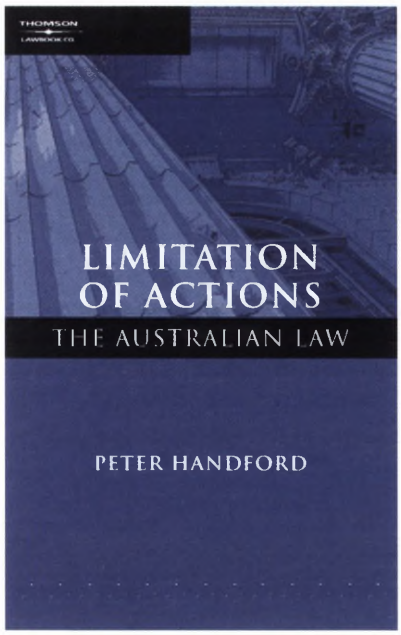
Limitation of Actions – The Australian Law

by Peter Handford, Lawbook Co, 2004

By Patrick Mugliston



A significant percentage of legal negligence cases arise as a consequence of ignoring or misunderstanding limitation period issues. This text will help to resolve the second of these problems.

In November 2005, Western Australia saw the *Limitation Act* 2005 (the Act) come into force. Following the spirit of the Law Reform Commission's (LRC) recommendations of 1997, the Act completely rewrites limitations law as it applies to personal injury and other claims.

Although revolutionary, it did not adopt the LRC's more original concepts; for example, its central recommendation for the implementation of two general limitation periods applying to all kinds of action. Under this concept, a three-year period would run from the point of discoverability and a 15-year 'long-stop' period would run from the date of the act or omission in question; the action would be barred once either period had expired. This was an adaptation of the Alberta model,[1] with the Commission adding the discretion to extend either period in narrowly defined circumstances. While the Law Reform Commission was perhaps one of the first to see the value of the Alberta legislation as a model, others have since done so.[2]

The Act should be within easy reach of every personal injury lawyer, especially with the aid of Professor Handford's scholarly text on limitations.[3] Foreshadowing the legislative changes, Handford's text is also relevant because it covers actions that accrue prior to November 2005 (and the Act does not operate retrospectively).

In his introduction, Handford explains that it is a 'sad comment' that for many years the most useful guide in Western Australia in this area of the law has been George Darby and Frederick Bosanquet's *A Practical Treatise on the Statutes of England and Ireland*, the last edition of which was published in 1893.[4]

Handford's work is adapted from a version which appeared in *The Laws of Australia* in 1994, but has been extensively revised and updated. In the intervening years, he was the principal author of the Law Reform Commission's *Report on Limitations and Notice of Actions* (project no. 36, part II), and undoubtedly knows more about the law of limitations than anyone in the jurisdiction.

Not only is the substance of *Limitation of Actions – The Australian Law* of value, the formatting and style make it easily accessible. The text starts with a compendious 22 pages of tables setting out limitation periods in Australian states and territories, correlating them with different causes of action. Each notation in the tables is conveniently cross-referenced against a passage in the text – I counted 426 such cross-references.

Each paragraph of the text begins with a pithy expression of a principle of law, followed by a discussion identifying the key issues and significant case law and legislation. The excellent footnotes provide more detailed information.

The second chapter discusses the various limitations acts in force in each jurisdiction, setting out the major limitations periods and the general rules that apply to them. Discussion of the historical background to the legislation is sufficient but not laborious. There is a sound explanation of the rule that limitations actions do not generally apply where there are specific limitations periods in other statutes.

The discussion of whether limitation statutes apply retrospectively is of particular interest. Handford explains that this depends on whether the legislation is classified as procedural (as it traditionally was) or substantive.[5] However, the High Court in *John Pfeiffer Pty Ltd v Rogerson*[6] held that for conflict of laws purposes the application of a limitation period was to be regarded as a question of substance, not procedure.[7] In the event that a limitation period is regarded as

procedural, it is initially construed as having retrospective operation.[8] But if a limitation period is considered to be substantive in nature, 'the presumption against retrospective legislation operates and the statute applies only to proceedings in which the cause of action accrued after the date on which the legislation came into operation'.[9]

A quarter of the text is taken up with an examination of limitation periods for actions in tort. This covers accrual of causes of action, torts actionable without proof of damage, torts actionable on proof of damage only, limitation periods for personal injury, extension of limitation periods, wrongful death, property damage and economic loss resulting from negligence and questions of contribution and indemnity between joint tortfeasors. Other chapters also refer to personal injury, making the book valuable for personal injuries lawyers. Survival of causes of action, for example, is examined in each jurisdiction. Another gem is the explanation of circumstances in which a defendant may be estopped from relying on limitation legislation.[10] Handford also discusses causes of action subsisting against a deceased person's estate for all jurisdictions.[11]

I asked Professor Hanford's views on the *WA Limitation Act* 2005.

1. Professor Handford, are you satisfied with the *Limitation Act* 2005?

'I think it is a very important step forward for WA to adopt modern limitation legislation, after making do with a very outdated Act for such a long time. Though it does not adopt the innovative approach recommended by the Law Reform Commission, it is a modern piece of legislation of the same kind as that in force in most other Australian jurisdictions – and has benefited from the experience of those other jurisdictions with some of the solutions adopted; for example, the idea of a general limitation period (s13).

'I do have one criticism of the Act, namely its structure. The drafters have decided to group all the limitation periods together, then all the extension provisions, then all the accrual rules. I think that it would have been better to arrange the rules by subject matter, so that all the provisions on personal injury are together, all the provisions on actions relating to land are together, and so on. For example, the provisions relevant to arbitrations are scattered all through the Act: ss29, 54, 63 and 88.'

2. Does it achieve the objectives identified in the Commission's report?

'One of the policy objectives specified by the Commission was that a limitations system needs to hold the balance fairly between the competing interests of the plaintiff, the defendant and society generally. There is no doubt that the new Act makes a much better job of doing this than the previous legislation, under which extension of the ordinary six-year limitation period for personal injury was not possible (except, from 1983 onwards, in cases of asbestos-related diseases) and there were very short limitation periods for actions against public authorities, the Crown and so on. Other states rejected such rules a generation or so ago, and WA was the only state that had retained them.

'Another policy objective identified by the Commission – the adoption of a uniform approach to all causes of action in the interests of simplicity and fairness – has not been met to the same degree. The new Act remains traditional in that it has different limitation periods and different rules for different classes of claim, which will lead to the occasional classification dispute as to which rules apply. In fairness, however, there is much less scope for this sort of thing than under the previous Act.'

3. From a personal injury lawyers' perspective, what sections of the Act do you think will be of most interest?

'Personal injury lawyers should first note that, although the Act in general applies only to causes of action arising on or after 15 November 2005, there has been an important change in the limitation period applicable to childbirth actions, which is retrospective.

'Instead of the former rule, under which the limitation period did not start running until the child turned 18, there is now a six-year period (s7). This is a rare instance where the former law was too pro-plaintiff. Another change with retrospective effect is that, by virtue of s6, a cause of action for personal injury no longer accrues on the suffering of damage, but according to the new rules in ss55 and 56. As regards causes of action arising on or after 15 November 2005, the most important sections for personal injury lawyers are ss14, 55 and 56, and 39. The combined effect of these is that instead of a six-year period running from the point when damage was suffered, with no possibility of extension, we now have a three-year period running from the point when the person becomes aware that they have sustained a not insignificant personal injury, or the first symptom or other manifestation of that injury, whichever is the earlier (plus an equivalent rule for asbestos-related diseases), with a possible extension in cases where the plaintiff was unaware of certain matters.

'Also noteworthy is s38, under which a court may extend the limitation period in cases of fraud or improper conduct – according to the Attorney-General's paper of 2003, "improper conduct" is intended to cover, among other things, sexual abuse cases. Lawyers should also note that the *Limitation Legislation Amendment and Repeal Act* 2005 abolishes the former short limitation periods in actions against the Crown and public authorities and in *Fatal Accidents Act* actions.

'One consequence of these provisions is that we now have rules for personal injury cases that are different from other negligence cases. There is some interesting case law from other jurisdictions about what is and what is not a personal injury (see para [47] of the book) which will become relevant in WA. For example, an action by a partnership for injury to a partner is a personal injury,[12] but an action against a solicitor for negligently failing to institute a personal injury action is not a personal injury.'[13]

>>

4. Do you think certain sections of the Act are likely to cause concern and, if so, for what reasons? What sections, if any, would you like changed?

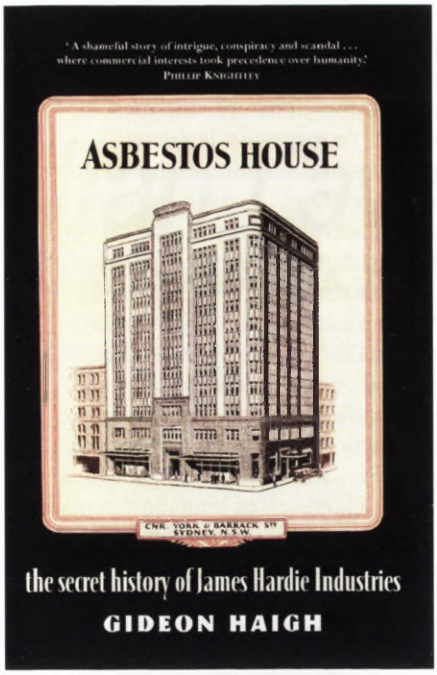
'There is a potential problem with the application of the Act to equitable claims. The adoption of the general six-year limitation period (s13) means that, in principle, the Act applies to all equitable claims, unlike most limitation acts, which only apply to equitable claims to a limited extent, leaving principles like laches to do the rest. Some equitable actions are covered by s27 (only added after the Bill had been introduced into Parliament, after the intervention of one of my colleagues at UWA), but it is likely that there will be cases which will not be satisfactorily resolved by the combination of ss13 and 27. Here, the difference between the Act and the Law Reform Commission's recommendations is that these difficult cases would have been dealt with by the general discretion to extend the ordinary periods. Another aspect of this problem is the law relating to mistake. Most Acts have special provisions for fraud and mistake which, in effect, adopt the equitable rule rather than the common law rule. One of the principal shortcomings of the previous law in WA (and one which led to the reference to the Law Reform Commission) was the fact that the common law rules on fraud and mistake still applied in WA. Under the new Act, we have reformed fraud (s38) but for some reason or other, no reform was made to mistake except to the extent that it is covered by s27.

'Some other provisions that give cause for concern are those relating to minor plaintiffs and those suffering from mental disability. The old Act produced very long limitation periods in such cases, and all jurisdictions in recent years have tried to amend their legislation to solve this problem in one way or another. This was usually done by a provision under which the ordinary limitation period keeps running against a minor who has a guardian to look after his or her interests (subject to certain exceptions, such as where the guardian or someone closely connected with the guardian is the defendant).

'The Law Reform Commission's recommendations influenced the approach recommended by the Ipp Panel in 2002, and the Ipp approach has been adopted (with individual variations) in NSW, Victoria and Tasmania. The WA provisions (ss30-37, 41-42 and 52-53), while attempting to do something similar, are much more complicated. For example, they have one rule for persons under 15 and another for persons aged 16 or 17 when the cause of action accrues. The relationship between the two rules is not easy to understand. Another difficulty arises under s36, where the limitation period in an action against a defendant in a close relationship with a person with mental disability is three years from the time when the relationship ceased – not an easy point to identify. These provisions suffer by trying to be too comprehensive. It remains to be seen how well they will work.' ■

Notes: **1** The Commission's report praises the Alberta model's 'limitations strategy' based on equitable principles rather than those of the 'common law.' The Alberta recommendation was adopted by the *Limitations Act* 1996 (Alberta), and similar legislation is now in force in Ontario and Saskatchewan. **2** It was supported by the Ipp panel in 2002 in *Review of the Law of Negligence*. The panel's recommendations now form the basis of the personal injury limitation provisions in NSW, Victoria and Tasmania. **3** Handford, *Limitation of Actions – The Australian Law*, Lawbook Co, 2004. **4** See p vii. **5** See pp 8-9: Handford refers to *Maxwell v Murphy* (1957) 96 CLR 26; *Allman v Country Roads Board* (1957) VR 581; and *Attorney-General (Vic) v Craig* (1958) VR 34. **6** (2000) 203 CLR 503. **7** See p13. **8** See p13. **9** Page 8. **10** See p28. **11** See p175 onwards. **12** *Howe v David Brown Tractors (Retail) Ltd* [1991] 4 All ER 30. **13** *Ackbar v CF Green & Co Ltd* [1975] QB 582.

Patrick Mugliston *is a barrister at Francis Burt Chambers in Perth.*
PHONE *(08) 9220 0483*
EMAIL *pmugliston@francisburt.com.au*



It's not often these days that plaintiff lawyers get praise in the national media for their work.

Yet journalist and author, Gideon Haigh, bestowed some in the *Good Weekend* magazine (*Melbourne Age* and *Sydney Morning Herald*) on 4 February 2006.

Reflecting on the tragic legacy of death and disease that was the consequence of massive asbestos use in Australia between the 1930s and 1980s, Haigh concludes:

> 'The group that has done the most to bring about compensation for victims of asbestos-related disease in Australia is neither government nor union. I began my research holding no particular brief for plaintiff lawyers, and I can understand complaints about the complications and cost they add to business. Yet without the tenacity of Melbourne's Slater & Gordon and Sydney's Turner Freeman, asbestos would have levied its human toll with impunity.'

And to the lawyers one could justifiably add the common law system and the once-level playing field of the common law courts of our country.

Those conclusions flow readily from the history of the hard-fought litigation that eventually rendered James Hardie