

A New Limitation Act for the 21st Century

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This article summarises and comments on the changes made in Western Australia by the Limitation Act 2005. It compares its provisions with the old law and the reforms recommended by the Law Reform Commission of Western Australia in 1997. The previous law was based on 19th century models and had remained untouched by reforms elsewhere. The 2005 changes have brought the law of limitation of actions into the 21st century.

THE Limitation Act 2005 (WA) ('the 2005 Act') and its companion Act the Limitation Legislation Amendment and Repeal Act 2005 (WA) have brought about far-reaching and long overdue reforms to the law of limitation of actions. For many years, the law in Western Australia has been seriously deficient. The Limitation Act 1935 (WA) ('the 1935 Act'), which contained the old provisions, did little more than reproduce English legislation enacted between 1623 and 1888.¹ Thus, for many years the law in Western Australia was very out of date: in contrast, all other Australian jurisdictions, except South Australia, enacted modern legislation between 1955 and 1985.² As a prominent example, in every other state and territory a court has power to extend the ordinary limitation period in a personal injury case – but, before 2005, this was not possible in Western Australia. The 2005 Act brings Western Australia into line with the other jurisdictions on such issues and solves many of the problems of the old law, but is also innovative in a number of respects. As a result, Western Australia, which only a short time ago had the most old-fashioned

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1. Principally the Real Property Limitation Acts 1833 and 1874 (UK); the Common Informers Act 1588 (Eng); the Limitation Act 1623 (Eng); the Civil Procedure Act 1833 (UK); the Mercantile Law Amendment Act 1856 (UK); the Statute of Frauds Amendment Act 1828 (UK) and the Trustee Act 1888 (UK).
2. See now Limitation Act 1985 (ACT); Limitation Act 1969 (NSW); Limitation Act 1981 (NT); Limitation of Actions Act 1974 (Qld), replacing legislation enacted in 1960; Limitation Act 1974 (Tas); Limitation of Actions Act 1958 (Vic), replacing legislation enacted in 1955. For South Australia, see Limitation of Actions Act 1936 (SA).

limitation laws in the country, now has a more modern statute than any of the other states.

In an indirect sense, the legislation results from the 1997 report of the Law Reform Commission of Western Australia ('LRCWA') on *Limitation and Notice of Actions*.³ However, it does not implement the LRCWA's central recommendation for two general limitation periods, together with a limited discretion to extend either period.⁴ Instead, the 2005 Act is essentially traditional in style (though not in arrangement), consisting of a number of different limitation periods with separate accrual rules, together with extension provisions. It has incorporated many of the better and most up to date provisions found in other Australian legislation. Also, the Act in fact adopts a large number of the LRCWA's incidental recommendations.⁵

The 2005 Act came into operation on the day on which it received the Royal Assent – 15 November 2005 (section 2). As a general principle, the Act applies only to causes of action which accrue on or after the commencement day (section 4), which means that the old law will continue to be important for some time to come; and limitation periods which have expired under the old law are generally not revived (section 5). But in two important instances the Act has made changes to causes of action accruing *before* the commencement day. First, under section 6, limitation periods for personal injury actions which have already expired can be revived. This section provides that sections 55 and 56 will apply to ascertain when such causes of action accrue, and then the old limitation period will apply.⁶ Secondly, under section 7, there is a new limitation period for personal injury actions relating to childbirth which applies to causes of action which accrued before the commencement day.⁷

It is important to note that the 2005 Act does not affect the operation of limitation provisions in other legislation (section 9).⁸ Thus, it will still be vital to ascertain

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3. LRCWA, *Report on Limitation and Notice of Actions*, Project No 36(II) (1997). The author, as the Commission's Executive Officer and Director of Research between 1983 and 1998, was the officer principally responsible for the writing of this report.
 4. This recommendation was consistent with a new approach to limitation laws first developed in Alberta and now enacted in Alberta, Ontario and Saskatchewan: see Limitations Act 1996 (Alta); Limitations Act 2002 (Ont); Limitations Act 2004 (Sask). A similar approach was adopted for personal injury by the Commonwealth's *Review of the Law of Negligence: Final Report* (2002) and has now been enacted in New South Wales, Victoria and Tasmania: see Limitation Act 1969 (NSW) s 50C; Limitation of Actions Act 1958 (Vic) s 27D; Limitation Act 1974 (Tas) s 5A.
 5. Useful source material for the Act can be found in: Attorney-General (WA), *Limitations Law Reform* (17 May 2002); Limitation Bill 2005 (WA), Explanatory Memorandum. Courts can refer to these sources and the report of the LRCWA, above n 3: see Interpretation Act 1984 (WA) s 19.
 6. See Limitation Bill 2005 (WA), Explanatory Memorandum, notes on cl 6. For ss 55 and 56, see below p 394.
 7. See below p 407.
 8. Except under s 28(3) and (5).

whether there is a limitation provision in particular legislation applicable to the case in hand.⁹ However, the Limitation Legislation Amendment and Repeal Act 2005 has repealed the former special periods which applied in actions under the Fatal Accidents Act 1959, section 7; the Limitation Act 1935, section 47A; and the Crown Suits Act 1947, section 6.¹⁰

TWO GENERAL INNOVATIONS

The general limitation period: section 13

The 2005 Act makes many changes in the limitation rules applying to particular causes of action, but there are two important new provisions which will have an impact on many different types of claim. The first is the adoption of a general or 'catchall' limitation period. This technique originated in the USA, and examples can be found in British Columbia and other Canadian jurisdictions, but in Australia the only other jurisdiction with such a provision is the ACT.¹¹ Instead of having specific limitation periods for each kind of action, which maximises the possibility for classification disputes about which provision applies in a given case, the legislation incorporates a general limitation period which applies in all cases for which no specific period is provided. Under section 13, an action on any cause of action cannot be commenced if six years have elapsed since the cause of action accrued. However, this provision does not apply if Division 3 of the Act provides for a different limitation period.¹²

Section 13 applies to actions for breach of contract, most claims in tort, breach of trust and many other cases, and makes it unnecessary to have specific limitation periods for these claims.¹³

Extension for fraud or improper conduct: section 38

The second innovation is section 38, which allows a court to extend the limitation period for any kind of action in cases of fraud or improper conduct. Under this section, a plaintiff may apply to a court for leave to commence an action even though the limitation period provided for under the Act has expired. The court may extend the time in which the action can be commenced up to three years from when

9. For a list of such periods in WA, now rather out of date, see Law Society of WA, *Causes of Action and Time Limitations* (Perth: Law Society of WA, 1985).

10. See below pp 394–95.

11. Limitation Act 1985 (ACT) s 11.

12. Pt 2 Div 3 (ss 14–29) sets out specific limitation periods for various tort actions, actions relating to land, securities, and other cases.

13. For further discussion of s 13, see below p 391.

the action ought reasonably to have been commenced if satisfied that the failure to commence the action was attributable to fraudulent or other improper conduct of the defendant or a person for whom the defendant is vicariously liable.¹⁴

Most jurisdictions have a provision under which, in actions involving fraud or mistake, the limitation period does not commence until the plaintiff discovers the fraud or mistake, or could with reasonable diligence have discovered it. In contrast, under the old law in Western Australia, fraud or mistake had no effect on the running of the limitation period except in actions to recover land or rent.¹⁵ In effect, in Western Australia the common law position prevailed, whereas the more modern legislation in other jurisdictions had adopted the equitable position. This was an unsatisfactory state of affairs, and was one of the principal reasons why the law of limitation of actions was referred to the LRCWA.¹⁶ The 2005 Act has now adopted a somewhat different approach from that of other modern Acts. Rather than delay the running of the period, it gives the court power to extend it, and rather than limit the provision to particular cases, section 38 applies to any case where the court is satisfied that failure to commence the action is attributable to fraud or improper conduct.

As regards actions attributable to fraud, section 38 appears to have benefited from the experience of other jurisdictions. The original English provision covered cases where the action was based on the fraud of the defendant or the defendant's agent,¹⁷ or a right of action was concealed by the fraud of any such person, and this formula was copied in Victoria, Queensland and Tasmania.¹⁸ Section 55 of the Limitation Act 1969 (NSW) added cases where the identity of the person against whom a cause of action lies was fraudulently concealed.¹⁹ Section 33 of the Limitation Act 1985 (ACT) is wider again, adopting a recommendation of the Orr Committee in England to make it clear that it is not limited to common law fraud, and so requiring that the concealment be 'deliberate' rather than 'fraudulent'.²⁰ Section 38 of the 2005 Act covers all the above cases and presumably also cases where the fraudulent or improper conduct does not involve concealment – for example, where the defendant

14. Section 38(3) provides that nothing in ss 39, 41 or 42 prevents a court from extending the time in which the plaintiff can commence an action under s 38. Under ss 39, 41 and 42 a court is given more specific powers to extend limitation periods in actions for personal injury or under the Fatal Accidents Act 1959 (WA), where the plaintiff is under 18 but has a guardian, or where the plaintiff is a person with mental disability but has a guardian.

15. Limitation Act 1935 (WA) s 27.

16. See LRCWA, above n 3, [13.50].

17. Limitation Act 1939 (UK) s 26.

18. Limitation of Actions Act 1958 (Vic) s 27; Limitation of Actions Act 1974 (Qld) s 38; Limitation Act 1974 (Tas) s 32.

19. In order to reverse the decision in *RB Policies at Lloyds v Butler* [1950] 1 KB 76.

20. Law Reform Committee, *Final Report on Limitation of Actions*, 21st Report (London: HMSO, 1977) Cmnd 6923 [2.23]–[2.24].

dishonestly tricked the plaintiff into believing that he or she had no actionable claim, or no prospects of success, or did not need to bring a claim.²¹

Quite clearly, ‘improper conduct’ will cover cases where there is no fraud. This may have a number of possible applications – for example, in cases involving sexual abuse.²²

CONTRACT AND OTHER COMMON LAW CLAIMS

The six-year limitation period in section 13 covers a wide range of common law actions, including most cases provided for by section 38 of the 1935 Act. Thus, for example, it covers:

- Actions for breach of contract, except that there is a longer period, 12 years, for actions on a deed under section 18 – reduced from the 20 year period for ‘actions on a specialty’ under section 38(1)(e)(i) of the 1935 Act.²³
- Actions in tort, except for personal injury, trespass to the person and defamation, for which sections 14–16 provide special limitation periods.²⁴
- Common law restitutionary claims such as actions for money had and received – a particularly good example of the avoidance of classification disputes, since formerly such actions had to be accommodated under the provisions for a ‘contract implied in law’ or ‘actions in the nature of actions on the case’.²⁵ However, the position regarding other restitutionary claims may not be so satisfactory.²⁶

The adoption of the general limitation period device makes it unnecessary to have specific provisions for a large number of actions for which the former Act provided specific limitation periods, such as actions on a judgment (section 32(1) of the 1935 Act), actions to enforce a recognisance (section 38(1)(e)), actions to recover penalties, forfeitures and other sums recoverable under statute (several incredibly complex provisions: sections 37, 38(1)(a)(i), 38(1)(c)(i) and 38(1)(e)(i)), and actions to recover

21. For these points, I am indebted to my former colleague Elise Bant. See generally J Edelman & E Bant, *Unjust Enrichment in Australia* (Melbourne: Oxford University Press, 2006), 363–67.

22. See below p 394.

23. The cause of action in contract accrues on breach. There are rules which govern when the cause of action accrues in relation to particular classes of contract: see PR Handford, *Limitation of Actions: The Laws of Australia*, 2nd edn (Sydney: Lawbook Co, 2007) 86–91. One such rule has been reformed by the Limitation Act 2005 (WA): s 59 provides that a cause of action for the repayment of a debt repayable on demand arises when there is a failure to comply with a demand for repayment. See J Tarrant, ‘Limitation Legislation and Loans Repayable on Demand’ (2004) 1 UNELJ 249.

24. See below p 395.

25. See Limitation Act 1935 (WA) s 38(1)(c)(v) and (vii).

26. See below p 400.

arrears of interest (sections 34 and 38(1) proviso).²⁷ In some cases, section 13 brings about important changes in the length of the limitation period – for example, reducing actions on a recognisance from 20 years to six, and increasing the limitation period for an action for breach of statutory duty from two years to six.²⁸ The application of section 13 may well be even wider than this. For example, it appears that it will cover applications for winding up of a corporation under section 459P of the Corporations Act 2001 (Cth).²⁹

Adopting a provision originating in England and copied in the ACT, section 26 provides that an action for an account cannot be commenced if the limitation period for the cause of action that is the basis of the duty to account has expired. This replaces the specific limitation periods for actions of account found in section 38(1)(c)(ii) and (iii) of the 1935 Act.³⁰

PERSONAL INJURY

It is in the area of personal injury claims that the most important limitation of actions issues arise. Traditionally, personal injury plaintiffs have had six years from the time when the cause of action accrues in which to bring an action. In the case of negligence actions, the cause of action accrues on the suffering of damage. This rule has caused considerable problems in cases of latent injury, such as pneumoconiosis and other forms of asbestos-related injury which have a long latency period: under the common law rule, the limitation period had usually expired long before the victim became aware of his or her condition. Once the problem was exposed by the House of Lords in *Cartledge v E Jopling & Sons Ltd*,³¹ legislation in most jurisdictions attempted to alleviate it. Various devices were used, with some jurisdictions trying out a succession of legislative expedients. Some states allowed a court to extend the ordinary limitation period in cases where material facts were not apparent before a certain date,³² others where a court thought it just and reasonable to do so.³³

27. For an account of these provisions, see LRCWA, above n 3, [12.38]–[12.60.]

28. Limitation Act 1935 (WA) s 38(1)(a)(i).

29. This is the conclusion of Phil Blaxill in an essay on limitation periods and winding up under the Limitation Bill 2005 (written for the UWA LLM Unit, Limitation of Actions, in 2005), relying inter alia on *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304.

30. There are different views on whether these provisions also covered equitable actions for account: see eg *Tito v Waddell (No 2)* [1977] Ch 106, 250–2 (Megarry VC).

31. [1963] AC 758.

32. Limitation Act 1963 (UK); Limitation Act 1969 (NSW) ss 57–58; Limitation of Actions Act 1974 (Qld) ss 30–31; Limitation of Actions Act 1958 (Vic) s 23A (added 1972, replaced 1983). Note also Limitation of Actions Act 1936 (SA) s 48 (added 1972); Limitation Act 1981 (NT) s 44 (not limited to personal injury cases).

33. Limitation Act 1980 (UK) s 33, originally enacted by the Limitation Act 1975 (UK); Limitation Act 1985 (ACT) s 36; Limitation Act 1969 (NSW) ss 60C, 60G (added 1990); Limitation of Actions Act 1958 (Vic) s 23A (added 1983). Note also Limitation Act 1974 (Tas) s 5(3) (extension limited to three years, on top of basic three year limitation period).

Alternatively, or in addition, the point of accrual was legislatively redefined to run from when the injury was discovered or became reasonably discoverable.³⁴ The latest legislation in three jurisdictions bars the claim once either a three year period running from the point of discovery or a 12-year period running from the date of the negligent act or omission expires.³⁵ Latent injuries are not the only source of difficulty: in some cases there are other reasons why a plaintiff may delay bringing an action.³⁶

Until 2005, the law in Western Australia remained virtually untouched by these reforms. A strict six-year limitation period applied, without any possibility of extension,³⁷ except in cases of asbestos-related diseases where, as a result of political pressure to provide a solution to the problems faced by workers at the asbestos mine at Wittenoom, legislation in 1983 provided for the limitation period to run from the point of discovery, rather than from when the cause of action would have otherwise accrued.³⁸ In other cases, the strict rule continued to apply, a state of affairs which became the subject of public controversy when claims by two Victorian residents for abuse at the hands of the Christian Brothers were transferred from Victoria to Western Australia under the cross-vesting legislation,³⁹ and so failed on the ground that the limitation period had expired many years previously.⁴⁰ Worse still, in cases where the action was brought against the Crown or a public authority, Western Australia was the only state to maintain the old rules under which the action was subject to a one-year limitation period (extendable to six years in some circumstances), together with complex notice provisions which caused all sorts of procedural tangles.⁴¹ These restrictive rules had been subjected to trenchant criticism by the courts over recent years.⁴²

The 2005 Act introduces a three-year period for personal injury claims, running from the point when the cause of action accrued (section 14(1)), and a similar period for

34. Limitation Act 1980 (UK) s 11, originally enacted by the Limitation Act 1975 (UK); Limitation of Actions Act 1958 (Vic) s 5(1A) (limited to personal injuries consisting of a disease or disorder: no longer applicable as from 2003).

35. See above p 388.

36. See eg *PD v Australian Red Cross Society* (1993) 30 NSWLR 376 (plaintiff contracted AIDS through blood transfusion, but delayed suing because she was concerned at effects of publicity for herself and her family, and had also received legal advice that there were difficulties in the way of a successful action).

37. Limitation Act 1935 (WA) s 38(1)(c)(vi).

38. Limitation Act 1935 (WA) s 38A, added by the Acts Amendment (Asbestos Related Diseases) Act 1983 (WA). See P Handford 'Damages and Limitation Issues in Asbestos Cases' (1991) 21 UWAL Rev 63.

39. *Taylor v Trustees of the Christian Brothers* (1994) Aust Torts Reports 81-288.

40. *Reidy v Trustees of the Christian Brothers* (1994) 12 WAR 583.

41. See LRCWA, above n 3, chs 10, 23.

42. See eg *Scott v Western Australia* (1994) 11 WAR 382, 383 (Rowland J); *Northey v Minister for Education* (1995) 13 SR (WA) 124, 125 (Kennedy DCJ); *Bingham v England* (1996) 17 WAR 226, 240 (Kennedy ACJ).

wrongful death claims, running from the death (section 14(2)).⁴³ The adoption of a three-year period brings Western Australia into line with the pattern now established throughout Australia as a result of the recommendations of the review body commissioned by the Commonwealth to deal with the so-called insurance crisis of 2002.⁴⁴ However, the legislation deals with many of the problems arising under the previous law by redefining the point of accrual. Under section 55(1), a cause of action for damages for personal injury accrues when the person becomes aware that he or she has sustained a not insignificant personal injury, or at the time of the first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a not insignificant personal injury, whichever is the earlier. This section does not apply to a personal injury that is attributable to the inhalation of asbestos (section 55(2)), but the 1983 amendments to the 1935 Act which determined the accrual of the cause of action in such cases are preserved by section 56. These provisions also have some effect where a cause of action accrued before 15 November 2005 and so would ordinarily be governed by the old law. In such cases, the former six-year limitation period continues to apply, but the cause of action is now deemed to accrue in accordance with the provisions of sections 55 or 56 (section 6).

In addition to delaying the point when the cause of action accrues, the legislation gives the court power to grant a plaintiff leave to commence a personal injury or Fatal Accidents Act action even though the limitation period has expired, if satisfied that the person to whom the cause of action accrued was not aware of the physical cause of the death or injury, or that it was attributable to the conduct of a person, or after reasonable enquiry had been unable to establish that person's identity (section 39). In these and other extension applications made possible by the 2005 Act,⁴⁵ the court is to have regard to whether the delay in commencing the action would unacceptably diminish the prospects of a fair trial, and whether extending the time would significantly prejudice the defendant (section 44).

This important reform of personal injury limitation law is completed by the abolition of the restrictive limitation periods which formerly applied in actions against the Crown and public authorities.⁴⁶ The unjust discrimination against such plaintiffs wrought by the former law has been consigned to the past, and all personal injury claimants are now subject to the same rules, as in every other Australian jurisdiction.

Limitation problems often arise in the context of claims by victims of sexual abuse, since such actions are commonly brought many years after the occurrence, when

43. 'Personal injury' is defined by s 3 to include a disease, impairment of a person's physical condition, and mental disability.

44. See Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) recommendation 24.

45. Ie, s 38 (fraud and improper conduct), s 40 (defamation actions); s 41 (persons under 18, with a guardian); s 42 (persons with mental disability, with a guardian).

46. See Limitation Legislation Amendment and Repeal Act 2005 (WA) ss 4, 6.

the victim is no longer under the influence of the perpetrator and something causes memories which have been suppressed for a long time to be revived.⁴⁷ In Australia, claims by members of the 'stolen generation' for psychiatric harm caused to them by being removed from their parents at birth can raise similar issues. Cases from other jurisdictions make it clear that child abuse is a form of personal injury for limitation purposes,⁴⁸ and in New South Wales the same view has been taken in a case of an Aboriginal child removed from her mother when very young and brought up in a home for 'white' children because of her fair skin.⁴⁹ Under the 2005 Act, such plaintiffs would have to show that the action was commenced within three years of the cause of action accruing in the terms stated in section 55, or make a case for an extension of time by showing lack of awareness of one of the facts stated in section 39. If this is not possible, section 38 may have a role to play: it has been suggested that sexual abuse or stolen generation claims may give grounds for a court to extend time on the basis that there is 'improper conduct'.⁵⁰

OTHER TORTS

Trespass to the person

Under section 16 of the 2005 Act, an action for trespass to the person, assault, battery or false imprisonment cannot be commenced if three years have elapsed since the cause of action accrued. This compares with the pre-2005 law, under which actions for 'trespass to the person, menace, assault, battery, wounding or imprisonment' were subject to a four-year period.⁵¹ Actions for menace, which were actions for threatening words, have been obsolete since the Middle Ages,⁵² but were nevertheless retained in the Bill as originally drafted, and were eliminated only at a late stage when the legislation was before the Legislative Council.⁵³ Though section 16 perhaps suggests that it might have a life of its own, trespass to the person is normally regarded as an umbrella term encompassing the torts of battery, assault and false imprisonment. Assault and battery usually occur at a particular moment in time, and so the cause of action accrues on the date of the trespass.⁵⁴

47. See eg LRCWA, above n 3, ch 9.

48. See eg *Stubbings v Webb* [1992] QB 197 (reversed on other grounds [1993] AC 498); *Tiernan v Tiernan* [1993] QSC 110; *Mason v Mason* [1997] 1 VR 325.

49. *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497. The claim was ultimately dismissed: see *Williams v Minister, Aboriginal Land Rights Act 1983* [2000] NSWCA 255.

50. See Attorney-General (WA), above n 6, 23.

51. Limitation Act 1935 (WA) s 38(1)(b).

52. See PR Handford, 'Tort Liability for Threatening and Insulting Words' (1976) 54 Can Bar Rev 563, 571-3.

53. See Standing Committee on Legislation, *Limitation Bill 2005 and Limitation Legislation Amendment and Repeal Bill 2005*, Report No. 1 (Sep 2005) [2.46]-[2.47].

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

False imprisonment, however, is a continuing tort and so the cause of action accrues continuously during the duration of the imprisonment.⁵⁵

Because these torts are actionable without proof of damage, they are all capable of protecting a variety of different interests involving personal security and freedom from confinement, but in the case of battery (which involves any unwanted contact with the person of another),⁵⁶ it is possible that personal injury may result,⁵⁷ and the same may be true of the other causes of action covered by section 16.⁵⁸ The question thus arises whether in a case of battery resulting in personal injury the appropriate limitation period is the three-year period for personal injury under section 14, rather than the three-year period for trespass under section 16. This could be important, because section 55 defines the point of accrual for personal injury as the point when the person first becomes aware that he or she has suffered a not insignificant personal injury (or the first symptom, sign or other clinical manifestation of personal injury, if earlier). This could be much later than the point when the battery occurs.

In Australia, battery can be committed intentionally or negligently.⁵⁹ A negligent battery is thus an alternative to an action in negligence when the harm is occasioned negligently but directly.⁶⁰ In a case of negligent but direct personal injury, the straightforward way of proceeding would be to sue in negligence, and there would then be no doubt that sections 14 and 55 apply. In the leading case of *Williams v Milotin*,⁶¹ where the plaintiff was the victim of a cycle accident and sued in negligence for personal injury more than three years after the occurrence, the High Court held that the possibility that the plaintiff could have sued in trespass, which was subject to a three-year limitation period, did not prevent him from instead suing in negligence, for which the limitation period was six years. The court said: ‘Why should the plaintiff’s action be limited by any other period of time than that appropriate to the

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55. *Coventry v Apsley* (1691) 2 Salk 420, 91 ER 366; *O’Connor v Isaacs* [1956] 2 QB 288.
56. According to Holt CJ in *Cole v Turner* (1704) 6 Mod 149, 87 ER 907: ‘The least touching of another in anger is a battery’. However, modern cases now suggest that hostility is not the appropriate test to distinguish contacts which are not tortious, but instead the law recognises an exception for everyday contacts which are the inevitable consequence of living in society: see *Collins v Wilcock* [1984] 1 WLR 1172, 1177 (Goff LJ); *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 73 (Lord Goff); *Department of Health and Community Services v JWB (Marion’s Case)* (1992) 175 CLR 218, 233; *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98. See also *Darby v DPP* (2004) 61 NSWLR 558, [82] (Giles JA).
57. As eg in *Lane v Holloway* [1968] 1 QB 379.
58. Given that ‘personal injury’ includes mental disability: see above n 43. For simplicity, from this point on the discussion in the text is confined to battery.
59. *Williams v Milotin* (1957) 97 CLR 465; *McHale v Watson* (1964) 111 CLR 384. In principle, the same should be true of assault, although it is hard to imagine a negligent assault. It should also be possible to have a negligent false imprisonment: for a case in which such a cause of action might have been brought, see *Sayers v Harlow Urban District Council* [1958] 1 WLR 623.
60. The overlap originated with *Williams v Holland* (1833) 10 Bing 112, which extended the action on the case for negligence from indirect to direct injuries.
61. (1957) 97 CLR 465.

cause of action on which he sues? The two causes of action are not the same now and they never were'.⁶² In the case of intentionally caused personal injury, there does not appear to be any objection to suing in negligence: in *Cusack v Stayt*,⁶³ for example, where the plaintiff's girlfriend intentionally drove her car at him and injured him, the action was brought in negligence, although the New South Wales Court of Appeal appeared to accept that battery would also have been an appropriate cause of action.⁶⁴ Again, if the action is brought in negligence, there would be no doubt about the appropriate limitation period. However, it is submitted that even if the action is brought in battery, if the battery results in personal injury then sections 14 and 55 should apply. In other jurisdictions, where the limitation legislation prescribes a special limitation period for actions for 'negligence, nuisance or breach of duty ... where the damages claimed ... consist of or include damages in respect of personal injuries to any person',⁶⁵ it has been held that both unintentional⁶⁶ and intentional⁶⁷ trespasses are covered, if they result in personal injury. In such cases, the issue is whether the trespass is a breach of duty; the fact that the cause of action for the personal injury is trespass, and not negligence, does not exclude it from this provision if personal injury results. The High Court's recent decision in *Stingel v Clark*⁶⁸ confirmed this. Western Australia has avoided the complications of the 'negligence, nuisance or breach of duty' formulation, but in the light of the cases on this provision, there seems no reason why an action for battery resulting in personal injury should be excluded from section 14.

Conversion and detinue

The limitation period applicable to conversion and detinue is the ordinary six-year period under section 13, in the same way as the ordinary six-year period for tort applied under the previous law. Although conversion may take many forms, all involve some intentional dealing with a chattel in a manner inconsistent with the owner's rights, and the cause of action accrues at the time of the dealing.⁶⁹ In

62. Ibid 474.

63. [2000] NSWCA 244.

64. On the issue of suing in negligence for intentional harm, note also *New South Wales v Lepore* (2003) 212 CLR 511, 572 (McHugh J).

65. As in Limitation Act 1980 (UK) s 11(1); Limitation Act 1974 (Tas) s 5(1); Limitation of Actions Act 1958 (Vic) s 5(1A), and note also s 5(6), now repealed. See also Limitation Act 1969 (NSW) s 18A; Limitation of Actions Act 1974 (Qld) s 11, which expressly include trespass.

66. *Kruber v Grzesiak* [1963] VR 621; *Letang v Cooper* [1965] 1 QB 232.

67. *Hayward v Georges Ltd* [1966] VR 202; *Long v Hepworth* [1968] 1 WLR 1299.

68. (2006) 226 CLR 442: see PR Handford, "'Negligence Nuisance or Breach of Duty'" and "Disease or Disorders": Personal Injury Limitation Periods in the High Court' (2006) 14 Tort L Rev 125. The majority refused to follow the House of Lords in *Stubbings v Webb* [1993] AC 498, which had held that 'breach of duty' did not cover trespass.

69. *Granger v George* (1826) 5 B&C 149, 108 ER 56; *Hiort v London & North Western Railway Co* (1879) 4 Ex D 188; *Perpetual Trustees & National Executors of Tasmania Ltd v Perkins* (1989) Aust Torts Rep 80-295. This is so even if the plaintiff waives the tort and

detinue, the cause of action accrues at the time the wrongful detention occurs, that is, where there has been a demand for the return of the chattel by the plaintiff and a refusal by the defendant.⁷⁰

Section 60 of the 2005 Act adopts a provision found in other modern Acts under which, where a cause of action for conversion or detention has accrued, and a further conversion or detention takes place before the goods are recovered by the original owner, the limitation period nonetheless runs from the date of accrual of the original cause of action, so the subsequent conversion or detention does not extend the period.⁷¹ There was no equivalent in the 1935 Act.

Defamation

The new Limitation Act has been able to incorporate the provisions about limitation periods in defamation actions which were finally agreed upon in 2005 and which are now in operation in all States and Territories as part of the new uniform defamation legislation. Thus, an action relating to the publication of defamatory matter cannot be commenced if one year has elapsed since publication (section 15). However, a court can extend this period to a maximum of three years since publication if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one-year period (section 40). The Limitation Bill 2004 (WA) originally adopted the recommendations of the WA Martin Committee on Defamation,⁷² but this proposed reform was overtaken by the reforms agreed at national level.

The provisions of the 2005 Act are a considerable improvement on those of the pre-2005 law. Under the 1935 Act, a two-year period applied to slander actionable without proof of damage,⁷³ but a six-year period applied to libel and other cases of slander.⁷⁴ There was also a special one-year period for defamation actions against newspapers,⁷⁵ which has now been repealed.⁷⁶ Unlike the new provisions in the

sues in quasi-contract: *Denys v Shuckburgh* (1840) 4 Y&C Ex 42, 160 ER 912. In the case of conversion of a cheque, time begins to run when the bank debits the drawer's account: *Associated Midland Corp Ltd v Bank of New South Wales* [1983] 1 NSWLR 533.

70. *Philpott v Kelley* (1853) 3 Ad & E 106, 111 ER 353; *Miller v Dell* [1891] 1 QB 468. Ignoring a demand may amount to a refusal: *Lloyd v Osborne* (1899) 20 LR (NSW) 190.
71. See *Beaumont v Jeffrey* [1925] Ch 1 (to which the legislative provisions give effect); *RB Policies at Lloyds v Butler*; above n 19. Again, the rule applies even if the plaintiff waives the tort and sues in quasi-contract: *Beaman v ARTS Ltd* [1948] 2 All ER 89, 92–3 (Denning J). However, as the Hon. Howard Zelling pointed out in his comments on the LRCWA's Discussion Paper (1992), it may be possible to avoid the effect of this provision by suing in trespass to goods: see LRCWA, above n 3, [12.36].
72. See WA Defamation Law Committee, *Report on Reform to the Law of Defamation in Western Australia* (Sep 2003) [26].
73. Limitation Act 1935 (WA) s 38(1)(a)(ii).
74. *Ibid* s 38(1)(c)(vi).
75. The Newspaper Libel and Registration Act 1884, Amendment Act 1888 (WA) s 6.
76. By the Defamation Act 2005 (WA) s 46(2).

other states, which apply to causes of action accruing on or after 1 January 2006, the Western Australian provisions, like the other Limitation Act changes, apply to causes of action accruing on or after 15 November 2005.⁷⁷

Contribution between tortfeasors

The 2005 Act, like the modern legislation in other jurisdictions, has a specific provision dealing with the limitation period applicable to actions for contribution between tortfeasors. Under section 17, a two-year period applies to actions for contribution under the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA). Formerly, a six-year period applied by virtue of these actions being regarded as actions on the case under section 38(1)(c)(vii) of the 1935 Act.⁷⁸ The two-year period runs from when the cause of action accrues. The point of accrual is defined by section 58. In a case where the person to whom the cause of action accrues is liable in respect of the damage for which contribution is claimed, the cause of action accrues at the date of the judgment or arbitral award in question; in other cases, it accrues at the date of the agreement fixing the amount of the liability.

EQUITABLE CLAIMS

The pre-2005 position

Historically, limitation legislation only covered common law claims, whereas equity applied its own rules, sometimes applying Limitation Act provisions by analogy and in other cases using the equitable doctrines of laches and acquiescence to deal with plaintiffs who had delayed in enforcing their claims.⁷⁹ Nineteenth century reforms gradually introduced statutory limitation periods for particular equitable claims, but in most jurisdictions the coverage is still not complete. Thus, in Western Australia, the 1935 Act applied to claims to recover land or rent in equity (section 24); most actions relating to mortgages (sections 29, 32(1), 34, 35) (but not to actions to redeem or foreclose a mortgage of personalty); actions by beneficiaries against trustees, subject to exceptions for fraud, fraudulent breach of trust, and conversion

77. Section 8 makes provision for situations where the same, or substantially the same, matter is published on two or more separate occasions, and one or more of the causes of action accrued before commencement day.

78. See *Thomson v Lord Clanmorris* [1900] 1 Ch 718.

79. Under the principle of laches, equity would refuse a remedy to a plaintiff who had not prosecuted a claim with due diligence after acquiring such notice or knowledge of the facts giving rise to the claim that it would be inequitable not to bring proceedings: *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279 (Lord Blackburn). Acquiescence can be an element in the defence of laches, but is also a separate defence, amounting to waiver of the plaintiff's rights precluding later enforcement of those rights because it would be inequitable to do so: *Allcard v Skinner* (1887) 36 Ch D 145, 186 (Lindley LJ). See LRCWA, above n 3, [13.1]–[13.60]; Handford, above n 23, 62–64.

of trust property (section 47);⁸⁰ and actions in respect of legacies in a will (section 32) and intestacies (section 33). This leaves a considerable number of equitable claims for which the 1935 Act did not provide, for example rescission for misrepresentation or undue influence, rectification, specific restitution of chattels, claims for specific performance or injunction, and actions for breach of fiduciary duty. Section 28 of the 2005 Act specifically preserved the jurisdiction to refuse relief on the grounds of laches or acquiescence.

One particular shortcoming of the 1935 Act in this area was that section 27, which provided that concealed fraud prevented the running of the limitation period until the time when the fraud was or ought to have been discovered, only applied to actions for land or rent. At common law, fraud did not delay the running of the limitation period.⁸¹ In contrast, most other Australian jurisdictions with more modern limitation legislation adopt equitable principles by postponing the commencement of the limitation period in cases involving fraud and mistake until the point where the fraud or mistake was or could with reasonable diligence have been discovered.⁸²

The 2005 Act

Most modern limitation legislation attempts a more comprehensive coverage of equitable claims, and recent reform proposals suggest that logically there should be no distinction: in principle limitation legislation should apply to all causes of action whatever their historical origin. Under the LRCWA proposals, for example, the two recommended general limitation periods, together with the discretion to extend, would apply to common law and equitable claims alike, with limited exceptions.⁸³ The Limitation Act 1985 (ACT), by adopting the technique of a general limitation period which applies to all causes of action unless another limitation period is specifically provided by the Act, extended the Act to all equitable claims. The 2005 Act, by enacting a similar provision in section 13, does the same.

In addition to section 13, two other provisions in the Limitation Act 2005 have some effect in the area of equitable claims. First, section 38, which has already been referred to,⁸⁴ allows for the extension of the limitation period for any kind of action in cases of fraud or improper conduct. Second, under section 27, headed ‘Equitable actions (not analogous to other actions)’:

An equitable action cannot be commenced after the only or later of such of the following events as are applicable –

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- 80. However, there is still some doubt about its application to express trustees: see LRCWA, above n 3, [13.28]–[13.29].
 - 81. See eg *Metacel Pty Ltd v Ralph Symonds Ltd* (1969) 90 WN (Pt 1) (NSW) 449; *Perpetual Trustee Co Ltd v Westpac Banking Corporation Ltd* (2002) 29 SR (WA) 301.
 - 82. See above p 390.
 - 83. See LRCWA, above n 3, [13.61]–[13.78].
 - 84. See above p 389.

- (a) the elapse of 6 years since the cause of action accrued; or
 - (b) the elapse of 3 years since time started running, on equitable principles, for the commencement of the action.⁸⁵
- (2) In this section ‘equitable action’ means an action:
- (a) for which the relief sought is in equity; and
 - (b) for which (had a limitation period not been provided for under subsection (1) or section 13) the limitation period would not be determined in equity by analogy to the limitation period for any other kind of action.⁸⁶

For certain claims, these provisions may not produce a satisfactory result. The six-year period under section 13, running from the point when the cause of action accrued, works well enough in many instances, for example, actions for breach of trust (for which in most cases a six-year period applied as a result of section 47 of the 1935 Act). Such actions are now governed by section 13, and there is no need for a specific provision. However, there are some actions for which a six-year period running from accrual is not suitable, and which will not come within section 38 because they do not involve fraud or other improper conduct. This applies particularly to certain claims of a restitutionary nature involving mistake, duress and undue influence.⁸⁷

Under the 1935 Act, such claims are not governed by a limitation period but are regulated by equitable principles such as laches and acquiescence. The 2005 Act provides that nothing in the Act affects any equitable jurisdiction to refuse relief on the grounds of laches, acquiescence or otherwise (section 80), but given section 13 the result is merely that equity can refuse relief on the ground of laches, acquiescence or otherwise in a case where the six-year period has not expired. This may not always be an acceptable outcome for the claims referred to above.

This was drawn to the attention of the Attorney-General when the Limitation Bill 2004 was being debated in Parliament, and what is now section 27 was added to the Bill. However, this may not result in a satisfactory outcome in all cases. Section 27 only applies to equitable actions for which, had a limitation period not been provided by sections 13 or 27, ‘the limitation period would not be determined in equity by analogy to the limitation period for any other kind of action’.⁸⁸ Mistake was part of equity’s concurrent jurisdiction, so the doctrine of analogy applied. Accordingly

85. Limitation Act 2005 (WA) s 27(1).

86. Limitation Act 2005 (WA) s 27(2).

87. See generally H McLean, ‘Limitation of Actions in Restitution’ [1989] Camb LJ 472.

88. For example, compare *Seagram v Knight* (1867) LR 2 Ch App 628 (time ran in equity in action for account in respect of cut timber, just as it would at common law in an action for conversion) with actions for breach of fiduciary duty, to which the doctrine of analogy did not apply.

such cases will not be affected by section 27. Thus, the legislation does not fix the problem of the previous law, unlike the provisions in other jurisdictions under which mistake, like fraud, delays the running of the period.⁸⁹ Undue influence is analogous to mistake and duress, and so it appears that such claims will likewise not be affected by section 27. Under the previous law laches would have been the only principle that applied to such claims, but now these claims will come within section 13. As compared with the provisions of the Limitation Act 2005, the LRCWA recommendations would have provided a more satisfactory outcome, because the recommended discretionary extension provision would have applied to any kind of claim. These issues apart, it seems unfortunate that section 27, as part of a 21st century limitation statute, has to resort to the old distinction between equitable claims to which the limitation legislation applied by analogy and those to which it did not. The history of limitation provisions relating to trusts in Western Australia is murky and obscure, but it seems that there was a distinction between express and other trustees,⁹⁰ a distinction which might be perpetuated by section 27.

LAND AND SECURITIES

Actions relating to land

Sections 4 to 14 and a number of the subsequent sections of the 1935 Act set out the current law relating to the running of time in actions for the recovery of land. They simply transcribe the provisions of the Real Property Limitation Acts 1833 and 1874 (UK). The former Act was adopted in Western Australia by an Act of 1837 and the latter copied by an Act of 1878. The major objection to these provisions is the way in which they are drafted. The provisions are complex, use anachronistic language, and adopt the typical 19th century form of trying to say everything in one long sentence. Some of the provisions are further complicated as a result of the drafter having added rules about acknowledgment and part payment.

The LRCWA recommended that in place of these provisions the legislation should adopt a simple modern version of these rules, such as that in the Limitation Act 1969 (NSW),⁹¹ and the Attorney-General in 2002 accepted this view.⁹² Sections 19, 61, and 65–78 of the Limitation Act 2005 put this policy into operation.⁹³ They are said to be based on the New South Wales provisions, but in fact the drafting has produced greater simplicity of statement and is a notable achievement.

89. Limitation Act 1985 (ACT) s 34; Limitation Act 1969 (NSW) s 56; Limitation Act 1981 (NT) s 43; Limitation of Actions Act 1974 (Qld) s 38; Limitation Act 1974 (Tas) s 32; Limitation of Actions Act 1958 (Vic) s 27.

90. See LRCWA, above n 3, [13.24]–[13.30].

91. Ibid [14.36].

92. See Attorney General (WA), above n 5, 25.

93. See Limitation Bill 2005 (WA), Explanatory Memorandum, clause notes on Part 4 Div 2.

Given that there are few changes in the law, it is not necessary to do much more than set out the 2005 equivalents of the 1935 provisions:

	2005 Act Section	1935 Act Section
Recovery of land – 12 years	19	4
Equitable interests	61	24
Accrual of certain causes of action to recover land:		
Adverse possession	65	5 (final words)
Dispossession or discontinuance	66	5(a)
Deceased in possession	67	5(b)
Grantor in possession	68	5(c)
Future interests in land	69	5(d), 7
Forfeiture	70	5(e), 6
Rent wrongly paid	71	11
Tenancies	72	9, 10
Effect of expiration of limitation period:		
Extinguishment of right and title to land	75	30
No title by adverse possession against Crown	76	36
Future interests in land	77	20
Provisions in case of land held on trust	78	25, 26
Miscellaneous		
Formal entry and claim	84	12, 13

The use of the New South Wales legislation as a model has resulted in a small number of substantive changes. The Limitation Act 1969 (NSW), like the Limitation Act 1935 (WA), was based on the 19th century English legislation but implemented a number of minor reforms recommended by the New South Wales Law Reform Commission. The following call for brief comment:

- Section 5 of the 1935 Act did not use the term ‘*adverse* possession’, and one commentator took the LRCWA to task for suggesting that the reference to ‘possession’ in this section meant the common law doctrine of adverse possession, arguing that this was contrary to the decision of the Full Court in *McWhirter v Emerson-Elliott*.⁹⁴ Moreover, it appeared that the reference to

94. [1960] WAR 208. See LRCWA, above n 3, [14.7].

‘possession’ in section 5 did not apply to leasehold interests.⁹⁵ Section 65 of the 2005 Act clears up both of these issues by providing, in respect of any cause of action to recover land, that the cause of action does not accrue unless and until adverse possession is taken.⁹⁶

- Section 65 puts into statutory form various rules developed by the common law.⁹⁷ If one adverse possessor is dispossessed by another, provided there is continuous and uninterrupted adverse possession, the period of adverse possession is not broken and the first adverse possessor’s period in occupation counts towards the second adverse possessor’s statutory period.⁹⁸ However, if at some point before the limitation period expires the land ceases to be in adverse possession, the cause of action does not accrue and any subsequent possessor must commence the period afresh.⁹⁹
- Sections 25 and 26 of the 1935 Act, dealing with land subject to an express trust, do not have any precise equivalent in the 2005 Act. Section 78 of the 2005 Act deals with land held on trust including a trust for sale, a provision modelled on section 16 of the Limitation of Actions Act 1974 (Qld). The LRCWA recommended the adoption of this model since Queensland, like Western Australia, has repealed its settled land legislation. Interestingly, however, the 2005 Act also contains section 73, based on section 37 of the Limitation Act 1969 (NSW) and dealing with settled land.
- Under section 72, following New South Wales, the cause of action in respect of tenancies at will and periodic tenancies accrues at the end of the first year of the tenancy, or when the rent becomes overdue, whichever is the later, a slight difference from the position under section 9 of the 1935 Act.
- Section 71, again following New South Wales, provides that in cases where rent is wrongly paid the landlord’s cause of action to recover the land accrues at the earliest time the lease can be determined – again a slight change from section 11 of the 1935 Act.
- Actions to recover arrears of rent, which under section 34 of the 1935 Act are subject to a six-year limitation period, will now be covered by the general six-year limitation period in section 13.
- Section 74 of the 2005 Act is a new provision, which makes it clear that a person may make an application under sections 38, 41 or 42 for leave to commence an action to recover land, and the court may extend the time in which such an action

95. Ibid [14.20].

96. Limitation Act 2005 (WA) s 65(1).

97. See eg *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *Horton v Briggs* (1903) 6 WALR 26.

98. Limitation Act 2005 (WA) s 65(2).

99. Limitation Act 2005 (WA) s 65(3).

can be commenced. The nearest equivalent in the 1935 Act is section 27, under which in cases of concealed fraud time did not run in an action to recover land or rent while the fraud remained concealed.

- There is no equivalent in the 2005 Act of section 8 of the 1935 Act, under which an administrator is deemed to claim as if there had been no interval between the date of death and the grant of administration.
- Out of date rules, such as the provisions on tenants in tail in sections 21 to 23 of the 1935 Act,¹⁰⁰ and the reference to possession of coparceners in section 14,¹⁰¹ have been abolished.

Mortgages

Under the 1935 Act there were limitation periods for various actions relating to mortgages of land and personalty. As regards mortgages of land, there were statutory limitation periods for actions by the mortgagor to redeem (section 29) and for actions by the mortgagee to recover principal money (section 32) and interest (section 34) and to recover possession (section 35). An action for foreclosure was deemed to be an action for recovery of land and so subject to section 35.¹⁰² The major problem with these provisions was that they were mixed up with limitation periods for other kinds of action and with provisions on acknowledgment and part payment. The law relating to mortgages of personalty was complex. In some instances provisions of the Limitation Act relating to debts, specialties and so on applied, but as respects actions by the mortgagor to redeem and actions by the mortgagee to foreclose no statutory period applied, making it necessary to fall back on the equitable principle of laches.¹⁰³

The Limitation Act 1969 (NSW), which contains the most modern Australian provisions on mortgages, brings about a complete assimilation of the law relating to mortgages of realty and personalty: the same provisions apply in each case. In 2002, the Attorney-General announced that Western Australia would adopt this model,¹⁰⁴ but this is not quite what the 2005 Act has done. Under the 2005 Act, a 12 year limitation period applies to actions by a mortgagor to redeem mortgaged property, real or personal (section 25), and actions by a mortgagee to recover principal money secured by a mortgage (section 20), recover possession (section 23), or foreclose

100. An estate tail was one limited to a person and the heirs of his body. They were abolished by the Property Law Act 1969 (WA) s 23.

101. Coparcenary was a form of joint tenancy under which, if a person died leaving no son to be his heir but two or more daughters, the daughters inherited the real property jointly.

102. See *Heath v Pugh* (1881) 6 QBD 345, 364 (Lord Selborne).

103. See *Charter v Watson* [1899] 1 Ch 175; *Re Stucley* [1906] 1 Ch 67; *Weld v Petre* [1929] 1 Ch 33 (actions to redeem); *London & Midland Bank v Mitchell* [1899] 2 Ch 161 (actions to foreclose).

104. See Attorney General (WA), above n 5, 25.

(section 24). These provisions apply to mortgages of ‘real property or real and personal property’ – in other words, not to mortgages of personalty alone. As regards actions by a mortgagee to recover interest secured on real property or real and personal property, the action cannot be commenced more than six years after the cause of action accrued, or if the limitation period provided for by section 20 for an action to recover the principal money has expired (section 21).

It is section 22 which finally reveals what is happening to mortgages of personal property. It provides that an action to recover interest secured by a mortgage of personal property cannot be commenced more than six years after the cause of action accrued, or if the limitation period for an action between the same parties on a cause of action to recover the principal money has expired. Unlike the closely related section 21, there is no reference to any specific section. The position therefore appears to be that as regards actions for possession, foreclosure and recovery of principal money secured by a mortgage of personal property, the ordinary limitation provisions of the 2005 Act apply – that is to say, the ordinary six-year period under section 13, unless the mortgage is by deed, in which case the 12 year period under section 18 will apply. There is here an echo of the old law, under which mortgages of personalty were governed by the ordinary provisions of the Act or equitable principles, and also of the LRCWA recommendations, which distinguished between mortgages of realty and personalty, and applied its two general limitation periods to the latter.¹⁰⁵

THE DISABILITY PROVISIONS

Under the pre-2005 law, in any common law cause of action, including tort, where the plaintiff was a minor at the time when the cause of action accrued, the limitation period did not commence running until the plaintiff became 18, and so the six-year period for actions in negligence would expire when the plaintiff reached the age of 24. In cases involving negligence during the birth process, this meant that defendants remained potentially liable for many years, an unsatisfactory state of affairs highlighted in Western Australia by *Dissidomino v Newnham*,¹⁰⁶ where the plaintiff was born with cerebral palsy and her parents, acting on her behalf, commenced an action against the doctor just before her 24th birthday. By the time of the first instance decision holding the doctor not liable the child was 30, and then there was an appeal to the Full Court (which was dismissed). The problem of very long limitation periods of this kind for medical practitioners and others is well known.¹⁰⁷ However,

105. See LRCWA, above n 3, [15.29]–[15.35].

106. (Unreported, FC WA, No 84 of 1993, 12 April 1994). See also *Headford v Bristol and District Health Authority* [1994] TLR 614 (CA); *Harriton v Stephens* [2002] NSWCA 461.

107. In the Second Reading speech on the Bill in the Legislative Assembly, the Attorney General, Hon. Jim McGinty MLA, quoted a letter from the Chairman of the Royal

it has also been argued that it would be wrong to cut down the rights of minor plaintiffs by reducing the period.

The problems of the 1935 Act provisions on disability were wider than this. There were in fact two sets of provisions, one dealing with actions under section 38 of the 1935 Act (sections 39–43) and the other dealing with actions to recover land or rent (sections 16–19).¹⁰⁸ Not only were these provisions antique in nature, for example in allowing the defendant in an action under section 38 an extension of time if he or she was ‘beyond the seas’ (section 41). Each set of rules was different, and there were some important actions which were not covered by either set of rules, so that there was no extension for disability. One important example was an action against a defendant executing a public duty or authority under section 47A.¹⁰⁹

For some time, law reform commissions and legislators throughout the common law world have been attempting to solve the problem of very long limitation periods in actions by minor plaintiffs against doctors and others. The LRCWA recommended a new approach to this problem which involved shorter limitation periods together with safeguards in particular cases. The 2005 Act did not adopt these recommendations,¹¹⁰ but its general approach is not dissimilar.¹¹¹ The problem is dealt with by a series of reforming measures.

New limitation period for childbirth injuries

As regards childbirth injuries, the 2005 Act retrospectively alters the limitation period applicable to a cause of action which accrued before the commencement day of the Act. Section 7(2) provides that an action on a cause of action (childbirth) cannot be commenced if the cause of action accrued before commencement day and six years have elapsed since commencement day, or the limitation period that would otherwise

Australian and New Zealand College of Obstetricians and Gynaecologists suggesting that this rule had resulted in a shortage of obstetricians in the private sector. Obstetricians were either leaving practice or were unwilling to commence practice in this area, due to the risk of legal proceedings and associated high insurance premiums: Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 Apr 2005, 564.

108. See LRCWA, above n 3, [17.1]–[17.10].

109. See *Scott v Western Australia* (1994) 11 WAR 382; *Brown v Minister for Education* [2003] WASCA 204.

110. Though, interestingly, they influenced the recommendations of the Commonwealth Report: see Commonwealth of Australia *Review of the Law of Negligence*, Final Report (2002) [6.48], n 8. These recommendations have now been enacted in New South Wales, Victoria and Tasmania; somewhat different provisions have now been adopted in the other jurisdictions. See B Mathews, ‘Post-Ipp Special Limitation Periods for Cases of Injury to a Child by a Parent or Close Associate: New Jurisdictional Gulfs’ (2004) 12 Torts LJ 239.

111. In 2002 the Attorney-General expressed doubts about these recommendations, suggesting that the government was of the view that limitation periods should remain suspended during minority: Attorney-General (WA), above n 5, 22. However, the 2005 Act now clearly supports the need to reduce the long limitation period allowed by the old law.

have applied has expired. ‘Cause of action (childbirth)’ is defined to mean a cause of action for damages relating to a personal injury to a person that was incurred in the course of the person’s mother giving birth to the person, or immediately after, and arising from, the person’s mother giving birth to the person, whether the birth was by way of natural childbirth or a medical procedure.¹¹²

This limitation period can be extended under particular provisions of the 2005 Act,¹¹³ for example, those dealing with extensions of time for personal injury (section 39), or fraud or improper conduct (section 38). For this purpose, the cause of action is to be taken as having accrued on 15 November 2005 (section 7(4)). The effect of section 7 is that a cause of action for a childbirth injury which accrued before commencement day will now expire, at latest, six years after commencement day (unless extended under the provisions referred to above). For example, if a child suffered a childbirth injury when born on 1 January 2004, under the old legislation the cause of action would not expire until 1 January 2028. It will now expire on 15 November 2011.

Minors

For causes of action accruing after commencement day, in place of the traditional rule under which the limitation period did not commence running until the minor reached adulthood, the 2005 Act provides that where a person is under 15 when the cause of action accrues, the action cannot be commenced if six years have elapsed since the cause of action accrued (section 30(1)).¹¹⁴ If a person is aged 15, 16 or 17 when the cause of action accrues, the action cannot be commenced if the person has reached the age of 21 (section 31(1)).¹¹⁵ The result of this is that the limitation period progressively reduces as the minor gets nearer adulthood.

The legislation assumes that minors will have a parent or guardian who will be able to take decisions on their behalf or in consultation with them, including a decision about the commencement of legal proceedings, making it unnecessary to delay the start of the limitation period until the minor has reached an age when he or she can take such decisions in person. It therefore provides that if a person is under 18 when the cause of action accrues, and during any time after the accrual but before the

112. Limitation Act 2005 (WA) s 7(1).

113. Section 7(3) provides that the extension provisions of the Act apply, but that ss 30 and 31 do not apply, and ss 32 and 41 do not apply if the plaintiff has reached 15 years of age at commencement day.

114. Unless a longer limitation period is applicable under ss 14–29, which provide specific limitation periods for particular actions: s 30(2). The section does not apply to an action for defamation: s 34.

115. Unless a longer limitation period is applicable by virtue of s 13 (the general six-year limitation period) or ss 14–29, which provide specific limitation periods for particular actions: s 31(2). This section does not apply to an action for defamation: s 34.

person reaches 18 the person is without a guardian, the time during which the person is without a guardian does not count in the reckoning of the limitation period. However, this period is subject to a 'longstop' provision under which an action cannot be commenced if the plaintiff has reached the age of 21, or, in a case where the general six-year limitation period or any of the specific limitation periods in sections 14–29 provide for a longer limitation period, that limitation period has expired (section 32).¹¹⁶ A guardian, for the purposes of these provisions, means a person who at law has responsibility for the long-term care, welfare and development of the minor and for whom it is practicable, having regard to the person's relationship with the minor, to commence an action on the minor's behalf (section 3(1)).¹¹⁷

The limitation periods applicable to minors can be extended in appropriate circumstances. A plaintiff who was a minor when the cause of action accrued may apply to a court for leave to commence an action even though the limitation period has expired. The court may extend the time in which the action can be commenced up to when the plaintiff reaches the age of 21, if it is satisfied that in the circumstances it was unreasonable for a guardian of the plaintiff not to commence the action within the limitation period (section 41).¹¹⁸

The protection of the minor's interests which is assumed if the minor has a parent or guardian will be illusory if the parent or guardian, or a person who is closely associated with the parent or guardian (eg, the partner of the minor's mother) is the potential defendant in the action. Section 33 therefore provides that if at some time after the cause of action accrues but before minority ceases a defendant is a person in a close relationship with the minor, the limitation period does not expire until the minor reaches the age of 25.¹¹⁹ However, this provision does not apply if any of the specific limitation periods in sections 14–29 provide for a longer limitation period for commencing the action. 'Person in a close relationship' means a person who at law has responsibility for the long-term care, welfare and development of the minor, or the day-to-day care, welfare and development of the minor, before the minor reaches the age of 18. The term also covers a third party whose relationship with the minor or the carer is such that it is in the circumstances reasonable for the minor or the carer not to commence an action against the third party, or for the minor not to wish

116. This section does not apply to an action for defamation: s 34.

117. It appears that the definition is wide enough to accommodate persons who care for minors but do not play a traditional parenting role. 'Practicable' is not defined: the emphasis appears to be on whether there is a sufficient relationship of trust, but it is uncertain whether other issues, such as the guardian's financial capacity to commence proceedings, or whether the proceedings are in the minor's financial or emotional interests, are relevant. (My thanks to Lucy Westwood, who made these points in an essay for the UWA LLM Unit, Limitation of Actions, in 2005.)

118. The court must have regard to the matters set out in s 44: see above p 394. Section 41 does not apply to an action for defamation: s 41(4).

119. 'Defendant' includes a person for whom a defendant is vicariously liable: s 33(3). This section does not apply to an action for defamation: s 34.

to divulge the conduct or events in respect of which an action against the third party would be founded.

Mental disability

A parallel series of provisions deal with persons with mental disability.¹²⁰ If a person is suffering a mental disability at any time after a cause of action accrues, and during the time in which the person is suffering the mental disability the person is without a guardian, the time during which the person is without a guardian does not count in the reckoning of the limitation period. However, the action cannot be commenced if 12 years have elapsed since the cause of action accrued (section 35).¹²¹ The definition of ‘guardian’ for the purpose of the provisions on persons with mental disability is different from that which applies where the person is a minor. A guardian, in relation to a person with a mental disability, means a person who is either the guardian or the administrator, or both, of that person’s estate, or has under the guardianship order, the administration order, or the provisions of the Guardianship and Administration Act 1990 (WA) the function of considering the appropriateness of commencing an action on that person’s behalf (section 3(1)).

The effect of these provisions is that a limitation period will continue to run against a person with mental disability if that person has a guardian. However, a plaintiff who suffers mental disability at any time after a cause of action accrues may apply to a court for leave to commence an action even though the limitation period has expired. The court may extend the time in which the action can be commenced up to 12 years from when the cause of action accrued, if it is satisfied that in the circumstances it was unreasonable for a guardian of the plaintiff not to commence the action within the limitation period (section 42).¹²²

Again, there are special exceptions to deal with the situation where the defendant is in a close relationship with a person with mental disability. Under section 36, if a person is suffering a mental disability at any time after a cause of action accrues, and during the time in which the person is suffering the mental disability a defendant is a person in a close relationship with the person with mental disability, the limitation period does not expire until three years have elapsed since the relationship ceased.¹²³ (The Act does not provide further details on how to determine when the relationship ceased.) However, this provision does not apply if the six-year general limitation

120. ‘Mental disability’ means a disability (including an intellectual disability, a psychiatric condition, an acquired brain injury or dementia) an effect of which is that the person is unable to make reasonable judgments in respect of matters relating to the person or the person’s property: s 3(1).

121. This section does not apply to an action for defamation: s 37.

122. The court must have regard to the matters set out in s 44: see above p 394. Section 42 does not apply to an action for defamation: s 42(4).

123. ‘Defendant’ includes a person for whom the defendant is vicariously liable: s 36(4). This section does not apply to an action for defamation: s 37.

period or any of the specific limitation periods in sections 14–29 provide for a longer limitation period for commencing the action, or if 30 years have elapsed since the cause of action accrued. ‘Person in a close relationship’ means a guardian of the person with mental disability, or a third party whose relationship with the person with mental disability or a guardian of that person is such that it is in the circumstances reasonable for the person with mental disability or the guardian not to commence an action against the third party, or for the person with mental disability not to wish to divulge the conduct or events in respect of which an action against the third party would be founded.

General comments

Though the primary application of these provisions may be to actions in tort, they in fact apply to all kinds of causes of action, in the same way as the disability provisions in limitation legislation in other jurisdictions. One clear improvement, as compared with the provisions of the 1935 Act, is that there are no causes of action to which the disability provisions do not apply. Though the drafting of the disability provisions is very different from those found elsewhere, the general effect is fairly similar, even if the provisions seem to be unnecessarily complex (the result, it seems, of political compromises).

CONFIRMATION BY ACKNOWLEDGMENT OR PART PAYMENT

Under doctrines that have been recognised for centuries, acknowledgment of a claim by the defendant, or part payment of a debt, extends the limitation period by causing it to start running afresh from the date of acknowledgment or payment. ‘The right shall be given a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth’.¹²⁴ The pre-2005 rules in Western Australia, which are found in sections 15, 29, 32–35, 38 and 44 of the 1935 Act, are subject to many disadvantages. First, they are very complex, consisting of different rules for different causes of action, understandable only in the light of their history.¹²⁵ Second, these rules are mixed up in the Act with provisions about limitation periods. Finally, because there has hitherto been no reform of the law, an old common law rule still applies: there is no acknowledgment unless there is an express promise to pay or an unconditional acknowledgment of a debt from which an express promise can be implied.¹²⁶ This means that case law from other jurisdictions on what constitutes an acknowledgment¹²⁷ cannot always be relied upon.

124. *Busch v Stevens* [1963] 1 QB 1, 6 (Lawton J).

125. See LRCWA, above n 3, [18.9]–[18.24].

126. See *Tanner v Smart* (1827) 6 B&C 603, 108 ER 573; *Spencer v Hemmerde* [1922] 2 AC 507.

127. See eg Handford, above n 23, 274–76.

In contrast to the position in Western Australia, the rules in the Limitation Act 1969 (NSW) have benefited from the reforms recommended by the Law Revision Committee and implemented in England in 1939, and the further reforms recommended by the New South Wales Law Reform Commission. As a result, New South Wales has one set of rules applying to all kinds of claim, and to acknowledgments and part payments alike (compendiously referred to as confirmations). The 2005 Act has adopted the New South Wales provisions wholesale (sections 46–51).

This has resulted in an important change in the law. Under the old law in Western Australia, and the law of most other jurisdictions, the rules about acknowledgment and part payment do not apply to claims for unliquidated damages in contract or tort. The New South Wales provisions, by applying the same rules to all kinds of claim, extend them to such cases. The LRCWA Report reviewed the arguments presented by the New South Wales Law Reform Commission in favour of this change, and the contrary arguments of other law reform bodies, notably the Alberta Law Reform Institute, which attempted to define the policy bases of the rules of acknowledgment and part payment. As regards acknowledgment, the Institute said that the debtor, by admitting indebtedness and a duty to pay, has renounced the need for protection by a limitations system, and the renewal of the limitation period is justifiable. As regards part payment, the making of such a payment will induce the creditor to believe that prompt litigation is not necessary, and will also support an inference that the defendant does not need the protection of a limitations system until the expiration of a new limitation period. These policies, it said, did not apply to unliquidated claims.¹²⁸ The LRCWA recommended that the doctrines of acknowledgment and part payment should not be applied to unliquidated claims. However, sections 46–51, by adopting the New South Wales approach, have now extended these principles to all kinds of claim, including, most importantly, claims for unliquidated damages in contract and tort. This means that, for example, confirmation by a defendant that the plaintiff has a claim in tort against him or her will have the effect of extending the limitation period.

PROCEDURAL AND OTHER REFORMS

Finally, a number of miscellaneous provisions in the 2005 Act should be noted, most of which adopt incidental LRCWA recommendations:

- The Act expressly states that an action commences on issue in the appropriate court of a writ or other originating application (section 12).¹²⁹

128. See LRCWA, above n 3, [18.36]–[18.41].

129. *Ibid* [20.7].

- The Act now incorporates a provision on the commencement of a counterclaim (section 81).¹³⁰
- The Act adopts uniform provisions on the recovery of tax mistakenly paid (section 28).¹³¹
- As respects arbitrations, the Act provides that the limitation period for the corresponding civil proceeding applies (section 29).¹³²
- The Act expressly provides that a limitation period may be extended or shortened by agreement (section 45).¹³³
- There is an express provision on the burden of proof (section 79),¹³⁴ adopting the position reached by the Australian common law.¹³⁵

CONCLUSION

There is no doubt that the 2005 Act has brought about major reform. The law of limitation of actions has been catapulted from the 19th to the 21st century. Very few areas of the old law remain unaffected by the new legislation. Limitation periods no longer depend on out of date distinctions based on the forms of action, which though abolished over a century ago, in this area still ruled us from their graves¹³⁶ until 15 November 2005.¹³⁷ We no longer have provisions on coparcenary,¹³⁸ tenants in tail¹³⁹ or restraints on anticipation.¹⁴⁰ We no longer have actions for menace, though it was not until the last minute that they were excluded. However, it is comforting to note that a few things apparently remain the same. Seamen claiming their wages can apparently rest secure in the knowledge that no attempt has been

130. Ibid [20.11].

131. Ibid [16.8].

132. Ibid [19.18].

133. Ibid [18.3].

134. Ibid [8.6].

135. See *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27; NJ Mullany, 'Australian Limitation Law – Relieving the Burden' (1993) 109 LQR 215.

136. 'The forms of action we have buried, but they still rule us from their graves': FW Maitland, *The Forms of Action at Common Law* (1st edn, 1909) 2.

137. See eg *SGIO v Teal* (1990) 2 WAR 105, 118–9 where Commissioner Williams QC 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.'

138. Limitation Act 1935 (WA) s 14.

139. Limitation Act 1935 (WA) ss 21–23.

140. Limitation Act 1935 (WA) s 47(1)(b), eventually removed by the Acts Amendment (Equality of Status) Act 2003 (WA) s 120(3). A restraint on anticipation was a device invented by equity to protect the separate property of married women in the days when the common law regarded a wife's property as belonging to her husband.

made to repeal the statute of Queen Anne which provides for a six-year limitation period for such claims.¹⁴¹

141. Administration of Justice Act 1705 (UK) s 17. However, the legislation has not been totally inactive on the maritime front. By repealing the provisions of the Supreme Court Act 1935 (WA) s 29 dealing with ship collisions, the Act allows the provisions of the Admiralty Act 1988 (Cth) s 37 to apply to such cases. It appears that the Administration of Justice Act 1705 will be taken care of by a forthcoming Bill on the inherited UK statute law, implementing the report of the LRCWA, *United Kingdom Statute Law in Western Australia*, Project No 75 (Oct 1994).