, is very out of date and suffers from a number of defects. These are dealt with in the following chapters. But there are also some major defects of general importance:

##### (a) Archaic language

2.41 The most important general defect of the Act is the archaic language 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.

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<sup>56</sup> *Prescription Act 1943* (South Africa) s 3(2)(c).

<sup>57</sup> *Italian Civil Code* art 2947.

<sup>58</sup> *Swiss Code of Obligations* art 60.

<sup>59</sup> See ch 7.

<sup>60</sup> *German Civil Code* art 852.

<sup>61</sup> See the decision of the Cour de Cassation 11 December 1918, Recueil Sirey 1921.1.161.

2.42 To appreciate this to the full it is probably necessary to read through the Act as a whole, and compare it with a modern Act such as the English Acts of 1939 or 1980 or the New South Wales Act of 1969. As an example, however, it is instructive to compare the provisions of the Western Australian Act on the accrual of rights of action in the case of present and future interests in land (sections 5 and 7) with the equivalent provisions in the New South Wales Act (sections 28 to 31) - provisions which were intended to reproduce the substantial effect of the old law without any changes.

**Western Australia  
Limitation Act  
1935**

5. In the construction of this Act, the right to make an entry or distress, or bring an action to recover land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:-

- (a) When the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or receipt of the profits of such land, or in receipt of such rent, and while entitled thereto has been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.
- (b) When the person claiming such land or rent claims the estate or interest of some deceased person who has continued in such possession or receipt in respect of the same estate or interest until the time of his death, and has been the last person entitled to such estate or interest who has been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

**New South Wales  
Limitation Act  
1969**

28. Where the plaintiff in an action on a cause of action to recover land or a person through whom he claims -

- (a) has been in possession of the land; and
- (b) while entitled to the land, is dispossessed or discontinues his possession,

the cause of action accrues on the date of dispossession or discontinuance.

30. Where -

- (a) the estate of interest claimed in an action on a cause of action to recover land is an estate or interest -
  - (i) assured as an estate or interest in possession by the will of a deceased person; or
  - (ii) passing on intestacy,

to the plaintiff or a person through whom he claims;

(b) the deceased is, at the date of his death, in possession by virtue of the estate or interest claimed or by virtue of an estate or interest out of which the assurance is made; and

(c) no person is, after the date of the death of the deceased and before the date on which the action is brought, in possession -

(i) by virtue of the estate or interest claimed and under the assurance or intestacy; or

(ii) as a personal representative of the deceased,

the cause of action accrues on the death of the deceased.

### 30. Where -

(c) When the person claiming such land or rent claims in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument has been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

(a) the estate or interest claimed in an action on a cause of action to recover land is an estate or interest assured as an estate or interest in possession (otherwise than by will) to the plaintiff or to a person through whom he claims;

(b) the person making the assurance is, on the date when the assurance takes effect, in possession by virtue of the estate or interest claimed or by virtue of an estate or interest out of which the assurance is made; and

(c) no person is, after the date on which the assurance takes effect and before the date on which the action is brought, in possession by virtue of the estate or interest claimed and by virtue of the assurance,

the cause of action accrues on the date on which the assurance takes effect.

(d) When the estate or interest claimed has been an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

...

7. 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

31. Subject to section 67, where -

- (a) the estate or interest claimed in an action on a case of action to recover land is at any time an estate in reversion or remainder or any other future estate or interest; and
- (b) no person is, at any time after the date on which the estate or interest claimed becomes a present estate or interest and before the date on which the action is brought, in possession by virtue of the estate or interest claimed,

the cause of action accrues on the date on which the estate or interest claimed becomes a present estate or interest.

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.

## (b) Use of out-of-date concepts

2.43 Apart from the general use of archaic language, 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 good example.<sup>62</sup> As is evident on reading it, it is couched in terms which demand a knowledge of the old forms of action:

"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:

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<sup>62</sup> For a detailed analysis of s 38, see J F Young *The Limitation Act 1935, in Relation to (1) The Distinction between Actions in Contract and Tort, and (2) Statutory Causes of Action* (Law Society of Western Australia Seminar Paper 1990).

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 or 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.

- (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..."

2.44 Distinctions which are now outdated or unimportant thus become vital for the purposes of limitation. The most important example is the distinction between trespass and case. In the Act, actions of trespass carry a shorter limitation period than other actions founded on tort and other actions in the nature of an action on the case. In the context of intentional harm to the person, if the principle of *Wilkinson v Downton*<sup>63</sup> (that a wilful act calculated to cause, and actually causing, physical harm is actionable) covers harm caused directly as well as indirectly,<sup>64</sup> it may provide a remedy in a case where trespass would lie but

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<sup>63</sup> [1897] 2 QB 57.

<sup>64</sup> See P R Handford "Wilkinson v Downton and Acts Calculated to Cause Physical Harm" (1985) 16 *UWALRev* 31, 34-38.

for the fact that the limitation period has expired. In the context of negligent harm to the person, there is controversy whether an action in trespass is available as an alternative to an action in negligence where the harm is directly caused.<sup>65</sup> In the limitation context this matters little, since the limitation period in trespass is shorter than in negligence;<sup>66</sup> but if it had been the other way round the question would have been most important. In England, the *Limitation Act 1939* section 2(1) imposed a general limitation period of six years for all common law actions, but the *Law Reform (Limitation of Actions etc) Act 1954* section 2 shortened this to three years for all actions for personal injury caused by negligence, nuisance or breach of duty. In *Letang v Cooper*,<sup>67</sup> a driver negligently drove over the legs of a lady sunbathing in a car park. Since the three-year limitation period had expired, the plaintiff attempted to sue for a negligent trespass. It was 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. The court clearly felt that distinctions between trespass and case were outmoded in the context of limitation. (Indeed, Lord Denning MR and Diplock LJ said that actions for negligent trespass should not exist at all.)<sup>68</sup>

2.45 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 carry a longer limitation period of six years.<sup>69</sup> The distinction between slander actionable per se and slander requiring proof of damage is complex and often irrational;<sup>70</sup> and it seems very odd that the more serious form of slander carries the shorter limitation period.

2.46 However, the most outstanding example of an archaic survival in section 38 is the action for menace. Actions for menace, which were actions for threatening words, have been obsolete since the middle ages.<sup>71</sup> It has been clear for many years that they were not a form of

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<sup>65</sup> See eg F A Trindade "Some Curiosities of Negligent Trespass to the Person - A Comparative Study" (1971) 20 *ICLQ* 706.

<sup>66</sup> 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. As a result of this case, s 36 was amended in 1956 so as to apply the same limitation period to both trespass and negligence.

<sup>67</sup> [1965] 1 QB 232.

<sup>68</sup> Id 240 (Lord Denning MR), 243-244 (Diplock LJ).

<sup>69</sup> 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.

<sup>70</sup> See eg J G Fleming *Law of Torts* (7th ed 1987) 522-527.

<sup>71</sup> See P R Handford "Tort Liability for Threatening or Insulting Words" (1976) 54 *Can BR* 563, 571-573.

trespass supplementary to assault<sup>72</sup> (which is restricted to acts - as opposed to words - causing an apprehension of harm),<sup>73</sup> but were actionable only on proof of special damage (usually financial loss)<sup>74</sup> and are therefore the ancestors of the tort of intimidation. This was perhaps not clear in 1623 when the ancestor of section 38 was originally drafted.<sup>75</sup> Nevertheless, it is surely time that actions for menace disappeared from the *Limitation Act*.

2.47 Much the same is true of actions of *scire facias*. In England, such actions were abolished by the *Crown Proceedings Act 1947*.<sup>76</sup> It appears that they are obsolete in Western Australia also - there is no reference to them in the *Rules of the Supreme Court*.

2.48 That the antiquated provisions of section 38 cause practical difficulties was recently confirmed by *State Government Insurance Commission v Teal*,<sup>77</sup> in which Commissioner Williams QC had to determine whether an action under section 7 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 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*."<sup>78</sup>

2.49 Other obsolete concepts can be found in other sections, such as 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.

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<sup>72</sup> Contra, G L Williams "Assault and Words" [1957] *Crim LR* 219, 224, but see Handford loc cit n 71.

<sup>73</sup> *R v Meade and Belt* (1823) 1 Lew 184. See Handford op cit n 71, 566-571.

<sup>74</sup> See *Anon* (1468) YB 7 Edw IV 24, pl 31 per Danby J; W Blackstone *Commentaries* (15th ed 1809) vol 3, 119-120.

<sup>75</sup> 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".

<sup>76</sup> S 23 and 1st Schedule.

<sup>77</sup> (1991) 2 WAR 105.

<sup>78</sup> Id 118-119.

Coparcenary was abolished in England in 1925<sup>79</sup> and was "virtually obsolete" in Western Australia by 1950.<sup>80</sup>

2.50 Another important example is 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 the entailed interest. In Western Australia, after 1969, entailed interests cannot be created at all.<sup>81</sup> Yet provisions on entailed interests are still to be found in the *Limitation Act*.

### (c) Conclusion

2.51 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:

"The old statutes are cast in a language explicable only by reference to court procedures, forms of land holding, and institutions, which otherwise are rarely of any but antiquarian interest to the practising lawyer, or to the citizen, of today."<sup>82</sup>

2.52 The *Limitation Act* as a whole needs comprehensive reform. Parliamentary counsel should abandon it and start afresh. Nearly every section is in need of change. Even where substantial change is not required, redrafting is needed. The Act as a whole is written in archaic, complex, unintelligible language, makes use of out-of-date legal concepts, and suffers because it was never conceived as an integral piece of legislation but simply as a putting-together of pieces from a number of different sources. The Act needs to be re-examined as a whole, and its provisions need to be set out in a logical order and clearly and simply expressed in modern English.

2.53 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. In contrast, all other Australian jurisdictions except South Australia - and virtually all other

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<sup>79</sup> As a result of the abolition by the *Administration of Estates Act 1925* (UK) s 45 of the rule that land descended to the heir.

<sup>80</sup> P R Adams *Law of Real Property and Conveyancing in Western Australia* (1950) 28.

<sup>81</sup> *Property Law Act 1969* s 23.

<sup>82</sup> NSWLRC Report para 7.

common law jurisdictions - will have modern limitation laws: something which will surely disadvantage litigants in Western Australia.

## 5. THE DIRECTION OF REFORM

2.54 In its report of 1936 which led to the English *Limitation Act of 1939*, the Wright Committee pointed out that the old limitation rules were based on the principle of a fixed period of limitation running from a fixed date. It asked whether it might be desirable to adopt a more flexible system, and reviewed two alternative bases for a limitation law:

- (1) Preserving the orthodox position, so far as it relates to the moment when time begins to run, but giving the court a general discretion to extend the time in appropriate cases;
- (2) Providing that the limitation period should run from the time when the plaintiff knows, or but for his own default might have known, of the existence of the claim.

However the Committee eventually rejected these alternatives, the first because of the difficulty of operating such a discretion and the uncertainty that would prevail, and the second again because of uncertainty, and opted for the retention of the traditional approach.

2.55 The English *Limitation Act 1939* was based on this approach, and all subsequent limitation legislation in England, Australia, New Zealand and Canada has been founded on the same basis.

2.56 After 50 years' experience with legislation based on the traditional approach, it is clear that it does not solve all the problems. The problems of latent personal injury and latent property damage, in particular, have not been solved by the traditional approach. Most jurisdictions now deal with latent personal injury by adopting the principle of discretion, and this is also increasingly being seen as the best way of dealing with latent property damage, but in each case such provisions constitute exceptions to legislation which remains based on the traditional approach.

2.57 It would be a much greater step to abandon the traditional approach entirely, but this step has been taken in a report submitted by the Alberta Law Reform Institute in 1989.<sup>83</sup> The report proposes a new Limitation Act for Alberta<sup>84</sup> which abandons the traditional approach of fixed periods of limitation running from a fixed date, irrespective of the plaintiff's knowledge, and instead adopts a basic limitation period running from the time when the plaintiff discovers, or ought to have discovered, the existence of a claim.<sup>85</sup>

2.58 In this paper, therefore, chapters 3-6 consider possible reforms to the *Limitation Act* which are derived from the experience of other jurisdictions who have reformed their Acts but have retained the traditional approach. Particular attention is devoted to the reforms proposed by the Wright Committee and the resulting changes introduced in England by the *Limitation Act 1939*, since most Australian jurisdictions have remained very close to this model. Attention has also been given to the reforms proposed by the New South Wales Law Reform Commission Report of 1969 (the only Australian report to recommend major innovation), which have influenced the legislation not only in New South Wales but also in the Australian Capital Territory and the Northern Territory, and the more recent reforms in England proposed by the Orr Committee and enacted in the *Limitation Act 1980*.

2.59 Chapter 7 deals with the special problem of latent damage.

2.60 Chapter 8, in the light of the Alberta proposals, considers the alternative of enacting a Limitation Act based on the principle that the limitation period runs from the time the plaintiff knows, or ought to have known, of the existence of the claim.

1. *Should the Limitation Act 1935 be repealed and replaced by modern statutory provisions?*
2. *If so, should the Limitation Act -*
  - (a) *continue to be based on the principle of a fixed period or periods of limitation running from a fixed date;*
  - (b) *continue to be based on the principle of a fixed period or periods of limitation running from a fixed date, but give the court a general discretion to extend the time in appropriate cases;*

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<sup>83</sup> *Limitations* (1989).

<sup>84</sup> The Alberta Model Limitations Act is reproduced in Appendix II.

<sup>85</sup> In Ontario, a recent report proposes a Limitation Act based on a similar principle: see *Recommendations for a New Limitations Act: Report of the Limitations Act Consultative Group* (1991).

- (c) *be based on the principle that the limitation period should run from the time when the plaintiff knows, or but for his own default might have known, of the existence of the claim?*

## Chapter 3

### LIMITATION PERIODS: COMMON LAW

#### 1. GENERAL LIMITATION PERIOD FOR COMMON LAW ACTIONS

3.1 The law governing the limitation periods applicable to common law actions is set out in section 38 of the *Limitation Act 1935*.<sup>1</sup> This section reproduces the provisions of the English *Limitation Act 1623*, with minor drafting amendments only.

3.2 Section 38 was dealt with in some detail in the previous chapter.<sup>2</sup> The point was made that the section perpetuates distinctions made by the old forms of action, by setting out limitation periods for slander, trespass to the person, trespass to land, debt, covenant, actions on the case and so forth.

3.3 The Wright Committee, commenting on the 1623 Act, which was the law in force in England before 1939, said that it should be considerably simplified. It recommended that the period for all actions founded in tort or simple contract (including quasi-contract) should be six years.<sup>3</sup> This recommendation was implemented by the English *Limitation Act 1939*,<sup>4</sup> and the Australian jurisdictions which have enacted modern Limitation Acts generally have similar provisions.<sup>5</sup>

3.4 If such a provision were adopted in Western Australia, it would have the important effect of subjecting most common law claims to a standard limitation period.<sup>6</sup> Though under section 38 most common law claims are already subject to a six-year period, some are subject

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<sup>1</sup> Quoted in para 2.43 above.

<sup>2</sup> Paras 2.43-2.48.

<sup>3</sup> Wright Committee Report para 5.

<sup>4</sup> S 2(1), which however made no express mention of quasi-contract. The present English legislation contains separate provisions for limitation periods in tort and contract: *Limitation Act 1980* (Eng) ss 2, 5. Again, there is no mention of quasi-contract.

<sup>5</sup> *Limitation Act 1969* (NSW) s 14(1)(a) and (b); *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation of Actions Act 1974* (Qld) s 10(a); *Limitation Act 1974* (Tas) s 4(1)(a). In the Northern Territory the period is three years: *Limitation Act 1981* (NT) s 12(1)(a) and (b).

<sup>6</sup> However, in contract the period runs from the date of the breach of contract, whereas in tort it runs from the commission of the wrong (in the case of a tort actionable without proof of damage) or from the point when damage is suffered (in the case of a tort requiring proof of damage).

to a shorter period. At present actions for slander actionable per se must be brought within two years<sup>7</sup> and actions for trespass to the person within four years.<sup>8</sup>

3.5 The Wright Committee recommended that this general provision should apply also to actions arising by virtue of statutory provisions not covered by a special limitation provision and to actions on a recognisance.<sup>9</sup> The general limitation provisions in modern Limitation Acts accept these recommendations.<sup>10</sup>

3.6 Section 14(1) of the New South Wales *Limitation Act 1969* is an example of a modern provision adopting these principles:

"An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or a person through whom he claims -

- (a) a cause of action founded on contract (including quasi-contract) not being a cause of action founded on a deed;
- (b) a cause of action founded on tort, including a cause of action for damages for breach of statutory duty;
- (c) a cause of action to enforce a recognizance;
- (d) a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture."

3.7 An alternative formulation is found in the Australian Capital Territory *Limitation Act 1985*, which instead of setting out particular causes of action provides a limitation period which applies to any cause of action other than one for which the *Limitation Act* provides a more specific limitation period.<sup>11</sup>

3.8 If a provision based on the New South Wales model is adopted in Western Australia, it would be important for it to be drafted in a way which reflected the fact that actions for quasi-

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<sup>7</sup> S 38(1)(a)(ii).

<sup>8</sup> S 38(1)(b).

<sup>9</sup> Wright Committee Report para 5.

<sup>10</sup> *Limitation Act 1939* (Eng) s 2(1)(b) and (d), and see now *Limitation Act 1980* (Eng) s 9; *Limitation Act 1969* (NSW) s 14(1)(c) and (d); *Limitation of Actions Act 1958* (Vic) s 5(1)(b) and (d); *Limitation of Actions Act 1974* (Qld) s 10(b) and (d); *Limitation Act 1974* (Tas) s 4(1)(b) and (d); *Limitation Act 1981* (NT) s 12(1)(b) and (d).

<sup>11</sup> *Limitation Act 1985* (ACT) s 11.

contract (better called actions in restitution) are now recognised as fully independent of contract.<sup>12</sup> Instead of saying that actions in contract include quasi-contract, it should recognise that actions in restitution are conceptually separate from both contract and tort. The Australian Capital Territory provision has the advantage that it covers all actions in contract, tort and restitution without making any statements about the classification of actions.

3. *Should section 38 of the Limitation Act be replaced by a modern provision? If so, should it be -*
  - (a) *one based on, for example, section 14(1) of the New South Wales Limitation Act 1969;*
  - (b) *one based on section 11 of the Australian Capital Territory Limitation Act 1985?*
  
4. *Should the limitation period under such a provision be*
  - (a) *six years;*
  - (b) *some other period?*

## 2. ACTIONS FOR PERSONAL INJURY

3.9 In England, the Tucker Committee Report in 1949 recommended that the limitation period for personal injury actions be reduced from six years to three years, because of the desirability of such actions being brought to trial quickly, while the evidence is fresh in the minds of the parties and witnesses.<sup>13</sup> This recommendation was implemented by the English *Law Reform (Limitation of Actions etc) Act 1954*. Legislation in four Australian jurisdictions has taken a similar step. In those jurisdictions the limitation period in actions for negligence, nuisance or breach of duty (whether arising by statute, contract or otherwise) in which the damages consist of or include damages for personal injury must be commenced within three years, as opposed to the six-year period which applies to most common law actions.<sup>14</sup> In the Northern Territory the limitation period for all common law actions, including actions for personal injury, is three years.<sup>15</sup>

<sup>12</sup> See eg *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

<sup>13</sup> *Report of the Committee on Limitation of Actions* 1949 Cmd 7740 para 22.

<sup>14</sup> *Limitation Act 1969* (NSW) s 18A; *Limitation of Actions Act 1974* (Qld) s 11; *Limitation of Actions Act 1936* (SA) s 36(1); *Limitation Act 1974* (Tas) s 5(1).

<sup>15</sup> *Limitation Act 1981* (NT) s 12(1)(b).

3.10 In Western Australia,<sup>16</sup> as in Victoria and the Australian Capital Territory,<sup>17</sup> the limitation period for personal injury actions remains six years. It should not be shortened unless provision is made for extending the normal limitation period in cases of latent personal injury. At present, it is only in cases involving asbestos-related diseases that such an extension is permissible.<sup>18</sup>

5. *Should the limitation period in actions for personal injury be*

(a) *the same as the limitation period for any other common law action;*

(b) *a shorter period, for example three years?*

### 3. OTHER PROVISIONS RELATING TO TORT

3.11 The modern Limitation Acts generally contain specific provisions dealing with two special problems in the area of tort:

#### (a) Successive conversions

3.12 It is provided that where an action for conversion or wrongful detention has accrued to the plaintiff and a further conversion or wrongful detention takes place before the plaintiff recovers possession, no action may be brought in respect of the further conversion or detention more than six years after the accrual of the cause of action in respect of the original conversion or detention.<sup>19</sup> In Western Australia, by contrast, this problem is not dealt with in the *Limitation Act*.

#### (b) Contribution between tortfeasors

3.13 The modern Limitation Acts all make specific provision for actions for contribution between tortfeasors. In New South Wales, Queensland, the Northern Territory and the Australian Capital Territory 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

<sup>16</sup> *Limitation Act 1935* s 38(1)(c)(vi).

<sup>17</sup> *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation Act 1985* (ACT) s 11(1) ("any cause of action").

<sup>18</sup> *Limitation Act 1935* s 38A: see para 7.8 below.

<sup>19</sup> *Limitation Act 1980* (Eng) s 3(1), replacing *Limitation Act 1939* (Eng) s 3(1); *Limitation Act 1969* (NSW) s 21; *Limitation of Actions Act 1958* (Vic) s 6(1); *Limitation of Actions Act* (Qld) s 12(1); *Limitation Act 1974* (Tas) s 6(1); *Limitation Act 1981* (NT) s 19(1); *Limitation Act 1985* (ACT) s 18.

period for the principal cause of action expires if this latter period expires first.<sup>20</sup> The cause of action accrues on the date on which judgment is given unless the tortfeasor makes an agreement with the original plaintiff and this agreement fixes the amount of the tortfeasor's liability, in which case the cause of action for contribution arises on the date the agreement is made. Western Australia, by contrast, has no separate limitation period applying to contribution actions.

6. *Should the Western Australian Limitation Act make specific provision for*

(a) *the successive conversion or wrongful detention of goods;*

(b) *actions for contribution between tortfeasors?*

*If so, what should those provisions be?*

#### 4. ACTIONS FOR AN ACCOUNT

3.14 The modern Australian Limitation Acts, following the lead of the English *Limitation Act 1939*, make separate provision for actions for an account.<sup>21</sup> Such actions may not be brought in respect of any matter which arose more than six years before the commencement of the action.<sup>22</sup> The Western Australian Act is very different. It distinguishes between actions for account which concern the trade of merchandise between merchants and merchants, their factors and servants G<sup>23</sup> and other actions for account,<sup>24</sup> although both are subject to a six-year limitation period.

3.15 The Australian Capital Territory provision differs from the rest in that, instead of providing a separate limitation period for such accounts, it provides that actions for an account may not be brought after the expiration of any time limit under the Act which is applicable to the claim which is the basis of the duty to account.<sup>25</sup>

<sup>20</sup> *Limitation Act 1969* (NSW) s 26(1); *Limitation of Actions Act 1974* (Qld) s 40(1); *Limitation Act 1981* (NT) s 24(1); *Limitation Act 1985* (ACT) s 21(1). For the different provisions in Victoria and Tasmania, see *Wrongs Act 1958* (Vic) s 24(4); *Tortfeasors and Contributory Negligence Act 1954* (Tas) s 3(6).

<sup>21</sup> *Limitation Act 1980* (Eng) s 23, replacing *Limitation Act 1939* (Eng) s 2(2); *Limitation Act 1969* (NSW) s 15; *Limitation of Actions Act 1958* (Vic) s 5(2); *Limitation of Actions Act 1974* (Qld) s 10(2); *Limitation Act 1974* (Tas) s 4(2).

<sup>22</sup> In the Northern Territory the period is three years: *Limitation Act 1981* (NT) s 13.

<sup>23</sup> S 38(1)(c)(ii).

<sup>24</sup> S 38(1)(c)(iii).

<sup>25</sup> *Limitation Act 1985* (ACT) s 12.

7. *Should the Limitation Act contain a separate provision for actions for an account? If so, should it*

- (a) *provide a set limitation period, say three years;*
- (b) *provide that actions for an account may not be brought after the expiration of any time limit under the Act which is applicable to the claim which is the basis of the duty to account?*

## 5. ACTIONS ON A DEED

3.16 The Wright Committee recommended that there should be a special limitation period for actions on a deed - 12 years, as opposed to the six-year period recommended for other actions.<sup>26</sup> This recommendation was adopted by the English *Limitation Act 1939*.<sup>27</sup> Modern Australian Limitation Acts contain a similar provision.<sup>28</sup> The limitation period is generally 12 years, though it is 15 in Victoria.<sup>29</sup>

3.17 In Western Australia, the *Limitation Act* provides a much longer period - 20 years - for "actions of covenant or of debt upon any bond or other specialty".<sup>30</sup>

8. *Should the Limitation Act contain a separate provision for actions on a deed? If so, should the limitation period be*

- (a) *12 years;*
- (b) *some other period?*

## 6. ACTIONS ON A JUDGMENT

3.18 The modern Limitation Acts make special provision for actions on a judgment.<sup>31</sup> These provisions in effect re-enact a provision of the English *Real Property Limitation Act 1833*,<sup>32</sup> still found in Western Australia in section 32 of the *Limitation Act 1935*. However

<sup>26</sup> Wright Committee Report para 5.

<sup>27</sup> S 2(3). See now *Limitation Act 1980* (Eng) s 8.

<sup>28</sup> *Limitation Act 1969* (NSW) s 16; *Limitation of Actions Act 1958* (Vic) s 5(3); *Limitation of Actions Act 1974* (Qld) s 10(3); *Limitation Act 1974* (Tas) s 4(3); *Limitation Act 1981* (NT) s14(1); *Limitation Act 1985* (ACT) s 13.

<sup>29</sup> There is also a 15-year period in South Australia: *Limitation of Actions Act 1936* (SA) s 34.

<sup>30</sup> S 38(1)(e)(i) - subject to ss 4 and 32, and to s 38(1)(d), which provides a 12-year period for actions of debt for rent upon a covenant in an indenture of demise.

<sup>31</sup> *Limitation Act 1980* (Eng) s 24, replacing *Limitation Act 1939* (Eng) s 2(4); *Limitation Act 1969* (NSW) s 17(1); *Limitation of Actions Act 1958* (Vic) s 5(4); *Limitation of Actions Act 1974* (Qld) s10(4); *Limitation Act 1974* (Tas) s 4(4); *Limitation Act 1981* (NT) s 15(1); *Limitation Act 1985* (ACT) s 14(1).

<sup>32</sup> S 40, as substituted by s 8 of the *Real Property Limitation Act 1874* (Eng).

this provision, unlike the modern provisions which have replaced it in other jurisdictions, deals also with actions to recover money secured by a mortgage or lien or otherwise charged on land.<sup>33</sup>

3.19 The modern provisions generally make actions on a judgment subject to a 12-year limitation period, running from the date on which the judgment became enforceable.<sup>34</sup> In England, however, the *Limitation Act 1980*,<sup>35</sup> adopting a recommendation of the Orr Committee,<sup>36</sup> reduces the period to six years.

3.20 The New South Wales *Limitation Act 1969* extends its provision for actions on a judgment<sup>37</sup> to actions on a foreign judgment.

9. *Should the Limitation Act contain a separate provision for actions on a judgment? If so, should the limitation period be*

(a) *12 years;*

(b) *some other period?*

10. *Should the provision be extended to actions on a foreign judgment?*

## 7. ACTIONS ON AN ARBITRAL AWARD

3.21 The modern Limitation Acts also contain provisions prescribing a limitation period for actions to enforce an arbitral award.<sup>38</sup> In these jurisdictions a six-year limitation period applies to an action to enforce an arbitral award where the agreement to arbitrate is not under seal.<sup>39</sup> The equivalent provision in Western Australia<sup>40</sup> provides a six-year period for "actions of debt upon any award where the submission is not by specialty". The language of this provision needs to be brought up to date. The legislation in New South Wales, the Northern

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<sup>33</sup> On these aspects of s 32, see paras 4.50-4.53 below.

<sup>34</sup> However the period is 15 years in Victoria, and also in South Australia: *Limitation of Actions Act 1936* (SA) s 34.

<sup>35</sup> S 24.

<sup>36</sup> Orr Committee Report para 4.16.

<sup>37</sup> *Limitation Act 1969* (NSW) s 17.

<sup>38</sup> *Limitation Act 1969* (NSW) s 20; *Limitation of Actions Act 1958* (Vic) s 5(1)(c); *Limitation of Actions Act 1974* (Qld) s 10(c); *Limitation Act 1974* (Tas) s 4(1)(c); *Limitation Act 1981* (NT) s 18; *Limitation Act 1985* (ACT) s 17.

<sup>39</sup> In the Northern Territory the period is three years.

<sup>40</sup> S 38(1)(c)(i).

Territory and the Australian Capital Territory specifically provides that the cause of action accrues on the date on which default in the observance of the award occurs.<sup>41</sup>

11. *Should the Limitation Act contain a separate provision for actions to enforce an arbitral award? If so, should the limitation period be*
  - (a) *six years;*
  - (b) *some other period?*
12. *Should the legislation specifically provide that the cause of action accrues on the date on which default in the observance of the award occurs?*

## 8. ACTIONS TO RECOVER A PENALTY OR FORFEITURE

3.22 The modern Limitation Acts also contain a specific provision dealing with actions to recover a penalty or forfeiture.<sup>42</sup> These Acts provide that actions to recover a penalty or forfeiture recoverable by virtue of an enactment cannot be brought more than two years from the date on which the cause of action accrued.<sup>43</sup> These provisions replace various different provisions laid down in the old legislation,<sup>44</sup> provisions which still apply in Western Australia.<sup>45</sup>

3.23 In England, the special provision was repealed by the *Limitation Amendment Act 1980*<sup>46</sup> and so the ordinary six-year period now applies.

13. *Should the Limitation Act contain a separate provision for actions to recover a penalty or forfeiture? If so, should the limitation period be*
  - (a) *two years;*

<sup>41</sup> *Limitation Act 1969* (NSW) s 20(3); *Limitation Act 1981* (NT) s 18(3); *Limitation Act 1985* (ACT) s 17(3).

<sup>42</sup> *Limitation Act 1939* (Eng) s 2(5); *Limitation Act 1969* (NSW) s 18(1); *Limitation of Actions Act 1958* (Vic) s s 5(5)(a); *Limitation of Actions Act 1974* (Qld) s 5; *Limitation Act 1974* (Tas) s 4(6); *Limitation Act 1981* (NT) s 16(1); *Limitation Act 1985* (ACT) s 15(1).

<sup>43</sup> A penalty does not include a fine to which a person is liable on conviction of a criminal offence.

<sup>44</sup> *Common Informers Act 1588* (Eng) s 5; *Limitation Act 1623* s 3.

<sup>45</sup> Under s 37(1), actions, suits and other proceedings for forfeiture on a penal statute whereby the forfeiture or benefit is limited to the Crown must be commenced within two years. Under s 37(2), such actions whereby the benefit is limited to the Crown must be commenced by that person within one year of the offence, and in default may be commenced by the Crown within two years of the ending of that year. Under s 37(3), such actions whereby the forfeiture or benefit is limited to any person who prosecutes in that behalf must be commenced within one year of the offence. Under s 38(1)(a)(i), actions for penalties, damages or sums given by any enactment to the party grieved must be commenced within two years of the offence.

<sup>46</sup> S 13(1) and Schedule 1.

(b) *some other period?*

## 9. ADMIRALTY ACTIONS

3.24 The Limitation Acts of some Australian jurisdictions contain provisions dealing with admiralty actions. First, such legislation generally provides that the provisions of the Act dealing with common law claims do not apply<sup>47</sup> (except that in three of these jurisdictions<sup>48</sup> the ordinary limitation period for actions in contract applies to a cause of action to recover seamen's wages). There are no equivalent provisions in Western Australia.

3.25 Secondly, special limitation periods are provided for certain claims against ships.<sup>49</sup> Actions to enforce a claim or lien against a vessel or her owners in respect of damage or loss to another vessel, her cargo and freight, or any property on board, or damages for loss of life or personal injury suffered by any person on board, caused by the fault of the former vessel may not be brought more than two years from the date of the damage. Actions to enforce a claim or lien in respect of salvage services may not be brought more than two years from the date the salvage services were rendered. The court has power to extend these periods to such an extent and on such terms as it thinks fit.<sup>50</sup>

3.26 In Western Australia the equivalent provision is contained in section 29 of the *Supreme Court Act 1935*, though it makes no provision for claims in respect of salvage services. It would seem that this provision should be transferred to the *Limitation Act*.

14. *Should the Limitation Act provide that the provisions of the Act dealing with common law claims should not apply to admiralty actions in rem?*
15. *Should actions to recover seamen's wages be exempted from this provision, so that the ordinary limitation period for actions in contract applies?*
16. *Should section 29 of the Supreme Court Act 1935 be transferred to the Limitation Act?*

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<sup>47</sup> *Limitation Act 1969* (NSW) s 22(1); *Limitation of Actions Act 1974* (Qld) s 10(6)(a); *Limitation Act 1974* (Tas) s 8(1); *Limitation Act 1981* (NT) s 20(2).

<sup>48</sup> NSW, Tas, NT.

<sup>49</sup> *Limitation Act 1969* (NSW) s 22(2); *Limitation Act 1974* (Tas) s 8(2); *Limitation Act 1974* (NT) s 20(3); *Limitation Act 1985* (ACT) s 19(1). In practice, the Australian Capital Territory provisions will apply only to boats on Lake Burley Griffin.

<sup>50</sup> The general topic of extension of limitation periods is dealt with in ch 7 below.

17. *Should this provision be extended so as to cover actions to enforce a claim or lien in respect of salvage services?*

## 10. ARBITRATIONS

3.27 The modern Limitation Acts provide that they apply to arbitrations in the same way as they apply to actions.<sup>51</sup> An arbitration is therefore not maintainable if commenced after the expiration of the limitation period fixed by the Act for a cause of action in respect of the same matter. In New South Wales, the Northern Territory and the Australian Capital Territory the legislation contains an express provision to this effect.<sup>52</sup> In all jurisdictions, the legislation sets out detailed provisions as to when an arbitration is deemed to be commenced,<sup>53</sup> and in some jurisdictions there are provisions for extension of the period.<sup>54</sup>

3.28 In Western Australia, by contrast, there is no provision in the *Limitation Act* extending it to arbitrations.

18. *Should the Limitation Act be expressly stated to apply to arbitrations in the same way as it applies to actions?*
19. *Should the Limitation Act contain provisions stating when an arbitration is deemed to commence?*

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<sup>51</sup> *Limitation Act 1969* (NSW) s 70(1); *Limitation of Actions Act 1958* (Vic) s 28(1); *Limitation of Actions Act 1974* (Qld) s 41(1); *Limitation Act 1974* (Tas) s 33(1); *Limitation Act 1981* (NT) s 46(1); *Limitation Act 1985* (ACT) s 47(1).

<sup>52</sup> *Limitation Act 1969* (NSW) s 70(2); *Limitation Act 1981* (NT) s 46(2); *Limitation Act 1985* (ACT) s 47(2).

<sup>53</sup> *Limitation Act 1969* (NSW) s 70(2); *Limitation of Actions Act 1958* (Vic) s 28(3); *Limitation of Actions Act 1974* (Qld) s 41(3); *Limitation Act 1974* (Tas) s 33(3); *Limitation Act 1981* (NT) s 48(1); *Limitation Act 1985* (ACT) s 49(1).

<sup>54</sup> The general topic of extension of limitation periods is dealt with in ch 7 below.

## Chapter 4

### LIMITATION PERIODS: PROPERTY AND EQUITY

#### 1. ACTIONS RELATING TO LAND GENERALLY

4.1 Sections 4 to 14 of the *Limitation Act 1939* deal with actions to recover land or rent. In essence they are simply a transcription of the provisions of the English *Real Property Limitation Act 1833* (as amended by the *Real Property Limitation Act 1874*).

4.2 The major problem with these provisions is the out of date form in which they are drafted. The Wright Committee did not recommend any substantial alternation in the rules themselves,<sup>1</sup> and the English *Limitation Act 1939* which implemented the Committee's recommendations did not make any changes of this nature, but recast the provisions in modern form.<sup>2</sup> Australian jurisdictions have, in general, followed the English Act.<sup>3</sup>

4.3 Some reform issues have however been identified by subsequent inquiries, such as the reports of the Orr Committee in England and the New South Wales Law Reform Commission.

4.4 The following paragraphs<sup>4</sup> give a brief account of the law in Western Australia and identify particular areas of the law that may be in need of reform. However, the most pressing need is for the provisions to be drafted in modern form.

#### 2. FREEHOLD LAND

##### (a) Introduction

4.5 Section 4 of the *Limitation Act* provides that actions to recover land are subject to a 12-year limitation period. The provision applies to making an entry or distress and bringing an action to recover land or rent.

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<sup>1</sup> Wright Committee Report para 8.

<sup>2</sup> *Limitation Act 1939* (Eng) ss 4-17; see now *Limitation Act 1980* (Eng) ss 15-19 and Schedule 1.

<sup>3</sup> *Limitation Act 1969* (NSW) ss 27-39; *Limitation of Actions Act 1958* (Vic) ss 7-19; *Limitation of Actions Act 1974* (Qld) ss 13-25; *Limitation Act 1974* (Tas) ss 10-22.

<sup>4</sup> Which rely particularly on A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (1991) ch 15 (referred to as Bradbrook).

4.6 Under section 4, this period runs from the time the right first accrues to some person through whom the plaintiff claims. Sections 5 to 10 of the *Limitation Act* deal with when that right is deemed to have accrued in a number of particular circumstances. In general, it should be noted that the right of action does not accrue unless there is adverse possession.

20. *Should the provisions of the Limitation Act dealing with actions to recover freehold land, and the accrual of the right of action in such cases, be abolished and replaced by modern provisions, as in other jurisdictions?*

21. *Should the normal limitation period for actions to recover land be*

(a) *12 years;*

(b) *some other period?*

**(b) Present interests**

4.7 In the case of present interests, a cause of action may accrue in two ways:

(i) *Discontinuance or dispossession*

4.8 Under section 5(a), a cause of action may accrue where the person entitled to possession has discontinued possession or been dispossessed, and adverse possession has been taken by some other person.

4.9 It should be noted that the modern limitation provisions which set out these requirements have been criticised as poorly drafted and confusing, because the need for discontinuance or dispossession and the need for adverse possession are set out in different sections.<sup>5</sup> The Western Australian provision, whatever its other shortcomings, at least sets out these requirements in the same section.

4.10 The statutory provisions do not enlarge on what is meant by adverse possession. This is a concept which has been elaborated in the case-law.<sup>6</sup> It means in essence actual possession of the land without the licence of the true owner. As in other contexts,

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<sup>5</sup> Bradbrook 564.

<sup>6</sup> See eg Bradbrook 566-577, 594-603.

"possession" signifies both an appropriate degree of physical control of the land in question and an intention to possess.

4.11 A person's right to bring an action to recover land will not be barred unless it is proved that adverse possession has continued unbroken for the whole of the limitation period. This, however, does not mean that the person who originally takes adverse possession must complete the full period himself. The adverse possessor may transfer the interest to another by sale, gift or devise in a will. If the adverse possessor is dispossessed by another, the second adverse possessor can add the first period of adverse possession to his own for the purpose of barring the true owner's right of action.<sup>7</sup> However, if the adverse possessor abandons possession before the full limitation period has run, the position is the same as if the land had never been adversely possessed.<sup>8</sup> Once the limitation period has run, the title of the owner is extinguished,<sup>9</sup> but only against the adverse possessor.<sup>10</sup>

4.12 One problem that has arisen from the case-law is that of implied licences. Traditionally, the courts have not been willing to find that possession of land has been taken unless there is firm evidence to that effect. Acts of user have to be inconsistent with the rights of the true owner and with the use he intends to make of the land.<sup>11</sup> However some English decisions seem to have established a doctrine under which the courts will imply a licence from the true owner to the would-be adverse possessor permitting him to commit the acts of possession on which he seeks to rely.<sup>12</sup> The Orr Committee<sup>13</sup> recommended that these cases should be reversed and that the more traditional approach as stated in *Treloar v Nute*<sup>14</sup> should be restored.

22. *Should it be possible to prevent time running in an adverse possessor's favour by implying a grant of a licence by the true owner to the adverse possessor?*

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<sup>7</sup> This principle is set out in statutory form by s 38(2) of the *Limitation Act 1969* (NSW), a provision which has no equivalent in any other State or Territory.

<sup>8</sup> Though it is questioned whether the adverse possessor's rights are lost if possession is abandoned after he has remained in possession for the full limitation period: Bradbrook 597-598.

<sup>9</sup> See paras 6.1-6.2 below.

<sup>10</sup> For the situation where the adverse possessor is a tenant of leasehold property, see para 4.29 below.

<sup>11</sup> *Leigh v Jack* (1879) 5 ExD 264.

<sup>12</sup> *Wallis's Clayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] 1 QB 94; *Gray v Wykeham-Martin and Goode* (unreported) [1977] Bar Library Transcript No 10A.

<sup>13</sup> Paras 3.47-3.52.

<sup>14</sup> [1977] 1 All ER 230.

*(ii) Person entitled to possession never obtained it*

4.13 A cause of action may accrue where a person is entitled to possession but never obtained it. This can happen where -

- (1) a person entitled to land dies while still in possession. Here, under section 5(b) of the *Limitation Act*, where a person is entitled to land pursuant to a will or on intestacy the limitation period accrues at the date of death, but only if there is some other person who is in adverse possession.

Under section 8, an administrator claiming the estate or interest of a deceased person is deemed to claim as if there had been no interval between the death and the grant of letters of administration, so that even in the case of an intestacy the right accrues at the date of death.

- (2) land is assured (otherwise than by will) by a person who is in possession at the time of the assurance and the person to whom the land is assured does not take possession. Under section 5(c), the right to bring an action for possession accrues on the date the assurance took effect, but only if there is some other person who is in adverse possession.

**(c) Future interests**

4.14 The right of the holder of a future interest accrues on the date the interest becomes one in possession. Sections 5(d) and 7 both provide to this effect. Again, this rule only operates if there is some other person who is in adverse possession. One effect of these provisions is that if the land has been adversely possessed at some point before the future interest becomes a present interest, the holder of the future interest will have less than the full limitation period.

4.15 Under section 20, when a person is entitled to both a present interest and a future interest in land, and the right to recover the estate or interest in possession is barred, no action can be brought in respect of the future estate unless in the meantime possession has been recovered by a person entitled to an intermediate estate.

4.16 The provisions in the modern Limitation Acts in other jurisdictions are essentially a re-enactment of these provisions in modern form, with little substantive change.<sup>15</sup> The Wright Committee did however identify one particular difficulty in this area.<sup>16</sup> They drew attention to the conflict between an action for the recovery of money charged on a reversionary interest in land and a reversionary interest in the proceeds of sale. In the case of land, the period did not begin to run until the reversion fell in,<sup>17</sup> but in the case of a reversionary interest in the proceeds of sale, the period ran from the date when the money became payable<sup>18</sup> (and so the charges might be extinguished before the reversion fell in). They recommended that in the case of an action to recover money charged on a reversionary interest in the proceeds of sale, time should not begin to run until the reversion fell in, thus making the position the same as for a reversionary interest in the land itself. This was implemented by section 6(1) of the English *Limitation Act 1939*, and now appears in the equivalent provisions in Australian legislation.<sup>19</sup>

4.17 The Orr Committee examined the provisions of the 1939 Act on future interests<sup>20</sup> and, though some members of the Committee were of the view that they led to undesirably long limitation periods, in the end decided to recommend that there be no further change to the law.

4.18 The Western Australian *Limitation Act* contains further provisions - sections 21 to 23 - dealing specifically with the barring of the rights of tenants in tail. There are no equivalent provisions in the modern Limitation Acts, even those of jurisdictions in which entailed interests can still be created. In Western Australia it is no longer possible to create such interests and all existing entailed interests have been converted into fee simple estates.<sup>21</sup> These provisions should therefore be abolished.

23. *In the case of an action to recover money charged on a reversionary interest in the proceeds of sale, should time only begin to run when the reversion falls in?*

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<sup>15</sup> *Limitation Act 1939* (Eng) s 6, now replaced by *Limitation Act 1980* (Eng) Sched 1 cl 4; *Limitation Act 1969* (NSW) ss 31, 67; *Limitation of Actions Act 1958* (Vic) s 10; *Limitation of Actions Act 1974* (Qld) s 15; *Limitation Act 1974* (Tas) s 12.

<sup>16</sup> Wright Committee Report para 9.

<sup>17</sup> *Real Property Limitation Act 1874* (UK) s 2 (replacing *Real Property Limitation Act 1833* (UK) s 5); cf *Limitation Act 1935* s 7.

<sup>18</sup> *Re Witham* [1922] 2 Ch 413.

<sup>19</sup> *Limitation Act 1969* (NSW) s 31; *Limitation of Actions Act 1958* (Vic) s 10(1); *Limitation of Actions Act 1974* (Qld) s 15(1); *Limitation Act 1974* (Tas) s 12(1).

<sup>20</sup> Orr Committee Report paras 3.59-3.64.

<sup>21</sup> *Property Law Act 1969* s 23.

24. *Should the provisions of the Limitation Act dealing with entailed interests be abolished?*

**(d) Co-ownership**

4.19 Where land is owned jointly by more than one person, in principle each co-owner is entitled to the use and possession of the whole of the land, and so possession by one co-owner is not adverse as against the others. However, section 14 of the *Limitation Act* provides that where a co-owner is in possession of more than his share such possession is not deemed to have been possession of the others. In other words, in such cases the co-owner will be in adverse possession. The section preserves an obsolete concept by providing that it applies not only to joint tenants and tenants in common but also to coparceners. Coparcenary was a type of co-ownership dependant upon the common law rules under which real property passed on intestacy to the heir. These rules were abolished with the passing of the *Administration Act* in 1903.

25. *Should the provisions in section 14 relating to coparcenary be abolished?*

**3. LEASEHOLD LAND**

4.20 As is the case with freehold land, under section 4 of the *Limitation Act* the limitation period in actions to recover leasehold land, or rent due on a lease, is 12 years. A number of provisions in the Act deal specifically with leaseholds. Again, they are little more than a transcription of the 19th-century English provisions.

26. *Should the provisions of the Limitation Act relating to leasehold interests be replaced by modern provisions?*

**(a) Actions by the landlord against the tenant**

*(i) Leases for a fixed term*

4.21 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 term of the lease expires.

4.22 According to section 34 of the *Limitation Act*, the landlord's right to recover any particular instalment of rent is barred six years from the date on which the rent became due. The tenant's failure to pay rent does not affect the landlord's title to the land.

4.23 The Wright Committee pointed out<sup>22</sup> that although the ordinary limitation period in actions for arrears of rent was six years, if the promise to pay was contained in a covenant under seal the period would be the longer period prescribed for specialty debts.<sup>23</sup> To overcome this difficulty they recommended that for actions to recover arrears of rent on a covenant under seal the period should be six years, instead of the longer period applicable to actions on instruments under seal generally. This was implemented by section 17 of the English *Limitation Act 1939*,<sup>24</sup> which laid down a six-year limitation period for recovering arrears of rent. Similar provisions appear in the modern Limitation Acts of Victoria, Queensland and Tasmania.<sup>25</sup> In New South Wales, the Northern Territory and the Australian Capital Territory this provision has been absorbed into a more general provision setting out a six year period for the recovery of arrears of income.<sup>26</sup>

27. *Should the limitation period for actions to recover arrears of rent on a covenant under seal be six years, instead of the longer period applicable to actions on instruments under seal?*
28. *Should this provision be confined to arrears of rent, or should it deal more generally with arrears of income?*

4.24 Where the lease contains a forfeiture clause, failure to pay rent may give the landlord a right to recover the land. According to section 5(e), the right to recover possession of the land accrues at the time of the forfeiture. However under section 6, where the right to recover possession by reason of forfeiture has first accrued in respect of an estate or interest in reversion or remainder, and the land has not been recovered by virtue of such right, the right to recover the land is deemed to have accrued in respect of such interests when they become interests in possession. The law on this issue is different in New South Wales and Tasmania.

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<sup>22</sup> Wright Committee Report para 9.

<sup>23</sup> In Western Australia, 12 years: *Limitation Act 1935* s 38(1)(d).

<sup>24</sup> See now *Limitation Act 1980* (Eng) s 19.

<sup>25</sup> *Limitation of Actions Act 1958* (Vic) s 19; *Limitation of Actions Act 1974* (Qld) s 25; *Limitation Act 1974* (Tas) s 22.

<sup>26</sup> *Limitation Act 1969* (NSW) s 24; *Limitation Act 1985* (NT) s 22; *Limitation Act 1985* (ACT) s 20.

There the right to recover land by reason of forfeiture accrues when the landlord could with reasonable diligence have discovered the facts giving rise to the forfeiture.<sup>27</sup>

29. *Where a lease contains a forfeiture clause, should the right to recover the land accrue*

- (a) *at the time of the forfeiture;*
- (b) *when the landlord could with reasonable diligence have discovered the facts giving rise to the forfeiture;*
- (c) *at some other time?*

(ii) *Tenancies at will*

4.25 Where there is a tenancy at will, section 9 provides that the landlord's right of action is deemed to have accrued either at the determination of the tenancy or one year after its creation.

4.26 In England the Orr Committee thought that the one-year rule was artificial and that the law should be changed so that in all cases time would not begin to run until the tenancy was determined.<sup>28</sup> The Committee pointed out that the one-year rule did not apply to licences, where time did not begin to run in a licensee's favour as long as the licence endured. Since the distinction between a tenancy at will and a gratuitous licence was tenuous, the Committee considered that in each case the limitation period should accrue at the point of determination. This recommendation was implemented by the *Limitation Act 1980*.<sup>29</sup> So far, no Australian jurisdiction has made a similar amendment. New South Wales, by contrast, has eliminated the determination of the tenancy as a possible starting point for the limitation period. That State's *Limitation Act* provides that the right to recover the land in the case of a tenancy at will accrues either one year from the commencement of the tenancy or on the date when rent first becomes overdue, whichever first happens.<sup>30</sup>

30. *In the case of a tenancy at will, should the cause of action accrue -*

- (a) *one year after the creation of the tenancy;*

<sup>27</sup> *Limitation Act 1969* (NSW) s 32; *Limitation Act 1974* (Tas) s 14.

<sup>28</sup> Orr Committee Report paras 3.53-3.55.

<sup>29</sup> Schedule 1 para 5.

<sup>30</sup> *Limitation Act 1969* (NSW) s 34. See para 4.28 below.

- (b) *when it is determined;*
- (c) *when rent becomes overdue;*
- (d) *in more than one of the above circumstances?*

(iii) *Periodic tenancies*

4.27 Where there is a periodic tenancy without a lease in writing, section 10 provides that the right of action is deemed to have accrued at the end of the period, or at the last time when rent was received, whichever last happens. The result of this provision is that such a tenancy can in time ripen into ownership if rent is not paid. The Orr Committee therefore recommended that in all cases the limitation period should run from the date of determination, in the same way as for tenancies at will.<sup>31</sup> This recommendation was not implemented by the *Limitation Act 1980*.

4.28 The New South Wales Law Reform Commission, by contrast, recommended that time should not begin to run until rent became overdue, whether or not the period had come to an end, and also that the section should not be restricted to oral tenancies.<sup>32</sup> These recommendations were accepted by the New South Wales *Limitation Act 1969*, and also applied to tenancies at will.<sup>33</sup>

31. *In the case of periodic tenancies, should the cause of action accrue -*

- (a) *at the end of the period;*
- (b) *at the last time rent was received;*
- (c) *when rent becomes overdue?*
- (d) *in more than one of the above circumstances?*

32. *Should this provision be restricted to oral tenancies?*

(iv) *Adverse possession*

4.29 In the case of freehold interests, it was pointed out above<sup>34</sup> that no right of action accrued unless there was adverse possession - that is, unless the land was in the possession of some person in whose favour a limitation period can run. However, in the case of particular

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<sup>31</sup> Orr Committee Report para 3.56.

<sup>32</sup> NSWLRC Report paras 179-180.

<sup>33</sup> S 34.

<sup>34</sup> Para 4.6.

leasehold interests, such as tenancies at will and periodic tenancies, it is uncertain whether the doctrine of adverse possession applies. According to the English Court of Appeal, this doctrine does not apply in the case of statutory provisions dealing with periodic tenancies.<sup>35</sup> It has been said that this decision should not be followed in Australia and that the statutory provisions should be subject to the doctrine of adverse possession.<sup>36</sup> This is said to follow from the interpretation of provisions such as section 14 of the Victorian *Limitation of Actions Act 1958*,<sup>37</sup> under which rights of action are not to accrue or continue unless there is adverse possession. In Western Australia there would seem to be no room for such an interpretation. The equivalent of the Victorian section 14, section 5 of the Western Australian Act, clearly applies only to the freehold interest provisions dealt with in that section.

33. *Should the doctrine of adverse possession apply to all leasehold interests?*

**(b) Actions by the tenant or the landlord against third parties**

4.30 If the tenant is dispossessed of the land subject to the lease by a third party, a right to bring an action to recover the land accrues to the tenant, a right that will be barred once the limitation period has run its course. However, the landlord has a reversionary interest, and under section 7 of the *Limitation Act* no right of action in respect of a future interest accrues until it becomes an interest in possession, which would not happen until the termination of the lease.<sup>38</sup>

4.31 Under section 11, however, the landlord's title to the land can be extinguished during the term of the lease if rent is paid to a third party and no rent is thereafter paid to the person wrongfully entitled. This provision only applies if the lease is in writing and the rent is at least \$2 a year.

4.32 The New South Wales Law Reform Commission recommended that in such cases, instead of the cause of action accruing when the rent is first received by the wrong landlord, time should not begin to run until the landlord becomes entitled to recover the land from the

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<sup>35</sup> *Hayward v Chaloner* [1968] 1 QB 107 (Lord Denning MR dissenting). A subsequent decision of the same court, *Jessamine Investment Co v Schwartz* [1978] QB 264, casts some doubt on the correctness of the decision.

<sup>36</sup> Bradbrook 586.

<sup>37</sup> The equivalent provisions in the other jurisdictions are *Limitation Act 1969* (NSW) s 38; *Limitation of Actions Act 1974* (Qld) s 19; *Limitation Act 1974* (Tas) s 16.

<sup>38</sup> See para 4.14 above.

tenant by forfeiture or breach of condition.<sup>39</sup> This recommendation was implemented by the New South Wales *Limitation Act 1969*.<sup>40</sup>

34. *If rent is paid to the wrong landlord, should the cause of action accrue -*

- (a) *when rent is first received by the wrong landlord; or*
- (b) *when the landlord becomes entitled to recover the land from the tenant by forfeiture or breach of condition?*

4.33 Even if the tenant's right of action and title are extinguished as against the third party, the tenant's title remains good against the landlord. This may provide an indirect means of overriding the third party's rights. It has been held by the House of Lords in *St Marylebone Property Company v Fairweather*<sup>41</sup> that a tenant whose own title had been extinguished by adverse possession could, by surrendering the lease, enable the landlord to evict the adverse possessor. Landlord and tenant can thus combine to defeat the interest of the adverse possessor. This problem was referred to the Orr Committee, but the Committee was equally divided on it and made no recommendation.<sup>42</sup> It seems that the *Fairweather* decision applies in Australia.<sup>43</sup>

35. *Should a tenant whose own title has been extinguished by adverse possession be able, by surrendering the lease, to assist the landlord to evict the adverse possessor?*

#### **4. TRUSTS RELATING TO LAND**

##### **(a) The present law in Western Australia**

4.34 A number of provisions in the *Limitation Act* deal with land which is subject to a trust. These provisions, like the other provisions in the Act, are derived from the 19th century English legislation.

4.35 Section 24 provides that the limitation period for the recovery of any land or rent in equity is the same as that which would apply if the claimant had been entitled at law, that is, 12 years.

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<sup>39</sup> NSWLRC Report para 173.

<sup>40</sup> S 32.

<sup>41</sup> [1963] AC 510.

<sup>42</sup> Orr Committee Report para 3.46.

<sup>43</sup> Bradbrook 603.

4.36 However, under section 25, when any land or rent is vested in a trustee on an express trust, the right of the beneficiary to bring an action against the trustee to recover the land or rent is deemed to have accrued at the time when the land or rent has been conveyed to a purchaser for valuable consideration, and is deemed to have accrued only against such purchaser and any person claiming through him.

4.37 Under section 26, the limitation period for actions to recover sums of money charged on or payable out of any land or rent, at law and in equity, and secured by an express trust, or to recover arrears of rent or interest in respect of such sum, or damages in respect of such arrears, is the same as it would be if there were no such trust.

**(b) Reform of the law in other jurisdictions**

4.38 The English *Limitation Act 1939* repealed the English legislation on which the Western Australian provisions were based and replaced them by new provisions. These take account of the fact that in England, since 1925, equitable property interests in land are generally created either by making the land settled land or subject to a trust for sale.<sup>44</sup> In the case of settled land, the 1925 property legislation built on reforms first enacted in the *Settled Land Act 1882*.

4.39 Thus, section 7 of the *Limitation Act 1939*<sup>45</sup> provided that -

- (1) The provisions of the Act apply to equitable interests in land, including interests in the proceeds of sale of land held on trust for sale, in the same way as they apply to legal estates, and therefore rights of action to recover land accrue to a person entitled in possession to an equitable interest on the same date as if it were a legal interest.
- (2) Where the limitation period for an action to recover land by a tenant for life or statutory owner of settled land (who under the *Settled Land Act 1925* hold the legal interest) has expired, the legal estate is not extinguished so long as the right of any person entitled to a beneficial interest in the land has not accrued or has not been barred by the Act.

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<sup>44</sup> *Law of Property Act 1925* (Eng) s 3. Settled land is governed by the *Settled Land Act 1925*.

<sup>45</sup> Now replaced by s 18 of the *Limitation Act 1980* (Eng).

- (3) Where land is held on any trust including a trust for sale, and the limitation period for an action by the trustees to recover the land has expired, the estate of the trustees is not extinguished so long as the right of any person entitled to a beneficial interest in the land or the proceeds of sale has not accrued or has not been barred by the Act.<sup>46</sup>
- (4) The statutory owner of settled land or the trustees of land held on trust, including a trust for sale, may bring an action to recover land on behalf of any person entitled to a beneficial interest in the land or the proceeds of sale whose right of action has not been barred by the Act, notwithstanding that the right of action of the statutory owner or trustees would otherwise have been barred by the Act.
- (5) Where any settled land or land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or the proceeds of sale, not being a person solely entitled, no right of action to recover the land shall be deemed to accrue through possession to any person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest.

4.40 The English settled land legislation was adopted in Queensland, Victoria, Tasmania and Western Australia. New South Wales and South Australia adopted earlier legislation of the same kind. More recently, however, Queensland and Western Australia repealed their settled land legislation and assimilated settled land with trust property so that the powers are exercised by the trustees.<sup>47</sup>

4.41 New South Wales, Victoria and Tasmania have incorporated provisions based on section 7 of the English Act in their limitation legislation.<sup>48</sup> Queensland, consequent on the repeal of the settled land legislation, modifies section 7 by eliminating the second provision set out above and all the other references to settled land.<sup>49</sup>

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<sup>46</sup> Bradbrook 580 n 113 specifically points out that there is no provision in Western Australia which covers this situation.

<sup>47</sup> Bradbrook 458. In Western Australia, the settled land provisions were introduced by the *Settled Land Act 1892* and repealed by the *Trustees Act 1962*.

<sup>48</sup> *Limitation Act 1969* (NSW) s 37; *Limitation of Actions Act 1958* (Vic) s 11; *Limitation Act 1974* (Tas) s 13.

<sup>49</sup> *Limitation of Actions Act 1974* (Qld) s 16.

**(c) Conclusion**

4.42 The current provisions of the Western Australian *Limitation Act* antedate the 1882 English reform of the law relating to settled land. They should therefore be replaced by more appropriate modern provisions. Since settled land has been abolished in Western Australia, the most appropriate model for Western Australia would presumably be the Queensland provision.

36. *Should the provisions of the Limitation Act relating to trusts of land be repealed and replaced by modern provisions? If so, should such provisions be based on*

(a) *section 16 of the Queensland Limitation of Actions Act;*

(b) *some other model?*

**5. EQUITABLE CLAIMS<sup>50</sup>**

4.43 In a number of instances, provisions of the *Limitation Act* apply to equitable claims. For example, the Act provides that the same limitation period applies to actions for land or rent in equity as applies to the equivalent claim at common law.<sup>51</sup> In addition the *Limitation Act* provides limitation periods for actions of account<sup>52</sup> and for certain actions against trustees.<sup>53</sup>

4.44 In addition, where a provision of the *Limitation Act* does not apply directly to an equitable claim it may do so by analogy. Where equitable relief is founded on a legal right (the so-called "auxiliary jurisdiction" of equity) and equity extends its aid to a person who does not have a remedy at common law, then equity applies the *Limitation Act* by analogy.<sup>54</sup> Again, where relief in equity corresponds to a remedy at common law, and the common law remedy is governed by the *Limitation Act*, then equity imposes a similar limitation on the remedy it provides.<sup>55</sup>

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<sup>50</sup> See generally J L Brunyate *Limitation of Actions in Equity* (1932); J G N Darby and F A Bosanquet *Statutes of Limitations* (2nd ed 1893) Part IV.

<sup>51</sup> See para 4.35 above.

<sup>52</sup> See para 3.14 above.

<sup>53</sup> See para 4.67 below.

<sup>54</sup> *Knox v Gye* (1872) LR 5 HL 656 per Lord Westbury LC at 674.

<sup>55</sup> *Smith v Clay* (1767) 3 Bro CC 646n; 29 ER 743 per Lord Camden LC at 744. Thus constructive trustees, unlike express trustees, could plead the limitation period: see paras 4.61-4.68 below.

4.45 Where the *Limitation Act* applies neither directly nor by analogy, there are no fixed limitation periods for causes of action founded in equity. However, under the equitable doctrine of laches equity will refuse a remedy to a person who has not prosecuted a claim with due diligence after having notice of the facts giving rise to the claim such that it has become inequitable not to bring proceedings.

4.46 Under another equitable doctrine, that of acquiescence, a defence may be available against a person who has allowed his rights to be violated and has sought no redress. This doctrine may apply in respect of any equitable claim, even in cases where the Limitation Acts apply directly or by analogy. However acquiescence has a specific importance in cases where the doctrine of laches applies, because acquiescence may be inferred if there is an unreasonable delay in the bringing of an action. This inferred acquiescence is the principal component of laches.

4.47 Section 28 of the *Limitation Act* provides that nothing in the Act is to be deemed to interfere with any rule of equity refusing relief on the ground of acquiescence or otherwise to any person whose right to bring an equitable claim is not barred by the Act.<sup>56</sup>

4.48 In England, the Orr Committee considered whether -

- (1) the power to refuse relief on the ground of laches or acquiescence should be retained, and if so extended to other forms of relief;
- (2) there should be a statutory limitation period applicable to certain forms of equitable relief for which there was presently no limitation period, such as specific performance and injunction.<sup>57</sup>

4.49 They concluded that it was not desirable to replace these doctrines by fixed statutory periods of limitation, because a statutory period would not be as flexible as the equitable doctrines and the courts would be unable to take into account the various factors currently considered when applying these doctrines. They also concluded that there should be no

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<sup>56</sup> There are similar provisions in the modern Limitation Acts in other jurisdictions: *Limitation Act 1980* (Eng) s 36, replacing *Limitation Act 1939* (Eng) s 29; *Limitation Act 1969* (NSW) s 9; *Limitation of Actions Act 1958* (Vic) s 31; *Limitation of Actions Act 1974* (Qld) s 43; *Limitation Act 1974* (Tas) s 36; *Limitation Act 1981* (NT) s 7; *Limitation Act 1985* (ACT) s 6.

<sup>57</sup> Orr Committee Report paras 3.94-3.100.

limitation period applicable to equitable remedies such as specific performance and injunction.

37. *Should all equitable claims be governed by the Limitation Acts, or should the doctrines of laches and acquiescence be retained in their present form?*
38. *Should there be a statutory limitation period applicable to certain forms of equitable relief for which there is at present no limitation period, such as specific performance and injunction?*

## 6. MORTGAGES

### (a) The present law in Western Australia

4.50 The law relating to limitation of actions as respects mortgages is extremely complex. It is based on a number of different provisions in the old English legislation, some of which also deal with matters other than mortgages, such as judgments<sup>58</sup> and legacies.<sup>59</sup>

4.51 In broad outline, the present provisions are as follows:<sup>60</sup>

- (1) Actions by the mortgagor to redeem the mortgage
- (i) In the case of a mortgage of land, the action is barred after the mortgagee has been in possession for 12 years: section 29.
- (ii) In the case of a mortgage of personalty, there is no statutory bar but the mortgagor may fail through laches or acquiescence.
- (2) Actions by the mortgagee for the sum due
- (i) In the case of a mortgage of land, the action is barred 12 years after a present right to redeem the same accrues: section 32.

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<sup>58</sup> See para 3.18 above.

<sup>59</sup> See para 4.72 below.

<sup>60</sup> Cf NSWLRC Report paras 195-199.

- (ii) In the case of a mortgage of personalty contained in a deed, section 38(1)(e)(i) provides a limitation period of 20 years.
  - (iii) In the case of a mortgage of personalty not contained in a deed, the limitation period is 6 years: section 38(1)(c)(i).
- (3) Actions by the mortgagee for interest
- (i) In the case of a mortgage of land, the action is barred six years after the interest becomes due: section 34.
  - (ii) In the case of a mortgage of personalty contained in a deed, the limitation period is 20 years under section 38(1)(e)(i).
  - (iii) In the case of a mortgage of personalty not contained in a deed, the limitation period is 6 years: section 38(1)(c)(i).
- (4) Actions by the mortgagee to recover possession
- (i) In the case of a mortgage of land, the action is barred 12 years after accrual of the cause of action: section 35.
  - (ii) In the case of a mortgage of personalty, the action to recover the security is barred after 6 years under section 38(1)(c).
- (5) Actions by the mortgagee for foreclosure
- (i) In the case of a mortgage of land, the action is barred 12 years after accrual of the cause of action: section 35.
  - (ii) In the case of a mortgage of personalty, no statutory limitation period applies but the mortgagee may be barred by laches or acquiescence.

**(b) Reform of the law in England**

4.52 Before 1939, the law in England was essentially similar. The Wright Committee pointed to a number of inconsistencies in these provisions, inconsistencies that are still present in the law of Western Australia, and recommended reform of the law.<sup>61</sup>

4.53 In particular, the Committee observed that there was no period for the recovery of money charged on personal property, whether for principal or interest, or for a foreclosure action in respect of mortgaged personalty.<sup>62</sup> They therefore recommended that the statutory provisions applying to the recovery of money charged on realty (section 40 of the *Real Property Limitation Act 1833*) should also apply to the recovery of money charged on personalty and that there should be a limitation period of twelve years for foreclosure actions in respect of mortgaged personalty. Section 32 of the Western Australian *Limitation Act* is identical to section 40 of the 1833 Act, except that it adds the following paragraph:

"This 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 mortgaged debt; and to an action on a covenant [sic] in a deed to secure the payment of a rentcharge."

This addition does not cover the point raised by the Wright Committee.<sup>63</sup>

4.54 The Committee also pointed out that the right to redeem mortgaged personalty should not be barred after twelve years, because of difficulties in banking practice that would ensue, and that in applying the above provisions to personalty there would have to be a saving in respect of a life insurance policy.<sup>64</sup> They therefore recommended that in the case of a charge on a life insurance policy, time should not run until the policy matured.

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<sup>61</sup> Wright Committee Report paras 9-10.

<sup>62</sup> Id para 10.

<sup>63</sup> For cases on s 32, see *Mulder v Mulder* (1939) 42 WALR 38, dealing with the interpretation of the words "present right to receive"; *Perpetual Executors v Whitfords* (1956) 58 WALR 51, in which the plaintiff successfully recovered capital and interest on a mortgage when the defendant company went into liquidation - the defendant's argument that this was a claim to recover more than six years' interest and was therefore barred under s 34 was rejected, the court saying that if this argument was correct it would mean that if no payment was made under the mortgage for 12 years s 32 would prevent any recovery whatsoever and the security would become valueless.

<sup>64</sup> Wright Committee Report para 10.

4.55 The recommendations of the Wright Committee were implemented by the English *Limitation Act 1939*.<sup>65</sup> The Orr Committee gave consideration to the mortgage provisions of the 1939 Act but recommended no change.<sup>66</sup> The English *Limitation Act 1980*<sup>67</sup> therefore does little more than re-enact the previous provisions.

4.56 As a result of these reforms the present English law is a lot simpler than the pre-1939 law. However, some complications and anomalies survive. This applies particularly to the distinctions that still exist between mortgages of land and mortgages of personalty. Section 16 of the English *Limitation Act 1980*, which sets out the mortgagor's right to redeem, deals only with land, and no specific period applies to the redemption of personalty.<sup>68</sup> Section 20, which deals with the recovery of property secured by a mortgage or charge, or of the proceeds of sale of land, deals separately with mortgages of land and of personalty.

4.57 The law in Victoria, Queensland and Tasmania,<sup>69</sup> being based on the provisions of the English 1939 Act, is subject to the same criticisms.

### (c) Reform of the law in New South Wales

4.58 The New South Wales Law Reform Commission Report<sup>70</sup> commented that the English *Limitation Act 1939* went some way towards simplifying the law, but recommended more far-reaching reforms, which were enacted in the New South Wales *Limitation Act 1939*.

4.59 The two most important features of the New South Wales legislation are that its provisions apply alike to all mortgages, both of land and of personalty, and that no remedy is left without a limitation period. The provisions in outline, as described by the New South Wales Law Reform Commission,<sup>71</sup> are as follows:

"[S]ection 41 fixes a limitation period of 12 years for an action to redeem mortgaged property, whether the property is land or personalty. The limitation period only runs while the mortgagee is in possession of the property.

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<sup>65</sup> Ss 12, 18.

<sup>66</sup> Orr Committee Report paras 3.65-3.70.

<sup>67</sup> Ss 16, 20.

<sup>68</sup> *Weld v Petre* [1929] 1 Ch 33.

<sup>69</sup> *Limitation of Actions Act 1958* (Vic) ss 15, 20; *Limitation of Actions Act 1974* (Qld) ss 20, 26; *Limitation Act 1974* (Tas) ss 18, 23.

<sup>70</sup> Para 204.

<sup>71</sup> Paras 204-208.

Section 42 fixes a limitation period of 12 years for the remedies of the mortgagee for principal money by action on the personal covenant or by action for foreclosure or other relief affecting the mortgaged property. The limitation period runs from the time when the respective causes of action accrue: normally, this time will be the date on which the principal sum becomes payable.

Section 43 fixes a six-year limitation period for the remedies for interest of a mortgagee by action on the personal covenant or by action for relief affecting the mortgaged property. In general, the limitation period runs from the date on which the interest in question falls due for payment.

Section 44 deals with the adjustment of interest between mortgagor and mortgagee in cases where the limitation period for an action to recover interest does not apply. In general, the mortgagee may retain interest for six years but no more.

Section 45 prevents the exercise by a mortgagee of powers of sale and other powers affecting the mortgaged property after the date on which his action to recover the principal money is barred."

4.60 These provisions have also been adopted in the Northern Territory and the Australian Capital Territory.<sup>72</sup>

39. *Should the present Western Australian provisions on limitation of actions as respects mortgages be replaced by modern provisions? If so, should the model for these provisions be -*

- (a) *the mortgage provisions in the English Limitation Act 1980;*
- (b) *the mortgage provisions in the New South Wales Limitation Act 1969;*
- (c) *some other model?*

## 7. TRUSTS<sup>73</sup>

### (a) The original position

4.61 In England, the law made a distinction between constructive trustees, who 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 - and express trustees, to whom no limitation period applied and who could plead only laches and acquiescence. However,

<sup>72</sup> *Limitation Act 1981 (NT) ss 25-29; Limitation Act 1985 (ACT) ss 22-26.*

<sup>73</sup> This account relies particularly on H A J Ford and W A Lee *Principles of the Law of Trusts* (2nd ed 1990) paras 1815-1835.

equity would never allow an express trustee to plead laches against the beneficiary, even where the trustee was not at fault. Express trustees were therefore at a disadvantage compared with constructive trustees or persons sued in negligence at common law.

4.62 Where an equitable remedy was sought to uphold a legal right, as in the case of actions relating to land, but the legal right was barred by the statute, equity again abided by the statutory provisions.

**(b) The Trustee Act reforms**

4.63 The position as outlined above was modified in England by the *Trustee Act 1888*.<sup>74</sup>

4.64 This Act drew a distinction between trustees who were guilty of fraud or who had retained trust property or converted it to their use, for whom no limitation period was prescribed, although they still might plead laches and acquiescence, and trustees who had committed an innocent breach of trust, for whom a six-year limitation period was prescribed, bringing them into line with defendants in negligence at common law.

4.65 The 1888 Act also sought to place constructive trustees in the same position as express trustees, superseding the application of the doctrine of analogy. It did this by defining trustees as including constructive trustees.

4.66 In spite of this the Wright Committee commented that there were some doubts whether the fraud exception applied to a constructive trustee.<sup>75</sup> According to *Taylor v Davies*,<sup>76</sup> there is a distinction between constructive trustees who should be regarded as express trustees, for whom the statute provides no relief, and those who should not, for whom the statute does provide relief. The Wright Committee recommended that the exception should be expressly extended to trustees whether holding as express or constructive trustees, including personal representatives.

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<sup>74</sup> S 8.

<sup>75</sup> Wright Committee Report para 11.

<sup>76</sup> [1920] AC 636.

**(c) The present position in Western Australia**

4.67 Western Australia adopted the provisions of the English *Trustee Act 1888* in the Western Australian *Trustees Act 1900*. When this provision was re-enacted by section 47 of the *Limitation Act 1935*, the following provision was added:

"For the purposes of this section the expression 'trustee' includes an executor or administrator, who for such purposes is included in the term trustee, and includes a trustee whose trust arises by construction or implication of law as well as an express trustee, and the provisions of this section relating to a trustee shall apply as well to several joint trustees as to a sole trustee."

4.68 This provision has no equivalent in the English Act<sup>77</sup> and appears to anticipate the recommendation made by the Wright Committee. However, the current Western Australian provision is still defective in a number of respects. Rather than stating a specific limitation period applying to trustees, it says that the appropriate limitation period is that which would have applied if the defendant had not been a trustee. Further, like other provisions of the *Limitation Act*, it makes reference to obsolete rules, in this case restraints on anticipation for married women entitled in possession to their separate use.

**(d) Reform in other jurisdictions**

4.69 In England, the *Limitation Act 1939*<sup>78</sup> consolidated the earlier law, with amendments, and the provisions in Victoria, Queensland and Tasmania<sup>79</sup> are derived from this Act. Under these provisions a distinction is still made between actions for fraud or fraudulent breach of trust or to recover trust property retained or converted by the trustee, to which no limitation period applies,<sup>80</sup> and other actions against a trustee, which are subject to a six-year period of limitation unless any other limitation provision applies.

4.70 The New South Wales *Limitation Act 1969* goes further, however. It provides statutory periods of limitation in respect of all breaches of trust, even those where the trustee

<sup>77</sup> S 47 in other respects reproduces the provisions of the *Trustee Act 1888* (UK) s 8. In *Western Australia Trustee Co v Tate* (1949) 51 WALR 46, Walker J followed *In re Jordison* [1922] 1 Ch 440, a decision on s 8, in holding that s 47 of the Western Australian Act did not allow a trustee to plead s 26 so as to bar the claim of an annuitant for arrears of his annuity.

<sup>78</sup> S 19. See now *Limitation Act 1980* (Eng) s 21.

<sup>79</sup> *Limitation of Actions Act 1958* (Vic) s 21; *Limitation of Actions Act 1974* (Qld) s 27; *Limitation Act 1974* (Tas) s 24.

<sup>80</sup> Thus a trustee cannot obtain title to land by way of adverse possession against the beneficiaries.

has committed fraud or retained or converted trust property. In these instances there is a 12-year limitation period, unless any other limitation provision applies.<sup>81</sup> In all other cases of breach of trust there is a six-year limitation period unless any other limitation provision applies, as in the English legislation and that of the Australian jurisdictions which have adopted it. Provisions based on the New South Wales legislation have been adopted in the Northern Territory and the Australian Capital Territory.<sup>82</sup>

4.71 The Orr Committee recommended a further change in this area.<sup>83</sup> Under the provisions of section 19 of the English *Limitation Act 1939*, if a trustee who, in good faith, distributed trust property among all those he reasonably believed to constitute the class of entitled beneficiaries, including himself, a latecomer who appeared more than six years after the distribution could recover his share from the trustee, though the other beneficiaries were protected by the *Limitation Act*. They proposed that section 19 should be amended so that the trustee/beneficiary could rely on a defence of limitation, except in respect of the share of trust property he would have had to pay to the latecomer had all the beneficiaries including himself been sued in time. This recommendation was implemented by the *Limitation Act 1980*.<sup>84</sup>

40. *Should the provisions of the Limitation Act dealing with actions against trustees be replaced by modern provisions? If so, should the model for those provisions be -*

(a) *the legislation of England, Victoria, Queensland and Tasmania;*

(b) *the legislation of New South Wales;*

(c) *some other model?*

41. *If a trustee, in good faith, distributes trust property among those he reasonably believes to constitute the class of entitled beneficiaries, including himself, should the trustee be able to rely on a defence of limitation against a latecomer except in respect of the share of trust property he would have had to pay to the latecomer had all the beneficiaries including himself been sued in time?*

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<sup>81</sup> S 47.

<sup>82</sup> *Limitation Act 1981* (NT) ss 32-33; *Limitation Act 1985* (ACT) s 27. In the case of the ACT, there is no need for a provision equivalent to s 48 of the *Limitation Act 1969* (NSW), because these actions against trustees are covered by the provision in s 11 which applies to "any cause of action".

<sup>83</sup> Orr Committee Report para 3.84.

<sup>84</sup> S 21(2).

## 8. DECEASED ESTATES

### (a) The present law in Western Australia

4.72 A number of provisions of the *Limitation Act* deal with claims against personal representatives. The general provision in section 4 dealing with actions for recovery of land applies to actions against personal representatives, and prescribes a limitation period of 12 years. Under section 32, the limitation period for claiming personalty under a legacy in a will is also 12 years. Under section 33, the period for claiming personalty on intestacy is again 12 years.

### (b) Reform of the law in other jurisdictions

4.73 As in other areas of the law of limitation, the above provisions are based on those found in the 19th-century English statutes. The Wright Committee, commenting on these provisions, pointed out anomalies:<sup>85</sup> in England, though actions to recover land and actions to claim personalty in a will were subject to a 12-year limitation period, the period for claiming personalty on an intestacy was twenty years for deaths before 1925<sup>86</sup> and six years for deaths after 1925.<sup>87</sup> The Committee recommended that the period should be 12 years in all cases. This recommendation was implemented by section 20 of the *Limitation Act 1939*.

4.74 In Western Australia the legislation already provides a 12-year period in all these cases. However, when the Wright Committee's recommendations were implemented by the *Limitation Act 1939* the separate provisions were replaced by one provision governing all claims to the personal estate of a deceased person, whether under a will or on intestacy.<sup>88</sup> A similar provision has been adopted in the Limitation Acts of Victoria, Queensland and Tasmania.<sup>89</sup>

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<sup>85</sup> Wright Committee Report para 12.

<sup>86</sup> *Law of Property Amendment Act 1860* (Eng) s 13.

<sup>87</sup> *Law of Property Amendment Act 1860* (Eng) s 13 was repealed by *Law of Property Amendment Act 1924* (Eng) Schedule X. For deaths after 1925 administrators on intestacy became trustees for sale: *Administration of Estates Act 1925*, s 33, and so the appropriate limitation period became the six years prescribed by the *Trustee Act 1888* s 8.

<sup>88</sup> *Limitation Act 1939* (Eng) s 20, now replaced by *Limitation Act 1980* (Eng) s 22.

<sup>89</sup> *Limitation of Actions Act 1958* (Vic) s 22; *Limitation of Actions Act 1974* (Qld) s 28; *Limitation Act 1974* (Tas) s 25.

4.75 In contrast, in New South Wales, the Northern Territory and the Australian Capital Territory, there are no special provisions dealing with personal representatives. Instead "trust" is defined to include the duties incident to the office of personal representative, and the limitation periods for trusts apply.<sup>90</sup>

4.76 A rule not affected by the English reforms of 1939 was the rule in *Seagram v Knight*<sup>91</sup> which provided that where a debtor became the administrator of his creditor, the running of time against that debtor was suspended.<sup>92</sup> This rule did not however apply to a debtor who became his creditor's executor. The Orr Committee recommended that this rule be abolished,<sup>93</sup> and this recommendation was implemented in 1980.<sup>94</sup> If the rule in *Seagram v Knight* applies in Western Australia, it may be that it should be abolished.

42. *Should the present provisions of the Limitation Act dealing with actions against personal representatives be repealed and replaced by modern provisions? If so -*
- (a) *should they be replaced by a specific provision dealing comprehensively with actions against personal representatives to recover personalty; or*
  - (b) *should the limitation periods dealing with trusts be made applicable?*
43. *Should the rule that the running of time against a debtor is suspended where the debtor becomes the administrator of the creditor be abolished?*

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<sup>90</sup> *Limitation Act 1969* (NSW) s 11; *Limitation Act 1981* (NT) s 4; *Limitation Act 1981* (ACT) s 8.

<sup>91</sup> (1867) LR 2 Ch 628.

<sup>92</sup> This is the only general rule under which the limitation period stops running having once started - though the same seems to have happened in Western Australia under the *Mortgagees Rights Restriction Act 1931* s 7: *Whitfords v Carter* (1938) 41 WALR 4.

<sup>93</sup> Orr Committee Report para 3.93.

<sup>94</sup> By the *Limitation Amendment Act 1980* (Eng) s 10, which added a new s 21A to the *Administration of Estates Act 1925* (Eng).

## Chapter 5

### EXTENSION OR POSTPONEMENT OF THE LIMITATION PERIOD

#### 1. DISABILITIES

##### (a) The present law in Western Australia

5.1 A general feature of limitation statutes is that, where a plaintiff suffers from certain disabilities, the limitation period will not begin to run until the plaintiff ceases to be under that disability. Most of the old English limitation statutes had provisions relating to disabilities - but the provisions varied considerably from one statute to another, and some had no provision for disabilities at all. Further rules were contained in other statutes, such as the *Forfeiture Act 1870* which provided that convicts could not sue while in prison, though time continued to run against them.

5.2 These differences have been carried over into the Western Australian *Limitation Act*. The Act thus contains two sets of rules about disabilities - one applying to actions for land or rent (inherited from the English 1833 and 1874 Acts) and the other applying to the other actions and suits mentioned in section 38 (inherited from the English *Limitation Act 1623*, though there have been some amendments).

5.3 The two sets of rules differ considerably from one another. In the case of actions for land or rent, where the plaintiff is an infant, a married woman (except one entitled to bring such an action) or an idiot, lunatic or person of unsound mind, that person (or some person claiming through him) may bring an action within a period of six years after the disability ceased or the person under the disability died (section 16). However, absence of the plaintiff beyond the seas is not a ground for extension of the time limit (section 17) and the limitation period cannot be extended more than 30 years after the right accrued (section 18). Nor may further time be allowed for a succession of disabilities (section 19).

5.4 In the case of the other actions or suits to which section 38 applies, infancy and insanity prevent time starting to run, but the fact that the plaintiff is a married woman does not (section 40). The fact that the plaintiff is beyond the seas or imprisoned does not extend the

time limit (section 39), but unlike the case of actions for land or rent the fact that the defendant is beyond the seas prevents time running until the defendant returns (section 41). A modern provision added to the Act (section 42) makes it clear that a person is not "beyond the seas" when he is elsewhere in Australia. In all these cases, the effect of the disabilities is to suspend the running of the period until the disability ceases - in contrast to the provisions relating to actions for land and rent, where the effect is to suspend the period for thirty years at the most.

5.5 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), section 32 (actions to recover money charged on land or rent), section 33 (action to recover an intestate's estate), section 34 (actions to recover arrears of rent or interest), section 37 (actions on penal statutes), section 37A (actions to recover money paid as taxes), section 47 (actions against trustees) and section 47A (actions against public authorities).<sup>1</sup>

**(b) Reform of the law elsewhere**

5.6 The Wright Committee drew attention to these differences between the various English statutory provisions as respects disabilities. It made a number of specific recommendations:<sup>2</sup>

- (1) That the disability dependent on the absence of the defendant beyond the seas be abolished;<sup>3</sup>
- (2) That in the case of actions under section 42 of the *Real Property Limitation Act 1833* (section 34 of the Western Australian Act) or sections 7 and 8 of the *Real*

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<sup>1</sup> The problem of infant plaintiffs suing public authorities was specifically drawn to the Commission's attention by Mr L L Davies and was also referred to in a paper given at the Law Society Summer School in 1982: H McLernon *Statutory Corporations: Limitation Problems* 6-7.

<sup>2</sup> It also recommended that time should not run against a convict until he is lawfully at large, or until an administrator or curator is appointed, but in Western Australia the law as regards convicts does not require amendment, since the *Criminal Code* provides that the estate of a prisoner vests in a curator, who has power to sue and defend actions in his behalf: s 684.

<sup>3</sup> Wright Committee Report para 15.

*Property Limitation Act 1874* (sections 29 and 32 of the Western Australian Act) infancy and insanity should be treated as disabilities;<sup>4</sup>

- (3) That where a claimant died under a disability, time should run against his personal representative from the date of his death;<sup>5</sup>
- (4) That actions to recover money charged on land (like actions to recover land itself) should in no case be kept alive by a disability for more than 30 years.<sup>6</sup>

5.7 Section 22 of the English *Limitation Act 1939* implemented all these recommendations. However, of equal importance was the general change in the law relating to disabilities brought about by this section. The disability provisions were no longer limited to particular actions but operated in respect of all actions. The English *Limitation Act 1980*<sup>7</sup> adopts the same principle, as do all the modern Acts in Australia.<sup>8</sup>

5.8 It seems clear that Western Australia should follow suit, adopting the reforms recommended by the Wright Committee and enacting disability provisions of general application.

43. *Should the various provisions about disabilities in the Limitation Act be replaced by generally applicable provisions?*

**(c) Who is a person under disability**

5.9 The modern Limitation Acts, while they all conform to the basic pattern described above, show some important differences in matters of detail.

5.10 Infancy and unsoundness of mind are grounds of disability under all the modern Acts, as they are in Western Australia. However, in some jurisdictions a person is also under

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<sup>4</sup> Id para 17(c).

<sup>5</sup> Id para 17(d).

<sup>6</sup> Id para 17(e).

<sup>7</sup> S 28.

<sup>8</sup> *Limitation Act 1969* (NSW) s 52; *Limitation of Actions Act 1958* (Vic) s 23; *Limitation of Actions Act 1974* (Qld) s 29; *Limitation Act 1974* (Tas) s 26; *Limitation Act 1981* (NT) s 36; *Limitation Act 1985* (ACT) s 30. Note also that the *Limitation of Actions Act 1936* (SA), though it generally resembles the Western Australian *Limitation Act*, has been reformed to incorporate all-embracing disability provisions (s 45).

disability if affected by a physical disability,<sup>9</sup> undergoing a sentence of imprisonment,<sup>10</sup> or involved in war or warlike circumstances.<sup>11</sup> No jurisdiction apart from Western Australia<sup>12</sup> now regards married women as under a disability, and South Australia (where, like Western Australia, there is no modern Limitation Act) is the only other jurisdiction in which absence from the jurisdiction is regarded as a disability.<sup>13</sup>

44. Which of the following should be regarded as a person under disability for the purpose of the Limitation Act?

- (a) persons under the age of 18;
- (b) persons of unsound mind;
- (c) persons affected by a physical disability;
- (d) persons undergoing a sentence of imprisonment;
- (e) persons involved in war or warlike circumstances;
- (f) married women;
- (g) persons absent from the jurisdiction.

#### (d) The effect of disability

5.11 Traditionally, disability prevents a limitation period from commencing to run until the person concerned ceases to be under disability. Once a limitation period starts running, nothing can interrupt it.<sup>14</sup> This means that a disability which manifests itself after the limitation period begins to run (for example, if a person becomes of unsound mind at some time after a cause of action accrues) has no effect on the running of the period.<sup>15</sup>

5.12 This is the position at the present day in England and the three Australian jurisdictions whose legislation was closely based on the English *Limitation Act 1939* - Victoria, Queensland and Tasmania.<sup>16</sup> However:

<sup>9</sup> *Limitation Act 1969* (NSW) s 11(3)(b)(i); *Limitation Act 1981* (NT) s 4(1); *Limitation Act 1985* (ACT) s 8(3)(b).

<sup>10</sup> *Limitation Act 1969* (NSW) s 11(3)(b)(ii); *Limitation of Actions Act 1974* (Qld) s 5(2); *Limitation Act 1974* (Tas) s 2(2)(c); *Limitation Act 1981* (NT) s 4(1).

<sup>11</sup> *Limitation Act 1969* (NSW) s 11(3)(b)(iii); *Limitation Act 1985* (ACT) s 8(3)(b). In Victoria and Tasmania, involvement of the plaintiff in war circumstances is not regarded as a ground of disability, but extends the limitation period under separate provisions: *Limitation of Actions Act 1958* (Vic) s 23(2); *Limitation Act 1974* (Tas) s 28.

<sup>12</sup> *Limitation Act 1935* s 16.

<sup>13</sup> *Limitation of Actions Act 1936* (SA) s 39; *Limitation Act 1935* (WA) s 41.

<sup>14</sup> *Prideaux v Webber* (1661) 1 Lev 31.

<sup>15</sup> *Purnell v Roche* [1927] 2 Ch 142.

<sup>16</sup> *Limitation Act 1980* (Eng) s 28, replacing *Limitation Act 1939* (Eng) s 22; *Limitation of Actions Act 1958* (Vic) s 23; *Limitation of Actions Act 1974* (Qld) s 29; *Limitation Act 1974* (Tas) s 26.

- (1) this does not affect a case where the right of action first accrued to a person not under a disability through whom the person under a disability claims;
- (2) where the person under disability dies while still under disability and the right of action accrues to another person under disability, no further extension of time is allowed;
- (3) even where the person is under disability, actions to recover land or money charged on land are subject to an ultimate time bar of 30 years;
- (4) 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.

5.13 In Western Australia, disability also prevents time from starting to run, but only in the particular cases to which this rule applies.<sup>17</sup> Some of the detailed rules are the same as in the jurisdictions with modern provisions - thus, an action to recover land or rent is subject to an ultimate period of 30 years, even where the plaintiff is under disability.<sup>18</sup> But some of the provisions only apply to particular causes of action. In the case of an action to recover land or rent, where the person under disability dies while still under disability, and the right of action accrues to another person under disability, no further extension of time is allowed,<sup>19</sup> but there is no such rule for common law actions.

5.14 In contrast to the position in the jurisdictions discussed above, in New South Wales, the Northern Territory and the Australian Capital Territory, disability not only prevents time starting to run when it is present at the time when a cause of action accrues, but also suspends the running of the limitation period when it arises after the commencement of that period.<sup>20</sup> These provisions do not apply to a cause of action to recover a penalty or forfeiture, except where the plaintiff is the aggrieved party. There is a similar provision in South Australia,<sup>21</sup> which, though it has not adopted a modern *Limitation Act*, has modernised its disability provisions. In South Australia and the Northern Territory, these provisions are subject to an ultimate limitation period of 30 years from the time the cause of action arose.

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<sup>17</sup> See paras 5.3-5.5 above.

<sup>18</sup> *Limitation Act 1935* s 18.

<sup>19</sup> *Id* s 19.

<sup>20</sup> *Limitation Act 1969* (NSW) s 52; *Limitation Act 1981* (NT) s 36; *Limitation Act 1985* (ACT) s 30.

<sup>21</sup> *Limitation of Actions Act 1936* (SA) s 45.

45. *Should disability*
- (a) *prevent the limitation period running when it is present at the time the cause of action accrues; or*
  - (b) *also suspend the running of the limitation period where it arises subsequently to the commencement of that period?*
46. *Should there be an ultimate period (for example 30 years) beyond which the running of time cannot be suspended, irrespective of disability? Should this apply in all cases, or only in particular cases, for example actions to recover land or money charged on land?*
47. *Should the disability provision -*
- (a) *affect a case where the right of action first accrued to a person not under a disability through whom the person under disability claims;*
  - (b) *apply without any further extension of time where the person under disability dies while still under disability and the right of action accrues to another person under disability;*
  - (c) *apply to actions to recover a penalty or forfeiture under a statutory provision where the action is not brought by an aggrieved party?*

## **2. ACKNOWLEDGMENT AND PART PAYMENT**

### **(a) The present law in Western Australia**

5.15 In the old English statutes there were various provisions by virtue of which, after time had begun to run, it could be made to start afresh by acknowledgment or part-payment. Part payment is a particular form of acknowledgment applicable when the right of action is in respect of a debt.

5.16 These old provisions were inconsistent in a number of respects. Some applied only to acknowledgment, some only to part payment and some to both. In some cases, acknowledgment by an agent was sufficient and in others it was not; in some cases an acknowledgment to a third party was sufficient, but in other cases it had to be made to the plaintiff personally; in some cases an acknowledgment could start time running again even after a limitation period had expired, and in other cases once the period had expired it was too late. Acknowledgment or part payment by one person generally bound others who were

jointly and severally liable in respect of the same liability or succeeded to the liability, but it was possible to be specifically exempted from such liability by statute.<sup>22</sup>

5.17 These provisions, with all their inconsistencies, have been carried over into the Western Australian *Limitation Act*. The Act contains no fewer than nine separate provisions about acknowledgment and part payment.

(i) *Actions to recover land*

5.18 Under section 15,<sup>23</sup> where a person has a right to make an entry or distress or to bring an action to recover land or rent, an acknowledgment of the title of the person entitled to the land or rent by the person in possession or receipt of the profits of land or in receipt of rent causes the right of the person entitled, or any person claiming through that person, to be deemed to accrue at the time of acknowledgment. The provision does not apply to part payment.

5.19 Under section 35,<sup>24</sup> a mortgagee of land can make an entry or 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.

(ii) *Actions to redeem a mortgage*

5.20 Under section 29,<sup>25</sup> 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 the mortgagor's estate) by the mortgagee or some other person claiming through the mortgagee, the 12-year limitation period starts running afresh from the date of the acknowledgment. The provision does not apply to part payment.

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<sup>22</sup> See Wright Committee Report paras 19-21.

<sup>23</sup> Reproducing s 14 of the *Real Property Limitation Act 1833* (Eng).

<sup>24</sup> Reproducing s 1 of the *Real Property Limitation Act 1837* (Eng).

<sup>25</sup> Reproducing s 7 of the *Real Property Act 1874* (Eng).

*(iii) Actions to recover money*

5.21 Under section 32(1),<sup>26</sup> 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 on any legacy, an acknowledgment or payment causes the limitation period (12 years, running from the time when a present right to receive the money has accrued to a person capable of giving a discharge or release) to start running afresh from the date of the acknowledgment or payment.

5.22 Under section 33,<sup>27</sup> in the case of an action to recover the estate or any share of the estate of a person dying intestate from the personal representative, an acknowledgment or payment causes the limitation period (12 years, running from the time the right to receive payment has accrued to a person capable of giving a discharge or release) to start running afresh from the date of the acknowledgment or payment. The provision also applies to a case where part of the estate or interest is applied for.

5.23 Under section 34,<sup>28</sup> 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 causes the limitation period (6 years) to start running afresh from the date of the acknowledgment. This provision does not apply to part payment.

5.24 Under section 44(4),<sup>29</sup> in an action for rent reserved by a lease by deed or an action of covenant or debt on any bond or other specialty or on any recognisance, acknowledgment or payment causes the limitation period (12 years) to start running afresh from the date of acknowledgment or payment.

5.25 Under section 38(1),<sup>30</sup> 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 any damages in respect of

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<sup>26</sup> Reproducing s 8 of the *Real Property Limitation Act 1874* (Eng).

<sup>27</sup> Reproducing s 13 of *Real Property Limitation Act 1860* (Eng), which replaced s 41 of the *Real Property Limitation Act 1833*.

<sup>28</sup> Reproducing s 42 of the *Real Property Limitation Act 1833* (Eng).

<sup>29</sup> Reproducing s 5 of the *Civil Procedure Act 1833* (Eng).

<sup>30</sup> Reproducing s 83 of the *Supreme Court Act 1928* (Vic).

those arrears, an acknowledgment causes the limitation period (6 years) to start running afresh from the date of acknowledgment. The provision does not apply to part payment.

5.26 In addition there is section 44(3),<sup>31</sup> which deals with acknowledgment of a simple contract debt. It provides that no acknowledgment or promise shall take any case out of the operation of section 38 unless it is made in writing.

5.27 Prior to 1828, the English legislation contained no provisions about acknowledgment of simple contract debts (as opposed to specialty debts). However, the courts held that an express or implied acknowledgment would be effective if it amounted to a promise to pay - a doctrine described in *Spencer v Hemmerde*<sup>32</sup> as "decorously disregarding an Act of Parliament". This gives the courts the difficult task of deciding when an acknowledgment amounted to a promise to pay. The rule was indirectly recognised by section 1 of the *Statute of Frauds Amendment Act 1828*, and therefore also by section 44(3) of the Western Australian Act.

(iv) *Inconsistencies*

5.28 There are a number of particular respects in which these provisions are inconsistent.

- (1) An acknowledgment must generally be made by the maker or the maker's agent, but under section 15 the acknowledgment must be signed by the maker, and under section 29 by the maker or persons claiming through the maker.
- (2) Acknowledgment and part payment bind persons other than the maker or recipient in some cases but not others. Thus under section 29 when there are two or more mortgagees in possession of mortgaged land, acknowledgment by one mortgagee of the mortgagor's right to redeem binds that mortgagee and his successors but not any other mortgagee or his successors; and where there are two or more mortgagors and the right of one mortgagor to redeem is acknowledged, the acknowledgment is deemed to have been made by all mortgagors. However, under section 44(3) and (5) acknowledgment or part payment by one co-contractor or co-debtor does not bind the other co-contractors or co-debtors. It is probable that under the common law an

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<sup>31</sup> Reproducing s 1 of the *Statute of Frauds Amendment Act 1828* (Eng) (Lord Tenterden's Act).

<sup>32</sup> [1922] 2 AC 507, 519 per Lord Sumner.

acknowledgment of title to land or mortgaged personalty by a person in possession binds all other persons in possession during the ensuing limitation period, and that a payment in respect of a mortgage debt by the mortgagor or any other person in possession of the mortgaged property binds all other persons in possession during the ensuing limitation period;<sup>33</sup> but there are no statutory provisions.

**(b) Reform of the law in England**

5.29 The inconsistencies between the provisions reviewed above are obvious. In England, the Wright Committee analysed the similar inconsistencies in the old English statutes and made recommendations designed to eliminate them.<sup>34</sup> These recommendations were implemented by the English *Limitation Act 1939*.<sup>35</sup> Provisions based on this Act have been adopted in Victoria, Queensland and Tasmania.<sup>36</sup> As a result, the law in these jurisdictions is a considerable improvement on the present Western Australian law. It is provided that acknowledgment or part payment causes the limitation period to start running afresh in actions to recover land and foreclosure actions, in actions to redeem a mortgage and in actions to recover debts and legacies.<sup>37</sup> Acknowledgment or part payment may have this effect even after the expiry of the limitation period, except in cases where the attempted acknowledgment or part payment is in respect of a right extinguished by the running of the limitation period.<sup>38</sup> Whether an acknowledgment or part payment binds persons other than the maker or recipient still varies according to the provision in question, and in this respect there is still some distinction between acknowledgment and part payment.<sup>39</sup>

5.30 These provisions, while a great improvement on the Western Australian position, still retain a number of complexities. In particular:

- (1) the law relating to acknowledgment and part payment is still stated in relation to particular kinds of action, and is not general in effect;

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<sup>33</sup> Australian Commentary on Halsbury's Laws of England (4th ed): *Limitation of Actions* paras C906(a) and C907(a), citing Halsbury's Laws of England (1st ed) vol 19 paras 251 and 165.

<sup>34</sup> Wright Committee Report para 19(d).

<sup>35</sup> Ss 23-25.

<sup>36</sup> *Limitation of Actions Act 1958* (Vic) ss 24-26; *Limitation of Actions Act 1974* (Qld) ss 35-37; *Limitation Act 1974* (Tas) ss 29-31.

<sup>37</sup> *Limitation Act 1939* (Eng) s 29; *Limitation of Actions Act 1958* (Vic) s 24; *Limitation of Actions Act 1974* (Qld) s 35; *Limitation Act 1974* (Tas) s 29.

<sup>38</sup> See para 6.4 below.

<sup>39</sup> *Limitation Act 1939* (Eng) s 31; *Limitation of Actions Act 1958* (Vic) s 26; *Limitation of Actions Act 1958* (Qld) s 37; *Limitation Act 1974* (Tas) s 31.

- (2) there are still distinctions between these provisions as regards their effect on third parties, and here acknowledgment and part payment still differ;
- (3) it seems anomalous that acknowledgment and part payment can, in some circumstances, be effective to start a period of limitation running afresh even after it has expired.

5.31 This last point was one made by the Orr Committee in England. They recommended that once a debt had become statute-barred it should remain irrecoverable by action.<sup>40</sup> This recommendation was implemented and the *Limitation Act 1980*<sup>41</sup> now so provides. But the law in Victoria, Queensland and Tasmania has not been altered.

**(c) Reform of the law in New South Wales**

5.32 The New South Wales Law Reform Commission recommended new provisions on acknowledgment and part payment with the object of simplifying the provisions found in the English legislation.<sup>42</sup> These recommendations were implemented by the New South Wales *Limitation Act 1969*,<sup>43</sup> and have also been adopted in the Northern Territory and the Australian Capital Territory.<sup>44</sup>

5.33 These provisions apply to "confirmation", a term which covers both acknowledgment and part payment,<sup>45</sup> and to all causes of action. Confirmation of any cause of action causes the limitation period to start running afresh from the date of the confirmation.<sup>46</sup> However, confirmation after the expiry of the limitation period does not revive it.

5.34 Confirmation in general has effect only between the parties to it or their agents. A person has the benefit of a confirmation only if it is made to that person or a person through

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<sup>40</sup> Orr Committee Report para 2.71.

<sup>41</sup> S 29(7).

<sup>42</sup> NSWLRC Report paras 248-267.

<sup>43</sup> S 54.

<sup>44</sup> *Limitation Act 1981* (NT) s 41; *Limitation Act 1985* (ACT) s 32.

<sup>45</sup> *Limitation Act 1969* (NSW) s 54(2)(a); *Limitation Act 1981* (NT) s 41(2)(a); *Limitation Act 1981* (ACT) s 32(2)(a).

<sup>46</sup> *Limitation Act 1969* (NSW) s 54(1); *Limitation Act 1981* (NT) s 41(1); *Limitation Act 1981* (ACT) s 32(1).

whom that person claims or their agent.<sup>47</sup> A person is bound by a confirmation only if that person is

- (1) a maker of the confirmation;
- (2) a successor of the maker under a devolution occurring after the making of the confirmation;
- (3) a trustee of the will or estate of a deceased person, or of any other trust, at the time of the confirmation or subsequently, and the maker is a trustee at the time of the confirmation; or
- (4) a person who, subsequently to the confirmation, comes into possession of property and claims through the maker of the confirmation, if the maker was in possession of the property at the time of the confirmation and the cause of action relates to property.<sup>48</sup>

48. *Should the provisions about acknowledgment and part payment be replaced by*

- (a) *provisions based on those in force in England, Victoria, Queensland and Tasmania;*
- (b) *provisions based on those in force in New South Wales, the Northern Territory and the Australian Capital Territory?*

49. *In particular -*

- (a) *Is there any reason why the law relating to acknowledgment and part payment should be different for any different classes of action;*
- (b) *Should acknowledgment or part payment ever have any effect on persons other than the maker or the recipient;*
- (c) *Should acknowledgment or part payment ever be effective to start a period of limitation running afresh after it has expired?*

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<sup>47</sup> *Limitation Act 1969 (NSW) s 54(5); Limitation Act 1981 (NT) s 41(4); Limitation Act 1981 (ACT) s 32(1).*

<sup>48</sup> *Limitation Act 1969 (NSW) s 54(6); Limitation Act 1981 (NT) s 41(5); Limitation Act 1981 (ACT) s 32(6).*

### 3. FRAUD

5.35 Though ignorance of the existence of a cause of action does not prevent time running, the matter is very different if this ignorance is brought about by the defendant's fraud - either fraud on which the cause of action is founded, or fraud concealing the existence of a cause of action arising independently of fraud.

5.36 In the old English law,<sup>49</sup> only one statutory provision dealt with concealed fraud. According to section 26 of the *Real Property Limitation Act 1833*, in the case of suits in equity to recover land or rent, where there was concealed fraud depriving the claimant or his predecessors of the land or rent, time would only run against the plaintiff from the moment the plaintiff discovered the fraud or could with reasonable diligence have discovered it.

5.37 Apart from this, there was a general equitable doctrine that a plaintiff was not affected by lapse of time where his ignorance was due to the fraud of the defendant and he had no reasonable opportunity of discovering the fraud before bringing an action.

5.38 The difficulty was that this equitable doctrine did not cover all kinds of actions. Before the *Judicature Acts of 1873-1875*, some actions were within the exclusive competence of courts of equity, some were within the exclusive competence of courts of common law, and there were certain actions in which both courts of equity and courts of common law had concurrent jurisdiction. Equity courts applied the equitable doctrine to actions within their exclusive competence, but the common law courts took the view that concealed fraud made no difference to the running of a limitation period, and applied that view not only to actions within their exclusive competence but also to actions in respect of which they had concurrent jurisdiction with courts of equity. After the *Judicature Acts* the courts held that where there was fraudulent concealment of a cause of action based on fraud, the equitable rule would prevail, in accordance with the general principle of the *Judicature Acts*.<sup>50</sup> However, where a

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<sup>49</sup> See generally J L Brunyate *Limitation of Actions in Equity* (1932) chap 2; J L Brunyate "Fraud and the Statutes of Limitations" (1931) 4 *Camb LJ* 174; D B Ross "Concealed Fraud and the Statute of Limitations" (1930) 4 *ALJ* 174.

<sup>50</sup> *Gibbs v Guild* (1882) 9 QBD 59; *Armstrong v Milburn* (1885) 2 TLR 615 (obiter dicta in the Court of Appeal).

cause of action was one formerly only cognisable at common law, and though there had been no active concealment, the cause of action itself was fraud, the decisions were in conflict.<sup>51</sup>

5.39 In Western Australia, the position is broadly the same. Section 27 of the *Limitation Act* sets out the rule found in section 26 of the *Real Property Limitation Act 1833*, but there is no other statutory provision, and it is unclear to what extent the equitable doctrine will apply in actions formerly within the exclusive or concurrent jurisdiction of common law courts - in spite of the fact that in Western Australia there has never been any formal division of jurisdiction between law and equity.

5.40 This was one of the matters that was specifically mentioned by the Law Society in the submission that led to the Commission being given this reference. The Law Society, referring to *Metacel v Simmonds*<sup>52</sup> and *Nelson v Larholt*,<sup>53</sup> pointed out that the equitable rule would not apply to common law actions and that section 27 of the *Limitation Act* was limited to actions in equity to recover land or rent.

5.41 In England, the Wright Committee reviewed these problems and said that the obscurity and uncertainty surrounding this area should be ended.<sup>54</sup> They recommended that in all cases where a cause of action was founded on fraud committed by the defendant or his agent, or where a cause of action was fraudulently concealed by the defendant or his agent, time should only run against the plaintiff from the time when he discovered the fraud or could with reasonable diligence have discovered it. This recommendation was implemented in England by the *Limitation Act 1939*<sup>55</sup> and has also been adopted by the modern Australian Limitation Acts,<sup>56</sup> with only two variations:

- (1) In New South Wales, the Northern Territory and the Australian Capital Territory, the provision also applies where the identity of the person against whom the cause of action lies is fraudulently concealed;

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<sup>51</sup> See *Armstrong v Milburn* (1885) 2 TLR 615; *Osgood v Sutherland* (1914) 111 LT 529; contrast *Bulli Gold Mining Co v Osborne* [1899] AC 351; *Lynn v Bamber* [1930] 2 KB 72. For discussion (obiter) in a Western Australian case, see *McKerlie v Lake View and Star* (No 2) (1939) 41 WALR 86.

<sup>52</sup> [1969] 2 NSW 201.

<sup>53</sup> [1948] 1 KB 339.

<sup>54</sup> Wright Committee Report para 22.

<sup>55</sup> S 26. See now *Limitation Act 1980* (Eng) s 32.

<sup>56</sup> *Limitation Act 1969* (NSW) s 55; *Limitation of Actions Act 1958* (Vic) s 27; *Limitation of Actions Act 1974* (Qld) s 38; *Limitation Act 1974* (Tas) s 32; *Limitation Act 1981* (NT) s 42; *Limitation Act 1985* (ACT) s 33.

- (2) In the Australian Capital Territory the provision is limited to deliberate concealment, whereas in other jurisdictions non-disclosure may be sufficient to prevent the running of the limitation period.<sup>57</sup>

50. *Should the provisions in the Limitation Act and the rules of law and equity as to concealed fraud be replaced by a rule based on the modern provisions in other jurisdictions that in all cases of fraud or fraudulent concealment the limitation period should run from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it?*

51. *Should this rule -*

- (a) *also apply to fraudulent concealment of the defendant's identity;*  
 (b) *only apply to deliberate concealment?*

#### 4. MISTAKE

5.42 The problem of mistake is similar to fraud. Under the old law in England, there was an equitable rule that where relief was sought from the consequences of 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. This rule, however, did not apply to cases formerly falling within the exclusive jurisdiction of courts of law; it only applied to cases which were formerly within the exclusive jurisdiction of courts of equity, or within the concurrent jurisdiction of both systems.

5.43 The Wright Committee recommended that in all actions for relief from the consequences of mistake, whether at common law or in equity, time should run only from the date when the mistake was, or could with reasonable diligence have been, discovered.<sup>58</sup> In the *Limitation Act 1939*, therefore, section 26 extended to cases of mistake as well as fraud.<sup>59</sup>

5.44 In Australia, mistake caused the same problems as it did in England, in spite of the fact that in no Australian jurisdiction was there a formal separation of common law and equitable jurisdiction. The modern Australian Limitation Acts have therefore adopted

<sup>57</sup> *Mongomerie's Brewery Co Ltd v Blyth* (1901) 27 VLR 175.

<sup>58</sup> Wright Committee Report para 23.

<sup>59</sup> See now *Limitation Act 1980* (Eng) s 32.

provisions based on that found in the English *Limitation Act 1939*.<sup>60</sup> A similar solution would seem appropriate for Western Australia.

52. Should the present rules as to relief from the consequences of mistake be replaced by a rule based on the provisions of modern Limitation Acts that time should run only from the date when the mistake was, or could with reasonable diligence have been, discovered?

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<sup>60</sup> *Limitation Act 1969* (NSW) s 56; *Limitation of Actions Act 1958* (Vic) s 27; *Limitation of Actions Act 1974* (Qld) s 38; *Limitation Act 1974* (Tas) s 32; *Limitation Act 1981* (NT) s 43; *Limitation Act 1985* (ACT) s 34.

## Chapter 6

### EFFECT OF RUNNING OF THE LIMITATION PERIOD

6.1 The traditional attitude in the common law has always been to regard the running of a period of limitation as barring the remedy but not extinguishing the right.<sup>1</sup> A plaintiff is prevented from enforcing a remedy by action, but the right is not thereby extinguished. The plaintiff may be able to enforce the right in another way, or the defendant may decline to rely on a defence of limitation.<sup>2</sup> Limitation, then, is a matter of procedure and not of substance. Limitation rules have traditionally been so characterised for conflict of laws purposes.

6.2 The only exception to this principle in the old English law was in the case of actions to recover land or rent. The *Real Property Limitation Act 1833* section 34 provided that at the determination of the limitation period the right or title to the land or rent was extinguished.<sup>3</sup> This rule was adopted in Western Australia along with the rest of the 1833 Act, and now appears in the Western Australian *Limitation Act 1935* as section 30.

6.3 In England, the Wright Committee examined a number of consequences which flowed from the fact that limitation barred the remedy only and not the right. They concluded that the distinction was important in conflict of laws, but that this was a question which should be separately examined.<sup>4</sup> Otherwise, they said that there was no case for changing the law to make limitation extinguish the right. By way of qualification, they suggested that there might be some support for regarding the running of the limitation period as extinguishing a plaintiff's title to goods in an action for conversion, by analogy with actions to recover land.<sup>5</sup>

6.4 Accordingly, the English *Limitation Act 1939* provided that the running of a period of limitation extinguished the right of the plaintiff in actions for conversion or wrongful

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<sup>1</sup> *Royal Norwegian Government v Constant and Constant* [1960] 2 Lloyd's Rep 431; *C & M Matthews Ltd v Marsden Building Society* [1951] Ch 758.

<sup>2</sup> Thus in *Kerr v Miller* (1981) 1 SR(WA) 244 the defendant admitted liability within the limitation period, and was subsequently prevented from pleading the *Limitation Act*.

<sup>3</sup> See A C Meredith "A Paradox of Sugden's" (1918) 34 *LQR* 253; J A Omotola "The Nature of Interest Acquired by Adverse Possession of Land under the Limitation Act 1939" (1973) 37 *Conv* 85.

<sup>4</sup> Wright Committee Report para 24.

<sup>5</sup> *Ibid.* On this question, see E Jenks "A Blind Spot in English Law" (1933) 49 *LQR* 215.

detention of goods,<sup>6</sup> as well as in actions for the recovery of land.<sup>7</sup> Similar provisions have been adopted in the modern Limitation Acts enacted in Australian jurisdictions.<sup>8</sup>

6.5 The New South Wales *Limitation Act*, however, goes further. The New South Wales Law Reform Commission, after a comprehensive examination of the issues, recommended that in all cases the running of a period of limitation should extinguish the right and not just the remedy.<sup>9</sup> This recommendation was implemented by sections 63 to 67 of the *Limitation Act 1969*. The principal reason for the New South Wales Commission's recommendation was to ensure that foreign courts applying New South Wales law would also give effect to New South Wales limitation periods.<sup>10</sup>

6.6 The Commission identified only one case where special treatment was required, that of a possessory lien.<sup>11</sup> It thought that a debt secured by a possessory lien on goods should not be extinguished as long as the owner had a cause of action for conversion or detinue or to recover the proceeds of sale, and section 68 of the Act so provides.

6.7 No other Australian jurisdiction has adopted the New South Wales approach to this issue, and in particular it has not been adopted in the Northern Territory or the Australian Capital Territory, the Limitation Acts of which are generally modelled on the New South Wales Act.<sup>12</sup>

6.8 In England, the Orr Committee echoed the suggestion of the Wright Committee that the conflict of laws aspects of this problem should be separately examined.<sup>13</sup> Otherwise, they were in favour of limitation continuing to be procedural, rather than substantive. They did however suggest a change in relation to stolen goods. Their view was that the rights of the owner should not be barred by lapse of time against a thief or receiver, but as against a bona

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<sup>6</sup> S 3.

<sup>7</sup> S 16.

<sup>8</sup> *Limitation Act 1969* (NSW) s 65(1); *Limitation of Actions Act 1858* (Vic) s 6(2); *Limitation of Actions Act 1974* (Qld) s 12(2); *Limitation Act 1974* (Tas) s 6(2); *Limitation Act 1981* (NT) s 19(2); *Limitation Act 1985* (ACT) s 43(1) (conversion and wrongful detention); *Limitation Act 1969* (NSW) s 65(1); *Limitation of Actions Act 1858* (Vic) s 18; *Limitation of Actions Act 1974* (Qld) s 24; *Limitation Act 1974* (Tas) s 6(2) (actions for the recovery of land). The NT and ACT Limitation Acts contain no provisions dealing with actions relating to land.

<sup>9</sup> NSWLRC Report paras 306-323. See also D F Jackson "The Legal Effects of the Passing of Time" (1970) 7 *Melb ULR* 407 and 449.

<sup>10</sup> *Id* para 321.

<sup>11</sup> *Id* para 315.

<sup>12</sup> See paras 2.26-2.28 above.

<sup>13</sup> Orr Committee Report para 2.96.

fide possessor or a person claiming through him the owner's rights should be extinguished after six years.<sup>14</sup> This recommendation has been adopted by section 4 of the *Limitation Act 1980*. No Australian Limitation Act contains a similar provision.

6.9 As suggested by the Wright Committee, the conflict of laws aspects of this problem were examined by the Law Commission as a separate issue. In its report, submitted in 1982,<sup>15</sup> the Law Commission recommended that the English rule that statutes of limitation (as opposed to rules of prescription) were classed as procedural should be abandoned, and that where according to conflict of laws rules a foreign law was applicable, the limitation rule of that foreign country should be applied, and not the limitation rules of the forum. This recommendation was implemented by the *Foreign Limitation Periods Act 1984*. Though the conflict of laws aspects may be a separate problem, it is interesting to note that the present English law would seem to be in harmony with the attitude to the general problem taken by the New South Wales Law Reform Commission.

6.10 It may be that the conflict of laws issues should be put aside as involving a separate problem, as has been done in England. This, however, still leaves the general issue of whether the running of the limitation period should bar the right or simply bar the remedy. Western Australia could choose to change the law in particular cases, such as conversion and theft, as has been done in England, or make a general change, following the example of New South Wales.

53. *Should the effect of the running of a period of limitation be -*

(a) *to bar the remedy, or*

(b) *to bar the right?*

54. *If the effect of the running of a period of limitation is to bar the remedy, should there be exceptions in the case of -*

(a) *actions to recover land;*

(b) *actions for conversion of wrongful detention of goods?*

55. *In the case of stolen goods, should the rights of the owner be barred by lapse of time against a thief or receiver?*

<sup>14</sup> Id para 3.8. See also M J Goodman "First Catch Your Defendant - Limitation and the Unknown Tortfeasor" (1966) 29 *MLR* 366.

<sup>15</sup> Law Commission, Report on *Classification of Limitation in Private International Law* (1982).

56. *If the effect of the running of a period of limitation is to bar the right, should a debt secured by a possessory lien on goods not be extinguished as long as the owner has an action for conversion or wrongful detention or to recover the proceeds of sale?*

## Chapter 7

### LATENT DAMAGE

#### 1. INTRODUCTION

7.1 As has already been noticed,<sup>1</sup> in 1936 the Wright Committee considered two alternatives to the present basis of limitation, whereby a fixed period of limitation runs from a fixed date.<sup>2</sup> One was to retain the fixed periods but to give a court a general discretion to extend the time in appropriate cases. The Committee eventually rejected this alternative and opted for the retention of the traditional approach whereby time runs from a particular point at which the cause of action is deemed to accrue, whether the plaintiff is aware of it or not. Only in the cases of concealed fraud and mistake would a different rule prevail. This general approach was adopted by the *Limitation Act 1939* and by the Australian statutes based on that Act.

7.2 One result of this approach has been that problems of "latent damage" - damage suffered by the plaintiff without his or her knowledge, which only becomes apparent at some later point in time - have occupied the attention of courts, law reform bodies and legislatures ever since. The problems have been particularly acute in the area of personal injury, and as a result legislation dealing with the problems in relation to personal injury actions has been enacted in England and in all Australian jurisdictions.<sup>3</sup> Another area where the problem of latent damage has become prominent is in negligent building cases, and it may also arise in actions for professional negligence, whether against professionals concerned with building or in other contexts. There is legislation in England,<sup>4</sup> three Australian jurisdictions<sup>5</sup> and New Zealand<sup>6</sup> but the other jurisdictions still have to contend with the problems caused by the common law.<sup>7</sup>

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<sup>1</sup> See para 2.54 above.

<sup>2</sup> Wright Committee Report para 7.

<sup>3</sup> For details, see paras 7.4-7.8 below.

<sup>4</sup> *Latent Damage Act 1986* (Eng).

<sup>5</sup> *Limitation of Actions Act 1936* (SA) s 48; *Limitation Act 1981* (NT) s 44; *Limitation Act 1985* (ACT) s 40.

<sup>6</sup> *Limitation Act 1950* (NZ) s 4(7).

<sup>7</sup> For details, see paras 7.10-7.33 below.

## 2. LATENT PERSONAL INJURY

7.3 The problems of latent damage in the field of personal injury were dealt with in detail in the Report on Part I. By the 1960's (if not earlier) it had become clear that a number of diseases such as asbestosis, mesothelioma and silicosis were contracted long before they became apparent. In England, the House of Lords held in *Cartledge v E Jopling & Sons*<sup>8</sup> that the cause of action accrued when the disease was contracted, even though the plaintiff was not aware of this, and could not be aware of it, until much later. The limitation period therefore expired before the plaintiff was aware that he had a cause of action.

7.4 This problem caused legislation to be enacted in England and in all the Australian States - either as part of a reforming *Limitation Act*, or by amendment to Limitation Acts already in existence. In England the *Limitation Act 1953* section 1 (which was based on the report of the Edmund Davies Committee<sup>9</sup>) allowed a plaintiff who was unaware of material facts of a decisive character to bring an action within one year of the earliest date on which he could reasonably be expected to discover the existence and cause of the injury. However this legislation proved unsatisfactory, and it was replaced by the *Limitation Act 1975*, passed as a result of the interim report of the Orr Committee.<sup>10</sup> The provisions of the 1975 Act have now been re-enacted in the *Limitation Act 1980*.<sup>11</sup> Section 11 provides that in personal injury cases the limitation period begins to run from the date on which the cause of action accrued (that is, the date on which the injury was contracted) or the date of knowledge (if later) of the person injured. What constitutes the date of knowledge is set out in detail in section 14. These provisions are subject to a discretion given to courts by section 33 to override the normal limitation periods. It can be seen that this legislation resorts to both of the alternatives rejected by the Wright Committee in 1936.<sup>12</sup> However, the 1975 Act, like the 1963 Act, seems to be unsatisfactory in a number of respects.<sup>13</sup>

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<sup>8</sup> [1963] AC 758.

<sup>9</sup> *Report of the Committee on Limitation of Actions in Cases of Personal Injury* 1962 Cmnd 1829.

<sup>10</sup> Law Reform Committee *Twentieth Report (Interim Report on Limitation of Actions in Personal Injury Claims)* 1974 Cmnd 5630.

<sup>11</sup> See generally A McGee *Limitation Periods* (1990) 115-141.

<sup>12</sup> See para 2.54 above.

<sup>13</sup> See particularly P J Davies "Limitations of the Law of Limitation" (1982) 98 *LQR* 249; D Morgan "Limitation and Discretion: Procedural Reform and Substantive Effect" (1983) 1 *CJQ* 109.

7.5 In Australia, the *Limitation Act* of Queensland<sup>14</sup> contains provisions modelled on the English *Limitation Act 1963*.<sup>15</sup> The legislation of all the other jurisdictions except for Western Australia contains provisions which give the court a discretion to disregard the normal limitation periods. In Tasmania,<sup>16</sup> this discretion is fairly limited: a judge who thinks it just and reasonable to do so may extend the period for bringing the action for such period as is thought necessary, but not exceeding six years from the date on which the cause of action accrued.<sup>17</sup> In South Australia,<sup>18</sup> the discretion is limited in another way: the court may extend the period if the plaintiff had not ascertained material facts until less than a year before the expiration of the limitation period, and brought an action within a year of ascertaining those facts, or if the plaintiff's failure to bring this action within the limitation period resulted from a representation or conduct by the defendant. The Northern Territory provision<sup>19</sup> is exactly the same as that of South Australia, and in each case the provision is not limited to personal injury but is general in application.

7.6 In Victoria and New South Wales the position as set out in the Report on Part I<sup>20</sup> has now been amended. The new legislative provisions in these jurisdictions and in the Australian Capital Territory all provide that in any personal injury action, a court may, on an application by a plaintiff, if it decides that it is just and reasonable to do so, order that the limitation period shall be extended for such period as it determines.<sup>21</sup> It can be seen that the ambit of discretion is much wider than in any of the other States.

7.7 In Western Australia, in view of the problem of asbestos-related diseases, the Commission was asked to produce a special report on latent injury and disease. The resulting report, submitted in 1982, recommended that the ordinary limitation period should not apply where a court determined that it was just that it should not apply. Statutory criteria would guide the court in making its decision. This approach is very similar to that adopted a few

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<sup>14</sup> *Limitation of Actions Act 1974* (Qld) ss 30-31.

<sup>15</sup> The legislation in New South Wales and Victoria formerly had a similar basis: See *Report on Part I* paras 3.30-3.48.

<sup>16</sup> *Limitation Act 1974* (Tas) s 5.

<sup>17</sup> The New Zealand Act contains a similar provision: *Limitation Act 1950* (NZ) s 4(7).

<sup>18</sup> *Limitation of Actions Act 1936* (SA) s 48.

<sup>19</sup> *Limitation Act 1981* (NT) s 44.

<sup>20</sup> Paras 3.44 and 3.45.

<sup>21</sup> *Limitation Act 1958* (Vic) s 23A, added by the *Limitation of Actions (Personal Injury Claims) Act 1983*; *Limitation Act 1969* (NSW) s 60C, added by the *Limitation Amendment Act 1990*; *Limitation Act 1985* (ACT) s 36.

years later in Victoria, the Australian Capital Territory and New South Wales,<sup>22</sup> but was not accepted in Western Australia, which rejected the idea of introducing discretion into the law of limitation (even though for some years courts have had a discretion to extend the limitation period under the *Fatal Accidents Act 1959* and the *Law Reform (Miscellaneous Provisions) Act 1943*)<sup>23</sup> and instead introduced legislation limited to asbestos-related diseases.

7.8 The *Acts Amendment (Asbestos Related Diseases) Act 1983* has a different basis from any of the legislative provisions described above.<sup>24</sup> Special provisions deal with diseases contracted before the Act came into force.<sup>25</sup> These apart, the Act adopts the scheme of the English 1975 legislation of making the limitation period run for three years from the date of knowledge<sup>26</sup> - but does not give the court the overriding discretion to disregard the normal limitation period which is an essential feature of the 1975 Act. In addition, it is of course limited to asbestos-related diseases. Other diseases such as AIDS,<sup>27</sup> where it is very likely that the limitation period will have expired before the sufferer is aware of the disease,<sup>28</sup> and other cases of personal injury are not covered. In these cases, the limitation period runs from the date on which the damage was suffered whether the plaintiff was aware of it or not.

7.9 It does not seem to be rational to have one set of rules for particular sorts of disease and another for all other cases; nor, surely, is it necessary to have such a complicated set of provisions as those now found in the Western Australian Act. In the light of the experience since 1983, and in particular of the legislative developments in other jurisdictions since then, the Commission is of the view that its recommendations in the Report on Part I should again be considered.

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<sup>22</sup> On the Victorian legislation see B McNaughton "Latent Injury and Disease: Limitation of Actions Reform" (1983) 8 *Legal Service Bulletin* 233.

<sup>23</sup> See paras 10.3 and 10.8 below.

<sup>24</sup> For an analysis and criticism of the Act, see P Handford "Damages and Limitation Issues in Asbestos Cases" (1991) 21 *UWAL Rev* 63, 75-88.

<sup>25</sup> Eg *Limitation Act 1936* s 38A(2)-(5).

<sup>26</sup> Eg id s 38A(6)-(9).

<sup>27</sup> Some actions involving AIDS contracted through the supply of infected blood or blood products have been brought under Part V Division 2 of the *Trade Practices Act 1974* (Cth): see eg *E v Australian Red Cross Society* [1991] ATPR 41-085. These actions will be subject to the three-year limitation period under s 82(2) of that Act.

<sup>28</sup> This applies even to other dust-related diseases such as silicosis. It has been pointed out that silicosis is a hazard of the other main form of mining in Western Australia, gold mining, and that it is illogical to make provision for one hazard but not the other: J Gordon "Latent Disease and the Limitation Act (WA) 1935-1978" (1987) 1 *Kalgoorlie Juridical Quarterly* 10.

57. *Should the Acts Amendment (Asbestos Related Diseases) Act 1983 be repealed and replaced by provisions dealing generally with latent personal injury, as recommended by the Commission in its Report on Part I?*

### 3. LATENT PROPERTY DAMAGE AND ECONOMIC LOSS: THE PRESENT LAW<sup>29</sup>

#### (a) Introduction

7.10 Latent damage has caused further problems in recent years in the areas of property damage and economic loss. As in the case of personal injury, no cause of action accrues unless and until the plaintiff suffers injury. The plaintiff then has six years in which to bring an action.<sup>30</sup> Where damage is immediately apparent upon its occurrence, this works satisfactorily,<sup>31</sup> but difficulties arise where the effects of the defendant's wrongdoing do not become manifest to, or could not reasonably have been discovered by, the plaintiff until it is too late to sue. The plaintiff's claim may well be statute-barred before the plaintiff either knew or ought to have known that such a right existed.<sup>32</sup>

7.11 This problem has become particularly prominent in defective building cases, but there is a wide range of other situations where damage may be suffered which does not manifest itself until after the expiration of the limitation period - for example, cases involving insurance brokers, stockbrokers, bankers, accountants, valuers, lawyers, local authorities and manufacturers of goods.

#### (b) The decision in *Pirelli*

7.12 The problem stems from the decision in *Pirelli General Cable Works Ltd v Oscar Faber and Partners*,<sup>33</sup> in which the defendants were engaged to design a factory chimney which was built in 1969. Cracks developed at the top of the chimney in April 1970, but were

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<sup>29</sup> See also N J Mullany "Limitation of Actions and Latent Damage - An Australian Perspective" (1991) 54 *MLR* 216.

<sup>30</sup> *Limitation Act 1935* s 38(1)(c)(vi).

<sup>31</sup> For an illustration see *D & F Estates Ltd v The Church Commissioners for England* (1985) (unreported) where it was held that the date of the collapse of plasterwork was also the date of the damage, so that damage and its discoverability coincided. Subsequent proceedings in the Court of Appeal and the House of Lords do not appear to have raised any limitation issue: see (1987) 36 *BLR* 72 (CA); [1989] *AC* 177 (HL).

<sup>32</sup> As occurred, for example, in *London Borough of Bromley v Rush and Tompkins* (1985) 4 *Con LR* 44.

<sup>33</sup> [1983] 2 *AC* 1 (hereafter referred to as *Pirelli*).

not discovered until 1977. The plaintiffs carried out extensive remedial work and then in October 1978 issued a writ claiming damages for negligence. The trial judge found that the plaintiffs could not with reasonable diligence have discovered the cracks before October 1972.

7.13 Previous cases<sup>34</sup> had held that unlike personal injury cases, in which the strict rule of *Cartledge v Jopling*<sup>35</sup> applied, in property damage cases time could not begin to run against an owner of property until the owner discovered the damage or ought with reasonable diligence to have discovered it. In *Pirelli* the trial judge and the Court of Appeal, affirming this line of cases, held that the cause of action accrued on the date of discoverability of the damage and that the action was therefore commenced in time. The House of Lords, however, rejected this view and held that the discoverability test could not prevail against the reasoning upon which *Cartledge v Jopling* had been based. Lord Fraser, who delivered the leading judgment, drew a clear distinction between a defect in property and damage to the property resulting from that defect, and held that the occurrence of physical damage was the event which gave the plaintiff a cause of action. As the initial physical damage suffered was in the form of unobservable cracks, this was the date on which the limitation period commenced notwithstanding that the damage was not discovered and was not reasonably discoverable.

7.14 It appears that *Pirelli* represents the law in Australia.<sup>36</sup> It has been adopted by State courts both in Western Australia<sup>37</sup> and elsewhere.<sup>38</sup> The issue has yet to come before the

<sup>34</sup> Beginning with *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858.

<sup>35</sup> [1963] AC 758 - see para 7.3 above.

<sup>36</sup> Contrast Canada, where the Supreme Court continues to endorse the discoverability test: *Kamloops v Nielsen* (1984) 10 DLR(4th) 641; *Central and Eastern Trust Co v Rafuse* (1987) 31 DLR(4th) 481; and see *Consumer Glass Co Ltd v Foundation Co of Canada* (1985) 20 DLR(4th) 126 (Ontario CA). Contrast also New Zealand, where the relationship between *Pirelli* and the discoverability test adopted in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 and *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 has not been clarified at an appellate level. In *Askin v Knox* [1989] 1 NZLR 248 the Court of Appeal referred to the "unsatisfactory disharmony" between the English and New Zealand cases and recommended legislative intervention.

<sup>37</sup> *Wickham v City of Gosnells* (1984) 55 LGRA 102 (WA).

<sup>38</sup> *Minister Administering Environmental Planning and Assessment Act 1979 v San Sebastian Properties Pty Ltd* [1983] 2 NSWLR 268; *Burgchard v Holroyd Municipal Council* [1984] 2 NSWLR 164; *Holden v Goodridge and Wyong Shire Council* (1985) 55 LGRA 231 (NSW); *Miell v Hatjopoulos* (1985) 2 BCL 258 (SA); *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1985) 61 ALR 504; *Hawkins v Clayton* (1986) 5 NSWLR 109; *Gillespie v Elliot* [1987] 2 Qd R 509; *Scanlon v American Cigarette Co (No 1)* [1987] VR 261; *Elanora Country Club Ltd v Summersby and Pearce & Sons (Excavations) Pty Ltd* (1988) 4 BCL 309; *Page v Castlemaine City Council* (1988) 66 LGRA 296 (Vic); *Calmao Pty Ltd v Stradbroke Waters Co-owners Co-operative Society Ltd* (1989) 89 ALR 507; *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314.

High Court for direct consideration, although it was briefly referred to in *Hawkins v Clayton*,<sup>39</sup> in which a number of different attitudes to the decision were expressed.<sup>40</sup>

**(c) Problems in the application of *Pirelli*: building and construction cases**

*(i) When actionable damage occurs*

7.15 The decision raises the question of when actionable damage can be said to have first occurred. There can, of course, be no liability in negligence until damage is suffered. The courts have recognised the necessity of distinguishing between damage resulting from normal settlement and shrinkage, to which all buildings are prone, and damage which can properly be classified as "real and material".<sup>41</sup> This, however, does not solve the problem of determining precisely when defects first cause "real and material" damage. Lord Fraser said that "damage will commonly consist of cracks coming into existence even though they [remain] undiscovered or undiscoverable".<sup>42</sup> However, the distinction between hidden physical damage and a latent defect may be extremely fine and necessitates the introduction of expert engineering evidence as to when actionable damage first occurred.

7.16 In one case, involving defects in a reinforced concrete building, the judge held that the nature and extent of the damage necessary to give rise to a cause of action was a matter of degree, and said that it must be both relevant and significant.<sup>43</sup> He thought that the necessity for remedial works should be taken into account, and also said that in order to be actionable the damage must affect the purpose for which the damaged article was to be used during its expected life. However, it has been argued that this is inconsistent with the general principles

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<sup>39</sup> (1988) 164 CLR 539. This case is not directly in point as it concerns the situation where the wrongful act itself effectively precludes the institution of proceedings within the statutory time limit. Solicitors who held a client's will in safe custody were held liable to the executor of the testatrix for economic loss suffered by the estate as a consequence of the firm's negligent failure, for six years after the testatrix's death, to locate the executor and advise him of the existence of the will.

<sup>40</sup> Deane J ((1988) 164 CLR 539, 588) suggested that the general rule of *Pirelli* might be subject to qualification in special circumstances and that its application might involve difficulties in special categories of case, and Mason CJ and Wilson J (at 543) agreed. Gaudron J (at 601) thought that it might be logical to adopt the *Pirelli* test in cases of physical loss, but that if the interest infringed was economic the discoverability test should be applied. Brennan J (at 561) by contrast favoured the *Pirelli* views.

<sup>41</sup> See eg *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Pirelli* [1983] 2 AC 1.

<sup>42</sup> *Pirelli* [1983] 2 AC 1, 16.

<sup>43</sup> *London Borough of Bromley v Rush and Tompkins Ltd* (1985) 4 Con LR 44.

of negligence because the law recognises that a plaintiff may have a damaged article before the functional utility of the building is affected.<sup>44</sup>

7.17 *Pirelli* places a large and costly burden on owners of buildings, particularly high-rise structures. Constant surveillance of both the facade and the foundations must now be carried out to detect the slightest manifestation of initial damage. Far from introducing certainty, *Pirelli* gives rise to a real fear of the failure to note what may be damage and the resulting forfeiture of the right to sue.

(ii) *Liability for discovered latent defects*

7.18 It might seem unacceptable for a building owner who knows of some incipient defect in the building to take no reasonable steps to remedy it and merely stand by until it causes damage; but on the basis of *Pirelli* if a plaintiff detects a latent defect before it results in damage he will have no cause of action. If the plaintiff prudently takes steps to remedy the defect, he will be denied recovery for the repair costs.<sup>45</sup> The situation is even more unacceptable where it is known that a defect will *inevitably* result in a particular form of damage.<sup>46</sup> Nonetheless, the House of Lords has recently confirmed that the tort is incomplete until physical damage occurs.<sup>47</sup> It would therefore appear that there is a strong disincentive to prospective plaintiffs to mitigate their losses - a situation which is clearly undesirable and economically wasteful of resources.<sup>48</sup>

(iii) *Classification of the loss*

7.19 It is arguable that the loss suffered in cases like *Pirelli* is better analysed as economic loss, rather than damage to property. The owner seeks to recover damages either to remedy the defect or to be compensated for the diminution in the value of the asset. The action is therefore founded not on the existence of physical damage but on the fact that the owner has

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<sup>44</sup> N J Mullany "Concrete Cancer: Its Limitation Implications" (1989) 5 *BCL* 197, 201.

<sup>45</sup> If, however, the cause of action in this type of case is viewed as one for economic loss (through having to spend money on repairs) arising out of a contractual relationship with professional people, a *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 reliance-type liability may arise before physical damage is sustained: see *Murphy v Brentwood District Council* [1991] 1 AC 398, 466 per Lord Keith.

<sup>46</sup> For example, cracking in concrete structures is inevitable once corrosion of the steel reinforcement has commenced.

<sup>47</sup> *D & F Estates Ltd v The Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>48</sup> J Stapleton "The Gist of Negligence - Part 1 - Minimum Actionable Damage" (1988) 104 *LQR* 213, 226.

acquired property of less value than was reasonably believed, and on which money must be spent to make it fit for its intended purpose. If this is so, the occurrence of subsequent physical damage is immaterial in fixing the date of the accrual of the action. Such a classification leads to a different conclusion from that reached in *Pirelli*. Since the claim is based on the fact that the plaintiff has received property not up to the contemplated standard, the value of the property cannot be affected by a latent defect until that defect is known or apparent. It is only the knowledge, or reasonable discoverability, of the defect which actually causes the loss - until that time the structure maintains its value.<sup>49</sup>

7.20 Until recently, the leading defective premises cases have repeatedly rejected the notion that recovery for repair costs is financial,<sup>50</sup> but it appears that the High Court will ultimately elect to classify the cost of repairing defects as economic loss. Deane J in *Sutherland Shire Council v Heyman*<sup>51</sup> was strongly of the view that the damage was not material physical damage, but rather "loss or damage represented by the actual inadequacy of the foundation . . . it is for the cost of remedying a structural defect".<sup>52</sup> Assuming that there is some scope for the recovery of this kind of pure economic loss, a plaintiff on receiving information that the building is suffering from defects likely to cause deterioration will be able to commence proceedings immediately.<sup>53</sup>

7.21 The fact that damage caused by a defect may not only be economic in that the defect must be remedied, but also physical in that it causes structural deterioration in the property, leads to the possibility that a plaintiff may have two causes of action with two different

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<sup>49</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 503-504 per Deane J; *Hawkins v Clayton* (1988) 164 CLR 539, 587-588 per Deane J, 600-601 per Gaudron J; *Murphy v Brentwood District Council* [1991] 1 AC 398, 919-920 per Lord Keith, 925-926 per Lord Bridge; *Department of the Environment v Thomas Bates & Son* [1991] 1 AC 499, 946 per Lord Keith.

<sup>50</sup> They ignored the obvious conflict between *Pirelli* and *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 where recovery for economic loss for defective work was allowed despite the fact that no physical damage had been suffered at the date of the action. But there is now considerable doubt as to the authority of *Junior Books*: see *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1983] 2 AC 509; *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71; *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* [1991] 1 AC 499.

<sup>51</sup> (1985) 157 CLR 424.

<sup>52</sup> Id 503-504. Deane J reiterated his position in *Hawkins v Clayton* (1988) 164 CLR 539 at 587-588. See also Gaudron J at 600-601.

<sup>53</sup> English courts have recently accepted that the damage is properly characterised as economic, but repudiated the existence of any liability for such loss: *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398, in which Deane J's classification of the loss suffered in these sorts of cases was expressly approved; *Department of the Environment v Thomas Bates & Son* [1991] 1 AC 499.

limitation periods.<sup>54</sup> The owner may be statute-barred from recovering physical loss caused by a latent defect and yet recover for economic loss caused by the same defect. Such a situation is clearly undesirable and conducive to uncertainty.

(iv) *The "doomed from the start" exception*

7.22 In *Pirelli*, Lord Fraser left the door open for exceptional cases by adding a qualification to the general rule to the effect that:

"there may perhaps be cases where the defect is so gross that the building is doomed from the start and where the owner's cause of action will accrue as soon as it is built."<sup>55</sup>

As a result, the possibility exists that the design or construction of a building may be so defective as to cause the limitation period to begin to run from the date the plaintiff acquired sufficient interest in the property to bring negligence proceedings. Yet this is contrary to the principle asserted in Lord Fraser's judgment that the cause of action arises not from the defect but from the damage caused by it, and therefore cannot predate that damage.<sup>56</sup>

7.23 Two guidelines as to the scope of the exception emerge from *Pirelli*. First, the facts must be exceptional. Secondly, mere inevitability of future damage is insufficient by itself. Later cases have approved a requirement of "impending inevitability" as a test of when a building can be said to be "doomed from the start",<sup>57</sup> but this has been narrowly construed to the point of requiring inevitability of the structure suffering damage almost immediately after construction.<sup>58</sup>

7.24 It may be possible to reconcile this exception with general principles by saying that the exception is not concerned with the distinction between existing defects and subsequent damage, but with the rather different question of whether or not the subject matter was physically damaged on its transfer to the plaintiff.<sup>59</sup> If this approach is not accepted, the

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<sup>54</sup> In fact, a building owner may have three different limitation periods if one takes an action for breach of contract into consideration, in which case time will run from the date of the breach.

<sup>55</sup> [1983] 2 AC 1, 16.

<sup>56</sup> See *Ketteman v Hansel Properties Ltd* [1987] AC 189, 205-206 per Lord Keith.

<sup>57</sup> *Kensington and Chelsea and Westminster Area Health Authority v Wettern Composites Ltd* (1984) 31 BLR 57; *London Borough of Bromley v Rush and Tompkins Ltd* (1985) 4 Con LR 44.

<sup>58</sup> See *Jones v Stroud District Council* [1988] 1 All ER 5, 13 per Neill LJ.

<sup>59</sup> *London Congregational Union Incorporated v Harriss & Harriss* [1988] 1 All ER 15, 28.

courts are likely to ignore the exception completely or reduce its status to that of a "cautionary dictum".<sup>60</sup> Presumably Lord Fraser's exception was intended to benefit plaintiffs, yet in theory it grants the advantage of an earlier commencement of the limitation period to a defendant whose negligence has caused an exceptionally serious defect - a situation which must be considered undesirable.

(v) *Successive purchasers*

7.25 Lord Fraser in *Pirelli* stated obiter that the duty of care:

"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 title than his predecessors."<sup>61</sup>

It follows that a purchaser of a building with a defect which has manifested itself in undiscovered damage would take over the cause of action at the date the property is acquired. By implication the subsequent purchaser's cause of action would accrue at the same time as that of the original owner, and would run for the same six-year period. Lord Fraser gave no authority for this argument, which is clearly 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 the interest was acquired.<sup>62</sup> It seems likely that Lord Fraser was primarily concerned with the possibility of indefinite postponement of the limitation period where there was a quick succession of sales, each within six years,<sup>63</sup> and that he did not address his mind to the accrual of actions to subsequent purchasers. However it is unfair for a limitation period to be running against someone who has not yet acquired a proprietary interest.

7.26 To avoid the potential injustice of this reasoning, it has been suggested that a purchaser should be able to sue if the purchaser has no knowledge and could not by the

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<sup>60</sup> *Ketteman v Hansel Properties Ltd* [1985] 1 All ER 352, 363 per Lawton LJ. See also Lord Brandon in the appeal to the House of Lords [1987] AC 189, 207 who dismissed Lord Fraser's comments as "no more than obiter dicta".

<sup>61</sup> [1983] 2 AC 1, 18.

<sup>62</sup> *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 493 per Brennan J; *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, 809-810 per Lord Brandon.

<sup>63</sup> Lord Fraser appears to have overlooked the fact that causes of action do not run with the land, but must be assigned to the plaintiff by the plaintiff's predecessor in title: see *Perry v Tendring District Council* (1984) 30 BLR 118.

exercise of reasonable care have acquired knowledge of the existence of the damage at the date of the purchase. A subsequent purchaser who was aware, or ought to have been aware, that a building was damaged at the date of purchase would have no cause of action because he could have, or should have, bargained for a reduction in the price.<sup>64</sup>

7.27 The difficulty as to who can sue would be resolved by categorising the loss suffered as economic. The cause of action would not be complete and time would not begin to run until the date of discoverability. The range of possible plaintiffs would therefore be restricted to those persons who have an interest in the property at the time the defect becomes discoverable. Though subsequent purchasers would have no cause of action against a negligent professional if the defect were discovered during the tenure of an earlier owner, this would not be unfair, because any inadequacy would presumably be reflected in a reduction in the purchase price.<sup>65</sup> In addition, the purchaser would have the option of paying full market value for the defective structure in consideration for an assignment of the vendor's cause of action.<sup>66</sup>

(vi) *Successive damage*

7.28 A matter not considered by Lord Fraser is the possibility of successive occasions of damage arising out of the same defect. The general principle is that a building can only be damaged once and that physical damage does not give rise to successive causes of action as each new manifestation of the original damage occurs.<sup>67</sup> By contrast, a New Zealand court has held that it is a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action,<sup>68</sup> but Brennan J in *Sutherland Shire Council v Heyman*<sup>69</sup> strongly endorsed the once-and-for-all view and criticised the New Zealand approach because it could theoretically lead to an endless series of claims whenever a defect manifested itself in fresh damage to a building, since on the strength of that damage alone any person who had an interest in the property at the time would have a cause of action. In order to avoid the

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<sup>64</sup> *RL Polk & Co (Great Britain) Ltd v Edwin Hill & Partners* (1988) 41 BLR 89.

<sup>65</sup> It seems likely that a vendor who elects not to disclose inadequacies would be liable to a subsequent purchaser for such a failure; see *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 415 per Richmond P.

<sup>66</sup> See eg *Trendtex Trading v Credit Suisse* [1982] AC 679; *Brownnton v Edward Moore Inbucon Ltd* [1985] 3 All ER 499.

<sup>67</sup> *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127.

<sup>68</sup> *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 424 per Cooke J. See also *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234.

<sup>69</sup> (1985) 157 CLR 424, 491-492.

problems of the New Zealand view, Australian courts are likely to adopt Brennan J's approach.

**(d) Professional advisers**

7.29 The problems of latent damage are not confined to construction cases. Defective advisory or drafting work carried out by lawyers, accountants, bankers, valuers, stockbrokers and other professional advisers may not become apparent until years after it was completed and sought to be relied upon. Though some of the concerns raised above in the context of defective premises have not surfaced in relation to professional advice, ascertaining the date of accrual and the nature of actionable damage has caused considerable difficulty.

7.30 There are at least four possible points at which time may begin to run in these cases: the date of the giving of the advice, the date when it was acted upon, the date on which loss became inevitable and the date of financial loss consequent upon the reliance.<sup>70</sup> Prior to *Pirelli*, it was held that if as a result of the defendant's negligence a plaintiff is exposed to contingent liability for future loss or acquires diminished contractual rights, this will constitute actionable damage in claims for this kind of pure economic loss. In *Forster v Outred*,<sup>71</sup> the leading case, the plaintiff claimed that the defendant solicitors had advised her negligently in relation to a transaction under which her property was charged as security for a loan made to her son. It was held that actual loss (as distinct from prospective loss) was suffered when the mortgage deed was executed and not when an attempt was made by the mortgagee to enforce the security.<sup>72</sup>

7.31 If it is accepted that actual loss was suffered in these cases in the form of an immediate drop in the market value on execution of the agreement, this supports the *Pirelli* view that actual damage and not discoverability governs the running of time. Hodgson J in *Dove v Banhams Patent Locks Ltd*<sup>73</sup> expressed doubts as to whether *Forster v Outred* could survive in the wake of *Pirelli*. These doubts appear to be based on the difficulty of viewing defective drafting or advisory work as capable of causing immediate and actionable loss: it seems that Hodgson J was of the opinion that deficiencies of this nature are mere concealed defects

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<sup>70</sup> See R Merkin *Richards Butler on Latent Damage* (1987) 56.

<sup>71</sup> [1982] 2 All ER 753.

<sup>72</sup> See also *Melton v Walker & Stanger* (1981) 125 SJ 861.

<sup>73</sup> [1982] 2 All ER 833, 840.

which may or may not manifest themselves in consequential damage and thus that until that date actions in respect of such work will not accrue. However, Hodgson J's comments were expressly disapproved by Neill LJ in *D W Moore & Co Ltd v Ferrier*,<sup>74</sup> in which it was held that actual damage was suffered on the drafting of a defective restrictive covenant because the plaintiff had obtained a covenant which was of less value than it ought to have been. Other post-*Pirelli* cases make it clear that arguments that the true nature of the loss in such cases is potential rather than immediate will rarely be entertained.<sup>75</sup> Likewise, though certain dicta of Gaudron J in *Hawkins v Clayton*<sup>76</sup> may cast some doubt upon the correctness of *Forster v Outred*, this approach has in general been adopted in Australia.<sup>77</sup>

7.32 It should be noted that the Court of Appeal in both *Forster v Outred* and *Moore v Ferrier* emphasised that it was not laying down a general rule that claims in respect of advice leading to the execution of documents will always accrue on execution. There may be cases where loss to the plaintiff does not result immediately from reliance on negligent advice, but arises only on the occurrence of some later event facilitated by the initial reliance. In such a case the action will accrue at that later time.<sup>78</sup> Such situations will, however, be relatively rare, and in the majority of cases the cause of action will accrue on the date of reliance.

7.33 In professional advice cases, therefore, just as in building and construction cases, a cause of action is likely to accrue some time before the consequences of the negligence in question become apparent. This gives insufficient protection to the interests of plaintiffs.

#### 4. LATENT PROPERTY DAMAGE AND ECONOMIC LOSS: ALTERNATIVES FOR REFORM<sup>79</sup>

7.34 In England, the problems caused by *Pirelli* resulted in the reference of the matter to the Law Reform Committee, which reported in 1984.<sup>80</sup> The *Latent Damage Act 1986* adopts

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<sup>74</sup> [1988] 1 All ER 400, 409.

<sup>75</sup> *Baker v Ollard & Bentley* (1982) 126 SJ 593; *Iron Trades Mutual Insurance Co Ltd v J K Buckenham Ltd* [1990] 1 All ER 808; *Bell v Peter Browne & Co* [1990] 3 All ER 124; *Lee v Thompson* (1990) 6 Professional Negligence 91. See N J Mullany "Limitation Periods in Torts and the Negligent adviser - The Injustice Continues" [1991] *LMCLQ* 169.

<sup>76</sup> (1988) 164 CLR 539, 267.

<sup>77</sup> See *Gillespie v Elliot* [1987] 2 Qd R 509; *Deputy Commissioner of Taxation v Zimmerlie* [1988] 2 Qd R 500; *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314. However, this view has been questioned in two recent decisions: *Magman International Pty Ltd v Westpac Banking Corp* (1991) 100 ALR 575; *Western Australia v Wardley* (1991) 102 ALR 213.

<sup>78</sup> Eg *UBAF Ltd v European American Banking Corporation* [1984] QB 713; *Broadcasting Corporation of New Zealand v Progeni international Ltd* [1990] 1 NZLR 109.

<sup>79</sup> See also N J Mullany "Reform of the Law of Latent Damage" (1991) 54 MLR 349.

the main recommendations of the Committee. A number of jurisdictions in Australia and Canada, both before and after *Pirelli*, have enacted legislation to deal with the problem of latent damage, and recommendations for reform have been made by law reform agencies and other bodies in Australia, Canada and New Zealand.

7.35 In all these instances the legislation, existing or proposed, operates by way of engrafting exceptions onto the existing limitation rules, exceptions which result in the normal limitation period being extended, or the running of time postponed, in specified circumstances. The exception is Alberta, where the Law Reform Institute has proposed an entirely new approach to limitation rules, under which the basic limitation period in all cases runs from the date on which the damage was or could reasonably have been discovered. This approach takes care of the problem of latent damage.

7.36 The paragraphs which follow analyse a number of approaches to the problem of latent property damage found in other jurisdictions where the special rules on latent damage operate as an exception to the normal limitation rules. The Alberta approach is reviewed in the next chapter.

**(a) England**

7.37 The provisions of the *Latent Damage Act 1986* are designed to apply to all forms of latent damage other than personal injury. It operates by inserting new provisions into the *Limitation Act 1980*. This legislation in effect confirms the *Pirelli* decision: it reaffirms the basic rule that the limitation period runs for six years from the date on which the cause of action accrued, that is when damage occurs.<sup>81</sup>

7.38 The latent damage problem is met by the introduction of a secondary three year period running from the date of discovery or reasonable discoverability of significant damage.<sup>82</sup> Time will not run until the plaintiff has the knowledge required for bringing an action. The requisite knowledge is knowledge:

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<sup>80</sup> English Law Reform Committee *Twenty-Fourth Report: Latent Damage*: (1984) Cmnd 9390.

<sup>81</sup> S 14A(4)(a).

<sup>82</sup> S 14A(4)(b).

- "(a) of the material facts about the damage in respect of which damages are claimed; and
- (b) of the other facts relevant to the current action . . ."<sup>83</sup>

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."<sup>84</sup>

The "other facts" referred to are:

- "(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
- (b) the identity of the defendant; and
- (c) if it is alleged that the act of 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."<sup>85</sup>

7.39 These provisions are however subject to the long-stop provision, under which all actions for negligence, other than those in respect of personal injury, are finally barred 15 years after the defendant's breach of duty, whether or not either or both of the two limitation periods have expired or even begun.

(i) *Preservation of the accrual rule in Pirelli*

7.40 It was seen as advantageous by the Law Reform Committee to preserve the accrual rule in *Pirelli* because it was established law and operates effectively where damage is discoverable within a short period of the act in question.<sup>86</sup> But this means that the courts remain faced with the question of determining exactly when actionable damage has occurred. The legislation gives no guidance to assist in deciding this question, or to confirm the authoritativeness of the "relevant and significant" test and the other factors identified in the case law.<sup>87</sup>

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<sup>83</sup> S 14A(6).

<sup>84</sup> S 14A(7).

<sup>85</sup> S 14A(8).

<sup>86</sup> English Law Reform Committee *Twenty-Fourth Report: Latent Damage* (1984) Cmnd 9390 paras 3.6-3.7, 4.4.

<sup>87</sup> See paras 7.15-7.16 above.

(ii) *The knowledge provisions*

7.41 The constituent elements of knowledge are similar to those which apply in determining whether time has run in an action for personal injury.<sup>88</sup> Their complexity has been the subject of criticism<sup>89</sup> and may lead to considerable difficulties. Of particular concern is the importance placed on a notional defendant who admits liability and can satisfy a judgment in assessing the seriousness of damage suffered. This reference was inserted in an attempt to ensure that plaintiffs are not penalised for failing to take action as soon as the first trivial evidence of damage is known to them.<sup>90</sup> However, it is arguable that against a defendant who admits liability and can satisfy a judgment almost any damage of which the plaintiff was aware would be sufficient to start time running.<sup>91</sup> Indeed, it seems that an action would be unjustified only if the costs of proceeding which cannot be recovered are likely to exceed the damages recoverable. Liability, particularly in building claims, will often be disputed and the capacity of defendants to meet a judgment debt uncertain. The degree of damage which would induce a reasonable plaintiff to initiate proceedings in these circumstances is likely to be significantly greater than the damage that would justify a plaintiff suing a solvent defendant who admits liability.<sup>92</sup> The insertion of this concept perpetuates unnecessary complexity and the uncertainty of its effect casts doubt on its usefulness.

7.42 As "damage" may be observable to an expert but invisible to a layman, a person's knowledge includes that which the person might reasonably have been expected to acquire from facts observable or ascertainable personally or with the assistance of appropriate expert advice. This provision raises a number of contentious issues:

- (1) It may give rise to considerable debate as to when a prudent person would seek expert advice. At what stage, for example, should the owner of premises call an engineer or surveyor to investigate cracks in the walls?

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<sup>88</sup> *Limitation Act 1980* (Eng) s 11.

<sup>89</sup> See n 13 above.

<sup>90</sup> See English Law Reform Committee *Twenty-Fourth Report: Latent Damage* (1984) Cmnd 9390 paras 4.7, 4.8.

<sup>91</sup> See Davies *op cit* n 13, 257-258; MA Jones "Reports of Committees: Latent Damage - Squaring the Circle" (1985) 48 *MLR* 564, 569.

<sup>92</sup> See Jones *id* 569.

- (2) Assuming that advice has been sought, it is unclear whether the client can rely without question on the advice received.
- (3) The term "expert" is not defined, and it is uncertain whether it is restricted to those in the business of providing professional advice.

(iii) *The relationship between the two limitation periods*

7.43 The reintroduction of the notion of discoverability will change the result of many latent damage cases. Given the evidentiary problems associated with determining the precise moment in time at which a defect crystallises into physical damage, the courts are likely to find it easier to determine when the damage became reasonably discoverable. It may become incumbent upon owners of buildings to conduct regular surveys every twelve months to ensure that they are in a position to take advantage of the discoverability test should the need arise. However, this test could only be said to be the dominant rule if the period running from the date of discovery were of the same or longer length than that governing the primary period, which is not the case.

(iv) *The long stop provision*

7.44 This, the most controversial provision in the Act, was included because some final cut-off point was thought necessary to offset the possibility that, with the reintroduction of the discovery rule, damage may not be detected for a long period after the negligent act. However, the insertion of a long-stop period raises two dilemmas: what is the most appropriate event to trigger the running of time, and what should be the duration of the period.

7.45 The election to adopt a breach of duty test as the event to commence the running of time is not free from difficulty. One objection is that, depending upon the act of negligence in question, it may be regarded as having occurred at any one of a number of stages - for example, in the case of a building contract, the date of design, of drawing plans, of submission of plans for tender, of construction, of inspection or of completion.<sup>93</sup> There is also the problem of "continuing breach"<sup>94</sup> which would undermine the whole purpose of the long-stop. Many of the difficulties could have been avoided by the recognition that it may not be

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<sup>93</sup> See Merkin, *op cit* n 70, 97.

<sup>94</sup> See *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384.

possible to treat every kind of claim as subject to the same set of rules: it may have been preferable to devise one trigger for building contracts and another for professional negligence claims.

7.46 In attempting to adjust the conflicting interests of the parties, a balance has to be struck between the victim whose action could be barred before it was known to exist, and the disadvantage defendants face when confronted with claims arising years after the events in question. Under the solution provided by the *Latent Damage Act* the possibility remains that plaintiffs will still be time-barred before they know or ought to have known of their cause of action, or even, in an extreme case, before it has accrued. It may not be acceptable to extend the length of the long-stop period, but it might have been appropriate to allow a judicial discretion to extend the period in exceptional cases, as the English Act does in personal injury actions.<sup>95</sup>

(v) *Successive purchasers*

7.47 Section 3 of the *Latent Damage Act* deals with the concern raised by Lord Fraser in *Pirelli* that fresh limitation periods may accrue on successive purchases of property. Section 3(1) allows a fresh cause of action to accrue to the purchaser on the date the purchaser acquired an interest in the property, if a cause of action has already accrued to the previous owner or other vendor without the owner or vendor being aware of the material facts which would give rise to a claim. The later owner is then given 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 on which that owner acquired the relevant knowledge.

7.48 Section 3(2) avoids the risk of a series of limitation periods running in relation to one property, but does this by the use of two levels of legal fiction. It stipulates that the cause of action acquired by the purchaser is treated as based on a breach of a duty owed to the original 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 original owner.

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<sup>95</sup> *Limitation Act 1980* (Eng) s 33.

7.49 While this will probably prevent an innocent purchaser being left without a remedy, it conflicts (like Lord Fraser's dictum)<sup>96</sup> with the principle that time cannot run against a plaintiff lacking a proprietary interest.<sup>97</sup> There are other difficulties also. It does not seem entirely fair that the purchaser's rights are determined solely by the state of knowledge of persons previously interested in the particular subject matter. Moreover, the problems as to the knowledge test previously discussed<sup>98</sup> may arise in this context also. The threshold level of the knowledge required may be so low as to preclude section 3 from ever coming into effective operation.

7.50 A preferable solution to the problems of subsequent purchasers (though not one open in England, in the light of the most recent decisions)<sup>99</sup> is to recognise that the loss suffered in these cases is economic arising upon the discovery of the defects.<sup>100</sup> If a defect manifests itself during a subsequent purchaser's ownership the subsequent purchaser should be able to sue for the diminution in the value of the asset and for repair costs. On the other hand, no cause of action should accrue to subsequent owners if defects become apparent before the property has been sold.

(vi) *The ambit of the Act*

7.51 The Act fails to define the term "negligence", and the question arises whether it is confined to actions for the tort of negligence or extends to actions for breaches of contractual or statutory duties to exercise reasonable care and skill. In *Iron Trades Mutual Insurance Co Ltd v J K Buckenham Ltd*<sup>101</sup> it was held that "negligence" is used in the tortious sense, and accordingly the court refused to apply the Act to contractual claims. This conclusion was arrived at by comparing the latent damage provisions with those dealing with personal injury.<sup>102</sup> However, it is doubtful whether the Act was directed solely to alleviate the unfairness caused by the limitation rules as they relate to claims in tort. It seems more likely

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<sup>96</sup> *Pirelli* [1983] 2 AC 1, 18 (quoted at para 7.25 above).

<sup>97</sup> See paras 7.25-7.27 above. In addition, the drafting of s 3 is too wide. Other than in the marginal note, no mention is made of the fact that the section deals with latent damage. This may lead to it applying in circumstances other than where damage has arisen from a defect, such as that caused by the independent acts of a third party, for example where goods to be supplied under an export contract are damaged by a carrier before the property or risk in them has passed to the purchaser: see E Griew (1986) 136 *New LJ* 1201.

<sup>98</sup> See paras 7.41-7.42 above.

<sup>99</sup> See n 47 above.

<sup>100</sup> See paras 7.19-7.21 above.

<sup>101</sup> [1990] 1 All ER 808.

<sup>102</sup> *Limitation Act 1980* (Eng) ss 11-14.

that Parliament aimed to remedy the more general problem that causes of action can accrue at a point in time before they can be reasonably known to exist. The exclusion of contractual claims from the scope of the legislation will ensure that a large body of professional negligence actions remain unaffected by the Act.<sup>103</sup>

(vii) *Conclusion*

7.52 The language of the Act is cumbersome and complicated, and it has not solved some of the problems associated with latent damage. Nonetheless, it represents a considerable improvement on the previous state of the law in England.

7.53 However, the precise operation of the Act has been thrown into some doubt by the recent decision of the House of Lords in *Murphy v Brentwood District Council*.<sup>104</sup> Although their Lordships did not expressly comment on the Act, one by-product of their decision to overrule *Anns v Merton London Borough Council*<sup>105</sup> and the cases dependent upon it may be to reduce the ambit of the *Latent Damage Act*, or possibly even make it redundant, since the decision eliminates a major premise on which the Act was enacted, namely that where a building is built defectively the damage is property damage and is recoverable. Whether the courts will take this view is not yet clear.

**(b) British Columbia and similar schemes**

7.54 An alternative way of dealing with the problem of latent damage has been adopted in British Columbia, and essentially similar legislation can be found in the *Draft Uniform Limitation Act* of the Uniform Law Conference of Canada and in reform proposals in Ontario, Saskatchewan and New Zealand. The essential difference between these legislative schemes

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<sup>103</sup> This problem may be exacerbated by a group of recent cases which suggest that English courts may be returning to the view that the existence of a contractual relationship excludes the possibility of a tort claim: see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1987] 2 All ER 923; *The Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Good Luck")* [1989] 3 All ER 628; *National Bank of Greece SA v Pinios Shipping Co No. 1, The Maira* [1989] 1 All ER 213; *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952. See however J H Holyoak "Concurrent Liability in Contract and Tort" (1990) 6 *Professional Negligence* 113; A V B Bartlett "Concurrent Liability after *Murphy*" (1991) 7 *Professional Negligence* 20, arguing that the House of Lords decision in *Murphy v Brentwood District Council* [1991] 1 AC 398 rests on the assumption that there may still be concurrent liability in contract and tort.

<sup>104</sup> [1991] 1 AC 398.

<sup>105</sup> [1978] AC 728.

and the United Kingdom *Latent Damage Act* is that, whereas the United Kingdom Act deals with the problem by adding a separate three-year limitation period running from the date of discovery, British Columbia and the other jurisdictions mentioned postpone the running of the general limitation period in particular cases where the plaintiff does not have sufficient knowledge of the claim.

(i) *British Columbia*

7.55 In British Columbia, the *Limitation Act 1979* lays down three basic limitation periods, of two, six or ten years depending on the nature of the action in question. There is also a fourth period of indefinite duration. All actions covered by the Act are categorised and allotted to one of the four periods.<sup>106</sup>

7.56 These general limitation periods are subject to section 6(3), which provides that:

"The running of time with respect to the limitation periods fixed by this Act for an action

- (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
- (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

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<sup>106</sup> One unfortunate consequence of this categorisation is that whereas actions for damages for injury to persons or property, including economic loss arising from the injury, are subject to the two-year limitation period, actions for professional negligence or negligent misrepresentation which do not result in physical injury to person or property are subject to the six-year period which applies to all actions not specifically provided for in the Act.

- (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."

For the purposes of section 6(3) "facts" are stated in subsection 4(b) to include:

- "(i) the existence of a duty owed to the plaintiff by the defendant; and
- (ii) that a breach of a duty caused injury, damage or loss to the plaintiff."

7.57 Thus, for the actions to which section 6(3) applies the basic accrual rules are redundant. If a claimant becomes aware of the claim after the accrual date, section 6(3) controls the commencement of the running of time.

7.58 All actions to which the Act applies are subject to a long-stop provision: Section 8(1) provides:

". . . 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, or in the case of an action against a hospital . . . or hospital employee acting in course of employment as a hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, after the expiration of 6 years from the date on which the rights to do so arose."

7.59 A number of comments may be made about the operation of these provisions.

(1) An anomaly exists in that the postponement of actions in negligence for purely economic loss will not be allowed under section 6(3) save for those against a negligent professional. The Canadian Supreme Court in *Kamloops v Nielsen*<sup>107</sup> sidestepped this problem by construing the action in question as one for property damage.

(2) There is some debate as to the effect of the phrase "facts within his means of knowledge". Whereas the identity of the defendant must be actually known to the claimant, it is not clear

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<sup>107</sup> (1984) 10 DLR(4th) 641.

whether a constructive knowledge test applies to other facts. The phrase may refer to the claimant's actual means or those of a reasonable person in the claimant's position.

(3) The requirement in section 6(3)(i) that the claimant know that the action would have "a reasonable prospect of success" introduces an undesirable subjective element into the date of knowledge test.

(4) The requirement in section 6(3)(j) that time begins to run when a claimant "ought . . . to be able to bring an action" is obscure. It was presumably intended to mean that time does not start to run until a claimant would regard the injury as being sufficiently serious to warrant bringing an action. However, by referring to "his own interests and taking his circumstances into account", the legislature has canvassed the possibility that other factors may justifiably delay the commencement of proceedings. No guidelines as to what these might be are given.

(5) The Act deals with the problem of successive purchasers in a way which anticipates Lord Fraser's reasoning in *Pirelli*,<sup>108</sup> and which is open to the same objections. Section 6(4)(c) attributes the knowledge or means of knowledge of a predecessor in title to a subsequent owner where the subsequent owner "claims through" a predecessor. Difficulties may arise in determining when purchasers are claiming through a predecessor in title. It has been suggested that a subsequent purchaser has a separate cause of action unless a prior owner could have taken action against the defendant.<sup>109</sup>

(6) A problem arises with the operation of the long-stop provision in latent damage cases. The 30 year period is said to commence from the time the right to bring an action arose. This was interpreted 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".<sup>110</sup> Since the Canadian courts have affirmed the rule that in latent damage cases time runs from the date of discovery,<sup>111</sup> a plaintiff may have as long as 30 years after the damage was first discovered to bring an action. These cases have prevented the section from achieving its objective, namely to ensure that, with the introduction of the notion of discoverability, limitation periods are not suspended for decades after the occurrence of the events upon which claims are based.<sup>112</sup>

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<sup>108</sup> See para 7.25 above.

<sup>109</sup> *Kamloops v Nielsen* (1984) 10 DLR(4th) 641, 686-687 per Wilson J.

<sup>110</sup> *Bera v Marr* [1986] 3 WWR 442, 456.

<sup>111</sup> See n 36 above.

<sup>112</sup> See *Bera v Marr* [1986] 3 WWR 442.

(ii) *Similar schemes*

7.60 The scheme of the Canadian *Uniform Limitation Act 1982* is basically similar to the British Columbia Act, except that it places a separate ten-year limitation period on claims the running of which is postponed because of the plaintiff's lack of knowledge.<sup>113</sup>

7.61 The Act allots various fixed limitation periods to different classes of claim.<sup>114</sup> Latent damage is dealt with by section 13(2), which provides that

"The beginning of the limitation period for an action is postponed until the plaintiff knows or, in all circumstances of the case, he ought to know

- (a) the identity of the defendant; and
- (b) the facts upon which his action is founded."

7.62 This provision may be too simplistic. It should perhaps incorporate a requirement that the claimant should have to be aware that the injury suffered is significant as opposed to trivial. It should perhaps also qualify the words "the facts" - as it stands, it suggests that the discovery period will not commence until the claimant discovers the last fact relevant to the action.

7.63 Section 13(2) is subject to two limitations. First, the actions to which it applies are limited by section 13(1) - thus, for example, it applies to actions for economic loss from a breach of duty of care only in respect of the rendering of services under a contract other than a contract of employment. Many building claims for defective workmanship may therefore not be covered. Secondly, section 13(3) provides (in a way not dissimilar to the 15-year period of the United Kingdom Act)<sup>115</sup> that the postponement provision does not allow an action to be brought more than ten years after the date of the act or omission on which the action is based. This is to be distinguished from the 30 year long-stop provision, which runs from the same point in time but applies to all actions under the Act.

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<sup>113</sup> The Newfoundland Law Reform Commission published a report in 1986 that recommended the enactment of a statute substantially similar to the *Uniform Limitation Act 1982*: Newfoundland Law Reform Commission *Report on the Limitation of Actions* (1986).

<sup>114</sup> Actions for personal injury and damage to property, and economic loss arising from such injury, are subject to a two-year limitation period, as in British Columbia. Economic loss not arising from such injury is excluded.

<sup>115</sup> See para above.

7.64 There are proposals in Ontario, New Zealand and Saskatchewan which also resemble the British Columbia scheme. A Bill introduced into the Ontario Parliament in 1983<sup>116</sup> provided that in particular cases, the running of the normal limitation period should be postponed until the plaintiff knew or ought to have known the identity of the defendant and sufficient facts to indicate that the plaintiff had a cause of action. The only missing element, as compared with British Columbia, was the absence of a long-stop provision. In 1989 the Canadian Bar Association (Ontario) suggested a scheme again similar to the British Columbia scheme except for two differences: the postponement provision applied to all types of claim, but only gave the plaintiff two years from the date of discovery to bring the action.<sup>117</sup> Further proposals similar in their essentials to the British Columbia scheme have been made by the New Zealand Law Commission in 1988<sup>118</sup> and the Saskatchewan Law Reform Commission in 1989:<sup>119</sup> the ordinary limitation period runs from the date the cause of action accrued, and the running of this period is postponed if the plaintiff does not have the requisite knowledge at that time,<sup>120</sup> but any such postponement is subject to an ultimate long stop.<sup>121</sup> The major difference between these proposals and the British Columbia scheme is that there is no limitation on the types of claim to which the postponement provision applies.

**(c) South Australia and similar schemes**

*(i) South Australia*

7.65 Section 48 of the South Australian *Limitation of Actions Act 1936* deals with the problem of latent damage in rather a different way from any scheme so far considered. It gives the court a discretion to extend the ordinary limitation period in defined circumstances, the general effect of which is to give the plaintiff 12 months after the date of discovery to bring an action.

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<sup>116</sup> See Ontario Bill 160 *An Act to Revise the Limitation Act*. It received its first reading on Dec 16, 1983, but did not receive second and third readings and lapsed.

<sup>117</sup> See Canadian Bar Association (Ontario) *Submission to the Attorney-General for Ontario Re Preliminary Report on the Reform of the Law of Limitations of Actions* (1989).

<sup>118</sup> New Zealand Law Commission *Report No 6: Limitation Defences in Civil Proceedings* (1988).

<sup>119</sup> Saskatchewan Law Reform Commission *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989).

<sup>120</sup> Saskatchewan adopts the provisions of the *Latent Damage Act 1986* (Eng); New Zealand adopts a simpler formulation based on the *Alberta Model Limitations Act*, as to which see ch 8.

<sup>121</sup> 30 years in the Saskatchewan proposals, 15 years in the New Zealand proposals. The New Zealand proposals do not deal with the problem of successive purchasers in a separate provision, but instead emphasise that the ultimate protection for the defendant is the 15 year long stop.

7.66 The section authorises the court to extend a limitation period beginning at accrual to such an extent and upon such terms as the justice of the case may require if satisfied that:

"(i) the 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; . . .<sup>122</sup>

and that in all the circumstances of the case, it is just to grant the extension of time."

7.67 If, when the plaintiff discovers all the facts material to the case, he still has at least 12 months remaining of the general limitation period measured from the time of accrual, this period will determine the time left for bringing a claim. However, by virtue of the discovery rule, the plaintiff will, if the justice of the case requires it, have 12 months after discovery of some fact material to the case in which to bring a claim. This provision effectively eliminates the problems associated with the accrual of actions under the general periods. Moreover, since there is no doubt that the court's power under section 48 encompasses not only personal injury claims but also damage to property and economic loss,<sup>123</sup> the question of the categorisation of a particular claim is irrelevant.

7.68 Section 48(3)(b)(i) refers to the plaintiff ascertaining facts material to the case. In *Sola Optical Australia Pty Ltd v Mills*<sup>124</sup> the High Court stated that:

"A fact is "material" to the plaintiff's case if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to justify bringing the action and is of sufficient importance to be likely to have a bearing on the case."<sup>125</sup>

The court made it clear that it is not necessary for there to be some interaction between the material facts and the plaintiff's decision to sue. The requirement of materiality must be shown by objective inquiry. In addition, the knowledge must be that of the plaintiff

<sup>122</sup> Or alternatively "(ii) that the plaintiff's failure to institute the action within the period of limitation resulted from representations or conduct of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances".

<sup>123</sup> "Action" is defined in s. 3(1) as including "legal proceedings of all kinds".

<sup>124</sup> (1987) 163 CLR 628, 636.

<sup>125</sup> Id 636.

personally without reference to constructive knowledge, to any need to use diligence to discover the facts in question earlier, or to any necessity to obtain advice. The fact that damage has occurred, that it was attributable in some degree to the defendant and the seriousness of the harm suffered are all presumably material.

7.69 It appears that the discovery period does not begin to run until the last material fact has been discovered by the plaintiff. This is similar to the position under the Canadian *Uniform Limitation Act 1982*, and is subject to the same criticism.<sup>126</sup>

(ii) *Similar schemes*

7.70 The Northern Territory provision<sup>127</sup> is in almost identical terms to the South Australian provision, and the Manitoba statute also has a similar provision,<sup>128</sup> except that it contemplates a subjective standard of knowledge.<sup>129</sup> A similar provision was proposed by the Ontario Law Reform Commission in 1969<sup>130</sup> but has not been adopted.

7.71 The provisions in this category resemble the personal injury extension provisions of the English *Limitation Act 1963*, which formed the basis for similar provisions in New South Wales, Victoria and Queensland (now superseded, except in Queensland). Criticisms of these provisions were reviewed by the Commission in its Report on Part I.<sup>131</sup>

(d) **Australian Capital Territory**

7.72 The Australian Capital Territory *Limitation Act 1985* deals with the problem of latent damage conferring a discretion on the court to override a defence of limitation if it is just and reasonable to do so. Section 40 of the Act provides:

"Subject to sub-section (2), where 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;

<sup>126</sup> See paras 7.61-7.62 above.

<sup>127</sup> *Limitation Act 1981* (NT) s 44.

<sup>128</sup> *Limitation Act 1987* (Manitoba) s 14(1).

<sup>129</sup> S 20(3).

<sup>130</sup> See Ontario Law Reform Commission *Report on Limitation of Actions* (1969).

<sup>131</sup> Paras 3.30-3.36, 3.39-3.45, 3.48-3.51, 3.55-3.56.

- (b) whether or not the limitation period applicable to that cause of action has expired;<sup>132</sup> 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."

7.73 Discretion plays a much wider role in this approach than in provisions of the kind enacted in South Australia. In contrast to the South Australian provision, which authorises the court to extend the limitation period to 12 months after the plaintiff discovered facts material to the case, the discretion in the Australian Capital Territory can be exercised to extend a period up to a maximum of 15 years measured from the date of accrual of the cause of action.

7.74 In addition, rather than employing a test of knowledge of material facts, the section directs the courts when exercising their discretion to have regard to all the circumstances of the case, including -

- "(a) the length of time between the occurrence of the damage or loss and the time at which the damage or loss might reasonably have been discovered by the plaintiff;
- (b) the extent to which the plaintiff, after he or she became aware of the damage or loss, acted promptly and reasonably;
- (c) the extent to which an extension of the limitation period would, or would be likely to, result in prejudice to the defendant;
- (d) the conduct of the defendant after the relevant cause of action accrued to the plaintiff, including the extent to which the defendant took steps to make available to the plaintiff means of ascertaining facts in relation to the cause of action;
- (e) the steps, if any, taken by the plaintiff to obtain, for the purposes of the cause of action, legal or other expert advice and the nature of any such advice."

7.75 This approach has its origin in the provisions of the English *Limitation Act 1980* dealing with personal injury. That Act, though it provides a primary limitation period of three

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<sup>132</sup> Note that the scheme of the *Limitation Act 1969* (NSW), under which the running of a period of limitation extinguishes the right rather than merely barring the remedy, has not been adopted in the ACT: see para 6.7 above.

years from the date of accrual, or of the date of knowledge if later, gives the court a discretion to override the limitation period and a list of factors to be considered in exercising that discretion.<sup>133</sup>

7.76 Similar provisions have now been adopted to deal with latent personal injury in Victoria, the Australian Capital Territory and New South Wales,<sup>134</sup> and were recommended by this Commission in its Report on Part I. The Australian Capital Territory is the first Australian jurisdiction to introduce such a provision to deal with latent property damage, but in Canada the Nova Scotia legislature enacted a similar provision in 1982.<sup>135</sup>

**(e) Conclusion**

7.77 The Commission's preliminary view is that, of all the possible ways of dealing with the problem of latent damage reviewed in this chapter, the Australian Capital Territory provision is the most satisfactory. It also has the merit of being consistent with the approach to the problem of latent personal injury recommended by the Commission in its Report on Part I. However, the problem of latent damage could also be satisfactorily resolved if the more general proposals for a new kind of *Limitation Act* put forward in Alberta were adopted. These are discussed in the next chapter.

58. *Should the problem of latent property damage and latent economic loss be dealt with by*
- (a) *the introduction of legislation based upon the English Latent Damage Act 1986, adding an additional three-year limitation period running from the date of discovery;*
  - (b) *the introduction of legislation based on the British Columbia Limitation Act 1979, postponing the running of the general limitation period in cases where the plaintiff does not have sufficient knowledge of the claim;*
  - (c) *the introduction of legislation based on section 48 of the South Australian Limitation of Actions Act 1936, giving the plaintiff 12 months after the date of discovery in which to bring an action;*

<sup>133</sup> *Limitation Act 1980* (Eng) ss 11-14, 33.

<sup>134</sup> *Limitation Act 1958* (Vic) s 23A, added by the *Limitation of Actions (Personal Injury Claims) Act 1983*; *Limitation Act 1985* (ACT) s 36; *Limitation Act 1969* (NSW) s 60C, added by the *Limitation Amendment Act 1990*.

<sup>135</sup> *Limitation of Actions Act 1982* (Nova Scotia) s 2A(4).

- (d) *the introduction of legislation based on section 40 of the Australian Capital Territory Limitation Act 1985, which confers on a court a discretion to disregard a defence of limitation if it is just and reasonable to do so;*
- (e) *some other solution?*

## Chapter 8

### A POSSIBLE ALTERNATIVE: THE ALBERTA PROPOSALS

#### 1. INTRODUCTION

8.1 The modern Limitation Acts found in England and most other Australian jurisdictions are a considerable improvement on the older legislation on which the Western Australian *Limitation Act* is still based. The provisions of these Acts have been considerably simplified and they have been drafted in simple modern English. But they still adhere to basic principles which have been adopted ever since the English *Limitation Act* of 1623 was enacted - that there should be a limitation period of fixed duration for each claim, but that there should be various categories of claim with different periods, and that the limitation period should commence at the time of accrual of the claim.

8.2 Alone among all the modern reforms, recent proposals made by the Alberta Law Reform Institute in its Report on *Limitations* in 1989 challenge these basic assumptions. The Institute suggests that an alternative basis for limitation law should be adopted, based on equitable principles and founded on the principle that limitation periods should run from the date of discovery.<sup>1</sup> As already pointed out, this means abandoning the basic principle that limitation periods should be fixed periods running from a fixed date, and adopting one of the two alternatives identified by the Wright Committee Report.<sup>2</sup>

8.3 In the view of the Commission, the Alberta alternative demands consideration in any discussion of the reform of the Western Australian *Limitation Act*. Before settling the details of reform, it is necessary to consider whether to adopt the totally different principles now proposed in Alberta. Accordingly, this chapter reviews the basic features of the Alberta proposal.

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<sup>1</sup> Similar proposals were made in Ontario in 1991: see *Recommendations for a New Limitations Act: Report of the Limitations Act Consultative Group* (1991).

<sup>2</sup> See para 2.54 above.

## **2. THE ALTERNATIVE STRATEGIES**

8.4 The Alberta Report identifies two different "strategies for a limitations system" which were developed in England. 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. This strategy 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. (This is the problem of latent damage, considered in the previous chapter.)

8.5 The alternative strategy is the "strategy in equity", that is, the doctrine of laches. The two main elements of this doctrine are that the limitation period is measured by judicial discretion and that the limitation period commences at the time of discovery. This 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.

## **3. OPTIONS FOR REFORM**

8.6 The Institute identifies five principal problems with the existing law in Alberta, as follows:

- (1) the limitation periods are often unreasonable, either to claimants or defendants;
- (2) the system does not offer sufficiently predictable limitation periods, because of the heavy reliance on judicial rules about accrual and the need for categorisation of claims, and is therefore inefficient;
- (3) the rules are unduly technical and complex;

- (4) in many cases there is a gap between the time of accrual and the time of discovery, which is unjust to claimants;
- (5) the rules are incomprehensible to litigants.

All these points are even more true of the law in Western Australia where, unlike Alberta, there has been no reform of the *Limitation Act* in modern times.

8.7 The Institute notes recent trends in limitations reform, both judicial and statutory. In recent years the courts, beginning with the English Court of Appeal in 1976,<sup>3</sup> have contemplated the idea that time should run from the discovery of the damage by the claimant, not from the more traditional point of accrual. Here, the Canadian courts have taken a different attitude from those in England and Australia: while the House of Lords has rejected the discovery rule,<sup>4</sup> the Supreme Court of Canada continues to endorse it.<sup>5</sup> As for statutes, the Institute finds that legislation more recent than the Alberta statute (which was enacted in 1931) adopts the discovery principle to deal with the problems of latent damage, but as an exception to limitation rules based on the traditional principles.

8.8 The options for reform identified by the Institute were:

- (1) to amend the existing Act;
- (2) to adopt a conventional modern model, such as the statute of British Columbia;
- (3) to enact legislation based on the strategy in equity.

8.9 It decided to recommend a new Act which relied to a much greater degree on the strategy in equity. It saw its recommendation as being based on the seven general principles of fairness, comprehensiveness, comprehensibility, clarity, organisation, plain language and simplicity.

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<sup>3</sup> *Sparham-Souter v Town and Country Developments* [1976] 1 QB 858.

<sup>4</sup> *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1.

<sup>5</sup> *City of Kamloops v Nielsen* (1984) 10 DLR(4th) 641; *Central and Eastern Trust Co v Rafuse* (1986) 31 DLR(4th) 481.

#### 4. RECOMMENDATIONS

##### (a) The basic rules

8.10 With one exception,<sup>6</sup> all claims subject to the proposed Alberta Act are to be governed by two limitation periods, the "discovery period" and the "ultimate period". The defendant will be entitled to plead limitation if either of these periods has expired.<sup>7</sup>

##### (i) *The discovery period*

8.11 The discovery period will begin when the claimant either discovered or ought to have discovered specified knowledge about his claim, and will extend for two years. The period will begin when the claimant discovers:

- (1) that the injury for which he seeks a remedial order has occurred;
- (2) that the injury was to some degree attributable to conduct of the defendant;
- (3) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding.<sup>8</sup>

8.12 The discovery rule should be applicable to all claims governed by the Act, to eliminate the problem of categorising claims and to make the Act as simple and comprehensible as possible.

8.13 The Act specifically defines when the discovery period begins to run against a "successor owner" of a claim,<sup>9</sup> a principal, and a personal representative of a deceased person as a successor owner of a claim.<sup>10</sup>

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<sup>6</sup> Claims based on a judgment or order for the payment of money: see para 8.15 below.

<sup>7</sup> The recent Ontario proposals put forward the same two basic limitation periods: see n 1 above.

<sup>8</sup> S 3(1)(a).

<sup>9</sup> Someone to whom a claim has been assigned, whether by contract or otherwise. Cf the problem of successive purchasers of defective property under the common law, dealt with at para 7.25 above.

<sup>10</sup> S 3(2).

*(ii) The ultimate period*

8.14 The ultimate period will extend for 15 years, usually from the accrual of a claim.<sup>11</sup> The Act specifies when the period will begin for claims resulting from a continuing course of conduct or a series of related acts or omissions, a claim based on the breach of a duty of care (which arises when the conduct, act or omission occurred), a claim based on a demand obligation, a claim under the *Fatal Accidents Act* and a claim for contribution.<sup>12</sup>

**(b) The application of the rules**

8.15 These two periods apply when a claimant seeks a remedial order in respect of a claim. A remedial order is defined to mean a judgment or order made by a court in a civil proceeding requiring a defendant to comply with a duty to pay damages for the violation of a right.<sup>13</sup> The Institute analyses the three processes in which a court is engaged in a civil proceeding as remedial orders, declarations and enforcement orders, and the proposed legislation expressly excludes the latter two from the ambit of the Act.<sup>14</sup> (Judgments for the payment of money are however subject to a special 10-year limitation period.) Also excluded from the Act are claims for judicial review and habeas corpus.<sup>15</sup> Claims based on the adverse possession of land are excluded from the two-year period but not the 15-year period.<sup>16</sup> Special limitation periods in other enactments are also specifically excluded.<sup>17</sup>

8.16 The effect of these rules is to apply the provisions of the *Limitation Act* to nearly all civil claims. Claims which were excluded from the old legislation, such as claims for breach of trust, are no longer excluded, on the basis that the Act should apply to legal and equitable claims alike. The courts are authorised to deny equitable relief to a claimant, through the application of the doctrines of acquiescence and laches, even when the applicable limitation period under the Act has not expired, but will not be granted any other discretion to shorten or lengthen an applicable limitation period.<sup>18</sup>

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<sup>11</sup> S 3(1)(6).

<sup>12</sup> S 3(3).

<sup>13</sup> S 1(i).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> S 3(4).

<sup>17</sup> S 2(2)(b).

<sup>18</sup> S 4.

**(c) Special rules**

8.17 Special rules which prevent the limitation period commencing or continuing are preserved, namely the rules relating to:

- (1) Fraudulent concealment<sup>19</sup>
- (2) Persons under disability<sup>20</sup>
- (3) Acknowledgment and part payment.<sup>21</sup>

8.18 Other special rules deal with claims added to a proceeding.<sup>22</sup> Parties continue to be permitted to vary the limitation period by agreement.<sup>23</sup>

**5. DISCUSSION**

**(a) The operation of the basic limitation periods**

8.19 The most important feature of the Alberta proposals is the adoption of two basic limitation periods governing all classes of claim. The operation of these two periods may be illustrated by means of an example. Suppose that a house built for the plaintiff in 1992 is built defectively. If in 1996 the plaintiff discovers, or ought to have discovered, the information specified in paragraph 8.11 above, the discovery period will begin to run and he will have two years in which to bring the action. At the end of that period, his claim will be barred even though the ultimate period will not expire until 2007 - because the Act provides that the defendant is entitled to plead limitation if either period has expired.

8.20 Alternatively, suppose that the damage only becomes apparent in 2006, and so the discovery period does not commence until then. Though the discovery period will not expire

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<sup>19</sup> S 5.

<sup>20</sup> S 6.

<sup>21</sup> S 9.

<sup>22</sup> S 7.

<sup>23</sup> S 8.

until 2008, the ultimate period will expire in 2007 and so the plaintiff will only have one year in which to bring the action.

**(b) The question of discretion**

8.21 As the above example shows, under the Alberta proposals there will still be cases in which, because of the operation of the ultimate period, a plaintiff will have no right to bring an action even though there was no way in which he could have discovered the existence of the damage within that period. The Alberta Law Reform Institute thought that this was "inescapable because there is no feasible alternative consistent with limitation policy".<sup>24</sup> They were not prepared to make discoverability the sole basis of the law of limitation, or even to provide a discretion to extend the ultimate limitation period in appropriate cases. Yet the introduction of a discretion to extend, a familiar device in most limitation legislation based on the traditional principle of fixed periods, would avoid injustice to plaintiffs without abandoning the ultimate period completely or making it much longer.<sup>25</sup>

**6. CONCLUSION**

8.22 Under the Alberta Law Reform Institute's proposals, an Act eight pages and 12 sections long would be substituted for the 21 pages and 61 sections of its predecessor. The clarity and simplicity of the new Act is impressive. One set of rules applies to all claims. The new rules are much fairer to claimants because all claims are subject to a discovery rule; but this rule 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. Adopting a discovery rule plus a comparatively short limitation period is more satisfactory all round than lengthening the limitation period to do justice to particular groups of claimants.

8.20 The Commission suggests that the Alberta proposals should receive very serious consideration for adoption in Western Australia.

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<sup>24</sup> *Limitations* (1989) 70.

<sup>25</sup> Though it should be noted that limitation periods longer than 15 years are not uncommon in other jurisdictions. In Scotland, there is a ultimate limitation of period of 20 years, to which the discoverability principle is subject: *Prescription and Limitation (Scotland) Act 1973* ss 7, 11(1); South Africa, Germany, Belgium and Holland have a limitation period of 30 years from the date of the wrongful act, and in France a 30-year limitation period runs from the date damage becomes apparent: see paras 2.39 above.

59. *Should the Western Australian Limitation Act be replaced by a Limitation Act based on the Model Limitation Act proposed by the Alberta Law Reform Institute?*
60. *If so, should such an Act -*
- (a) *simply adopt the discovery period without also adopting the ultimate period;*
  - (b) *adopt both the discovery and the ultimate period;*
  - (c) *adopt both the discovery and the ultimate period, but give courts power to extend the ultimate period when it is just and reasonable to do so?*

## PART II: OTHER LIMITATION LEGISLATION

### Chapter 9 INTRODUCTION

9.1 There are many statutes besides the *Limitation Act* which set out periods of limitation or special notice requirements applicable to particular actions.<sup>1</sup> This paper makes no attempt to deal comprehensively with these provisions. The *Limitation Act*<sup>2</sup> specifically provides that nothing in it applies to any action for which another Act provides a special limitation period.

9.2 Part II of this Discussion Paper deals with two particular groups of limitation provisions:

- (1) The statutory provisions setting out special limitation periods in actions on behalf of or against estates, to be found in the *Law Reform (Miscellaneous Provisions) Act 1941*, and in wrongful death actions by relatives, to be found in the *Fatal Accidents Act 1959*;
- (2) The statutes setting out special limitation and notice provisions for actions involving the Crown and actions against public authorities and local government authorities - in the case of public authorities, these provisions are to be found in an amendment to the *Limitation Act 1935*, but in the case of the Crown and local government authorities the provisions are set out in, respectively, the *Crown Suits Act 1947* and the *Local Government Act 1960*.

9.3 Unlike the vast number of other special statutory provisions, these provisions have been the subject of attention by law reform commissions in other jurisdictions dealing with problems of limitation, either in the context of a general review of the *Limitation Act* or as the subject of special reports.

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<sup>1</sup> See para 1.3 above.

<sup>2</sup> S 49.

61. *Should the Limitation Act continue to provide that nothing in it applies to limitation periods prescribed by other Acts, or should consideration be given to abolishing these other limitation periods?*

## Chapter 10

### ACTIONS INVOLVING DEATH

#### 1. INTRODUCTION

10.1 Formerly the death of a plaintiff or a defendant extinguished an existing cause of action,<sup>1</sup> and even where that death resulted from the commission of a tort it did not give rise to any cause of action on the part of any person who suffered damage as a result of the death.<sup>2</sup> However both these rules have now been amended by statute.

10.2 The English *Fatal Accidents Act 1846*,<sup>3</sup> which was adopted in Western Australia in 1849<sup>4</sup> and was adopted or copied in all the other Australian jurisdictions, gave an action to certain relatives consequent upon the death of another as the result of a tort, providing the deceased would have been able to sue in person had he survived. In Western Australia the provisions are now contained in the *Fatal Accidents Act 1959*.

10.3 The English *Law Reform (Miscellaneous Provisions) Act 1935*, which was again the model for Australian legislation, allows actions to be brought on behalf of a deceased plaintiff and against the estate of a deceased defendant. In Western Australia these provisions were enacted in the *Law Reform (Miscellaneous Provisions) Act 1941*.

10.4 In each case, these statutes originally contained special limitation provisions.

#### 2. FATAL ACCIDENTS ACT 1959

10.3 According to section 3 of the English *Fatal Accidents Act 1846*, actions had to be commenced within twelve months of the death of the deceased - a much shorter period than the six-year period which then applied in most personal injury cases.<sup>5</sup> This provision applied in Western Australia from 1849, when the English Act was adopted in Western Australia, until it was repealed by the *Fatal Accidents Act 1959*, which (as amended) sets out the current

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<sup>1</sup> "Actio personalis moritur cum persona". The principle goes back at least as far as the 15th century.

<sup>2</sup> *Baker v Bolton* (1808) 1 Camp 493.

<sup>3</sup> Now replaced by the *Fatal Accidents Act 1976* (Eng).

<sup>4</sup> By 12 Vic No 21 (1849).

<sup>5</sup> *Limitation Act 1623* (Eng) s 3.

law. Section 7 provides that actions under the Act must be commenced within one year of the death of the deceased, unless a court gives leave or the defendant consents to the bringing of the action within six years of that date.<sup>6</sup> Section 10 further provides that if the defendant dies within twelve months of the deceased's death an action may be brought against the estate within six months of the grant of probate or administration, even though the ordinary one-year period has expired. Again, the period is much shorter than the six-year period which applies in personal injury cases.

10.4 In most jurisdictions, the special limitation period for fatal accident actions has now been abolished, with the result that the limitation period which applies in such cases is the ordinary limitation period applying to all personal injury actions. England was the first jurisdiction to take this step - the *Law Reform (Limitation of Actions etc) Act 1954* section 2 reduced the period of limitation for personal injury actions to three years, and section 3 amended the *Fatal Accidents Act* so as to provide that the same limitation period would apply in fatal accident actions. This means that the rules about extending the limitation period in personal injury actions also apply in fatal accident claims. These rules are now set out in section 12 of the English *Limitation Act 1980*.

10.5 Most Australian jurisdictions have followed the English example and abolished the special limitation provisions for fatal accident actions, so that the ordinary period of limitation for personal injuries now applies. South Australia was the first to do so in 1956;<sup>7</sup> it was followed by New South Wales in 1969,<sup>8</sup> Tasmania in 1974,<sup>9</sup> Queensland and the Northern Territory in 1981,<sup>10</sup> and Victoria in 1983.<sup>11</sup> In all these jurisdictions the limitation period is now three years, and may be extended in specified circumstances.<sup>12</sup> In the Australian Capital Territory the limitation period for fatal accident actions differs from that applicable to personal injury actions, but is as long as that in the other jurisdictions - the action must be

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<sup>6</sup> The action must be commenced within the six-year time limit. In *Stevens v MVIT* [1978] WAR 232 the cause of action was extinguished where at the end of the six-year period an application for leave had been made and refused, and an appeal had not been entered.

<sup>7</sup> *Wrongs Act 1936* (SA) s 21, as amended 1956.

<sup>8</sup> *Limitation Act 1969* (NSW) s 19.

<sup>9</sup> *Limitation Act 1974* (Tas) s 5(2).

<sup>10</sup> *Common Law Practice Act 1867* (Qld) s 14, as amended 1981; *Limitation Act 1981* (NT) s 17.

<sup>11</sup> *Wrongs Act 1958* (Vic) s 20, as amended 1983.

<sup>12</sup> In Queensland, Tasmania, South Australia and the Northern Territory the provisions dealing with extension of the limitation period in personal injury actions apply: *Limitation of Actions Act 1974* (Qld) s 31(1); *Limitation Act 1974* (Tas) s 5(2); *Limitation of Actions Act 1936* (SA) s 48(1); *Limitation Act 1981* (NT) s 44(1). In the other jurisdictions, see *Limitation Act 1969* (NSW) ss 60D, 60H; *Wrongs Act 1958* (Vic) s 20; *Limitation Act 1985* (ACT) s 39.

brought within three years of the death or six years of the relevant act, neglect or default, whichever is the longer.<sup>13</sup> These provisions contrast starkly with Western Australia's one-year period.

10.6 The Commission suggests that there is a clear case for abolishing the special limitation period applicable to fatal accident actions, and allowing the claimants the same period of time in which to bring an action as is available in personal injury cases.

62. *Should the special limitation period applicable to Fatal Accidents Act actions be abolished?*

### 3. LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1941

10.7 The English *Law Reform (Miscellaneous Provisions) Act 1935* section 4 abolished the old rule that death extinguishes a cause of action, and allowed actions to be brought on behalf of the estates of deceased plaintiffs and against the estates of deceased defendants. No special limitation period applied to actions by deceased plaintiffs, and so the applicable limitation period was that applying to personal injury actions generally (six years between 1935 and 1954, and three years thereafter). However, in actions against the estates of deceased defendants, section 1(3) provided that (unless proceedings were pending at the date of the time) 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. In 1954 the *Law Reform (Limitation of Actions etc) Act* widened the scope of the rule by abolishing the requirement that the cause of action should have arisen not earlier than six months before the death.

10.8 In Western Australia, the *Law Reform (Miscellaneous Provisions) Act 1941* brought about a similar reform. Again, there is no special period of limitation where an action is brought on behalf of a deceased plaintiff, but where an action is brought against the estate of a deceased defendant, section 4(3)(b) provides that the cause of action must have arisen not earlier than twelve months before the death, and proceedings must be taken out not later than six months after the personal representative took out representation or twelve months after the death, whichever is the later. A Supreme Court judge can extend the time for instituting proceedings as the justice of the case may require - though this provision does not allow the

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<sup>13</sup> *Limitation Act 1985 (ACT)* s 16.

judge to vary the requirement that the cause of action must arise not earlier than 12 months before the deceased person's death.

10.9 In England, the special limitation period for actions against deceased defendants has now been abolished. This was the recommendation of the Law Commission in its report on Proceedings against Estates in 1969, and the recommendation was implemented by the *Proceedings against Estates Act 1970*. The *Law Reform (Miscellaneous Provisions) Act 1935* thus now contains no limitation provisions and the ordinary provisions of the *Limitation Act* apply to all actions brought on behalf of or against deceased estates.<sup>14</sup>

10.10 A similar step has been taken in New South Wales. The *Limitation Act 1969* abolished the special limitation provision contained in section 2(3) of the New South Wales *Law Reform (Miscellaneous Provisions) Act 1944*,<sup>15</sup> and so the ordinary provisions of the *Limitation Act* now apply to actions against deceased estates, as well as actions brought on behalf of estates. The same is true in Victoria,<sup>16</sup> Queensland<sup>17</sup> and the Australian Capital Territory.<sup>18</sup> In the other Australian jurisdictions, the special shorter period of limitation in actions against estates has not been abolished.

10.11 Though a majority of jurisdictions retain the special rule, it has been abolished by the two jurisdictions which have been most active in reforming the law of limitation of actions - England and New South Wales - and in three other jurisdictions where there have been recent reforms. The Commission therefore suggests that there is a good case for abolishing the special limitation period applicable to actions against estates.

63. *Should the special limitation period applicable to actions against estates be abolished?*
64. *If it is not abolished, should judges be granted discretion to allow plaintiffs to bring actions in cases where the cause of action arose more than 12 months before the deceased person's death?*

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<sup>14</sup> *Limitation Act 1980* (Eng) s 11(5).

<sup>15</sup> *Limitation Act 1969* (NSW), s 4(3) and Schedule 2.

<sup>16</sup> *Administration and Probate Act 1958* (Vic) s 29(3).

<sup>17</sup> *Succession Act 1981* (Qld).

<sup>18</sup> *Limitation Act 1985* (ACT).

## Chapter 11

### ACTIONS INVOLVING THE CROWN, PUBLIC AND LOCAL GOVERNMENT AUTHORITIES

#### 1. INTRODUCTION

11.1 In Western Australia, the ordinary limitation rules do not apply in actions against the Crown in right of Western Australia, public authorities and local government authorities. In these cases, special statutes set out special limitation periods shorter than those set out in the *Limitation Act*, and also impose the additional requirement that notice of the intended action must be given to the appropriate authority within a very short period.

11.2 The particular provisions are as follows -

- (1) *Actions against the Crown*: The plaintiff must notify the Crown Solicitor within three months and the action must be brought within one year, but with the Attorney General's consent, or, in certain circumstances, with the leave of the court, the action may be brought within six years.<sup>1</sup>
- (2) *Actions against public authorities*: The plaintiff must notify the prospective defendant as soon as practicable, and the action must be brought within one year, but with the defendant's consent, or, in certain circumstances with the leave of the court, the action may be brought within six years.<sup>2</sup>
- (3) *Actions against local government authorities*: The plaintiff must notify the council within 35 days, and give further particulars as soon as possible, and the action must be brought within one year, but in certain circumstances, with the leave of the court, the action may be brought within six years.<sup>3</sup> The provision is confined to actions in respect of a tort.

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<sup>1</sup> *Crown Suits Act 1947* s 6.

<sup>2</sup> *Limitation Act 1935* s 47A.

<sup>3</sup> *Local Government Act 1960* s 660.

11.3 The object of these provisions would seem to be to protect the Crown and public or local government officials, after a very short lapse of time, from being held responsible for their acts, even at the expense of the injured party.<sup>4</sup> This would seem to be unfair and unnecessary. It also makes the job of drafting a reforming statute (such as the *Acts Amendment (Asbestos Related Diseases) Act 1983*) extremely complex.<sup>5</sup>

11.4 A comparison of the statutory provisions of Western Australia with those of the other jurisdictions will show that Western Australia has retained restrictions which are generally regarded as out of date.

## 2. ACTIONS AGAINST THE CROWN

11.5 Formerly, proceedings could not be taken against the Crown, except by petition of right - in which case it could protect itself against stale claims by refusing to endorse the petition.<sup>6</sup> Following the enactment of Crown proceedings legislation it became necessary to determine whether the periods of limitation set out in the *Limitation Act* applied to actions against the Crown.

11.6 The position in England, New South Wales, Victoria, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory is that the Limitation Acts of those jurisdictions expressly state that they apply to proceedings by and against the Crown.<sup>7</sup> In each case, there are a few exceptions, but these are not important for present purposes. In South Australia, the *Crown Proceedings Act* contains a provision to the same effect.<sup>8</sup>

11.7 The position in the other jurisdictions thus contrasts strongly with the position in Western Australia, where the *Crown Suits Act 1947* section 6 imposes a general limitation period of one year, plus a requirement of giving notice as soon as practicable or within three months after the cause of action accrues (whichever is the longer). The Commission suggests

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<sup>4</sup> Wright Committee Report para 26, dealing with similar provisions in the English statutes.

<sup>5</sup> This Act contains separate amending provisions for the *Limitation Act*, the *Fatal Accidents Act*, the *Law Reform (Miscellaneous Provisions) Act*, the *Crown Suits Act* and the *Local Government Act*.

<sup>6</sup> See P W Hogg *Liability of the Crown* (1971) 31.

<sup>7</sup> *Limitation Act 1939* (Eng) s 30, *Limitation Act 1980* s 37; *Limitation Act 1969* (NSW) s 10; *Limitation of Actions Act 1958* (Vic) s 32; *Limitation of Actions Act 1974* (Qld) s 6; *Limitation Act 1974* (Tas) s 37; *Limitation Act 1981* (NT) s 6; *Limitation Act 1985* (ACT) s 7.

<sup>8</sup> *Crown Proceedings Act 1972* (SA) s 11(1).

that, in view of the position in other jurisdictions, these restrictions are out of date and should be abolished.

65. *Should the special limitation and notice periods applicable in actions against the Crown be abolished?*

### 3. ACTIONS BY THE CROWN

11.8 It can be seen that the statutory provisions of other jurisdictions apply to actions by the Crown as well as actions brought against the Crown. At common law, in proceedings by the Crown, defendants could not plead the statutes of limitation,<sup>9</sup> though one exception to this rule was the English *Crown Suits Act 1769* (often called the *Nullum Tempus Act*) which subjected the Crown to a 60 year period of limitation in actions for the recovery of land. This statute was received by the Australian jurisdictions, but has now been repealed both in England and in Australia - except in South Australia. The English *Limitation Act 1939* substituted a period of 30 years,<sup>10</sup> and this provision has been adopted in New South Wales<sup>11</sup> and Tasmania<sup>12</sup> - though the English *Limitation Act 1980* reduces the period to 12 years.<sup>13</sup> On the other hand, the Limitation Acts of Victoria,<sup>14</sup> Queensland<sup>15</sup> and the Northern Territory<sup>16</sup> provide that time does not run against the Crown by adverse possession.

11.9 In Western Australia, section 36 of the *Limitation Act*, which was modelled on the ancestor of the provision now to be found in the Victorian Act,<sup>17</sup> provides that the Crown's title to land is not affected by adverse possession. However, since England and New South Wales, in particular, have adopted a different view, it is necessary to decide whether there should be a limitation period applying to actions against the Crown.

66. *Should there be a limitation period applying to actions against the Crown for recovery of land? If so, should that period be -*

(a) *a 30-year period;*

<sup>9</sup> See eg *Public Trustee v Sherwood* (1928) 30 WALR 112.

<sup>10</sup> *Limitation Act 1939* (Eng) s 4(1).

<sup>11</sup> *Limitation Act 1969* (NSW) s 27(1).

<sup>12</sup> *Limitation Act 1974* (Tas) s 10(1).

<sup>13</sup> *Limitation Act 1980* (UK) s 15(7) and Schedule 1 Part II para 10.

<sup>14</sup> *Limitation of Actions Act 1958* (Vic) s 7.

<sup>15</sup> *Limitation of Actions Act 1974* (Qld) s 6(4).

<sup>16</sup> *Limitation Act 1981* (NT) s 6(4).

<sup>17</sup> Wright Committee Report para 26.

- (b) a 12-year limitation period;
- (c) some other period?

#### 4. ACTIONS AGAINST PUBLIC AUTHORITIES

11.10 At one time, most of the jurisdictions under examination had special limitation provisions applying to actions against public authorities. These were usually not uniform, but were scattered over a number of special statutes dealing with particular authorities. In England, the special provisions were consolidated by the *Public Authorities Protection Act 1893*<sup>18</sup> which imposed a uniform limitation period of six months for actions against public authorities. The Wright Committee recommended that the special period should be retained, but that it should be extended to one year,<sup>19</sup> and section 21 of the *Limitation Act 1939* so provided.

11.11 In Western Australia also, special limitation periods applicable to actions against public authorities were at one time to be found in the various statutes setting up that particular authority.<sup>20</sup> However, in 1954, these provisions were unified by an amendment to the *Limitation Act*,<sup>21</sup> which imposed a limitation period of one year and a requirement to give notice as soon as practicable,<sup>22</sup> for all actions against public authorities. This provision was obviously modelled on the English legislation mentioned in the previous paragraph.

11.12 Over the last 40 years there has been a general movement in favour of abolishing the special limitation periods applicable in actions against public authorities. England was the first jurisdiction to take this step, in 1954. Following the report of the Tucker Committee in 1949,<sup>23</sup> the *Law Reform (Limitation of Actions etc) Act 1954*<sup>24</sup> repealed the *Public Authorities Protection Act* and section 21 of the *Limitation Act 1939*, so allowing the ordinary limitation periods to apply in actions against public authorities.

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<sup>18</sup> S 1.

<sup>19</sup> Wright Committee Report para 26.

<sup>20</sup> See eg *Dermer v Minister for Water Supply* (1941) 43 WALR 85, dealing with the limitation period in the *Land Drainage Act 1925*. The defendant argued that s 38 of the *Limitation Act 1935* would operate to bar the plaintiff's right of action if it was not barred under the *Land Drainage Act*, but the court did not find it necessary to deal with the point.

<sup>21</sup> S 47A.

<sup>22</sup> On the question of when notice is given as soon as practicable, see *Luetich v Walton* [1960] WAR 109.

<sup>23</sup> *Report of the Committee on Limitation of Actions* (1949) Cmd 7740.

<sup>24</sup> S 1.

11.13 Tasmania passed legislation in the same year, abolishing special limitation and notice requirements imposed by any Act on public authorities.<sup>25</sup>

11.14 In Victoria, the Victorian Statute Law Revision Committee, when recommending the enactment of a modern Limitation Act, said that the special limitation periods should be abolished but that the notice requirements should be retained,<sup>26</sup> and section 34 of the *Limitation of Actions Act 1955* implemented this recommendation. However, in 1966 the *Limitation of Actions (Notice of Actions) Act* repealed section 34, thus bringing actions against public authorities fully into line with all other actions.

11.15 In New South Wales, the New South Wales Law Reform Commission did not report on public authorities in its original report and so the *Limitation Act 1969* made no change in this respect. However the New South Wales Law Reform Commission in its third report on Limitation in 1975<sup>27</sup> dealt with the problem of special protections for public authorities and recommended that these rules should be abolished. This recommendation was implemented by the *Notice of Action and Other Privileges Abolition Act 1977*.

11.16 In Queensland, the report of the Queensland Law Reform Commission which led to the enactment of the *Limitation Act* recommended that the special rules applicable to public authorities should be abolished.<sup>28</sup> Clause 30 of the draft Bill attached to the report was designed to implement this recommendation. However, this clause was dropped from the Act as eventually enacted.

11.17 There is no legislation in South Australia and the Northern Territory abolishing special periods of limitation applicable to actions against public authorities. However, section 47 of the South Australian *Limitation Act 1935* alleviates the position in respect of a number of authorities by providing that where legislation imposes a limitation period of less than 12 months, a limitation period of 12 months shall apply. This period, like the other limitation periods imposed by the Act, can be extended at the court's discretion under the provisions of section 48.

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<sup>25</sup> *Public Officers Protection Act 1934* (Tas) s 6A, inserted by *Limitation of Actions Act 1954* (Tas) s 3 and Second Schedule.

<sup>26</sup> Victorian Statute Law Revision Committee *Report on Limitation of Actions* (1949) para 3.

<sup>27</sup> New South Wales Law Reform Commission *Third Report on the Limitation of Actions - Special Protections* (1975).

<sup>28</sup> Queensland Law Reform Commission *Report on a Bill to Amend and Consolidate the Law Relating to Limitation of Actions* (1972) 2.

11.18 It was thus in the very year - 1954 - that this reform movement began that Western Australia passed a statute perpetuating the old rules. Ever since then, Western Australia has remained out of line with the general direction of reform in this area. The Commission suggests that there is a good case for abolishing the special limitation periods for public authorities, as has already been done in the jurisdictions - England and New South Wales - which have taken the lead in reform of the law of limitation of actions.

67. *Should the special limitation and notice provisions applicable in actions against public authorities be abolished?*

## 5. ACTIONS AGAINST LOCAL GOVERNMENT AUTHORITIES

11.19 It does not seem that English legislation ever enacted special periods of limitation applicable to actions against local government authorities. Certainly, no such provisions were mentioned by the Wright Committee in 1936 and none were repealed by the *Limitation Act 1939*; nor do any such periods now exist.<sup>29</sup> The same seems to be true of Victoria.

11.20 New South Wales,<sup>30</sup> South Australia,<sup>31</sup> Tasmania<sup>32</sup> and the Northern Territory,<sup>33</sup> however, at one time had special provisions similar to those to be found in section 660 of the Western Australia *Local Government Act 1960* imposing a short period of limitation and special notice requirements in actions brought against local government authorities. Queensland also had such a provision, but limited to actions in respect of property damage.<sup>34</sup>

11.21 In recent years, all these provisions (except Queensland's provision limited to property damage) have been repealed.<sup>35</sup> Western Australia is therefore the only jurisdiction to retain special limitation and notice requirements in actions against local authorities (except for Queensland's limited provision). Again, the Commission suggests that Western Australia is

<sup>29</sup> See J F Josling *Periods of Limitation* (1973).

<sup>30</sup> *Local Government Act 1919* (NSW) s 580.

<sup>31</sup> *Local Government Act 1934* (SA) s 719.

<sup>32</sup> *Local Government Act 1906* (Tas) s 231.

<sup>33</sup> *Local Government Act* (NT) s 404(1).

<sup>34</sup> *Local Government Act 1936* (Qld) s 52(10)(i).

<sup>35</sup> See *Notice of Action and Other Privileges Abolition Act 1977* (NSW) s 4 and Schedule 1; *Statutes Amendment (Miscellaneous Provisions) Act 1972* (SA) s 11; *Limitation of Actions Act 1954* (Tas) s 3; *Limitation Act 1981* (NT) s 3 and Schedule Part IV.

out of line with developments elsewhere and that the special limitation and notice periods should be abolished.

68. *Should the special limitation and notice provisions applicable in actions against local government authorities be abolished?*

## PART III: QUESTIONS AT ISSUE

### Chapter 12

#### QUESTIONS AT ISSUE

The Commission welcomes comment, with reasons where appropriate, on any matters arising out of this discussion paper and, in particular, on the questions set out below (which are also set out at appropriate places in the text). The Commission is interested not only in receiving responses covering all the questions listed, but also in responses dealing only with one or a few particular issues.

#### GENERAL

1. Should the *Limitation Act 1935* be repealed and replaced by modern statutory provisions?
2. If so, should the *Limitation Act* -
  - (a) continue to be based on the principle of a fixed period or periods of limitation running from a fixed date;
  - (b) continue to be based on the principle of a fixed period or periods of limitation running from a fixed date, but give the court a general discretion to extend the time in appropriate cases;
  - (c) be based on the principle that the limitation period should run from the time when the plaintiff knows, or but for his own default might have known, of the existence of the claim?

#### CHAPTER 3 - LIMITATION PERIODS: COMMON LAW

##### General limitation period

3. Should section 38 of the *Limitation Act* be replaced by a modern provision? If so, should it be -
  - (a) one based on, for example, section 14(1) of the New South Wales *Limitation Act 1969*;
  - (b) one based on section 11 of the Australian Capital Territory *Limitation Act 1985*?

4. Should the limitation period under such a provision be
- (a) six years;
  - (b) some other period?

(Paragraphs 3.1 - 3.8)

### **Actions for personal injury**

5. Should the limitation period in actions for personal injury be
- (a) the same as the limitation period for any other common law action;
  - (b) a shorter period, for example three years?

(Paragraphs 3.9 - 3.10)

### **Other provisions relating to tort**

6. Should the Western Australian *Limitation Act* make specific provision for
- (a) the successive conversion or wrongful detention of goods;
  - (b) actions for contribution between tortfeasors?

If so, what should those provisions be?

(Paragraphs 3.11 - 3.13)

### **Actions for an account**

7. Should the *Limitation Act* contain a separate provision for actions for an account? If so, should it
- (a) provide a set limitation period, say three years;
  - (b) provide that actions for an account may not be brought after the expiration of any time limit under the Act which is applicable to the claim which is the basis of the duty to account?

(Paragraphs 3.14 - 3.15)

### **Actions on a deed**

8. Should the *Limitation Act* contain a separate provision for actions on a deed? If so, should the limitation period be
- (a) 12 years;

- (b) some other period?

(Paragraphs 3.16 - 3.17)

### **Actions on a judgment**

- 9. Should the *Limitation Act* contain a separate provision for actions on a judgment? If so, should the limitation period be
  - (a) 12 years;
  - (b) some other period?
- 10. Should the provision be extended to actions on a foreign judgment?

(Paragraphs 3.18 - 3.20)

### **Actions on an arbitral award**

- 11. Should the *Limitation Act* contain a separate provision for actions to enforce an arbitral award? If so, should the limitation period be
  - (a) six years;
  - (b) some other period?
- 12. Should the legislation specifically provide that the cause of action accrues on the date on which default in the observance of the award occurs?

(Paragraph 3.21)

### **Actions to recover a penalty or forfeiture**

- 13. Should the *Limitation Act* contain a separate provision for actions to recover a penalty or forfeiture? If so, should the limitation period be
  - (a) two years;
  - (b) some other period?

(Paragraphs 3.22 - 3.23)

### **Admiralty actions**

- 14. Should the *Limitation Act* provide that the provisions of the Act dealing with common law claims should not apply to admiralty actions in rem?
- 15. Should actions to recover seamen's wages be exempted from this provision, so that the ordinary limitation period for actions in contract applies?

16. Should section 29 of the *Supreme Court Act 1935* be transferred to the *Limitation Act*?

17. Should this provision be extended so as to cover actions to enforce a claim or lien in respect of salvage services?

(Paragraphs 3.24 - 3.26)

### **Arbitrations**

18. Should the *Limitation Act* be expressly stated to apply to arbitrations in the same way as it applies to actions?

19. Should the *Limitation Act* contain provisions stating when an arbitration is deemed to commence?

(Paragraphs 3.27 - 3.28)

## **CHAPTER 4 - LIMITATION PERIODS: PROPERTY AND EQUITY**

### **Freehold land**

20. Should the provisions of the *Limitation Act* dealing with actions to recover freehold land, and the accrual of the right of action in such cases, be abolished and replaced by modern provisions, as in other jurisdictions?

21. Should the normal limitation period for actions to recover land be

(a) 12 years;

(b) some other period?

(Paragraphs 4.5 - 4.6)

22. Should it be possible to prevent time running in an adverse possessor's favour by implying a grant of a licence by the true owner to the adverse possessor?

(Paragraph 4.12)

23. In the case of an action to recover money charged on a reversionary interest in the proceeds of sale, should time only begin to run when the reversion falls in?

24. Should the provisions of the *Limitation Act* dealing with entailed interests be abolished?

(Paragraphs 4.16 - 4.18)

25. Should the provisions in section 14 relating to coparcenary be abolished?

(Paragraph 4.19)

**Leasehold interests**

26. Should the provisions of the *Limitation Act* relating to leasehold interests be replaced by modern provisions?

(Paragraph 4.20)

27. Should the limitation period for actions to recover arrears of rent on a covenant under seal be six years, instead of the longer period applicable to actions on instruments under seal?

28. Should this provision be confined to arrears of rent, or should it deal more generally with arrears of income?

(Paragraph 4.23)

29. Where a lease contains a forfeiture clause, should the right to recover the land accrue -

- (a) at the time of the forfeiture;
- (b) when the landlord could with reasonable diligence have discovered the facts giving rise to the forfeiture;
- (c) at some other time?

(Paragraph 4.24)

30. In the case of a tenancy at will, should the cause of action accrue -

- (a) one year after the creation of the tenancy;
- (b) when it is determined;
- (c) when rent becomes overdue;
- (d) in more than one of the above circumstances?

(Paragraphs 4.25 - 4.26)

31. In the case of periodic tenancies, should the cause of action accrue -

- (a) at the end of the period;
- (b) at the last time rent was received;
- (c) when rent becomes overdue?
- (d) in more than one of the above circumstances?

32. Should this provision be restricted to oral tenancies?

(Paragraphs 4.27 - 4.28)

33. Should the doctrine of adverse possession apply to all leasehold interests?

(Paragraph 4.29)

34. If rent is paid to the wrong landlord, should the cause of action accrue -

- (a) when rent is first received by the wrong landlord; or
- (b) when the landlord becomes entitled to recover the land from the tenant by forfeiture or breach of condition?

(Paragraphs 4.30 - 4.32)

35. Should a tenant whose own title has been extinguished by adverse possession be able, by surrendering the lease, to assist the landlord to evict the adverse possessor?

(Paragraph 4.33)

### **Trusts relating to land**

36. Should the provisions of the *Limitation Act* relating to trusts of land be repealed and replaced by modern provisions? If so, should such provisions be based on

- (a) section 16 of the Queensland *Limitation of Actions Act*;
- (b) some other model?

(Paragraphs 4.34 - 4.42)

### **Equitable claims**

37. Should all equitable claims be governed by the Limitation Acts, or should the doctrines of laches and acquiescence be retained in their present form?

38. Should there be a statutory limitation period applicable to certain forms of equitable relief for which there is at present no limitation period, such as specific performance and injunction?

(Paragraphs 4.43 - 4.49)

### **Mortgages**

39. Should the present Western Australian provisions on limitation of actions as respects mortgages be replaced by modern provisions? If so, should the model for these provisions be -

- (a) the mortgage provisions in the English *Limitation Act 1980*;
- (b) the mortgage provisions in the New South Wales *Limitation Act 1969*;
- (c) some other model?

(Paragraphs 4.50 - 4.60)

## Trusts

40. Should the provisions of the *Limitation Act* dealing with actions against trustees be replaced by modern provisions? If so, should the model for those provisions be -
- (a) the legislation of England, Victoria, Queensland and Tasmania;
  - (b) the legislation of New South Wales;
  - (c) some other model?
41. If a trustee, in good faith, distributes trust property among those he reasonably believes to constitute the class of entitled beneficiaries, including himself, should the trustee be able to rely on a defence of limitation against a latecomer except in respect of the share of trust property he would have had to pay to the latecomer had all the beneficiaries including himself been sued in time?

(Paragraphs 4.61 - 4.71)

## Deceased estates

42. Should the present provisions of the *Limitation Act* dealing with actions against personal representatives be repealed and replaced by modern provisions? If so -
- (a) should they be replaced by a specific provision dealing comprehensively with actions against personal representatives to recover personalty; or
  - (b) should the limitation periods dealing with trusts be made applicable?

Should the rule that the running of time against a debtor is suspended where the debtor becomes the administrator of the creditor be abolished?

(Paragraphs 4.72 - 4.76)

## CHAPTER 5 - EXTENSION OR POSTPONEMENT OF THE LIMITATION PERIOD

### Disability

43. Should the various provisions about disabilities in the *Limitation Act* be replaced by generally applicable provisions?
- (Paragraphs 5.1 - 5.8)
44. Which of the following should be regarded as a person under disability for the purpose of the *Limitation Act*?

- (a) persons under the age of 18;
- (b) persons of unsound mind;
- (c) persons affected by a physical disability;
- (d) persons undergoing a sentence of imprisonment;
- (e) persons involved in war or warlike circumstances;
- (f) married women;
- (g) persons absent from the jurisdiction.

*(Paragraphs 5.9 - 5.10)*

45. Should disability

- (a) prevent the limitation period running when it is present at the time the cause of action accrues; or
- (b) also suspend the running of the limitation period where it arises subsequently to the commencement of that period?

46. Should there be an ultimate period (for example 30 years) beyond which the running of time cannot be suspended, irrespective of disability? Should this apply in all cases, or only in particular cases, for example actions to recover land or money charged on land?

47. Should the disability provision -

- (a) affect a case where the right of action first accrued to a person not under a disability through whom the person under disability claims;
- (b) apply without any further extension of time where the person under disability dies while still under disability and the right of action accrues to another person under disability;
- (c) apply to actions to recover a penalty or forfeiture under a statutory provision where the action is not brought by an aggrieved party?

*(Paragraphs 5.11 - 5.14)*

**Acknowledgment and part payment**

48. Should the provisions about acknowledgment and part payment be replaced by

- (a) provisions based on those in force in England, Victoria, Queensland and Tasmania;

- (b) provisions based on those in force in New South Wales, the Northern Territory and the Australian Capital Territory?

49. In particular -

- (a) Is there any reason why the law relating to acknowledgment and part payment should be different for any different classes of action;
- (b) Should acknowledgment or part payment ever have any effect on persons other than the maker or the recipient;
- (c) Should acknowledgment or part payment ever be effective to start a period of limitation running afresh after it has expired?

*(Paragraphs 5.15 - 5.34)*

### **Fraud**

50. Should the provisions in the *Limitation Act* and the rules of law and equity as to concealed fraud be replaced by a rule based on the modern provisions in other jurisdictions that in all cases of fraud or fraudulent concealment the limitation period should run from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it?

51. Should this rule -

- (a) also apply to fraudulent concealment of the defendant's identity;
- (b) only apply to deliberate concealment?

*(Paragraphs 5.35 - 5.41)*

### **Mistake**

52. Should the present rules as to relief from the consequences of mistake be replaced by a rule based on the provisions of modern Limitation Acts that time should run only from the date when the mistake was, or could with reasonable diligence have been, discovered?

*(Paragraphs 5.42 - 5.44)*

## **CHAPTER 6 - EFFECT OF RUNNING OF LIMITATION PERIOD**

53. Should the effect of the running of a period of limitation be -

- (a) to bar the remedy, or

- (b) to bar the right?
54. If the effect of the running of a period of limitation is to bar the remedy, should there be exceptions in the case of -
- (a) actions to recover land;
  - (b) actions for conversion of wrongful detention of goods?
55. In the case of stolen goods, should the rights of the owner be not barred by lapse of time against a thief or receiver?
56. If the effect of the running of a period of limitation is to bar the right, should a debt secured by a possessory lien on goods not be extinguished as long as the owner has an action for conversion or wrongful detention or to recover the proceeds of sale?

(Paragraphs 6.1 - 6.10)

## CHAPTER 7 - LATENT DAMAGE

### Latent personal injury

57. Should the *Acts Amendment (Asbestos Related Diseases) Act 1983* be repealed and replaced by provisions dealing generally with latent personal injury, as recommended by the Commission in its Report on Part I?

(Paragraphs 7.3 - 7.9)

### Latent property damage and economic loss

58. Should the problem of latent property damage and latent economic loss be dealt with by
- (a) the introduction of legislation based upon the English *Latent Damage Act 1986*, adding an additional three-year limitation period running from the date of discovery;
  - (b) the introduction of legislation based on the British Columbia *Limitation Act 1979*, postponing the running of the general limitation period in cases where the plaintiff does not have sufficient knowledge of the claim;
  - (c) the introduction of legislation based on section 48 of the South Australian *Limitation of Actions Act 1936*, giving the plaintiff 12 months after the date of discovery in which to bring an action;
  - (d) the introduction of legislation based on section 40 of the Australian Capital Territory *Limitation Act 1985*, which confers on a court a discretion to disregard a defence of limitation if it is just and reasonable to do so;

- (e) some other solution?

(Paragraphs 7.10 - 7.27)

## **CHAPTER 8 - A POSSIBLE ALTERNATIVE**

- 59. Should the Western Australian *Limitation Act* be replaced by a Limitation Act based on the Model Limitation Act proposed by the Alberta Law Reform Institute?
- 60. If so, should such an Act -
  - (a) simply adopt the discovery period without also adopting the ultimate period;
  - (b) adopt both the discovery and the ultimate period;
  - (c) adopt both the discovery and the ultimate period, but give courts power to extend the ultimate period when it is just and reasonable to do so?

(Paragraphs 8.1 - 8.20)

## **CHAPTER 9 - OTHER LIMITATION LEGISLATION**

- 61. Should the *Limitation Act* continue to provide that nothing in it applies to limitation periods prescribed by other Acts, or should consideration be given to abolishing these other limitation periods?

(Paragraphs 9.1 - 9.3)

## **ACTIONS INVOLVING DEATH**

### ***Fatal Accidents Act 1959***

- 62. Should the special limitation period applicable to *Fatal Accidents Act* actions be abolished?

(Paragraphs 10.3 - 10.6)

### ***Law Reform (Miscellaneous Provisions) Act 1941***

- 63. Should the special limitation period applicable to actions against estates be abolished?
- 64. If it is not abolished, should judges be granted discretion to allow plaintiffs to bring actions in cases where the cause of action arose more than 12 months before the deceased person's death?

(Paragraphs 10.7 - 10.11)

## **CHAPTER 11 - ACTIONS INVOLVING THE CROWN, PUBLIC AND LOCAL GOVERNMENT AUTHORITIES**

### **Actions against the Crown**

65. Should the special limitation and notice periods applicable in actions against the Crown be abolished?

*(Paragraphs 11.5 - 11.7)*

### **Actions by the Crown**

66. Should there be a limitation period applying to actions against the Crown for recovery of land? If so, should that period be -

- (a) a 30-year period;
- (b) a 12-year limitation period;
- (c) some other period?

*(Paragraphs 11.8 - 11.9)*

### **Actions against public authorities**

67. Should the special limitation and notice provisions applicable in actions against public authorities be abolished?

*(Paragraphs 11.10-11.18)*

### **Actions against local government authorities**

68. Should the special limitation and notice provisions applicable in actions against local government authorities be abolished?

*(Paragraphs 11.19-11.21)*

## APPENDIX I

### DERIVATION OF SECTIONS OF WESTERN AUSTRALIAN LIMITATION ACT 1935

Section		
1	Short title.	
2	Repeal.	
3	Interpretation.	RPLA 1833 s 1 (most)
4	No land or rent to be recovered but within 12 years after the right of action accrued.	RPLA 1833 s 2 as replaced by RPLA 1874 s 1
5	When the right shall be deemed to have accrued.  (a) In the case of an estate in possession. On dispossession. (b) On abatement or death. (c) On alienation. (d) In case of future estates. (e) In case of forfeiture or breach of condition.  When the right of entry shall be deemed to have accrued.	RPLA 1833 s 3
6	Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.	RPLA 1833 s 4
7	Provision for case of future estates.  Time limited to 6 years when person entitled to the particular estate out of possession, etc.	RPLA 1833 s 5 as replaced by RPLA 1874 s 2.
8	An administrator to claim as if he obtained the estate without interval after the death of deceased.	RPLA 1833 s 6
9	In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.	RPLA 1833 s 7

10	No person after a tenancy from year to year, to have any right but from the end of the first year or last payment of rent.	RPLA 1833 s 8
11	Where rent amounting to \$2 reserved by a lease has been wrongfully received no right to accrue on determination of the lease.	RPLA 1833 s 9
12	A mere entry not to be deemed possession.	RPLA 1833 s 10
13	No right to be preserved by continual claim.	RPLA 1833 s 11
14	Possession of one coparcener, etc., not to be the possession of the others.	RPLA 1833 s 12
15	Acknowledgment in writing given to the person entitled or his agent, to be equivalent to possession or receipt of rent.	RPLA 1833 s 14
16	In cases of infancy, etc., 6 years to be allowed from the termination of the disability or previous death.	RPLA 1833 s 16 as replaced by RPLA 1874 s 3
17	No time to be allowed for absence beyond seas.	RPLA 1874 s 4
18	30 years utmost allowance for disabilities.	RPLA 1833 s 17 as replaced by RPLA 1874 s 5
19	No further time to be allowed for a succession of disabilities.	RPLA 1833 s 18
20	When the right to an estate in possession is barred the right of the same person to future estates also barred.	RPLA 1833 s 20
21	Where tenant in tail is barred, remaindermen whom he might have barred shall not recover.	RPLA 1833 s 21
22	Possession adverse to a tenant in tail, shall run on against the remaindermen whom he might have barred.	RPLA 1833 s 22
23	Possession under an assurance by a tenant in tail.	RPLA 1833 s 23 as replaced by RPLA 1874 s 6

24	No suit in equity to be brought after the time when the plaintiff might have brought an action at law.	RPLA 1833 s 24
25	In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.	RPLA 1833 s 25
26	Time for recovering charge and arrears of interest not to be enlarged by express trust for raising same.	RPLA 1874 s 10
27	In cases of fraud no time shall run whilst the fraud remains concealed.	RPLA 1833 s 26
28	Saving the jurisdiction of equity on the ground of acquiescence or otherwise.	RPLA 1833 s 27
29	Mortgagor to be barred at end of 12 years from the time when the mortgagee took possession or from the last written acknowledgment.	RPLA 1833 s 28 as replaced by RPLA 1874 s 7
30	At the end of the period of limitation the right of the party out of possession to be extinguished.	RPLA 1833 s 34
31	Receipt of rent to be deemed receipt of profits.	RPLA 1833 s 35
32	Money charged upon land and legacies to be deemed satisfied at the end of 12 years if no interest paid nor acknowledgment given.	RPLA 1833 s 40 as replaced by RPLA 1874 s 8
33	Claims to estate of intestates.	RPLA 1860 s 13 replacing RPLA 1833 s 41
34	No arrears of rent or interest to be recovered for more than 6 years.	RPLA 1833 s 42
35	Mortgagees may bring actions to recover land within 12 years after last payment of principal or interest.	RPLA 1837 s 1
36	No title by adverse possession against Crown.	cf Crown Suits Act 1769
37	Actions on penal Statutes.	Common Informers Act 1588 s 5

37A	Actions to recover moneys paid as taxes, fees, etc.	(Inserted 1978)
38	Limitation of time for commencing other actions and suits. Arrears of interest not recoverable after 6 years.	LA 1623 s 3 CPA 1833 s 3 MLAA 1856 s 9 (Vic) SCA 1928 ss 80,82,83
38A	Extended limitation period in certain cases.	(Inserted 1983)
39	Except absence beyond seas.	MLAA 1856 s 10
40	Persons under disability allowed time from removal of disability.	LA 1623 s 7 CPA 1833 s 4
41	Extension of time where person liable is beyond the seas.	Administration of Justice Act 1705 s 19
42	Meaning of expression "beyond the seas".	(Vic) SCA 1928 s 86
43	No extension of time against a joint debtor not beyond the seas.	MLAA 1856 s 11
44	(1) Effect of acknowledgment, etc., preserved except in certain cases.	cf SFAA 1828 s 1
	(2) Indorsements of payments by creditor on bills of exchange not sufficient.	SFAA 1828 s 3
	(3) Acknowledgment not sufficient unless in writing.	SFAA 1828 s 1 (1st part)
	(4) Effect of acknowledgment in actions of covenant etc., under section 38.	CPA 1833 s 5
	(5) Part payment by one contractor not to prevent bar in favour of another.	MLAA 1856 s 14
45	Judgment may be recovered against some co-defendants.	SFAA 1828 s 1 (2nd part)
46	Limitation to apply to counter-claim and set-off.	cf SFAA 1828 s 4
47	Trustees may plead Statute of Limitations in certain cases.	Trustee Act 1888 s 8
47A	Protection of persons acting in execution of statutory or other public duty.	(Inserted 1954)

48	Crown not affected, except as expressly provided.	-
48A	Amendments contained in Second Schedule.	(Inserted 1954)
49	Exception of cases provided for by other Acts.	(Vic) SCA 1928 s 80

#### Abbreviations

CPA	-	Civil Procedure Act
LA	-	Limitation Act
MLAA	-	Mercantile Law Amendment Act
RPLA	-	Real Property Limitation Act
SCA	-	Supreme Court Act
SFAA	-	Statute of Frauds Amendment Act

## APPENDIX II

### ALBERTA MODEL LIMITATIONS ACT

From the Alberta Law Reform Institute's Report on *Limitations*  
(Report No 55 1989)

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#### [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) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;
- (e) "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;
- (f) "law" means the law in force in the Province, and includes
  - (i) statutes,
  - (ii) judicial precedents, and
  - (iii) regulations;
- (g) "limitation provision" includes a limitation period or notice provision that has the effect of a limitation period;
- (h) "person under disability" means
  - (i) a minor, or
  - (ii) an 'adult who is unable to make reasonable judgments in respect of matters relating to the claim;

- (i) "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, and 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
  - (iv) *habeas corpus*;
- (j) "right" means any right under the law and "duty" has a correlative meaning;
- (k) "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 his circumstances ought to have known,
    - (i) that the injury for which he seeks a remedial order had occurred,
    - (ii) that the injury was to some degree attributable to conduct of the defendant, and
    - (iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding, or
  - (b) 15 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 clause (1)(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 clause (1)(a);
  - (b) against a principal when either
    - (i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or
    - (ii) an agent with a duty to communicate the knowledge prescribed in clause (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 clause (1)(a), if he acquired the knowledge more than 2 years before his death,
    - (ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or
    - (iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge after his appointment.
- (3) For the purposes of clause (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 terminated or the last act or omission occurred;
  - (b) a claim based on a breach of a duty arises when the conduct, act or omission occurred;
  - (c) a claim based on a demand obligation arises when a default in performance occurred after a demand for performance was made;
  - (d) a claim in respect or a proceeding under the Fatal Accidents Act arises when the conduct which caused the death, upon which the claim is based, occurred;
  - (e) a claim for contribution arises when the claimant for contribution was made a defendant in respect of, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based, whichever first occurs.

- (4) The limitation period provided by clause 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 or 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 clause (1)(a), and
  - (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by clause (1)(b).

**[Acquiescence or Laches]**

- 4 Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines or acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

**[Concealment ]**

- 5(1) The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant fraudulently concealed the fact that the injury for which a remedial order is sought had occurred.
- (2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.

**[Persons under Disability]**

- 6(1) 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.
- (2) Under this section, the claimant has the burden of proving that the operation or the limitation periods provided by this Act was suspended.

**[Claims Added to a Proceeding]**

- 7(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 either 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 or process, sufficient knowledge of the added claim that he 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,
  - (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 he 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 clause (3)(c), if in issue, has been satisfied, and
  - (b) the defendant has the burden of proving that the requirement of clause (3)(b) or 4(b), if in issue, was not satisfied.

**[Agreement]**

- 8 Subject to section 10, 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]**

- 9(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, a share of estate property, and interest on any of the foregoing.

- (2) Subject to subsections (3) and (4) and section 10, 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 or the limitation period applicable to the claim, the operation of the limitation periods begins anew 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 thereon, 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]**

- 10(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.
- (2)
  - (a) An agreement made by or with an agent has the same effect as if made by or with the principal, and
  - (b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.
- (3) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made
  - (a) with or to him,
  - (b) with or to a person through whom he derives a claim, or
  - (c) in the course or proceedings of a transaction purporting to be pursuant to the Bankruptcy Act (Canada).
- (4) A person is bound by an agreement, an acknowledgment or a 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.

**[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 or 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.

**[Transitional]**

- 13(1) *Subject to subsection (2), this Act applies where a claimant seeks a remedial order in a proceeding commenced after the date the 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 his 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]**

- 14(1) *Section 60 of the Law of Property Act is amended by adding the following:*
- (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 it shall be deemed that no such right has ever been so acquired.*
- (2) *The Limitation of Actions Act is repealed.*