Report No 6

Limitation Defences in Civil Proceedings

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Report No. 6

Limitation Defences in Civil Proceedings

October, 1988 Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and

accessible as practicable.

The Commissioners are:

The Rt Hon. Sir Owen Woodhouse KBE DSC - President

Jim Cameron CMG

Sian Elias QC

Jack Hodder

Sir Kenneth Keith KBE

Margaret A. Wilson

The Director of the Law Commission is Alison Quentin-Baxter. The offices of the Law Commission are at Fletcher Challenge House, 87-91 The Terrace, Wellington. Telephone (04) 473 3454, Facsimile (04) 471 0959. Postal address: PO Box 2590, Wellington, New Zealand.

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31 October 1988

Dear Minister

I am pleased to submit to you the sixth report of the Law commission, on Limitation Defences in Civil Proceedings.

The report follows your request on 1 October 1986 that we examine the Limitation At 1950 and make recommendations on what, if any, changes are need to it. Our principal recommendation is that the 1950 Act be repealed and replaced with a new Limitation Defences Act of wide application and with three central features -

* a defence based on a standard limitation period of three years;
* extension of the three year period in certain circumstances, in particular where a claimant shows absence of knowledge of essential facts relevant to the claim;

* a further defence based on a ``long stop'' limitation period of `5 years.

A draft Bill which would give effect to our recommendations maybe found in Chapter XV of the report. In addition to setting out our recommendations with precision, the draft Bill offers an example of ways in which the format and style of legislation might be improved to make it more accessible.

Yours sincerely

Owen Woodhouse President

The Right Honourable Geoffrey Palmer, MP Deputy Prime Minister and Minister of Justice

SUMMARY OF RECOMMENDATIONS

The central recommendations in this report are outlined in the paragraphs below. A full list of our recommendations may be found in Appendix A, and they appear in legislative form in the draft Bill contained in Chapter XV.

1 There should continue to be a statute of general application which effectively imposes limits on the time within which a claimant may commence civil proceedings against a defendant.

2 The Limitation Act 1950 should be repealed and replaced with a new statute of wide application and having three central features -

(a) a defence based on a standard three year limitation period, but subject to

(b) extensions in certain specified circumstances, in particular where the claimant shows absence of knowledge of essential facts relevant to the claim, but generally subject to

(c) a further defence based on a ``long stop'' limitation period of 15 years.

3 The new statute should be called the Limitation Defences Act, should not extinguish rights of action or title to property, and, subject to specialist scrutiny by Parliamentary Counsel, should follow the draft contained in Chapter XV of this report.

4 The standard limitation defence should protect a defendant who asserts and proves it against any claim based on an act or omission which preceded by three years or more the service on the defendant of the proceedings; this should be subject to provisions relating to extension of three year period and to ancillary claims.

5 The standard limitation period should be extended where there has been -

(a) absence of knowledge of essential facts;

(b) infancy (being under the age of 18 years);

(c) incapacity by reason of physical or mental condition, restraint of the person, or warlike conditions;

(d) agreement between the parties;

(e) acknowledgement or part-payment;

(f) reference of the claim to the Ombudsmen, the statutory agencies empowered to seek resolution of disputes, or to the wrong court, or to an arbitration which is set aside.

6 Extensions of the standard limitation period should be proved by the party relying on them, should be permitted to operate cumulatively (provided overlapping periods of time are not counted twice), and should not operate to the detriment of a bona fide purchaser for value.

7 The ``long stop'' limitation defence should protect a defendant who asserts and proves it against any claim based on actor omission which preceded by 15 years or more the service on the defendant of the statement of claim (or other formal document setting out the claim); this would override the recommended extension provisions except in cases where -

(a) the parties have agreed otherwise;

(b) absence of knowledge was caused by deliberate concealment on the part of the defendant;

(c) the claimant is less than 21 years of age when the long stop period expires; or

(d) the claim is against a trustee for fraudulent breaches of trust or conversion of trust property to the trustee's use.

8 The new statute should apply to arbitrations and civil claims brought before the High Court, District Courts (including Family Courts and Small Claims/Disputes Tribunals), and the Labour Court,except where there are statutory or contractual provisions to the contrary or which otherwise deal with the time within which such claims may be commenced.

9 ``Self help'' remedies such as distress for arrears of rent should be able to be challenged and set aside if the principal obligation would have been unenforceable in court or arbitral proceedings because of the defences provided in the new statute.

10 The doctrine of adverse possession as it applies to land outside the Land Transfer Act 1952 should be abolished, and the new statute should not apply to claims for recovery of land where the claimant has been dispossessed in circumstances amounting to trespass. Such abolition should not affect title acquired by adverse possession prior to repeal of the 1950 Act, and the 1952 Act should be amended to permit those in adverse possession of abandoned land, but without title, at the date of repeal of the 1950 Act to obtain a certificate of title under the 1952 Act.

11 After proceedings have been commenced, ancillary claims (including counterclaims, third party claims, and additional or alternative causes of action) related to or connected with the act or omission on which the original claim is based should be determined free from any standard limitation defence (but not a ``long stop'' defence) unless the original claim is or could have been defeated by such a defence .

12 The new statute should not come into force until approximately on year after enactment, and should not apply to claims commenced before the expiry of the 1950 Act.

13 Following commencement of the new statute, there should be a three year transitional period during which a claimant could commence claims not already statute - barred under the 1950 Act but otherwise subject to defences under the new statute.

I

Introduction

1 the Limitation Act 1950 provides that if a person wishes to take a civil (i.e. non-criminal) claim to court or have it determined by an arbitrator they must commence the court proceedings or arbitration within a certain time or else the person against whom the claim is brought can point to the expiry of the time limit and insist that, irrespective of the apparent merits of the claim, the claim be dismissed. The most common time limit is six years, although the Act also fixes time limits of two, 12 and 60 years for certain types of cases, and is generally measured fro the date of the event complained of in the claim.

2 As we observed in our discussion paper on the 1950 Act (NZLC PP3, September 1987),most New Zealnaders understand and accept that our system of justice includes having access to the courts to determine disputes which cannot otherwise
be dealt with. Indeed, this is taken for granted. But most would also agree with the proposition that justice delayed may be justice denied. That proportion has two aspects to it: first, it is unjust that a person with a good claim is delayed in having that claim satisfied; but, second, it is unjust that a person may have to defend a claim which relates to matters well in the past, when memories have dimmed, witnesses or others involved have died or disappeared, and documents have been lost on or destroyed. It is this second aspect which underlies both the 1950 Act (and similar legislation in most comparable countries) and the comment made in an old English case that there is more of cruelty than justice in the pursuit of stale claims.

3 Statutes of limitation such as our 1950 Act attempt to achieve a balance between these often conflicting interests of those who might wish to bring civil claims (``claimants'') and of those who might have to defend such claims (``defendants''). Having considered these matters, we have concluded that in New Zealand that balance should be made fore fair and more clear, and that this can best be achieved by the enactment of a new statute which would replace the 1950 Act and be rather wider in its application.

4 Subsequent chapters of this report deal with the present law and its problems as well as our proposals for changes to the law. The balance of this chapter explains the approach we have taken in our review of the 1950 Act, and the scope of that review.

APPROACH TO REVIEW

5 In considering the 1950 Act and the topic of limitations in general, we have been mindful of the obligations imposed by the Law Commission Act 1985. AS well as establishing this Commission as a central advisory body for the systematic review, reform and development of the law of New Zealand, the Act emphasises the objective of clarity in the law. In s. 5 there is reference to making our law ``as understandable and accessible as is practicable'', and to-

... the desirability of simplifying the expression and content of the law, as far as that is practicable.

6 This obligation relates directly to both the policy and drafting choices we recommend in this and other projects. Because the topic of limitations involves the whole range of non-criminal law - alphabetically, from Accident Compensation through to at least Wills - and the 1950 Act is drafted on an assumption that its readers are familiar with various aspects of common law and court procedure, this obligation has at time seemed most formidable.

7 Section 5 of our Act also contains the important requirement that we -

Shall take into account to ao Maori (The Maori dimension) and shall also give consideration to the multicultural character of New Zealand society.

We have tried to keep this requirement in mind throughout our review,and it is reflected in some specific recommendations such as those relating to the length of the standard limitation period, and the exclusion of proceedings in the Maori Land Courts from the general proposals. We will return to this requirement at various points in later chapters (see paras. 113-115, 159, 161, 317 and 354), but might conveniently note here that nothing in our proposals would affect the existing jurisdiction or powers of the Waitangi Tribunal.

8 It should also be noted here that, notwithstanding recent and significant litigation commenced by Maori agencies, such as the N.Z. Maori Council, our research and consultation strongly suggests that individual Maori are disproportionately few among those bringing civil claims to the courts, and that although cultural as well as economic factors contribute to that situation, a revised limitation regime would make little or no difference. Those cultural and economic factors relate to the ability or inclination to make use of the court system at all, not at or within any particular time. In broad terms then, we believe that the fairness and clarity we seek in a replacement for the 1950 Act would benefit all who may be involved in litigation, irrespective of culture.

STAGES IN THE REVIEW

9 We have undertaken this review in stages as follows:

(a) Preliminary consultations and extensive research, including a review of overseas laws and relevant literature, and a file survey of existing practice i in the High Court.

(b) Preparation and distribution of the discussion paper, copies of which were distributed to Members of Parliament, central government agencies, local government bodies, lawyers, architects, engineers, surveyors, accountants, and

other interests parties.

(c) Receipt and consideration of submissions on the discussion paper and related matters from interested persons and organisations.

(d) Further consultation with some of those making submissions and others with particular expertise.

(e) Preparation of this report, including the drafting of the new statute which we recommend for enactment (set out in Chapter XV.

10 Further details of and comment on the consultative activities undertaken in connection with this review and summarised in Appendix b.

SCOPE OF TOPIC

11 Our review has covered the 1950 Act and special limitation provisions found in other statutes. It has also been necessary to consider those matters not presently subject to any limitation period, but which might be covered by a revised statute. In other words, the whole of the non-criminal law has had to be kept in mind.

12 However, the present review has not been concerned with statutes or rules which subject a litigant to time restrictions after proceedings have been commenced, such as the limits on the time in which to take an appeal or the powers of courts to strike out proceedings for failure to pursue them. but, it may be noted that such statutes or rules reflect general ideas of dispatch and finality which are also relevant to limitation statutes.

13 The criminal law is another area which is not part of the present exercise. The 1950 Act does not prescribe time limits for prosecution of offences. The question of whether criminal prosecutions should be subject to a general regime will be the subject of a separate later review by the Commission.

14 We must also make clear that this review is not concerned with monetary limitations on awards of damages. The Commission is well aware of (and monitoring) representations from professional and other groups here and overseas seeking statutory ceilings on the amount of damages for which they are liable. Again, that is a separate question, but the submissions dealing with certain aspects of the quantum of damages - sometimes described as the ``deep pocket'' problem - will be considered in our separate review of the law relating to contribution as between parties in civil litigation.

15 Nor is it possible in a review of limitations law to deal with problems or at least uncertainties in substantive legal rules, such as the relatively recent expansion of liability for negligence, the boundary between contract and tort, or the availability of damages for purely economic loss. Insofar as some of these changes have represented successful attempts by claimants to avoid existing limitation rules _ as in the building subsidence cases - we trust that our proposals would largely eliminate the need for such developments.

OVERSEAS LAW REFORM

16 The topic of limitations has been considered in many reports produced by law reform agencies in various parts of the world. These begin with the pioneering 1936 report of the English Law Revision Committee and extend through the British, North American and Australian reports listed in our bibliography (see Appendix C) to the Scottish Law Commission's consultative memorandum, published late in 1987.

17 We have been greatly assisted by the valuable work in these reports.

However, many of them have been principally or exclusively concerned with problems related to personal injury claims and replacement of such proceedings in New Zealand by the comprehensive accident compensation scheme means that the conclusions in the overseas reports are not necessarily directly applicable in this country.

SOME DEFINITIONS

18 The law is notorious for the use of language not readily understood by those subject to it.This is certainly true of the 1950 N.Z. Act (reproduced as Appendix D to this report) which assumes a reader to have a good grasp of basic legal terms. We summarise the Act in Chapter III but, for those whose grasp of such terms in uncertain, the following simplified definitions may offer some assistance in reading this report:

(a) ``action'' - means the process of bringing a claim against another to court, and is defined in s.2 of the 1950 Act to exclude criminal proceedings;

(b) ``cause of action'' - means the legal rule relied on by the person bringing a claim against another to court; an action may be based on one or more causes of action - for example, a building subsidence case may be based on both breach of contract and also negligence by a builder - and each cause of action may have different factual and legal components;

(c) ``contract'' - means an agreement involving the acceptance of mutual obligations, breach of which may entitle the party not in breach to claim a remedy (usually a sum of money as damages) from the party in breach;

(d) ``tort'' - means a breach of an obligation imposed by the law (with damages available for breach) but not based on any contract - for example, the duty to take reasonable care not to harm others by an act or omission (``negligence'');

(e) ``accrual of a cause of action'' - means the time when it first becomes possible for a claim to be brought to court based on a particular cause of action (see also Chapter III);

(f) ``litigation'' - means the process of seeking to resolve a dispute in court proceedings;

(g) ``jurisdiction'' - means an area of authority and may relate to the powers of a court or statutory body (e.g. claims for less than $12,000 are within the jurisdiction of the District Court) or to a separate legal system (e.g. Australia has federal, state and territorial jurisdictions).

II

History of the 1950 Act

19 As with much of our law, the 1950 Act may be more readily understood in the context of its historical development. That development is outlined in this chapter, which is largely based on Chapter II of our earlier discussion paper.

ANCIENT LAWS

20 The idea of a limit on the time in which one party may bring a court action to obtain a remedy against another is not limited to English law. the laws of ancient Athens generally prohibited all actions where the injury was committed five years before complaint was made. And under the Roman law rules of usucapio 10 years' possession of land made the possessor's title secure.

ENGLISH STATUTES

21 The first English statute of limitation was the Statute of Merton 1235 (20 Hen.II, c.8) prohibiting some claims which predated certain historical events. For example, writs of right could not be taken if they arose prior to the coronation of Henry II in 1154. In 1540 a new statute set the limitation period for writs of right at 60 years. The opening words of that statute indicated that avoidance of difficult questions of proof was a primary reason for the change to a fixed time period.

22 But it was the English statute of 1623 (``an Act for Limitation of Actions, and for avoiding of Suits in Law'') which formed the basis of limitations statutes throughout the common law world. The Act applied to a variety of real and personal actions, and specified four different limitation periods as well as provisions for extension in certain circumstances.

23 The limitation periods in the 1623 Act were as follows:

(a) Twenty years - for most actions relating to land.

(b) Six years - for actions upon the case (other than slander), actions for account, and actions for trespass, debt, detinue, and replevin for goods or cattle.

(c) Four years - for actions for assault, battery, wounding or imprisonment; and

(d) two years - for slander.

24 The Act provided for extension where the claimant was a minor (under the age of 21 years), a married woman (``feme covert''), mentally disabled (``non-compos mentis''), in prison, or overseas. In relation to actions for land outside the 20 year limit, such persons were given a further 10 years from the time that disability ceased. In relation to other causes of action the limitation period began to run only when the disability ceased.

THE WRIGHT REPORT 1936

25 A comprehensive review of the 1623 Act and related limitation legislation was undertaken by the (English) Law Revision Committee chaired by Lord Wright MR and resulted in its fifth interim report (``Statutes of Limitation'', Cmnd 5334, December 1936). The Wright Report contained 23 recommendations, most of then enacted in the Limitation Act, 1939 (U.K.). In particular, the committee recommended that the limitation period for all actions founded in tort or simple contract or by virtue of statutory provisions (not covered by a special limitation provision) should be six years. It was also recommended that the disability based on the ``absence of the defendant beyond the seas'' be abolished.

26 The committee considered the operation of limitation law in hard cases,but did not recommend that there should be a general discretion in the court to extend the limitation period because ``the fundamental benefit conferred by statutes of limitation namely the elimination of uncertainty would be prejudiced''.

27 The committee also declined to incorporate the equitable doctrine that time should be measured from when the claimant knows or ought to know of the existence of the claim, except in the event of fraudulent concealment of the cause of action by the defendant and similarly upon the discovery of a mistake.

28 The committee's desire for consistency and uniformity did not prompt a rationalisation of the notion of accrual of a cause of action. Its report

acknowledged that the different accrual dates for contract and tort actions could make a difference, but said:

On the whole we are of opinion that, if the time when the statute is to run is to be fixed by a more or less rigid objective test, the present test is the best. The law is well settled,and, generally, the application of the test to different types of action has had a sensible result. A certain amount of complication appears to be inevitable, and any attempt to produce a comprehensive statutory definition of time when a cause of action accrues would probably create more difficulties than it would solve. (para 6)

THE ENGLISH ACT OF 1939

29 The 1939 Act (applicable to England and Wales only) was largely based on the recommendations in the Wright Report. the debates on the Bill in the House of Commons did not focus on the Wright Report's concerns but rather on the provision which restricted the time in which actions could be taken against local authorities to one year (the limitation period had until this time been six months under the Public Authorities Protection Act 1893).

30 On the one hand it was argued that local authorities should have special protection (particularly in relation to personal injuries) because of the volume of accidents and claims made against them, the difficulty of documenting accidents for which their employees were responsible (particularly education boards), and the financial problems of varying rates and calculating financial commitments.

31 The counter argument was that public authorities were in no different position from any large corporation with a large number of employees and financial commitments. There was some evidence of abuse of this protection on the part of public authorities, moreover, by prolonging negotiations until the time had run out and then refusing to settle. Nevertheless the special protection for public authorities was enacted in the 1939 Act.

NEW ZEALAND LEGISLATION

32 The New Zealand Act of 1950 substantially followed the 1939 English Act and parliamentary and departmental discussion on the subject was similarly focused. Before its enactment, New Zealand limitation law was to be found in the 1623 Act,
the Civil Procedure Act 1833, the Crown Suits Act 1769, the Real Property Limitation Acts of 1833 and 1874 (English legislation in force here), and in the Judicature Act 1908, the Property Law Act 1908 and the Trustee Act 1908. The aim of the 1950 Act was to simplify and limitations legislation.

33 It differed from the English Act where there were circumstances special to New Zealand. Sections were added, for example, relating to Land Transfer land, Crown land and Maori customary land. The English provisions relating to advowsons, tithes and dower were omitted. Like the English Act, Part II extended limitation periods in the case of disability, acknowledgement, part payment, fraud and mistake.

34 The most controversial clauses (as with the English legislation) were those which provided special limitation periods governing suits against the Crown and local authorities and that the defendant should be given notice of the intention to sue. At the time, each statute constituting a local authority had a special provision establishing the period in which it should be sued. This was generally three months where the suits were against harbour boards and six months for municipalities and counties.

35 Section 23 of the 1950 Act substituted a single uniform limitation period

of one year for cases against the Crown and public authorities and required that the defendants be informed of the intention to sue within a month of the breach. Some attempt was made to assuage critics by giving the Court power (in s.23(2)) to extend the period of six years, and this applied until the whole of s.23 was was repealed (and not replaced) in 1962. The ``Report by the Department of Justice - Limitation Act 1950'' requested by the Law Revision Committee of New Zealand (LR175) states the reasons for this as follows:

Where failure to give the required notice results in the claim being barred we think the provision unjust. There is no reason why public authorities should be handicapped by lack of notice of an intended claim ... But if there is any justification for keeping the provision we are of the opinion that tall large business corporations should receive notice. However the difficulties that would allow from such a provision would be worse than exist under the present law.

36 The other area where the 1950 Act differed from the English legislation was in the provision for personal injuries. In 1950 the legislators favoured a two year limitation period for such claims but with a discretion for this to be extended to six years. The original wording of s.4(7) was:

.. the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudice in his defence or otherwise by the delay.

37 the case of Silvius v. Feilding Borough Council [1957] NZLR 713 concerned the meaning of s.23(2) which was in terms similar to s.4(7). It established that a mistake of law did not constitute ``mistake or reasonable cause'' within the meaning of s.23(2) (and impliedly also within the meaning of s.4(7)). the 1962 Amendment to s.4(7) (s.23 was repealed at the same time) was in response to that case. It added after the word ``mistake'' the words ``of fact or mistake of any matter of law other than the provisions of this subsection''.

38 In 1970, s.4(7) was further amended to include an automatic extension of the two year period to six years if the intended defendant consented and to provide that the discretionary elements applied only where there was no such consent. This wording was to remove doubts about whether the Limitation Act had to be specifically pleaded in personal injury cases in New Zealand. The provision appears not to have been judicially considered, probably because of the implementation of the accident compensation scheme.

III

The Present Law

39 A survey of the present law relating to limitations in New Zealand involves not only a review of the provisions of the 1950 At but also of the many specific limitation periods contained in other statutes and the relevant common law and procedural rules. An indication of the complexity of the whole area is the length of the treatment of the topic ``Limitation of Actions'' in the standard legal encyclopaedia, Halsbury's Laws of England (4th ed, 1979, vol. 28) - no fewer than 157 pages, while the N.Z. Supplement to Halsbury runs to 60 pages.

40 We think that it will assist readers of this report if a short description of the 1950 Act and some of the other statutory and common law rules precedes discussion of the options for and details of law reform proposals. The description offered in this chapter is necessarily simplified and those seeking further detail must look to Halsbury or some other text which contains a

further statement of the law.

THE 1950 NEW ZEALAND ACT

41 The Limitation Act 1950 came into force at the beginning of 1952 and, as explained in the previous chapter, replaced a collection of earlier English and local statutes with provisions generally drawn from the 1939 English Act.

Accrual of cause of action

42 The Act applies to ``actions'', defined as non-criminal proceedings in a court of law (s.2), and also to arbitrations (s.29), providing for time limits of 560, 12, six and two years. These time limits are generally measured from ``the date of the accrual of a right of action''. As we have noted the legislation has not attempted to define that expression. According to Halsbury that phrase means -

When there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed. (28 Halsbury's Laws of England (4th ed),para. 622)

43 However, the facts required to be proved may differ depending on the nature of the legal claim made. Thus the claim for breach of contract accrues on the date of breach, irrespective of whether the breach has caused actual loss. On the other hand, a claim in negligence does not accrue until there is damage resulting from a breach of duty. The distinction is of major importance in cases - such as those involving building subsidence - where there can be a significant delay between a breach and resulting damage or injury. Where there is a continuing series of events which infringe the rights of a claimant, there is a separate accrual for each event and a separate limitation period applies in relation to each event. In such cases (copyright infringement is an example) the limitation period acts as a limit on recovery as damages (and interest) will normally only be available back as far as the six years preceding the commencement of the litigation.

The limitation periods

44 The Act provides a two year limitation period in relation to actions to ``recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment'': s.4(5).

45 Section 497) provides that an action ``in respect of the bodily injury to any person'' is subject to a two year limitation period, but this may be extended with the consent of the intended defendant (up to a maximum of six years), and subject also to the power of the court to grant leave to bring the proceedings on an application brought within six years.

46 The six year period applies to the following:

(a) actions founded on simple contract or on tort: s4(1)(a);

(b) actions to enforce a recognisance: s.4(1)(b);

(c) actions to enforce an award in an arbitration (except where the submission is
by a deed): s.4(1c);

(d) actions to recover any sum ``recoverable by virtue of any enactment'' (other than a penalty or forfeiture): s.4(1)(d);

(e) actions for an account: s.4(2);

(f) actions to recover seamen's wages: s.4(8);

(g) successive conversions or wrongful detentions of chattels: s.5(1);

(h) arrears of interest in respect of any judgement debt: s.4(4);

(i) actions (or distress) to recover arrears of rent: s.19;

(j) actions in relation to breach of trust (not being fraudulent, or involving conversion to trustee's own use): s.21(2);

(k) actions to recover arrears of interest on sums secured by mortgages or charge or payable in respect of proceeds of sale of land: s.20(4); and

(l) actions to recover arrears to interest in respect of any legacy: s.22.

47 The Act provides for a 12 year limitation period to apply to the following:

(a) actions upon a deed: s.4(3);

(b) actions upon a judgement: s.4(4);

(c) actions to challenge a will on grounds of undue influence or want of testamentary capacity: s.4(6);

(d) actions for recovery of land (other than by the Crown): s.7(2)

(e) actions to recover land by person entitled to a succeeding estate or interest: s.9(2);

(f) actions for redemption of land (other than Land Transfer land) where mortgagee is possession: s.16;

(g) Actions to recover principal sum of money secured by mortgage or charge or being proceeds of sale of land: s.20(1);

(h) foreclosure actions in respect of mortgaged personal property: s.20(2);

(i) actions in respect of claims to the whole or share of the personal estate of a deceased person: s.22.

48 A 60 year period applies in relation to actions by the Crown for recovery of land (s. 7(1)) and recovery of a future interest in land (s.9(2)(a)).

Extensions of limitation periods

49 Part II of the 1950 At modifies the operation of the various limitation periods in limited circumstances. In broad terms, the commencement of the period is postponed if the claimant is an infant (this is, under 20 years of age) or is mentally impaired or is unable to discover the existence of a cause of action by reason of fraud or mistake; and the cause of action is revived and the limitation period starts again if the person subject to the claim (the intended defendant) has acknowledged liability in some way or made a part payment.

Matters outside the Act

50 The 1950 Act expressly excludes from its scope the following matters:

(a) any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in rem: s.4(8);

(b) any claim for specific performance of a contract, for an injunction, or for other equitable relief (except where applied by the court by way of analogy) s.4(9);

(c) customary land within the meaning of the Maori Affairs Act 1953: s.6(1);

(d) the right of the Crown to minerals (including uranium, petroleum, and coal); s.6(3);

(e) actions relating to mortgages and charges on ships: s.20(5);

(f) actions against trustees in respect of fraudulent breaches of trust or for recovery of converted trust property: s.21(1);

(g) recovery of any tax or duty or interest thereon, or to forfeiture proceedings (under the Customs Acts, or in respect of a ship): s.32, proviso; and

(h) those where a period of limitation is prescribed by any other enactment: s.33(1).

PLEADING REQUIREMENTS

51 Although the 1950 Act is phrased in terms of an absolute prohibition on bringing actions outside the specified limitation periods, this is misleading. A statement of claim relating to, for example, a breach of contract which occurred more than six years before the claim is presented to a court for filing (the way that proceedings are commenced and the running of a limitation period is terminated) will not be turned away at the court registry. It will proceed to be determined in the usual way unless the defendant pleads as defence that the limitation period expired before the proceedings were commenced. But if that plea is made and the Act is shown to apply, the court must dismiss the claim.

52 In other words, the 1950 Act is best described as providing a special defence for defendants rather than imposing any prohibition on claimants. A defendant is not bound to plead that special defence and it is well established that it is not for the court to raise a limitation defence if a defendant has not done so.The current High Court Rules deal with those matters by requiring an ``affirmative defence'' to be pleaded with full particulars (R.130), and also requiring any affirmative response (for example, if a claimant proposes to meet a pleaded limitation defence by arguing that one of the Part II extension provisions applies) to be pleaded in a reply (RR. 169, 170).

53 This emphasis on pleading follows from the fact that the limitation defence is procedural in nature: it does not (except in relation to conversion, and land: see Chapter XII),extinguish a right or claim, but prevents the court from enforcing it.Obviously, the inability to enforce a right against another devalues the right very substantially, but it remains alive and may be relied on in certain circumstances.

Thus, for example, if a debtor pays a ``statute-barred'' debt (one in respect of which a limitation defence could have been pleaded successfully), it cannot be latter recovered on the ground that it was not due; and the creditor may also be able to obtain satisfaction of a statute-barred debt by (among other things) retaining possession of a thing until a claim is satisfied, or making a deduction from a legacy payable to the debtor.

EQUITABLE RULES

54 Under s.4(9) of the 1950 Act, claims for equitable relief (such as specific performance or an injunction) in relation to matters subject to a six year limitation period - such as, tort and contract - are expressly excluded from that period ``except insofar as [it] may be applied by the court by analogy''. This reflects the historical development of English law through two different court systems - the courts of equity, and the common law courts - and the rule that courts exercising the equitable jurisdiction will apply limitation rules by analogy in certain cases:

... when claims are made in equity, which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same subject matter which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim. (16 Halsbury's Laws of England (4th ed) para. 1485.)

55 Application of a limitation period against an equitable claim by way of analogy occurred in the recent case of Matai Industries Ltd v. Jensen & Others (unreported, Tipping J, Christchurch, A180/84, judgement 18 May 1988), where a claim alleging breach of a fiduciary duty against the receiver of a company was held to be barred on that basis.

56 A body of equitable rules which may bar claimants from obtaining a remedy (even where the 1950 Act does not) survives under s.31:

Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

The application of equitable principles under this section is limited to refusals of relief. The main thrust of those principles is that a claimant is bound to pursue his or her claim without undue delay. Equity does not specify a fixed time after which claims are barred. The doctrine of laches looks at the circumstances of the case - in particular, acquiescence on the claimant's part and any change of position on the defendant's part. The doctrine applies when an action is subject to the Act and the court refuses to grant relief to a claim not already barred by the Act - effectively shortening the period. That is most likely to happen where there has been a short delay but serious prejudice to the defendant.

57 An equitable defence is generally only available where the claimant knew or reasonably should have known of the existence of a cause of action and where the that delay was actually prejudicial to the defendant. Prejudice is the key notion: in the absence of prejudice, even a long delay will not bar an action; but a short delay with serious prejudice will certainly do so.

PARTICULAR STATUTES

58 An extensive (although probably not exhaustive) list of specific statutory time limits on commencement of litigation is set out in Appendix E. Not all work in the same way, and a small selection may be illustrative:

(a) Carriage of Goods Act 1979, s.19

claims for loss of goods must be made within 12 months from the date the carriage should have been completed, except in cases of fraud by the carrier, or where the plaintiff obtains leave from the court (within six years) having established that the delay was due to a mistake of fact or law or other reasonable cause, and there would be no material prejudice to the intended defendant;

(b) Fair Trading Act 1986, s.43

claims for remedial orders (including damages) for conduct contravening the Act must be made within three years from the time matter giving rise to the claim
occurred;

(c) Matrimonial Property Act 1976 s.24

applications must be made within 12 months of decree of dissolution or nullity of marriage, but this time may be extended by the court after hearing all persons with an interest in the property affected;

(d) Mental Health Act 1969, s.124

claims relating to acts done under the Act (such as detention) can only be brought with the leave of a Judge of the High Court, and such leave must be sought within six months after the act complained of (but excluding time in detention or while a defendant was overseas);

59 These and other statutory provisions differ from the Limitation Act regime in so far as they often (but not always) feature a shorter period combined with a provision for discretionary extension. They are discussed in more detail in Chapter XIII.

IV

Limitations and Latent Defects

60 In most cases questions of limitations do not arise: the ``wrong'' (a breach of contract, or of a duty in care and negligence), the damage or injury, and a knowledge of both of these by the potential claimant are more or less simultaneous. However, complications occur when the ``wrong'', the damage, and the potential claimant's knowledge of these are spread over a period of time which may exceed the orthodox limitation period.

61 This chapter focuses on those complications as they affect litigation concerning personal injuries, damages to buildings and professional advice. This focus service to illustrate the operation of statutes of limitation in decided cases, the difficulties that have been shown, and the line of reasoning which lead to the tentative proposals for change contained in our discussion paper.

62 It may be mentioned that this area - commonly known as ``latent damage'' - has been the subject of much judicial and academic controversy and is at least indirectly responsible for the Minister's reference of the Limitation Act 1950 to this Commission for review.

PERSONAL INJURY

63 A convenient starting point is the House of Lords' decision in Cartledge v E Jopling & Sons Ltd [1963] AC 758. In that case nine claimants sought damages from an employer for pneumoconiosis in relation to inhalation of silicate dust at their work place between 1939 and 1950; the proceedings were commenced late in 1956 and alleged negligence and breach of a statutory duty. The trial judge held that there were breaches of statutory duty by the employer and would have awarded damages to the claimants but for the effect of the Limitation Act 1939 (U.K.) His decision was upheld by both the Court of Appeal and the House of Lords.

64 In his speech in the House of Lords, Lord Reid said (at pp. 771-2);

It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears tome to be unreasonable and unjustifiable in principle that a course of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action.If there were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person had discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances

But the present question depends on statute, the Limitation Act 1939, and section 26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time should not begin to run until the fraud has been or could with reasonable diligence have been discovered. ... the necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief the present case can only be prevented by further legislation.

65 Lord Reid went on to suggest that he would have been inclined to think that an extension to this scope at s.26 of the 1939 Act would achieve substantial justice and would not prejudice the legitimate rights of defendants, there being little practical difference between causing damage which only occurs at a later date and causing damage which can only be discovered at a later date.

66 The decision in Cartledge v Jopling was considered by the Edmund Davies Committee which recommended in its report (1962) that a personal injury claimant should be able to bring a claim within 12 months of the ``date of knowledge'' - that is, the earliest date on which the existence and cause of the injury could reasonably have been discovered. This recommendation was enacted in the Limitation Amendment Act 1963.

67 In 1970 the Scottish Law Commission recommended that the 12 month period following knowledge should be extended to three years, and this reasoning was endorsed by the English Law Commission in its report later in 1970 and enacted in the 1971 amending legislation.

68 The New South Wales and Western Australia Law Reform agencies have recommended extension of standard limitation periods to cover latent damage in the occupational disease field. In New Zealand, the no-fault accident compensation system and consequential abolition of common law rights of action in relation to personal injury by accident (including occupational diseases) has meant that this issue has not been the subject of litigation. However, insofar as present incapacity may be related to pre-Accident Compensation exposure to asbestos or similar risk and subsequent latent damage to the body, the law might well be that employers are presently protected by the provisions of the Limitation Act 1950 and the reasoning in Cartledge v Jopling.

BUILDING CASES

69 The tendency of buildings to suffer major damage some time after construction in the absence of proper foundations or adequate soil stability has provoked much litigation during the past two decades. Under the traditional approach to the liability of builders in such circumstances - that the cause of action accrued at the date of breach (often on completion of an inadequate building) - a limitation defence was often available to a builder if

the six year period expired before the owner knew or could reasonably have known of the damage. But the law developed significantly from the early 1970s, based on the fact that a limitation defence would not be available in such circumstances if liability was founded on negligence and the cause of action measured from the date of actual damage. In the absence of the builder (either through a limitation defence or, quite commonly, through insolvency) building owners sued professional advisers and local bodies with some success.

70 The case which led to local authorities facing liability for negligent inspection of building foundations where buildings later suffered from structural damage was Dutton v Bognor Regis Urban District Council [1972] 1 QB 373. That case arose from the purchase by a developer of land which included a filled-in rubbish tip. The developer subdivided the land and obtained planning permission from the local council in 1958. Before the building in question was erected, the Council's offices inspected the trenches dug for foundations. The house was completed in 1959, sold to a Mr Clark early in 1960 and sold by him to a Mrs Dutton later that year. Shortly after she moved in she noticed that the walls and ceiling were cracking, the staircase slipped, and doors and windows would not close. These problems were due to internal subsidence
and in 1964 Mrs Dutton issued proceedings claiming BP2,240 for the cost of repairs and BP500 for permanent diminution in value of her property. Mrs Dutton settled her claim against the developer for BP625 (apparently on the basis of the then rule that an owner-builder owes no contractual duty to a purchaser of a house). But Mrs Dutton was awarded BP2,115 (the balance of her claim) against the local council on the basis of a breach of a duty to take reasonable care in inspecting the building foundations. The Court of Appeal confirmed the judgement in favour of Mrs Dutton.

71 The leading decision of the New Zealand Court of Appeal in this area is Mount Albert Borough Council v Johnson [1979] 2 NZLR 234. That case related to a subdivision in Begbie Place,Mount Albert, which has become somewhat infamous by reason of the subsidence which has occurred on the previous landfill site. The building in question in this case was completed in 1966 following the issue of a building permit by the Council and an inspection of the piles by a Council inspector. Flat 3 of the building was sold in 1966 and remedial work was done in 1967 after the initial purchaser complained of cracks. In 1968 Flat 3 was sold to an intermediate purchaser who sold to the claimant, Johnson, in 1970. Johnson observed cracks from the about the end of 1970 and the defects worsened during the 1971-1973 period at the end of which a consulting engineer inspected the premises and recommended $10,000 worth of remedial work. At the end of 1973 Johnson sued the Council. In confirming the Supreme Court's decision awarding damages to Johnson, the Court of Appeal held that there were separate and distinct damage in 1967 and then again in 1970, and that a limitation defence in respect of the 1970 damage could not succeed because the cause of action and negligence arose when the defect became apparent or manifest. The developer was also sued, held to be responsible for Johnson's loss and on a 50:50 basis with the Council, but later proved insolvent (which meant that the Council was liable for the whole of Johnson's loss).

72 In Pirelli General Cable Works Ltd v. Oscar Faber & Partners [1983] A AC 1 the House of Lords applied the Cartledge reasoning to a case involving a latent building defect, holding that the date of accrual of the cause of action in negligence (for damage to the top of a high chimney) was the date when the damage came into existence and not when the damage was (or could, with reasonable diligence,have been) discovered. the House of Lords disapproved earlier English Court of Appeal decisions which suggested that the cause of action in negligence cases accrues only when damage is discoverable.

73 In his speech in the Pirelli case, Lord Fraser agreed with the view expressed in Cartledge by Lord Reid that the result appeared to be both unreasonable and

contrary to principle,but that the law was so firmly established that only Parliament could alter it - hopefully in very short order. In fact, as discussed below, the decision was followed by the report by the English Law Reform Committee (chaired by Lord Scarman, one of the Law Lords who sat in Pirelli), the recommendations of which found their way into the Latent Damage Act 1986.

74 In Canada, the Pirelli approach was rejected by a majority of the Supreme Court of Canada in City of Kamloops v Nielson (1984) 10 DLR (4th) 641. The majority (per Wilson J) said:

This Court is in the happy position of being free to adopt or reject Pirelli. I would reject it. This is not to say that Sparham -Souter [an English Court of Appeal decision laying down a discoverability test, but overruled in Pirelli] presents no problem. As Lord Fraser pointed out in Pirelli, the postponement of the accrual of cause of action until the date of discoverability may involve the courts in the investigation of facts many years after their occurrence ... It seems to me, however, to be much the lesser of two evils.

75 The Kamloops decision involved in part the British Columbia Limitations Act 1975 which provides that, in relation to actions for damages in respect of injury to personal property (including economic loss whether based on contract, tort or statutory duty) time does not begin to run against a claimant until the identity of a defendant is known and he or she has means of knowledge of facts which would show a reasonable cause of action.

76 The relationship between the House of Lords' decision in Pirelli and the Court of Appeal's decision in Johnson has not yet been clarified at appellate level in New Zealand, and has caused some problems in subsequent High Court cases. In Paaske v Sydney Construction (unreported, Auckland, A387/74; judgement 24 June 1983),l another Begbie Place case, Thorp J held that in relation to the claimants' cause of action against the builder, the Pirelli decision was directly in point and must be applied, but that in relation to the cause of action against the builder, the Pirelli decision was directly in point and must be applied, but that in relation to the cause of action against the Council, the Johnson decision should prevail. In Askin v Knox (unreported, Dunedin, A14/84; judgement 3 March 19860, where a limitation defence succeeded (there was also a finding of absence of negligence), Holland J was of the view that the distinction drawn between the New Zealand and United Kingdom limitation statutes in Paaske ``appears to me to be a distinction with very little defence''. In Williams v Mount Eden Borough Council (unreported,Auckland, A360/85; judgement 2 April 1986), where the negligence had resulted in the likelihood of the local body issuing a requisition to bring the building up to earthquake standards (although there was not serious structural damage or imminent danger to occupants), Casey J held that the damage complained of would only crystallise on the issue of the local body requisition and thus the cause of action in negligence had not accrued, although he was prepared to grant declaratory relief. But he observed that ``after Perilli the limitation question is in some disarray''. And in Gillespie v. Mount Ablert City Council (unreported, Auckland A1162/81; judgement 18 June 1987), Thorp J reaffirmed the conclusions on issues he had previously canvassed in Paaske.

77 Most recently, in the Court of Appeal's decision in Askin v Knox (not yet reported CA67/86; judgement 5 July 1988), the ``unsatisfactory disharmony'' between English and New Zealand law was noted and discussed, but not decision on whether Pirelli should be followed in New Zealand was necessary as the court upheld the High Court finding that negligence by the defendant had not been proved.

Nevertheless, the judgement of the Court of Appeal (sitting with five members) indicates that the reasoning in Pirelli may not be ``irresistible'', and notes

the ``obviously unjust'' results produced by that decision. (See also para 99, below.)

78 The significance of the limitations issue may be illustrated by the leading English and New Zealand cases from Dutton onwards. They show a wide range in the period between construction of a building and the signs of damage becoming manifest:

Case

Number of years between construction of building and signs of damage

Dutton [1972] 1 QB 373, CA 2

Gabolinscy [1975] 1 NZLR 150 10

Sparham-Souter [1976] QB 858, CA 4

Bowen [1977] NZLR 394 2

Anns [1978] AC 728, 8

Batty [1978] QB 554, CA 3

Johnson [1979] 2 NZLR 234 6-8

Acrecest [1983] QB 260, CA 1

Dennis [1983] QB 409 21

Pirelli [1983] 2 AC 1 9

Askin (1986) unreported 10

Williams (1986) unreported 11

Jones v Stround DC [1988] 1 All ER 5, CA 12

79 the substantive judge-made law applying to defective buildings has changed significantly during the period covered by the cases listed in the preceding paragraph. The most significant changes which have occurred (and been reflected) in those cases include:

(a) local bodies have been held liable in tort for negligent approval of by-laws and negligent inspection of foundations relating to buildings which have subsequently shown signs of damage - the local body was required to pay damages in Dutton, Bowen, Anns, Batty, Johnson, Acrecrest, and Paaske;

(b) this liability of local bodies has been extended to original owners (e.g. Acrecrest) and to successive owners;

(c) the traditional immunity of owner-builders selling premises has been ended (se Dutton, Anns and Johnson);

(d) it has been accepted that contractual liability can run alongside tortious liability (e.g. Batty);

(e) it has been accepted that damages can be awarded for economic loss as opposed to physical damage (see Williams and,more recently, Stieller v Porirua City [1986] 1 NZLR 84);

(f) it has been accepted that three can be successive action for negligence arising from the same originating act (see Johnson and Gillespie).

80 A feature of a number of the building case involving local government defendants has been the absence or irrelevance of the builder as a party in the litigation, often because of the insolvency of the builder - leaving the local body as the only worthwhile defendant: this occurred in the Mount Albert litigation (se Paaske); and was commented on in Dennis, where Lawton L J made reference to the desirability of a compulsory insurance scheme for builders.

81 The question of insurance has been specifically addressed in some of the cases, in particular Dutton (per Lord Enning at p.398) and in Bowen where Woodhouse J said (at p.419):

There is the further consideration that the practical effect of accepting that there is a duty of care owed by one class to another it usually not limited to shifting individual losses from each innocent plaintiff to the negligent defendant. By the conventional use of insurance it becomes possible for the losses to be widely spread and thereby a double social purpose is served On the one hand, the serious strains that can arise if the random losses were left to lie where they fall are removed for the unfortunate and innocent victims. On the other, the opportunity for their wide distribution through insurance encourages savings in the form of premium reserves which can be used for the important purpose of supporting the economy generally. And in this regard third party insurance by the building industry would seem to be entirely feasible while any general system of first party insurance by purchasers would not.

82 It may also be noted that, in Bowen, Richmond P referred to the limitation period as one of the factors which would prevent an extended liability for local bodies in tort from becoming infinite; however, the idea of successive causes of action and the need for discoverability means, as was recognised by Geoffrey Lane L J in Sparham-Souter, that the limitation period may be extended indefinitely.

83 In addition to the uncertainty surrounding the different approaches taken in the Pirelli and Bowen cases, there are several other areas where the law is not
completely clear at present. These include the following:

(a) the position of a successive owner recovering damages, but failing to repair
before on-selling;

(b) the measure of damages - to render the building habitable (Anns), to compensate for diminution in value (Bowen), or restoration of the building to its proper state;

(c) the uncertain scope and effect of opportunities for intermediate examination of the premises - whether a purchaser is liable to make a closer inspection than an existing owner (se Pirelli), and when an expert engineer should be called in(as opposed to a builder) (see Dennis);

(d) the concept of buildings which are ``doomed from the start'' - as mentioned in Pirelli, and perhaps exemplified in Batty (house built o sliding hillside), but heavily restricted in Ketteman v Hansel Properties Ltd [1988] 1 All ER 38, HL;

(e) the higher standard of duty owned by a builder to a subsequent purchaser, as opposed to the original owner, and the effect of the original terms of a building contract on the duty owed to later owners (as discussed by Richmond P in Bowen);

(f) the impact of the Fair Trading Act 1986 on the sale of buildings.

PROFESSIONAL ADVICE

84 The scope for damage or loss to occur some considerable time after an act or omission by a professional adviser is well documented in reported cases in most countries. To take one example, persons purchasing a house may instruct solicitors (among other things) to check the title; if the sale proceeds, the purchasers will usually have no reason to give any thought to the title until they attempt to resell, which may be many years later. If the solicitors were negligent and there was a defect in the title, which could cost a reasonable sum to rectify or cause a significant reduction in the resale price, the operation of the limitation period may be critical to the success of a claim against the solicitors.

85 In McLaren Maycroft & Co. v. Fletcher Development Co. Ltd [1973] 2 NZLR 100, an appeal from a finding that consulting engineers were liable to contribute to meeting the damages awarded against a subdivision developer in yet another housing subsidence case, the Court of Appeal reiterated that the true nature of an action brought against a professional person by a client for damage caused by a lack of proper professional skill and are is in contract. The following passage from Bagot v Stevens Scanlan & Co. Ltd [1966] 1 QB 197, 204, was cited with approval by Richmond J (with whom the other members of the court agreed):

It seems to me that, in this case, the relationship which created the duty of exercising reasonable skill and care by the architects to their clients arose out of the contract and not otherwise. The complaint that is made against them is of a failure to do the very thing which they contracted to do. That was a relationship which gave rise to the duty which was broken. It was a contractual relationship, a contractual duty, and any action brought for failure to comply with that duty is, in my view, an action founded on contract. It is also, in my view, an action founded upon contract alone.

86 The survival of the proposition that a professional person is liable to a client only in contract (if there is one), and not in tort is very much in doubt: see Rowe v Turner Hopkins [1982] 1 NZLR 178, where the Court of Appeal indicated that the proportion would have to be reviewed in some future appropriate case. As mentioned in para 79(d), the rule does not apply in relation to a builder.

87 In Central Trust Co. v Rafuse (1986) 31 DLR (4th) 481, a claim resulting from a solicitor's performance of legal services in connection with a mortgage transaction, the Supreme Court of Canada rejected both the Pirelli reasoning and the proposition asserted in Bagot and upheld in McLaren Maycroft. In giving the decision of the court, Le Dain J stated (at 224) that:

.. the judgement of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence... There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence...

88 In Day v. Mead [1987] 2 NZLR 443, Cooke P noted that all Australian State jurisdictions, and the Supreme Court of Ireland as well as that of Canada had accepted the existence of concurrent tort and contractual professional duties, and doubted whether New Zealand courts ``should swim against such a strong tide''. He also suggested that:

... a possible solution with some attraction in this field is to recognise that, subject to special contractual terms, the same duty of care arises in both tort and contracts and has the same incidents. In this view, the duty is not to cause damage by failing to take reasonable care; and the cause of action for negligence does not arise in either tort or contract unless some untoward damage accrues... A corollary of that approach would be a uniform limitations period.

89 The question of when ``damage'' occurs remains complicated by the effect of the Pirelli decision. In D W Moore & Co. Ltd v Ferrier [1988] 1 All ER 400,l where an insurance broking company sued solicitors in 1985 for negigently drafting a restraint of competition convenant in successive employment contracts in 1971 and 1975, the English Court of Appeal upheld the solicitor's limitation defence against the company's claim in tort (the availability of concurrent claims in tort and contract was not in dispute) because the damage had been suffered when the defective contract was executed, not when the employee sought to leave the firm and set up in competition. Lord Justice Neill said (at p.410a):

It is a question of fact in each case whether actual damage has been established. In the present case, to use the language of Templeman L J in Baker v. Ollard & Bentley [(1982) SJ 593, an earlier Court of Appeal decision] the plaintiffs suffered damage `because [they] did not get what [they] should have got'. The plaintiffs' rights under the two agreements were demonstrably less valuable than they would have been had adequate restrictive covenants been included.

THE LATENT DAMAGE ACT 1986 (U.K.)

90 As emerges from the previous discussion, the House of Lords' decision in Pirelli had a major impact in this area. It terminated an apparent development in England law towards treating a cause of action as accruing on the date of discovery or discoverability of damage, reiterated the logic of the statutory interpretation which the House of Lords had felt bound by in th earlier Cartledge case, and caused considerable controversy. The refusal of the Supreme Court of Canada to follow Pirelli, and the uncertainty of the position in New Zealand, are illustrative of that controversy.

91 In 1980 (before the Pirelli decision) the Lord Chancellor invited the (English) Law Revision Committee to consider the law relating to the accrual of the cause of action, and limitation, in negligence cases involving latent defects (other than latent disease or injury to the person).

92 A hint of the direction which reform might take was contained in the speech of Lord Fraser in Pirelli, where he said (at p.19):

Postponement of the accrual of the cause of action until the date of discoverability may involve the investigation of facts many years after their occurrence - see, for example, Dennis v. Charnwood Borough Council [1983] QB 409 - with possible unfairness to the defendants, unless a final long-stop date is prescribed, as in section 6 and 7 of the Prescription and Limitation (Scotland) Act 1973.

93 The 1973 Scottish Act provided for prescriptive periods of five (s.6) and 20 (s.7) years. Where the relevant period had expired without any relevant claim having been made, or the existence of the obligation having been relevantly acknowledged, then the obligation was extinguished. Although the shorter period could be extended where there was fraud or error induced by the potential defendant, or by the legal disability of the potential claimant, the longer 20 year period provided an absolute barrier against claims.

94 The Law Revision Committee was chaired by Lord Scarman, one of the Law Lords who had decided in Pirelli case. the Committee's general approach was set in para . 4.2:

Three principles are of critical importance in this branch of the law. They are -

(i) that claimants must have a fair and sufficient opportunity of pursuing their remedy;

(ii) that defendants are entitled to be protected against stale claims;

(iii) that uncertainty in the law is to be avoided wherever possible.

95 the Committee developed its principles towards two principal recommendations, outlined in para. 4.4:

We consider that a plaintiff who has no means of knowing that he suffered damage should not as a general rule be barred from taking proceedings by a limitation period which can expire before the discovers (or could discover) his loss. But we are equally convinced that defendants require protection from stale claims and that a time limit must be set to legal action by a plaintiff. In our view therefore two reforms are necessary. The first is the introduction of an extension to the ordinary period of limitation so as to give a plaintiff in a negligence case involving latent damage an additional period of years from the date on which he knows (or ought reasonably to have known) that he has suffered significant damage... the second reform is the introduction of a long-stop which would operate to bar legal action in cases of latent defect or damage after a defined period of years.

The Committee went on to indicate that the limited nature of its terms of reference had discouraged it from attempting to redefine general rules governing the accrual of a cause of action.

96 The major recommendations of the Scarman Committee were summarised in para 5.3 of the report, which was published in October 1984:

(a) there should be no change in the general rule of substantive law whereby a cause of action in negligence accrues at the date on which the resulting damage occurs...;

(b) in negligence cases involving latent defects the existing six year period of limitation should be subject to an extension which would allow a plaintiff three years from the date of the discovery, or reasonable discoverability, of significant damage...;

(c) there should be a long stop applicable to all negligence cases involving latent defects which should bar a plaintiff from initiating court action more than
15 years from the defendant's breach of duty (irrespective of whether damage has occurred)...;

(d) the effect of the long stop should be to bar the plaintiff's remedy, not to extinguish his right...;

(e) where the plaintiff is under a disability at the `date of knowledge' it should be possible for his action to be commenced within three years of the date that his disability ceases, or he dies, whichever is the sooner; the existence of the plaintiff's disability during the long stop period should have no effect on its duration; but the extension of the limitation period by section 28 of the Limitation Act 1980 in case of disability should remain

unaffected by the long stop...;

(f) the long stop should not only apply to cases of latent damage involving fraud, deliberate concealment or mistake...;

(g) the extended limitation period should run not only against the plaintiff but also against his successors in title...;

(h) the preceding recommendations should be of general application to cases of latent damage and not confined to say, building, construction or engineering cases.

97 The Scarman Committee recommendations were enacted in the Latent Damage Act 1986, which essentially inserted additional provisions into the Limitation Act 1980, and came into force in September 1986 (and is reproduced as Appendix F to this report).

THE ALBERTA PROPOSALS

98 The discussion paper published by the Alberta Institute of Law Research and Reform in 1986 took the two major features emphasised by the Scarman Committee, a shorter limitation period based on discoverability together with a longer long stop period, and suggested their application in all situations save for a few defined exceptions. Instead of the three year and 15 year periods favoured by the Scarman Committee, the Alberta paper recommended periods of two years and 10 years. It was the logic of the Alberta proposals as to structure and scope, together with the more conservative time limits favoured in the 1986 English Act, which formed the basis for the tentative proposals expressed in our discussion paper, published in September 1987.

THE COURT OF APPEAL: ASKIN v. KNOX

99 As mentioned above (para.77), the Court of Appeal has recently noted the problems caused by Pirelli. The judgement of the court in Askin v. Knox concludes
with an extended discussion of direct relevance to our work:

While High Court Judges have been right to follow Bowen and Johnson, sooner or later the problems created by Pirelli will have to be faced by this Court, unless there is legislative intervention in the meantime. This Court is of course willing to deal with the problems if and when a case squarely raising the issue arises. But we venture to suggest that individual litigants should not be left to bring the issue to resolution and that there is a strong case for legislation.

Pirelli produces results so obviously unjust that in England and Wales they have been remedied by the Latent Damage Act 1986. It is quite an elaborate Act but apparently to substantially the same effect as Bowen and Johnson, with the important addition of a longstop period. The Law Reform Committee, under the chairmanship of Lord Scarman, whose report led to the Act (Twenty-fourth Report, Latent Damage, 1984, Cmnd. 9390) saw the possibility of injustice to defendants and the element of uncertainty as warranting an absolute limit of 15 years from the date of the negligence. Their report, para 4.13, makes it clear that necessarily that particular period is somewhat arbitrary and a represents a compromise to strike `the right balance between justice for plaintiffs and certainty for defendants'.

It is true that by declining the follow Pirelli that Court might be able to avert most of the injustice caused by that decision, but to introduce a longstop would not be within our power. That could only be done by legislation. There is ground for treating negligence in building and building control as a

special subject with it own problems, and for enacting a longstop period, in the context of either an Act similar to the English one or a more general Limitation Act. Even Mr and Mrs Askin [the plaintiffs] might now agree that it would have been the lesser of two evils to have been told that they could have no remedy after 20 years that had elapsed in their case. We express no opinion as to what period is fairest; that is a question of policy for Parliament and the advice of the Law Commission would be appropriate. We respectfully commend this matter to attention.

V

The Need for a General Statute

100 In a review of the Limitation Act 19509 a fundamental question is whether there is a need for any general limitations statute at all. In other words, should the 1950 Act simply be repealed, leaving litigants to have claims determined on the strength of the case presented to the court? We considered this issue in Chapter III of our discussion paper and have since confirmed our tentative view that there are good reasons for a general statute. Although none of those who made submissions or were consulted by us advocated simple repeal, the purposes of statues of limitation are outlined in this chapter in some detail, not least because they bear on the shape of our recommendations for reform (by replacement) of the 1950 Act.

THE PURPOSES OF LIMITATIONS STATUTES

101 the traditional reasons for having statutes of limitation were described in the pioneering Wright report (1936) as follows:

The Act of 1623 and its successors were, no doubt, passed in order to give more precise effect to the presumption, already made by law, that, after a long lapse of time, debts had been paid and rights satisfied... The reasons both for the presumption of law and the statutes may be said to be two fold. In the first place it is desirable that there should be an end to litigation, and that people should not be exposed to the risk of ``stale demands'', of which they may be quite ignorant and - owing to changing circumstances- unable to satisfy. Secondly, it may have become impossible, or very difficult, owing to the loss of receipts, or other documents, or the death of witnesses, for the defendant to prove his case. [para 5]

102 A quarter of a century later, the 1962 report of the (Edmund Davies) U.K. Committee on limitations in personal injury actions provided a much cited threefold explanation:

We have constantly borne in mind what we conceive to be the accepted function of the law of limitations. In the first place, it is intended to protect defendants from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even where they are still available, may well have no accurate recollection. Secondly, we apprehend that the law of limitation is designed to encourage claimants not to go to sleep on their rights, but to institute proceedings as soon as it is reasonably possible for them to do so... thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he may treat as being finally closed an incident which might have led to a claim against him. [para. 17]

103 Some additional points were made in the following passages from the comprehensive Ontario Law Reform Commission report (1969),which have also been widely cited since their publication:

Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die; documents maybe lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of limitation in any dispute. A statute of limitation is sometimes referred to as an `Act of peace'.

There is an obvious but very significant point which must be borne in mind in considering the problem of limitations. The right to bring an action in the courts is not the equivalent of having a good cause of action. A plaintiff may or may not be successful in his lawsuit...

Apart from the protection they give to potential defendants, limitation statues enable the courts to function more effectively by ensuring that litigation is not started so long after the event that there are likely to be evidential difficulties. In addition, the commercial world is able to carry on more smoothly. The limitation statutes encourage early settlements so that the disrupting effect of unsettled claims on commercial intercourse is minimized. [pp. 9-10]

104 Although most cases are brought reasonably promptly, as is shown by our survey of High Court registries (Appendix D to our discussion paper) as well as anecdotal evidence, some are launched only at the very end of the present six year limitation period and because of it. The following paragraph from a recent High Court decision (Richardson McCabe & Co. Ltd v. S Ivory Ltd Greig J, Wellington, CP46/86; unreported judgement of 8 December 1987), where the defendant failed in an attempt to have the proceedings struck out as an abuse of the court's process, is illustrative:

The basis for this [application] is that the fire, the event on which the action is founded,occurred on 28 February 1980, some 5 years and 362 days before the proceedings were issued. In the meantime the plaintiff and its insurers had treated the events of the fire and the claims that then arose and were settled as fully disposed of and closed. Furthermore, two of the principal witnesses, employees of the defendant, who were knowledgeable as to the arrangements made about the security of goods in the defendant's possession and as to the causes of the fire, are now deceased. Further employees who were knowledgeable and were involved in the day to day activities of the defendant at the time of the fire are no longer in their employment; are scattered throughout New Zealand and beyond and may be difficult if not impossible to consult or to all as witnesses. Even the fire officer who was principally involved in the investigation of the fire and the insurance assessor involved in the insurance claim are no longer in their respective employment and at this stage will necessarily have a hazier recollection of the events and their opinions than they would nearer to the time.

105 The decline in the quality of evidence at time passes inevitably affects the ability of the judicial system to produce a proper resolution of a dispute, a point well made in the Alberta ILRR paper (1986), at para 2.198:

The judicial system must, insofar as possible, ensure that the adjudicative process secures justice for claimants and defendants. By the time that ten years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial

decision. At this point adjudication will be likely result in a judicial remedy for a claimant with a spurious claim as one with a meritorious claim. Adjudication under these circumstances can only detract from the credibility of the judicial system, and undermine its effectiveness. The judicial system is a human system, and we think it is counterproductive for a society to require it to attempt to do what it cannot do properly.

106 The Alberta paper went on to argue that questions of law as well as those of fact are affected by the passage of time:

It is often very difficult for a judge of a current generation to weight the reasonableness of conduct which occurred many years ago as a judge of an earlier generation would have weighted it.

This question of contemporary standards is most important and most difficult in areas where social or professional standards have changed - often quite quickly - or where the courts have developed the law, as discussed in relation to latent damage in the previous chapter.

107 The submission of the Interprofessional Committee on Liability (representing architects, engineers, surveyors and valuers) made the point this way:

Our professions are working in areas where rising public expectations have lifted standards of performance and where there is evolving technology. It is difficult, to say the least, for expert witnesses to put aside knowledge of present standards and available technology when giving evidence which may be used to judge the performance, at some distant past date, of a fellow professional. [para. 61(e)]

THE INSURANCE FACTOR

108 Our enquiries into matters of insurance in the limitations context have confirmed our initial view that an open-ended system with long ``tails'' of liability would impact adversely on the availability and cost of insurance. We have been particularly assisted by the general discussion in a recent article by George L Priest, Professor of Law and Economics in the Yale Law School (``The Current Insurance Crises and Modern Tort Law'' (1987) 96 Yale Law Journal 1521), and the local data supplied by the Interprofessional Committee on Liability (discussed further in Chapter X).

109 As mentioned in our discussion paper, judicial extensions of liability in tort have occurred in New Zealand, elsewhere, with the courts taking into account whether insurance is available when allocated the loss:

In so far as an action in negligence may be viewed in social terms as a loss allocation mechanism there is much force in the argument that the costs of carelessness on the part of the solicitor causing foreseeable loss to innocent third parties should in such a case be borne by the professionals concerned for whom it is a business risk against which they can protect themselves by professional negligence insurance and so spread the risk, rather than be borne by the hapless individual third party. (Gartside v. Sheffield Young & Ellis [1983] NZLR 37, at 51 per Richardson J)

110 That premise was criticised in submissions made to us. the Interprofessional Committee on Liability's submission, para 12, reads in part:

The inference in the judgement quoted is that the defendant, together with his insurances, is a source of wealth from which to compensate the poor third party. It creates the impression to the lay reader, which we believe may include almost all of our legislators, that there are in place insurances which

are intended to protect `the hapless individual...' who has been damaged in circumstances where there is a professional available (among other possible targets) for that individual to sue.

We find that the reality is different. Professional indemnity insurance is intended to protect the professional, not to be the source, the `deep pocket', from which the uninsured third party is to be restored to his former position. The Court should not presume that insurance is available for any case of negligence brought before it. Professional liability insurance is written on a `claims made' basis, on an annual basis and for a finite amount. The continued availability of such insurance is by no means certain in a volatile world market threatened with `liability crises'. In the United Kingdom two years ago some architects were compelled to pay 12% of gross income for indemnity cover while others were unable to purchase any insurance. As a result of these factors, when a claim is made, particularly in respect of latent damage, professional indemnity insurance previously arranged may not exist (and contractors all risks insurance is unlikely to exist) so that insurance will not be available to meet the plaintiff's losses.

THE REPEAL OPTION

111 The suggestion that there be no limitation period was put to the English Law Reform Committee by the TUC (the umbrella organisation for British trade unions), and discussed in the Committee's 1974 report. Although that discussion relates to personal injury claims, we think much of it applicable in th wider context, and worthy of reproduction here:

26. The TUC;s argument is simple. While we have a system which makes an injured person's right to recover damages depend on his ability to prove facts which show fault on the part of the defendant resulting in damage suffered by him, it is as much to the plaintiff's as to the defendant's advantage (and usually more so) to institute proceedings quickly while the evidence is still fresh and the witnesses can recall what happened. If, the TUC argue, the plaintiff is unreasonably dilatory in getting proceedings on their feet, not only will he have been kept out of his money for longer if he eventually succeeds, but his chances of discharging the burden of proof which the law casts upon him will be reduced. There is, therefore, no need to give the defendant the additional protection afforded by the law of limitation. Moreover, in those cases where the plaintiff could not reasonably have instituted proceedings earlier than he in fact did (because, for example, he is the victim of an insidious disease), then any limitation period is likely to produce arbitrary and unjust results.

27. this is a formidable argument, but there are also formidable arguments on the other side: -

(1) first, and perhaps foremost, most personal injury claims depend on the proof by the testimony of eye-witnesses of fairly simple facts, running-down actions being obvious examples.If a claim could be freely brought after the lapse of an undefined period of years, then the evidence on neither side would be likely to be reliable and injustice might be done;

(2) in spite of the fact that it is normally in the interest of a plaintiff who has a strong case to start proceedings promptly, all experience shows that claimants do not start proceedings promptly unless there is a sanction for failing to do so. We have no doubt that in many cases it is consciousness that time is running against the plaintiff which makes him, and his legal advisers, press on with his claim without undue delay. We think it is in the public interest that meritorious claims should, where this is practicable, be settled at an early date and, if they cannot be settled, should come on for trial while the evidence is still fresh. If the sanction of limitation were removed, the incentive to `get on with it' would be very much weaker;

(3) in the great majority of personal injury claims, the plaintiff's ability to recover the damages due to him depends in the last resort on the defendant's being insured. The evidence we have received from insurance interests is to the effect that open-ended liability might make some risks uninsurable and this would be to the interest of nobody;

(4) a stale claim, even if hopeless, has a considerable nuisance value; there is a real need to protect potential defendants against such actions.

28. Our conclusion on this question is that, while the arguments in favour of doing away with limitation in personal injury claims must be taken seriously, they are outweighed by the considerations we have referred to above.

112 We agree but would add that, although there is some degree of arbitrariness in any statutory limitation period, the main problem - the scope for claimants to be deprived of a remedy where they are unaware time is running against them - would be virtually eliminated if the statute were to provide (as we recommend) that the standard limitation period may be extended where a person lacks knowledge of material facts.

THE MAORI DIMENSION

113 It is also convenient to mention here one argument against a general statute which raises the question of te a Maori (the Maori dimension). We summarised this argument in our discussion discussion paper (at para. 62(e)) as follows:

...in the New Zealand context the idea of prohibiting old claims being brought to court may be a European approach, not necessarily shared by those in the Maori community.

114 Our attempts to solicit specific responses on this point have not been especially fruitful. We have been advised that an early and irrevocable solution to disputes is not necessarily the Maori way, and that Maori would favour an unhurried and in part negotiated or evolving solution if such is achievable. We have further been advised of the particular affinity of Maori for traditional lands. And we understand that the bringing of disputes of a civil nature to court is uncommon in the Maori community, except claims in the Maori Land Courts. However, we believe that the absence of Maori claimants from the ordinary civil courts is a cultural and socio-economic matter, and not a situation brought about by time limits on the bringing of proceedings. Accordingly, and given our recommendations on matters affecting Maori land, we believe that our proposals would be as beneficial for Maori litigants as for others.

115 We should also add that our review of the Limitation Act 1950 is clearly not a proper or convenient vehicle for determining the issue of whether grievances based on the Treaty of Waitangi should be litigated in the ordinary courts. The Treaty of Waitangi Act 1975 is a specific statute dealing with these grievances but refraining from either giving jurisdiction to the ordinary courts or making the Waitangi Tribunal's findings binding. A simple repeal of the
1950 Act would not revive any jurisdiction for litigating such grievances, and any such revival must be considered in the context of changes to the 1975 Act.

THE STATUS QUO OPTION

116 Having concluded that New Zealand should have a general statute of limitations, for all the reasons mentioned above, we now turn to another

fundamental question: Why change? In other words, can the 1950 Act be retained more or less in its present form? We think not. the 1950 Act has many deficiencies in substance and drafting and should be replaced. We summarise our reasons below.

117 In the first place, the 1950 Act is essentially based on the work of the Wright Committee more than half a century ago. That work was valuable but modest in scope and has been superseded by more detailed and more imaginative work by other studies, not least those in various Canadian law reform agencies. The Wright Committee worked in another country and, perhaps more importantly, another area, not against a legal background which includes (as our does) a system of registered land titles, no-fault compensation for accidental injury, a degree of uncertainty in common law rules, and a wide scale conferring of judicial discretion through statutes.

118 Secondly, the passage of time has been accompanied by an increase in the rate of change within our society and in the pace and volume of our commercial life. In an increasingly complex world, more people are engaged in more transactions and these are undertaken more rapidly than half a century ago. Innovations in transport and telecommunications and office equipment make it possible for most things - including litigation - to be undertaken with greater dispatch than in an earlier era. We believe these matters weigh in favour of rather shorter standard limitation periods than are contained in the 1950 Act, and elaborate on this in the next chapter.

119 Thirdly, the 1950 Act is incomplete, misleading and somewhat inaccessible in its structure and drafting. It is incomplete, for example, in failing to identify how the running of a limitation is brought to an end; one must look outside the Act to find that this is achieved by filing originating proceedings with a court. It is misleading insofar as it is phrased in terms of ``No action shall be brought'' - an absolute prohibition - when what the Act actually provides is a defence to judgement which a defendant may or may not plead.And it is inaccessible in that, for example, it is phrased in terms of ``the date on which the right of action accrued'' which can mean little to those without legal training.

120 Fourthly, the present Act permits the difficulties in relation to latent defects as outlined in the previous chapter to continue. In this it creates great uncertainty and, if the Pirelli approach ultimately prevails, results that are ``unreasonable and contrary to principle''. On the other hand, if the Canadian Kamloops approach prevails here, liability in negligence is potentially unlimited in time in latent damage situations.

PRINCIPLES FOR A NEW STATUTE

121 Having concluded that new legislation in this field is necessary, we record our broad concurrence with the general principles for a new limitations statute set out in the Alberta ILRR paper at para. 1.51:

(1) Fairness. The Act should strike as fair a balance between the interests of claimants and defendants as is possible.

(2) Comprehensiveness. The primary element in the Alberta limitations system should be an Act which includes, in so far as feasible, all limitation provisions in force in Alberta.

(3) Comprehensibility. The Act should be as comprehensible as possible for all persons, laymen and lawyers, who will be affected by it.

(4) Unambiguous. Each provision of the Act should, in so far as possible, express its purpose, scope and method of operation clearly.

(5) Organisation. The provisions of the Act should be organised in a logical sequence in order to enhance their clarity and to eliminate redundancy.

(6) Plain language. The Act should be drafted in contemporary plain language.

(7) Simple. The Act should contain provisions expressing fundamental principles designed to be applicable in most cases, and it should not be burdened with technical solutions for rare cases.

122 The draft of a Limitations Bill attached to the Alberta ILRR paper is reproduced as Appendix G to this report as an illustration of a modern organisation of limitation rules as well as a concise statement of the recommendations contained in the paper.

THE JUDICIAL DISCRETION OPTION

123 In our discussion paper, we asked: If it is accepted that there must be change from the 1950 Act, should a new Act continue to emphasise fixed and certain rules, or should three be a general judicial discretion to deal with cases where fixed rules may act unfairly?

124 At para. 73 of that paper, we noted that the case against a judicial discretion in a statutory limitation regime was stated (and accepted) in the Wright Report (1936):

The exercise of such a discretion would no doubt present difficult problems to the court, and it is not easy to foresee how it would operate. In so far as it came to be exercised along will-defined principles, its chief merit - flexibility - would tend to disappear. On the other hand, if it remained more or less impossible to predict from one case to another how the discretion of the court was going to be exercised, the fundamental benefit conferred by statutes of limitation, namely the elimination of uncertainty, would be prejudiced, (para. 7, p. 11)

125 There was a near unanimity of responses in favour of that view. The N.Z. Law Society submission stated that -

The tentative view expressed in the paper that a broad judicial discretion should not be a feature of a new Limitation Act is strongly supported. This is one area of law where certainty should prevail for the reasons contained in the Wright report and set out in para. 73 of the paper.

126 We have confirmed our initial opinion that a broad judicial discretion should not form the basis of new legislation. The discretion option could permit a very short and simply worded statute, but we are satisfied that it would largely undermine the search for certainty and repose which underlies all statutes of limitation. We have taken particular note of the Scarman Report (1984) reasoning and conclusion against discretion in relation to latent damage, of the Alberta ILRR paper (1986) endorsement of that view in a wider context, and of the passing from New Zealand of personal injury limitation - which creates hard cases and has encouraged proposals for wide discretions to deal with these (most recently in the N.S.W. Law Reform Committee's 1986 report) - with the comprehensive Accident Compensation scheme. On the other hand, we accept that some specific areas of law may be best covered by a short limitation period perhaps subject to discretionary extension; we return to those in Chapter XIII.

127 Overall, we have no doubt that the balance between claimant and defendant can be more justly and rationally fixed than in the 1950 Act, and that a new balance can be more explicitly and accessibly drafted. The central features of

the revised balance we recommend are outlined in the next chapter and elaborated in the balance of this report.

VI

A Shorter Standard Limitation Period

128 Given the difficulties encountered with the present law (discussed in Chapter IV), and the several purposes of a statute of limitations (outlined in Chapter V), the new balance we seek as between claimants and defendants is complex and not able to be stated in a single rule. In broad terms, we recommend a new limitations regime of fairly general application (matters excluded are considered in Chapters XI to XIII) with three central features not found in the 1950 Act:

(a) A standard three year limitation period commencing on the date of the act or omission which is the subject of the claim.

(b) This period to be extended in certain circumstances in particular where the claimant shows absence of knowledge of relevant matters of fact (such as the occurrence of an act or of damage).

(c) A ``long stop'' limitation period of 15 years measured from the date of the act or omission and (subject to situations of deliberate concealment, infancy and conversion or fraud by trustees, discussed in Chapter X) overriding postponements or extensions of the standard period.

129 We believe that those features together go as far as is possible to satisfy the principles of fairness to claimants, protection of defendants, and avoidance of uncertainty, identified by the Scarman Committee (see para. 95). The standard period is considered in some detail in this chapter. The ``knowledge'' or ``discoverability'' extension is considered, along with other grounds for postponement or extension, in Chapters VII to IX, while the long stop period and exceptions are considered in Chapter X.

PRELIMINARY

130 The responses to our discussion paper indicate that the proposal perceived to be most contentious is that for a ``standard limitation period'' of three years. At present the ``standard'' period is six years (see s.4 of the 1950 Act), although that is measured from the date of accrual of the cause of action (generally, from the date of breach of a contract,or damage for most torts), while our proposal includes an effective postponement of any limitation period until damage is discoverable. Nevertheless, the proposal does mean that in ordinary cases (where the ``wrong'', the damage, and knowledge of both, are more or less simultaneous) the period within which proceedings must be commenced would be halved.

131 As mentioned earlier the reasoning underlying our proposal for a reduced standard period owes much to the Alberta ILRR paper, but rather than that paper's proposal for two yeas from discoverability (and a 10 year long stop) the periods we propose correspond with the 1986 English Act provisions for three years from discoverability, together with a 15 year long stop. However, that Act is limited in scope, and the discoverability plus three year period comes into play only where an original six year period, measured from accrual, has expired.

132 Any limitation period may be perceived as arbitrary, and there is no logically correct choice. However, as a matter of judgement, we favour a reduction of the standard period to three years for reasons which may be

summarised as -

(a) the discovery extension permits a short standard period;

(b) six years is simply too long; and

(c) international trends indicate the desirability of a shorter standard period -

and are elaborated in the balance of this chapter.

THE SIX YEAR PERIOD

133 The six year period for limitation of personal actions first appears in the English statute of 1623 in relation to actions upon the case (other than slander), actions for account, and actions for trespass, debt, detinue, and replevin for goods or cattle. A four year period was provided for actions for assault, battery, wounding, or imprisonment; and a two year period for slander.

134 The Wright Committee report (1936) recommended standardisation of most personal actions at six years - ``the period which at present applies to the majority of such actions and is familiar to the general public'' (para. 5). That recommendation made its way into the 1939 English Act, the model for the 1950 N.Z. Act.

135 A relatively recent and detailed (but still not extensive) argument given for the six year period is in the U.K. Law Reform (Orr) Committee report (1977):

2.50 There is, inevitably, an arbitrary element in the selection of any limitation period and there is no magic about a six-year period which makes it inherently preferable to any other period. The question we have had to consider is whether - on assumption that, as we recommend, time should normally start running from the accrual of the plaintiff's cause of action - some other, equally arbitrary, period should be substituted for the six years prescribed by the Limitation Act 1939.

2.51 There was virtually no support from those whom we consulted for a general limitation period longer than six years. Indeed, most of those who expressed views on the subject were of the opinion that for most transactions (particularly
in the field of commerce) six years constitute an unnecessarily long period. It was accordingly suggested by some that a period of four or five years should be adopted, on the ground that in practice such a period gives ample time for a potential plaintiff to obtain legal advice and institute proceedings. Moreover, a five-year period for contract and tort has now, in effect, been accepted by Scots law and a shorter period has a measure of international support.

2.52 We agree that for most claims the six year period is usually unnecessarily long and we do not think that the substitution of a five-year period would cause any hardship. (Adoption of a substantially shorter period might, however, cause difficulty unless English law were to abandon, as the normal terminus quo, accrual of the plaintiff's cause of action). On the other hand, we have received no evidence to suggest that the six-year period causes any difficulty and we do not think that it would be right to change a rule which has become familiar to the general public as well as to the legal profession unless it can be shown that there would be a substantial advantage in doing so.

136 Our work in this area leads us to doubt that ``the general public'' has much familiarity with the 1950 At, and that much of it is unfamiliar to many of

the legal professions.

SHORTER PERIODS: PERSONAL INJURY

137 Although the 1939 English Act provided a general six year period of contract and tort actions, the question of a separate (and generally shorter) period for personal injury actions has received much attention from law reform agencies, and has resulted in a shift from accrual to discoverability as the commencement point in some jurisdictions. Developments in this area have generally been contemporaneous with or followed removal of special protections given to public authorities under earlier legislation.

138 Thus, the Monckton Committee report (1946) recommended that personal injury action should be subject to a three year limitation period. The Tucker Committee report (1949) endorsed a six year period for contract cases (``It is well known to the public, and the evidence produced before us by those engaged in commerce and banking, in spite of some suggestions to the contrary made to us from there quarters, satisfies us that no change is required'': para. 20) and saw a general advantage in uniformity between tort and contract, but recommended a standard two year limit for personal injury actions, ``having regard to the desirability of such actions being brought to trial quickly whilst evidence is fresh in the minds of the parties and witnesses'' (para. 22). The Tucker Committee also recommend a judicial discretion to permit actions outside the two year period but subject to an overall six year limit. The Monckton recommendations found their way into English legislation, while the Tucker recommendations were echoed in New Zealand legislation (see s.4(7) of the 1950 N.Z. Act).

139 The decision in Cartledge v. Jopling (see Chapter IV) was considered by the Edmund Davies Committee (1962) which recommended that a personal injury plaintiff should be able to bring a claim within 12 months of the ``date of knowledge'' (that is, the earliest date on which the existence and cause of the injury could reasonably have been discovered). This recommendation was enacted in England in 1963.

140 The Scottish Law Commission report (1970) considered that the 12 month period permitted after the date of knowledge was too short. It could see no logical distinction between cases where knowledge of damage was simultaneous with the accident and cases where knowledge was delayed, and recommended that there be three years from the date of knowledge in all cases. The English Law Commission's report (1970) effectively endorsed the SLC reasoning and conclusion on this point and the 1971 English Act settled on the three year period.

141 The New South Wales Law Reform Commission report (1975) also recommended a reduction from six years to three years (plus one more year, with leave) for personal injury claims. It observed that ``the continuance for over three centuries of a six year limitation period should not, of itself, recommend its retention if it has become unpractical, inconvenient or unsuited to modern conditions'' (para. 138). The report also records the N.S.W. LRC's opinion that ``most tort actions are stale after the lapse of three years from the accrual'' (para. 145).

142 The N.S.W. Law Reform Commission's most recent report on this topic (1986) again recommended a three year limitation period for personal injury claims, but with a discretion for the court to extend that period.

A SHORTER PERIOD: OTHER DEVELOPMENTS

143 In Scotland a five year limitation period was enacted following the Scottish Law Commission's report (1970), which stated that most respondents had concurred with the suggestion of five years in a discussion paper, and that:

In England the period is six years, but we are aware that suggestions have been made that that period is now unduly long. In the case of commercial contracts the period of six years is out of line with much shorter periods prescribed by certain Continental systems, and the possibility of participation in the Common Market strengthens the case for a shorter period. (para. 68)

144 The 1974 UNICITRAL Convention of the Limitation Periods in the International Sale of Goods provides for a four year limitation period (article 8) from the date on which the claim accrues (breach for contract, delivery for defect in quality, discoverability for fraud).

145 A Commentary on Article 8 of the UNCITRAL Convention is of some interest:

1) Establishing the length of the limitation period required the reconciliation of various conflicting considerations. On the one hand, the limitation period must be adequate for the investigation of claims, negotiation for possible settlements [,and] making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration was given to the special problems resulting from the distance that often separates the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against dangers of uncertainty and injustice that would result from the extended passage of time without the resolution of disputed claims. (These dangers include the loss of evidence and the possible threat to business stability or solvency resulting from extended delays).

2) In the course of drafting this Convention, it was generally considered that limitation period within the range of three to five years would be appropriate. The limitation period of four years established in this article is a product of compromise.

146 A four year limitation period is also provided in the People's Republic of China Foreign Economic Contract Law (1985) in relation to sale of goods, the period being measured from ``the time the party knew or ought to know his rights were infringed'' (Article 39).

147 In England, a three year limitation period now applies to the commencement of
an action for libel or slander (defamation) (se s.4A of the 1980 English Act). but there is (in s.32A) a discretionary power to extend the time limit on the grounds of absence of knowledge of relevant facts, provided such action is brought within 12 months of the plaintiff becoming aware of such relevant facts. This follows a recommendation of the Faulks Committee report on defamation (1975). [NB: The N.Z. Committee on Defamation's 1977 report recommended a two year limitation period but with power for the court to extend this to six years: see p. 108.]

148 As mentioned earlier, a three year period features in the 1986 English Act which gives effect to the recommendations of the Scarman Committee report (184). At para. 4.9 of the report the Committee stated:

We have considered various possible lengths for the special limitation period and we have concluded that a period of three years from the date of knowledge ... would be the most appropriate. The ordinary period for tort cases is six years, and the fact that this is the period with which people are most familiar as a substantial, although by no means conclusive, argument for adopting a similar period for the extension of time in latent damage cases. However where the plaintiff knows, or is assumed to know, that he can take proceedings the law sometimes imposes a more stringent time limit on him. In the field of

personal injuries, for instance, it is (subject to the court's discretion) three years, and in contribution proceedings the limitation period is two years from the date on which judgement is given. The plaintiff's knowledge of significant damage is the cornerstone of our recommendations for an extended period of limitation and, although we accept that under the general law a plaintiff is entitled to a full six years in which to commence proceedings, regardless of his date of knowledge,we think it would be fairer to defendants and that it would not be unreasonable to plaintiffs, to require claimants in latent damage cases to bring the proceedings within a shorter period than six years from the date of knowledge.

149 Also in the U.K., the Consumer Protection Act 1987 (implementing an EEC directive on product liability) provides for a three year limitation period calculated from the discovery of the damage, the defect, and the identity of the person liable.

150 In the Australian context, it may be noted that the Trade Practices Act provides for a general limitation period of three years (followed in our Fair Trading Act 1986), and that a new section on unconscionable contracts has a special limitation period of two years.

151 A two year period has also become a feature of statutes of limitation in certain Canadian provinces. In 1966 Alberta extended the application of this period (already applicable to personal injury, seduction and defamation claims) to property damage actions. In 1968 amendments to the Manitoba statute made personal property claims subject to a two year limitation period and similarly with certain tortious cause of action (e.g. assault, false imprisonment, seduction) which were also subject to an extension provision in the absence of knowledge by the plaintiff.

152 In its 1969 report the Ontario Law Reform Commission also favoured a two year period for personal injury and property damage actions (whether based on tort or contract) with an extension provision covering these and also professional negligence actions. It accepted the advantages of a two year period for personal injury claims then noted the lack of sense in different limitation periods covering different actions (i.e. for personal injury and property damage) which could commonly arise from motor vehicle accidents.

153 The British Columbia LRC report (1974) accepted that ordinary contract claims should be subject to a six year limitation period, and thought that this period should also apply to torts causing damage to a plaintiff's economic interests. However, a two year period (coupled with an extension provision) was favoured for other personal claims and this was enacted in s.3(1) of the 1975 British Columbia Act (reproduced as Appendix H to this report). Similar provisions were recommended in the Newfoundland LRC's 1986 report.

THE ALBERTA REFORM PROPOSALS

154 Two years is also the period favoured in the Alberta Institute of Law Research and Reform's discussion paper (1986) but for all causes of action subject to a limitation regime, and measured from a date of knowledge. The discussion paper rejects the idea that the same limitation period is appropriate where time is measured from accrual as when it measured from discovery:

We feel that a limitation period running from discovery should usually be shorter than one running from accrual for, although enough time must be given to attempt to settle the dispute and, if necessary, to bring the claim, no time need to be allowed for discovery. (para 2.147)

155 The Alberta paper also suggested that categories of claims were probably given varying limitation periods under earlier legislation ``because it was

thought that the usual time required for discovery varied''.However -

When time begins to run with discovery ... we cans see no justification for limitation periods of differing lengths. (para. 2.148)

156 Importantly, the Alberta paper goes on to observe that the length of the post-discovery limitation period ``should depend primarily on the amount of knowledge selected to define discovery'' (para.2.149); the more knowledge required for discovery, the shorter the limitation period which will be appropriate. This paves the way for the Alberta paper's assertion that two years would provide -

... a limitation period of sufficient duration to give even a relatively unsophisticated claimant ample time in which to attempt to settle his controversy with a defendant and to bring a claim when necessary. (para. 2.154)

157 All of which leads to the Alberta paper's conclusion on this point:

We think that a two-year discovery period is quite reasonable. The discovery period will not even begin to run until the claimant knew or should have known the three basic facts which trigger its operation, and he will be given two more years to consult a lawyer, to investigate the law and facts, to conduct settlement negotiations with a defendant, and to bring an action if necessary. (para.2.181)

ARGUMENTS AGAINST CHANGE

158 Two important organisations opposed the idea of standard three year period (advanced in our discussion paper) in submissions to us. We set out their comments, and our brief responses, to assist those who wish to be as fully informed as possible on this important point.

159 The N.Z. Law Society submissions said:

The Society is opposed to any reduction in the standard limitation period from six years to three years. It is not persuaded that the six year period causes any injustice and does not believe a case has been made out of reform. The Society is influenced by the following factors:

(a) There is no evidence contained in the preliminary paper of prejudice. The Society is talking only about the time in which proceedings have to be launched. The argument that on the eve of the six year period memories have dimmed as to relevant events applies equally to cases launched without earlier warning or advice on the eve of a three year limitation period.

(b) The whole approach in the paper seems to be dictated by the fact that the old limitation period of six years was introduced at a time when the pace of life was much slower and people were less educated. In the experience of legal practitioners there is still a large number of people in our society who are ignorant of legal matters and their legal rights. It is not uncommon to find clients who seek legal advice, particularly in the areas of tortious liability, breach of fiduciary duty and breach of professional obligations, some years after the alleged wrong. A grave injustice would be suffered by such less well advantaged members of society who found they could not proceed with legal action because they were outside the three year limitation period.

(c) the imposition of a three year limitation period seems hardly consistent with ``the Maori dimension'' referred to in section 5(2)(a) of the Law Commission Act but not referred to in the paper at all.

(d) The Society wishes to stress that it supports the quicker resolution of legal disputes. It is submitted the key lies not in the shortening of the limitation period but in ensuring the Judges are given the power to control the conduct of Court proceedings and ensure their expeditious resolutions. Far grater injustices occur as a result of the delays in resolving many Court proceedings after they have been issued than in the fact that a small percentage of proceedings are launched after the expiration of three years.

160 The submissions of the Law Reform Division of the Department of Justice said:

We are not persuaded that the current standard six year limitation period should be reduced to three years (subject to appropriate extensions or suspensions and a long stop). We recommend a more cautious approach, which could perhaps reduce the period of five years. While it is correct that the speed of communications has increased since 1950, it is also fair to point out that there is more litigation of considerable complexity. Commercial litigants in particular are likely to try and reach a negotiated settlement before using the courts as a last resort. Three years may be too short to conduct intricate negotiations.

We also point out that, apart from the Ablerta paper,there appear to have been no calls for a shortened general period of limitation. We are not aware of any complaints (either locally or overseas) that a six year limitation period is toto long and gives rise to ``state claims''.

We are also strongly of the opinion that current shorter limitation periods should not be increased to bring them into line with a standard period. This matter is dealt with in more detail in our response to Question K.

161 As to the Law Society's submission points, we would comment as follows:

(a) No evidence of prejudice - the point is that stale claims are (quite properly) presumed to be prejudicial to defendants as the risk of memories fading, records being lost, witnesses becoming unavailable, and joint tortfeasors becoming defunct, grows with the passage of time.

(b) Unsophisticated claimants - the argument applies to any limitation period and involves a policy choice, but the discoverability extension we suggest minimises the risk.

(c) The Maori dimension - this point can be dealt with on several levels -

(i) if the argument is that Maori are culturally disinclined to litigate disputes (or are disproportionately located in socio-economic state that do not consider this as an option) then a longer limitation period will make no difference;

(ii) if the argument is that Maori culture would require longer efforts to settle a grievance, then that may be acknowledged in choosing three or four (rather than one or two) years from the date of knowledge as the relevant period;

(iii) other of our recommendations will mean that Maori land will be free from any risk of extinction of title (see para 354), and proceedings in the Maori Land Court free from defences under the 1950 Act (see para. 317).

(d) Greater control of proceedings after commencement - we agree, but the present disincentive to move to strike out for want of prosecution before six years has passed is very relevant (see also para. 165, below).

162 More generally, in contending for discovery-plus-six years as a standard

formula, the Law Society submission appears to give no weight to the absence of a discovery time factor, and would provide no statutory incentive to issue proceedings before a dispute becomes stale.

163 Our responses to the Justice Department submission's three points are:

(a) Complex commercial disputes - we do not think that the argument that three years may be ``too short to conduct intricate negotiations'' is valid in the commercial context; it is delay of that order which justified the introduction of the High Court Commercial List an still discourages commercial parties from litigating (as opposed to writing off) disputes; and in rare cases where it is possible to negotiate for that length of time the commencement of proceedings (or agreement not to take a limitation defence) will not preclude continuation.

(b) No calls for shorter periods - this appears to be a variation on the ``if it ain't broke, don't fix it'' theme, but overlooks the need for ``fixing'' of present uncertainties in the latent damage area, our statutory obligation to clarify the law, and the different responses in other submissions on our discussion paper.

(c) No increase of special short periods - this depends on whether there are discernible policy justifications for separate treatment of such causes of action, and is considered in Chapter XIII.

THE LAW COMMISSION'S APPROACH

164 The precise length of a standard period is a matter on which uniformity is unlikely. We think it should and can be at least half of the present six-year period, and note recent remarks by Mr Justice Eichelbaum to the 24th Australian Legal Convention (Perth, September 1987):

How often, is a criminal case tried six months after the event, have we hears a witness explain his failure to recall detail with `it was so long ago?' - and reacted with the inward thought that progress has been lightning quick compared with a civil action coming on for what we regard as expeditious hearing, say eighteen months after issue, which in turn might have been a year following the relevant happenings.

... The next suggestion will be regarded as optimistic, to say the least,but we should, by rights, adjust our thinking in terms that six months is far too long to decide the fate of serious (or any) criminal charges and that eighteen months must be seen as an absolute and exceptional maximum for mundane civil litigation; while delays of three years or more, not, I regret, uncommon in our country, are simply outrageous.

Although those remarks are directed to the passage of time after commencement of proceedings, their thrust relates to delay between the time of the events in question and adjudication of the dispute. The same considerations are applicable to limitation periods.

165 Similarly we have noted that the non-expiry of a limitation period is a powerful factor against the success of an application to strike out an already filed claim for want of prosecution: see McGechan on Procedure, para. 187.04(4A), citing in particular Roe v. Cullinane Turbull [1985] 1 NZLR 33; on the other hand, see K U McKay Solicitors Nominee Co. v Bennett (Jeffires J, High Court, Napier, A27/82, unreported judgement of 9 June 1986).

166 Overall, we believe the arguments in favour of a short standard period advanced in the Alberta ILRR paper are cogent and applicable in New Zealand, but, bearing in mind that our proposals involve some element of restriction on unhurried access to the courts, have concluded that the balance we seek can

be as well achieved with a three year period, and we so recommend.

RELATED MATTERS

167 A limitation period must be placed on context, and the paragraphs following indicate our conclusions on such questions as when the period commences and ends, and what consequences it produces. In considering these questions, we have kept in mind the inadequacies of the 1950 Act, the emphasis on clarity in the Law Commission Act 9185, and the principles formulated in the Alberta ILRR paper (see Chapter V).

168 Because there is inevitably uncertainty (and discretion) in nay ``date of knowledge'' formula, we would depart from the Alberta proposals and provide for the defendant's act or omission (on which a claim is based) to be the standard commencement date: it is relatively easily and objectively fixed, within the knowledge of the party who must plead it, and will apply in the vast majority of cases. Absence of knowledge would be a basis for extension of the standard period - the onus being on the claimant who asserts matters obviously not likely to be within the defendant's knowledge. This is considered in detail in the next chapter.

169 In most cases the date of the ``act or omission'' will be clear. It refers to that conduct of the defendant of which the claimant complains. In relation to a contract, it will usually be the date of breach and thus correspond with the present rule as to the date of accrual. In other cases, the act or omission may be an earlier date than accrual - in negligence, for example, where a delay in the occurrence of damage would relate to our proposed extension provisions rather than the date of accrual. In some categories of cases, such as those where questions of status are involved, there may be no relevant act or omission and no limitation point will arise.

170 Some difficulties will continue to arise with continuing acts or omissions. In most cases a series of acts (copyright infringements, for example) will be severable with a separate limitation period applying to each. In some limited situations the courts may regard an omission as being of a continuing nature (as in Midland Bank Trust Co. Ltd v. Hett, Stubbs & Kemp [1979] Ch 384, which related to solicitors' failure to register documents on behalf of a client), although in similar situations the omission is more often treated as crystallising at the date when some action should have been taken (or a reasonable time after that date) and that is more consistent with our approach to limitations policy generally.

171 As may be seen most clearly in the draft new statute we recommend (set out in Chapter XV), we have provided special provisions dealing with claims based on demands, conversion, contribution, indemnity and certain intellectual property claims. We considered whether special provisions were needed for cases relating to testamentary claims but concluded that they were not. In some cases act or omission will be the granting of probate or letters of administration, and in others the claims will be made under statutes which (we recommend in Chapter XIII) will retain their own limitation provisions.

172 Rather than the somewhat fictional prohibition (``No action shall be brought...'') found in the 1950 Act, we recommend that the new statute be phrased in terms of the creation of a positive limitation defence. This would continue but clarify the present situation whereby a defendant may choose to defend a claim on the merits and not take the limitation point. Obviously, the onus of proof of the exipry of the three years would rest on the party who seeks to rely on it: the defendant. It is also very relevant to the final question raised in our discussion paper, that of nomenclature: should a new statute also be known as the ``Limitation Act''? Does that have any, or an accurate, meaning for those outside the legal profession? Or should there be a new, more informative, but also more cumbersome title, such as ``the Civil Proceedings

(Time Limit for Commencement) Act''? Neither the submissions, or our internal discussions, have generated a perfect title, but we have concluded that the new statute would be accurately and concisely described as the ``Limitation Defences Act'', and we so recommended.

173 The proposal to have a positive statutory defence, rather than a prohibition,
and to provide for extensions in certain circumstances (see Chapter VII to IX), seem to us to lead quite clearly to the conclusion that the new statute should not seek to extinguish rights after the expiry of the standard limitation period. The 1969 N.S.W. Act provides for such an extinction of rights, but only in relation to a 30 year long stop period. There is scope for extended argument on the right/remedy options, and on the implications for the principles relating to conflicts between the laws in various jurisdictions. We do not propose to review such arguments in this report, and merely refer those with a particular interest in this area to the relevant part of the 1967 N.S.W. report and the 1986 Alberta paper.

174 Finally, there is the question of what action is required of a claimant to stop time running for the purposes of limitation defence. At present, the position is that time stops running when a statement of claim or other formal document containing a claim is filed or lodged with the court, and it is possible (although unusual) for there to be a delay of many months before it is actually served on the defendant. We believe that the essence of the limitation regime is to bring the claim to the attention of the defendant at an early date, and accordingly recommend that the limitation period should be considered in terms of measurement back from the date of service. This is the position in Scotland and has very recently been recommended in England (see Report of the Review Body in Civil Justice, Cm 394, June 1988, p 397). In cases where there is some difficulty in effecting prompt service, we believe the matter should be dealt with by a prompt application to the court for directions on how to proceed to attempt such service (for example, by way of newspaper advertisement). In relation to arbitrations the same principle is provided for in the 1950 Act (s.29(3)) and should continue to apply.

175 To summarise: We recommend that a new statute provide that it be a defence to any claim if the defendant proves that the act or omission on which the claim is founded preceded the service of the claim to the defendant by more than three years. The defence would apply to the relevant part of a claim relating to a sequence of series of acts or omissions - as, for example, in relation to infringement of intellectual property rights over some period of time.

VII

Extension of the standard Period - Absence of Knowledge

176 The potential for harshness which is inherent in any fixed
limitation period has traditionally been reduced by provisions for extension or postponement of such periods. Thus in the 1623 English Act a potential plaintiff who was -

> ... with the Ave of One and twenty years, Feme Covert [a married woman], non-compos mentis [mentally disabled], imprisoned, or beyond the Seas

was permitted to continue an action relating to land within 10 years of the termination of any of those states,even though the standard 20 year limitation period had expired.

177 The 1950 N.Z. Act provides for extensions in the following circumstances:

(a) where the person bringing the claim is an infant;

(b) where that person is of unsound mind or detained under the Mental Health Act 1969;

(c) where there has been an acknowledgement or part payment of the claim by the defendant;

(d) where the plaintiff was unable to discover the claim because of fraud or mistake.

178 As indicated in our discussion paper, we consider extensions (or postponements) to be an important part of the balance to be sought in a new limitation regime, and these are considered in some detail in this and the next two chapters. We see no reason to restore the ancient and long abandoned disabilities of feme covert, imprisonment (except as discussed in relation to disability), or absence overseas, and these are not considered in this report.

LACK OF KNOWLEDGE

179 The 1950 N.Z. Act contains no general provision for extending limitation periods on the ground of lack of knowledge, but the principle is recognised in relation to fraud and mistake - where s.28 provides that time begins to run only when ``the plaintiff has discovered the fraud or the mistake... or could with reasonable diligence have discovered it''; and also in relation to personal injury claims - where s.4(7) permits the court to extend time from two to up to six years from accrual if the delay in commencement of proceedings ``was occasioned by mistake of fact or mistake of any matter of law... or by any other reasonable cause''.

180 We recommend a general extension of the standard three year period where a plaintiff shows absence of knowledge of certain factual matters. More precisely, we recommend that there be added to the standard three year limitation period a ``compensatory'' period representing the time passing between the date of occurrence of the act or omission on which the claim is based and the date on which the claimant gained (or reasonably should have gained) knowledge of any of the following acts:

(a) the occurrence of the act or omission;

(b) the identity of the person responsible;

(c) the act or omission has caused harm;

(d) that the harm is significant.

181 We propose that this extension involves an onus of proof on the claimant for it is based on matters unlikely to be within the knowledge of a defendant but
normally known to the claimant. thus, in a latent damage case, a defendant would be entitled to point to the passage of three years from any act or omission by them and have a defence to the claim unless the claimant shows lack of knowledge of matters referred to in para. 180, in which case the claimant has three years from knowledge in which to serve the claim.

182 This ``knowledge'' or ``discoverability'' extension was outlined in our discussion paper (at para. 126) and attracted favourable responses from all who addressed it, as well as from all those whose opinions and advice we sought. It means that cases such as Cartledge and Pirelli (see Chapter IV) would be

decided differently, although it must be kept in mind that this extension would be subject to the ultimate 15 year time limit or ``long stop'' defence which is the further major element in the balance we seek, and is discussed in some detail in Chapter X.

183 The ``absence of knowledge'' extension we propose would include situations where a plaintiff's ignorance was due to fraud or mistake, and thus the new statute we recommend contains no precise equivalent to s.28 of the 1950 Act. The impact of the extension on the rights of a third person who acquires an interest in property unaware of any claim by a claimant, dealt with in the proviso to s.28, is considered in more general terms at the end of this chapter.

``KNOWLEDGE''

184 The notion of a date of knowledge in limitations statutes appears to have commenced in Commonwealth jurisdictions at least with the Edmund Davies Report (1962), and the subsequent enactment of the 1963 English Act with provision for a personal injury claimant to have 12 months from the time that ``facts of a decisive character'' (included in or being ``the material facts relating to [the] cause of action'') ceased to be ``outside the knowledge (actual or constructive) of the plaintiff'': s.3(3).

185 The concept of knowledge is not simple. It has two broad aspects - what matters have to be known and what type of knowledge is sufficient. Indeed, our Court of Appeal has relatively recently approved a five-fold categorisation of knowledge in the context of constructive trusts:

(1) actual knowledge; (2) knowledge which is obtainable but for shutting one's eyes to the obvious; (3) knowledge obtainable but for wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make; (4) knowledge of circumstances which would indicate that facts to an honest and reasonable person; and (5) knowledge obtained from enquiries which an honest and reasonable person would feel obliged to make, being put on enquiry as a result of his or her knowledge of suspicious circumstances. (Westpac Banking Corporation v. Savin [1985] 2 NZLR 41, per Richardson J at 52.)

186 Although the Alberta ILRR paper suggests that ``theoretically a claimant will not have conclusively discovered his claim until he possesses all of the knowledge that the final appellate court must have in order to grant him the remedy which he seeks'', it recognises that some lesser degree of knowledge (that which would ``prompt a reasonably diligent person to give serious consideration to bringing an action'') is appropriate for defining a date of knowledge in a limitation statute (para. 2.117).

187 That paper goes on to categorise the types of knowledge which may be relevant to a date of knowledge as follows:

(a) knowledge of the harm sustained;

(b) knowledge that the harm was attributable in some degree to conduct of another;

(c) knowledge of the identity of the person (the defendant) referred to in (b) above;

(d) knowledge that the harm (considered alone) was sufficiently serious to have justified bringing an action; and

(e) knowledge that an action against the defendant would, as a matter of law, have a reasonable prospect of success.

In the end the Alberta recommendation is that types (a) to (d), but not (e), should be required before a date of knowledge can be established.

188 The Alberta paper goes on to consider the date of knowledge in relation to -

(a) a successor owner - when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed;

(b) a principal - when the principal first acquired or ought to have acquired such knowledge, or an agent with a duty to communicate the knowledge actually acquired it, and

(c) a person representative of a deceased person - the earliest of -

(i) date of actual/constructive knowledge of the deceased if this was at least two years before death;

(ii) date of appointment of representative if known at that time; or

(iii) date of actual/constructive knowledge after appointment.

(See paras. 2.186-193.)

OVERSEAS MODELS

189 The potential for complex legislation is illustrated by the lengthy provisions made by the 1986 English Act for a date of knowledge, in a new s.14A(5) to (1)) of the 1980 English Act (reproduced in Appendix F to this report).

190 Section 3 of the Latent Damage Act goes on to deal with successor owners: in broad terms, the date of knowledge is that when some person with an interest becomes seized of the ``material facts''; neither the longer accrual-based period nor the post-discovery period are revived by successive transfers of interests in the property.

191 The s.14A formula is complex, involving the following elements:

(a) existence of a right to bring an action for damages; subs. (5);

(b) knowledge of the seriousness of the damage: subs. (7);

(c) knowledge of the connection between the damage and some act or omission (but not of legal culpability): subs. (8)(a), (9);

(d) knowledge of the identity of persons who caused (or are otherwise responsible for) the act or omission: subs. (8)(b) and (c);

(e) knowledge includes constructive knowledge, including that of experts where it is reasonable to seek such assistance: subs. (10).

192 It is doubtful if the detailed drafting has achieved a high degree of certainty. Most of the elements in s.14A are also found in s.14 (personal injury claims) and were subjected to strong criticism in an article by P J Davies in (1982) 98 Law Quarterly Review 249. Among the points made by the author, who recommended giving a very wide discretion of there courts in limitation matters, were the following:

(a) ``facts ascertainable or observable'' by the claimant would need to have

regard to health and intelligence of the claimant;

(b) some potential claimants' timidity, ignorance or poverty might deter them from obtaining ``expert'' (i.e. professional) advice - particularly from non-medical professionals;

(c) an ``expert'' opinion may fail to follow some line of inquiry that an ``able amateur'' (e.g. a trade union official) might;

(d) where the expert advice sought is that of a lawyer the proviso (as in s.14A(10), see below) means that a claimant is fixed with bad advice about matters of law but not about matters of fact (e.g. the identity of the wrongdoer);

(e) in measuring the significance of the injury, non-monetary considerations are treated as immaterial, and the statutory assumption (of liability and ability to pay damages) would mean that every claim worth more than the costs of proceeding (after scale costs have been credited) is one for ``serious'' damage'

(f) rejection of the ``worthwhile cause of action'' test means that a claimant is deemed to know the legal significance of facts, and this applies to the matter of whether the employment of a wrong-doer by another party justifies commencing commencing an action against the latter.

193 Compared with the English date of knowledge, the Scottish approach, in s.17 of the Prescription and Limitation (Scotland) Act 1973 -

(a) emphasises ``all the circumstances'' in relation to constructive knowledge;

(b) deals with employers and principals specifically instead of using a wider formula to cover any other forms of vicarious liability; and

(c) is silent on the matter of expert advice.

194 The Scottish Law Commission's 1987 consultative memorandum contains a useful discussion of aspects of knowledge, suggesting that -

(a) no specific reference to seeking the advice of experts should be made, ``reliance being placed upon the courts to decide in particular cases what knowledge can be reasonably imputed to the claimant'' (see para. 4.54);

(b) for constructive knowledge the test should be ``what it would have been reasonable for the claimant to have discovered taking into account his or her particular characteristics and circumstances'' (see para. 4.46); but

(c) in cases of disability, the claimant would have imputed to him any knowledge (actual or constructive) of any tutor, curator or curator bonis who is to protect his interests, unless the claim is against the tutor, curator or curator bonis.

195 The simplest definition of a date of knowledge appears to be that in the 1982 draft Act prepared by the Uniform Law Conference of Canada:

13(2) The beginning of the limitation period for an action is postponed until the claimant knows or, in all circumstances of the case, he ought to know -

(a) the identity of the defendant; and

(b) the facts upon which his action is founded.

196 This provision has been recommended for enactment in Ontario (1977 departmental discussion draft, cl.6(4)) and in Newfoundland (1986 Law Reform Commission report, p.7), and the essential approach is a feature of the 1987 New Brunswick Bill (cl.6(1)).

197 A similarly concise formulation is to be found in the 1936 South Australian Act which refers (in s.48(3)(b)(i) - in the context of a wide judicial discretion to extend time) to the date of ascertainment of ``facts material to the plaintiff's case.''

198 This provision has recently been considered by the High Court of Australia in Sola Optical Australia Pty Ltd v. Mills (1987) 62 AlJR 3 where it was confirmed that -

(a) a fact is ``material'' to the plaintiff's case if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to justify bringing the action, and is of sufficient important to be likely to have a bearing on the case;

(b) t is not necessary for there to be some interaction between the material fact and the plaintiff's decision to sue; and

(c) the knowledge must be that of the plaintiff personally, and it is not possible to impute knowledge of an agent to a plaintiff for the purposes of establishing a date of knowledge.

199 The Alberta ILRR paper is critical of s.13(2) of the Uniform Act, noting that
it does not address the question of the seriousness of the harm, or contain any adjective qualifying the phrase ``the facts''. The latter omission means that the discovery period cannot begin until the last fact relevant to the action has been discovered. More generally, the paper suggests that -

in operation, this definition will give the courts tremendous discretion in determining when the discovery period began for a particular claim. (para. 2.120)

200 The Alberta ILRR also criticises the South Australian provision, noting that it also gives a very wide discretion to the court in determining the date of knowledge, and suggesting that the existence of rules of law might be capable of categorisation as ``material facts''.

CONSTRUCTIVE KNOWLEDGE

201 We believe that actual knowledge is insufficient for fixing a date of knowledge: constructive knowledge must also be taken into account. As the Scarman Committee report (1984) observed:

To define knowledge solely in terms of what the plaintiff actually knows... [would] be grossly unfair to defendants,... favour dilatory claimants and... effectively hand to claimants the option of choosing when the special limitation period should start to run against them. (paras. 4.5 and 4.6)

202 The English legislation involves a high degree of complexity, not least in relation to constructive knowledge to be imputed where expert advice ought reasonably to have been sought. We prefer the view, taken in the Scottish consultative memorandum (1987), that this is a matter which can safely be left to the courts to apply the tests illustrated in Savin (see para. 180) subject only to a legislative emphasis that the enquiry is about knowledge of facts and not of law.

203 A related question is whether the test for constructive knowledge is to be objective or to have regard to the personal characteristics of the claimant in the particular case. It was suggested in the Orr report (1974) that -

... the concept of a reasonable man is not an abstraction, but involves consideration of all the circumstances of a given case and we should have thought that these will include the fact [... that most people do not have a legal or businesslike turn of mind and among other things are reluctant to visit a solicitor's office] and would also include, where it arises, the fact that a plaintiff may, as a result of an accident, have been rendered less diligent in the protection of his interests than he would otherwise have been. (para 59)

204 It is true that a departure from a purely objective test involves a grater degree of uncertainty for defendants, but an objective ``hypothetical reasonable man'' test could well work considerable injustice - undermining the essential thrust of the discoverability extension - if not able to be related to the health, intelligence and social competence of a particular claimant. Further, in a society which is becoming increasingly conscious of the distinctions between different cultural groupings, and objective test invites criticism for being based on monocultural assumptions.

205 It may be appropriate to repeat that the new limitation regime were propose in this report involves a series of balancing factors. The new three year period does not provide a complete guarantee of freedom from litigation for a potential defendant, for it is subject to the extension provisions. But it does reduce the risk of such litigation to a small number of abnormal situations. In our view, that degree of uncertainty would not be greatly aggravated by the use of subjective elements in a constructive knowledge test.

206 Thus, as indicated in our discussion paper, and in accordance with the Alberta ILRR proposals, we see advantage in a legislative statement that constructive knowledge should be considered having regard to the circumstances and particular abilities of the claimant in question.

SUBJECTS OF KNOWLEDGE

207 In considering the subjects or types of knowledge which must be considered in
fixing a date of knowledge in the limitation context, we think that a simple reference to ``relevant'' or ``material'' facts is too vague and likely to cause necessary uncertainty. On that basis, it is useful to recall the categories outlined in the Alberta ILRR paper:

(a) harm sustained;

(b) harm attributable in some degree to conduct of another;

(c) identity of that other;

(d) harm sufficiently serious of justify litigation; and

(e) that litigation would have a reasonable prospect of success.

208 In our view the first three of those categories are essential to any date of knowledge. It was the lack of knowledge of harm having been suffered which offended against common sense and led to criticism of the state of the law disclosed in both the Cartledge and Pirelli decisions of the House of Lords. Likewise, knowledge of both a connection between the loss suffered and some act or omission of another person - as opposed to some natural cause - and the identity of that person are essential if the extension provision is to have some meaning in relation to latent damage cases.

209 The last category, the prospects for success of litigation, has been dealt with differently in various jurisdictions. It is, for example, explicitly included in s.6(3) of the 1975 British Columbia Act which refers to knowledge of facts showing a reasonable man that -

(i) an action on the cause of action would, apart from the effect of the expiry of a limitation period, have a reasonable prospect of success.

210 For sometime the English Court of Appeal interpreted the language of s.7(3)(c) of the 1963 English Act to cover knowledge by a claimant that a defendant's acts or omissions amounted as a matter of law to negligence or other breach of duty; in other words, that time did not begin to run until a plaintiff knew (actually or constructively) that there was ``a worthwhile cause of action''. But the majority decision of the House of Lords in Central Asbestos Co Ltd v. Dodd [1973] AC 518 reversed that approach, in part because of doubt that the legislation was intended to erode the general rule that a person's legal rights do not depend on their having a correct understanding of the law.

211 The 1974 Orr Committee report was particularly concerned with the date of knowledge in the personal injury field in the aftermath of Dodd's case. The Committee was in no doubt that a date of knowledge required actual or constructive knowledge of both the injured condition and of its having been caused by acts or omissions of the defendant. But it rejected the ``worthwhile cause of action'' element:

The principle that ignorance of the law is no excuse is of long standing and founded on good reasons and it would, in our view, be difficult to introduce an exception to it in this instance without making similar exceptions elsewhere in the law of limitation and possibly in other fields as well. (para. 53)

212 We believe that knowledge of a ``worthwhile cause of action'' should not be part of a date of knowledge, sharing the Alberta ILRR paper's objection that -

Frequently this will be a very difficult and subjective issue for even the lawyers and judges involved in a case, and requiring a court to determine when a claimant, usually a non-lawyer, had sufficient knowledge of legal consequences of factual events will further confound the matter. (para. 2.125)

213 As to category (d) - the significance of the damage or loss - the Scarman Committee report (1984) pointed out that -

Latent damage is by definition hard detect and may in many cases be heralded by defects that a first appear to be minor and isolated. It may not be until much later than the full significance of these earlier defects becomes apparent and it might be harsh if an extended period of limitation based on discovery and discoverability started to run against the plaintiff from the moment that the first apparently trivial damage appeared. (para. 4.7)

214 We agree: and to avoid the problem described there, and also to avoid a situation where time does not begin to run until every last detailed of damage has been defined, we consider it appropriate for the statute to make reference to the degree of damage in general terms. We doubt that the English formula - the assumption of liability and ability to pay - is particularly helpful. Thus, although recognising that any question of whether damage can be described as `1`significant'' or not involves a value judgement and extends the area within which the courts will have a discretion in determining the date of knowledge, in the end we have reached the view that the new statute should be so framed. We believe that this provision would be relevant in only a very few cases, and that the courts would take a commonsense approach to unmeritorious reliance on

it by claimants.

215 The qualification of occurrence of damage by a requirement for ``significance'' is part of the reason for framing the new limitation regime in terms of a discoverability extension, rather than defining the starting point for all limitation periods in terms of knowledge. If there were a requirement for ``significant loss or damage'' then time would never commence to run in relation to insignificant loss or damage, a state of affairs which seems entirely unsatisfactory. Under our proposals, time would effectively start to run against a claim for nominal damages on the discovery of nominal damages; if the damage were later discovered to be significant, time would effectively start to run against a claim of that damage only from the date of that second discovery.

SUCCESSOR OWNERS

216 The question of a date of knowledge can be further complicated by particular circumstances, notably where there is a principal: agent relationship, where property or other rights are transferred (whether by sale or gift) from one person to another, and where one person dies and another becomes the personal representative administering their estate.

217 We believe that the principal: agent situation can be dealt with adequately by the courts applying ordinary principles relating to the existence or otherwise of constructive knowledge on the part of the principal.

218 The position of successor owners was discussed in the Pirelli case. Lord Fraser of Tullybelton (with whom the other Law Lords agreed) noted that in the earlier English Court of Appeal decision in Sparham - Souter it had been held that the earliest moment at which time could begin to run against each successive owner of the defective property was when he or she bought, or agreed to buy it. He disagreed:

If that is right,it would mean that if the property happened to be owned by several owners in quick succession, each owning it for less than six years, the date when action would be timebarred might be postponed indefinitely ... I think the true view is that the duty of the builder and of the local authority is owned to owners of the property as a class, and that if time runs against one owner,it also runs against all his successors in title. No owner in the chain can have a better claim than his predecessor in title. ([1983] 2 AC 1, 18)

219 The Scarman Committee (1984) also considered this issue:

[There is] a particular difficulty inherent in the date of knowledge approach,namely that a successor in title will not be in a position to discover that he has suffered damage until, at the earliest, the date on which he acquires the property in question. Nevertheless we share the view expressed by Lord Fraser (and his reasoning) in the Pirelli case that once time begins to run it should run not only against the plaintiff but also his successors in title and we recommend that, for the avoidance of doubt, the legislation which implements our recommendations should specifically so provide. (para. 4.21)

That recommendation was enacted in s.3 of the Latent Damage Act 1986.

220 A similar approach has been taken in the 1975 British Columbia Act where it is provided in s. 6 (running of time postponed) that -

(c) where a person claims for a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title of interest passed is that of the first-mentioned person;

(d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

221 In the Alberta ILRR paper (1986) the view favoured was that -

... the discovery period should begin when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the requisite knowledge. This rule should apply when the successor owner has acquired the claim in either a commercial or a donative transaction, and it should draw no distinction between a successor owner who holds beneficially and one who holds in trust. (para. 2.187)

222 Notwithstanding the unanimity of opinion indicated in the immediately preceding paragraphs, a number of submissions made on our discussion paper suggested a different conclusion. Such submissions emphasised the scope for a vendor to conceal a defect - for example, cosmetic disguise of a crack in a building - or for a defect to be of such a nature that it might not become apparent to a purchaser for some time - for example, proneness to flooding in only the most severe of storms. The submissions also cast doubt on the ability of a purchaser in such situations to obtain any adequate remedy from the vendor.

223 This is a difficult point, but we have concluded that fairness to a successor owner should be accorded a greater priority than is the case in the English or British Columbia legislation. The ultimate protection for a potential defendant is the 15 year long stop limitation defence we propose.If, within that period, a person acquires property or other rights without actual or constructive knowledge of some defect, they should be entitled to the full benefit of the absence of knowledge extension which we have recommended. We should also add that the number of cases directly affected by this particular issue is likely to be extremely small in practice.

224 These proposals leave room for an unscrupulous building owner to recover damages or settlement money from a builder for a defect but fail to apply the money to remedial work, then sell the property without disclosing (or perhaps concealing) the defect. The purchaser might have a claim against the builder as a successor owner without prior knowledge. We think such situations would be very unlikely to arise, and the risk could be further reduced by the courts making an order for indemnity of actual remedial work costs or the builder defendant requiring some indemnity as part of a settlement, or both.

225 Another method of avoiding such a double jeopardy (or any) risk might be the registration of a memorandum of encumbrance on the Land Transfer Act register, as illustrated in Davison Properties Ltd. v. Manakau City Council 7 NZTPA 42 where the Council's approval of a subdivision was conditional on the developer advising potential purchasers of restrictions set out in a foundation investigation report, and this was done by registration of a memorandum (with a nominal rent charge) drawing attention to the report. We stress that the problem does not arise out of a limitation provision, but hope that this and related matters will be addressed in the Building Industry Commission's current work in this area.

SUCCESSION ON DEATH

226 Different issues arise in the situation where property or other rights pass to a personal representative on the death of a deceased person. Is the personal representative entitled to the benefit of the absence of knowledge extension? Or does time continue to run against the estate? In other words, is the personal representative to be treated as a successor owner?

227 The U.K. Latent Damage Act and the 1975 British Columbia Act do not distinguish this situation from others involving successor owners. On the other hand, the Alberta ILRR paper favours the making available of the full limitation period to a personal representative (except where the deceased has had the benefit of such a period) on the basis that it cannot be assumed that personal representatives have any knowledge of the affairs of the deceased prior to assuming that position.

228 Again, we have not found this an easy point to determine, but have concluded that time should continue to run against the estate. On balance, we think the position of personal representatives is distinguishable from that of successor owners and agree with the comment in the British Columbia LRC report (1974) -

there appears to be no logical reason why the personal representatives of a person who become aware of facts which would have entitled that person to maintain an action would be placed in any worse or better position than that person would be were he still living and discovered those facts. (p.80)

229 To summarise: where proceedings are brought by personal representatives of a deceased person,

(a) if three years have passed since the deceased gained knowledge, a limitation defence will succeed (irrespective of whether the personal representatives knew of the deceased's knowledge), but

(b) if the deceased never gained knowledge, the gaining of knowledge by the personal representatives will entitle them to claim the benefit of the extension.

For further details see clause 12 of the Draft Bill (Chapter XV).

THIRD PARTIES, CONVERSION, TITLE

230 As mentioned earlier in this chapter, s.28 of the 1950 N.Z. Act protects transactions with third parties for valuable consideration against proceedings brought under the present extension available in cases of fraud or mistake.

231 The 1975 British Columbia Act provides (in s.6(6)) that the postponement of time for absence of knowledge ``does not operate to the detriment of a bona fide purchaser for value''. this reflects a recommendation in the British Columbia LRC report (1974) but the reasons for such a provision were not discussed in the body of the report.

232 We understand these provisions to reflect a more general problem in commercial law; adjustment of rights between two innocent parties - an original owner who may have lost possession of an asset by conversion or theft, and a third party purchaser in good faith of the asset. The early common law approach was to uphold the primary rights of the original owner, but it is possible to discern during the past century a legislative trend in favour of the position of the innocent purchaser (or at least the more general idea of minimising disruption to commercial transactions).

233 The same underlying problem is addressed in a slightly different context in s.5 of the 1950 Act which provides a six year limitation period - measured from the date of a first conversion - on claims for conversion or wrongful detention of goods, and extinguishes the title of the original owner at the end of that period. But this is made subject to s.26(1) of the Sale of Goods Act 1908 which in turn provides that title to stolen goods revests in an original owner when someone is convicted of theft of the goods (irrespective of whether the thief for an innocent subsequent purchaser has possession at he time of the

conviction).

234 The problems reflected in (and in meshing) ss.5 and 28 of the 1950 Act, and s.26(1) of the 1908 Act, are undoubtedly difficult. We have considered the range of possible solutions (none of them perfect) and concluded that the essential balance reflected in the 1950 Act - that the expiry of the standard limitation period results in an improvement of the position of a subsequent bona fide purchaser (and a consequent deterioration of that of the original owner) - should be retained but rationalised. More particularly, we recommend that -

(a) none of the extensions to the standard limitation period (i.e. infancy, disability, etc, as well as absence of knowledge) should operate to the detriment of a bona fide purchaser for value;

(b) s.26(1) of the Sale of Goods Act 1908 should be repealed;

(c) a claim for conversion of goods should continue to be specially defined in terms of the first conversion (or detention in the situation of bailment) for limitation purposes; and

(d) given our proposal to abolish adverse possession as a basis for extinction of title to land (see Chapter XII), and the relative nature of title to goods, the new statute should not expressly provide for extinction of title to goods.

VIII

Extension of the Standard Period - Disability, Infancy

235 As already mentioned, English (and New Zealand) limitation statutes have long contained provisions for extension of standard limitation periods where the plaintiff is an infant (under the age of majority - currently 20 years) or suffers from unsoundness of mind at the time of accrual of a cause of action. The underlying premise is an assumption that such persons are incapable of conducting their own affairs (in particular, of pursuing a claim) and that it would be unfair for time to be running towards a limitation defence while that incapacity continues.

236 IN fact, of course, many persons under the age of 20 years - such as those employed and living apart from parents or guardians - are well capable of looking after their own affairs. Similarly, there are many degrees of unsoundness of mind, and those at the least affected end of the scale may in fact be capable of conducting their own affairs. Further, there will be many situations where the interests of an infant or person of unsound mind are being preserved and promoted by a parent, guardian, or other care giver. We draw attention to these matters because a blanket assumption of incapacity may be unreal, and the present law does mean that a limitation period may be extended to a point where a claim is quite stale. On the other hand, there may be circumstances other than infancy or unsoundness of mind which impair the ability of a person to pursue a claim (e.g. physical condition) but are not (or not clearly) recognised under the present law.

237 Against that general preface, we proceed in this chapter to consider the present law on this topic and developments in other countries. We conclude with proposals for substantial revision of the present law.

LIMITATION ACT 1950

238 Section 2(2) of the 1950 N.Z. Act deems a person to be ``under a disability while he is an infant or of unsound mind''.Section 2(3) makes provision for a

conclusive presumption of unsoundness of mind where a person is detained or kept in custody (involuntarily) under any provision of the Mental Health Act 1969. Perusal of overseas law reform reports suggests that s.2(3) is designed to prevent the running of time where a person has been wrongly detained in a mental institution and, although not actually suffering from unsoundness of mind, is effectively prevented from taking proceedings.

239 Section 24 of the 1950 N.Z. Act provides that where at the time of accrual of the cause of action the plaintiff was under a disability the limitation period is measured from the time that that person either ceased to be under a disability or died, whichever comes first. The Wright Report (1936) considered but rejected the possibility of there being a suspension of the running of time during disability, i.e. where there was a supervening disability after the accrual of the cause of action. This view was enacted in the 1939 English Act and followed in the 1950 N.Z. Act.

240 Section 24 also provides that a limitation period which has already commenced to run against a right of action accruing to some person who is not under a disability continues even where the cause of action transfers to a person who is under a disability. Further, if one person with a disability succeeds (on the death of another person with a disability) to a cause of action, the only extension of time allowed is in relation to the disability of the first (deceased) person.

241 There is a ``long stop'' provision in s.24(e): a 30 year limit on extension for disability in relation to actions to recover land or money charged on land. Further, the disability extension is expressly precluded from applying to actions to recover a penalty or forfeiture except where the action is brought by an aggrieved party.

SCOTLAND

242 The 1973 Scottish Act provides (in s.6(4)(b)) that any period during which the claimant was under legal disability is not to be reckoned as part of the prescriptive period.

243 The Scottish Law Commission's 1987 consultative memorandum, which suggests a five year standard limitation period, subject to a 20 year long stop, suggests that disability should not affect either period. As to the shorter period, the Commission indicates that, as ``normally there is someone responsible in law to pursue on behalf of the legally disabled'', it had revised an earlier view and concluded that legal disability should not suspend the running of time.

NEW SOUTH WALES

244 The 1967 N.S.W. LRC report took the view that disability should be extended to cover physical impairment (e.g. a person in a coma) and also any supervening disability (subject to a 28 day minimum for any period of disability).It also recommended that the period after the termination of disability within proceedings could be brought should be three years.

245 These recommendations were included in the 1969 N.S.W. Act, s.11(3) of which defines disability to cover both infancy and a state where a claimant -

is, for a continuous period of 28 days or upwards, incapable of, or substantially impeded in the management of his affairs in relation to the cause of action..., by reason of-

(i) any disease or any impairment of his physical or mental condition;

(ii) restraint of his person, lawful or unlawful, including detention or

custody under the Mental Health Act 1958;

(iii) war or warlike operations; or

(iv) circumstances arising out of war or warlike operations.

246 Section 52 provides that the running of the limitation period is suspended for the duration of any disability and will be extended to a minimum of three years after the date of the death of the person with a disability or cessation of disability.

247 Section 52 also provides that running of time is suspended during any disability whether or not it is the same disability that has caused some other suspension of the same limitation period, but retains the provision (presently found in the 1950 N.Z. Act) that it does not operate to extend the time to bring an action to recover a penalty or forfeiture unless the plaintiff is the aggrieved party.l

248 Also of importance is s.53 of the 1969 N.S.W. Act provides a ``notice to proceed'' mechanism whereby a person against whom a cause of action lies may give to the ``curator'' of a person with an incapacity a notice to proceed and such notice has the effect of terminating the suspension of time on grounds of disability.

CANADIAN JURISDICTIONS

249 The 1969 Ontario LRC report on limitations agreed with the N.S.W. LRC on supervening disabilities, and the extension of disability to physical impairment, but did not recommend a ``notice to proceed'' provision, describing this as ``cumbersome''. The Ontario LRC also recommended that the disability extension should not apply where an infant was in the custody of a parent or a person of unsound mind's affairs were being administered by a committee or by the Public Trustee, except where the action was being brought by the person who formerly had a disability against the parent or administrating body. (See pp. 96-100).

250 The 1974 British Columbia report took a different approach. It not only endorsed but extended the N.S.W. notice to proceed scheme to cover infants as well as persons having mental or physical incapacity.

251 Thus s.7 of the 1975 B.C. Act provides that a limitation period is suspended during disability (with a minimum of one year to remain after the end of disability) and that a notice to proceed (delivered to a guardian and to the Public Trustee) has the effect of deeming the disability to cease on the date of delivery of the notice.

252 Although the 1985 Newfoundland LRC working paper expressed support for a notice to proceed provision, the Newfoundland LRC revised its position in its final report, endorsing the 1986 Supplement which incorporated two significant conclusions:

(a) the disability extension provisions should not apply where the individual with a disability had someone capable of suing on his or her behalf, except where the individual with a disability was bringing an action against the care giver; and

(b) the notice to proceed provisions would add complexity when the desired aim was simplicity and, given the revised position as to the availability of the disability extension generally, it would provide only minimal benefits.

253 The NLRC Supplement makes reference to economic matters and insurance

availability and cases doubt on the ``advisability in current social and economic circumstances, of affording extended unqualified protection to disabled individuals''. However, the NLRC proposals do not include any general long stop provision as contemplated in the Alberta paper and in our discussion paper.

THE LAW COMMISSION'S VIEW

254 In our discussion paper we suggested that infancy and unsoundness of mind should be retained as grounds for extension of the standard limitation period, but subject to the long stop provision (para. 1.41).

255 The submissions received in response to the discussion paper contained conflicting views as to whether infancy and unsoundness of mind should be retained as grounds for extension. However, some submissions made a persuasive case that it is not possible to proceed on an assumption that all (or even most) parents will diligently enforce their children's legal rights. The thrust of these submissions was that the 15 year long stop period could cause problems where the interests of infants have not been advanced (or, indeed, have been damaged) by parents or guardians. We accept the thrust these submissions and, as may be seen in Chapter X, have made consequential adjustments to the operation of the long stop period.

256 We conclude that it is not possible to make any general assumption about the position of people who are under the age of majority or who have impairment which affects their ability to conduct their own affairs. They are not necessarily incapable of conducting their own affairs, or in a position where no other person is protecting their interest. On the other hand, they are not necessarily protected by the existence of parents or guardians or other care givers.

257 In relation to infancy, we have considered ta wide range of possible changes but have concluded that there should continue to be a general presumption of incapacity but a slightly lower age limit. This is an area where the law has traditionally been protective, and it is not possible to generalise about the reasonableness or responsibility of parents' or guardians' actions to protect the interests of children and young persons (or to distinguish easily or effectively between those that may have been reasonable and those that may not). In particular, we recommend that where the act or omission occurs while the claimant is under 18 years, should have up to the age of 21 years to take a claim.

258 In relation to other forms of incapacity, we have concluded that the 1969 NSW Act provides the most appropriate model in many respects (para. 245, above). More particularly, we recommend that -

(a) incapacity extend to any impairment of a person's physical or mental condition, restraint of that person, and to wear or warlike operations and conditions; but

(b) the claimant must prove that such incapacity resulted in his or her being actually incapable of (or substantially impaired in) managing their affairs in relation to the claim for a continuous period of 28 days or more - if the claimant had someone else managing his or her affairs, this criterion might not be satisfied;

(c) where any such periods are proved, the standard limitation period should be correspondingly extended;

(d) there be no special provisions providing for a minimum period for commencing proceedings following the end of some disability - the extension

ensures three ``able'' years for such commencement and we are not persuaded that any further complexity or allowance of time can be justified;

(e) there be no ``notice to proceed'' mechanism - it would be complex, of little value to defendants, and subject to the risk that a guardian or other case giver may fail to respond (through ignorance or otherwise) to such a notice in a way which protected the interests of the person with a disability.

259 It is convenient to record here our view that the various grounds of extension may be cumulative, provided that time is not counted twice (and subject to the long stop limitation period).Thus, for example, a period of incapacity may be added to a period of absence of knowledge, but any overlap may only be counted once. Similarly, separate periods of incapacity should be added together, notwithstanding that they may arise from different cases.

260 To avoid misunderstanding in relation to incapacity by reason of lawful or unlawful detention, it may be appropriate to indicate that our proposals are not intended to provide an automatic extension of a limitation period for persons in penal institutions. The onus is to be on a claimant that the relevant circumstances actually impeded management of his or her affairs. Ordinarily, where communication with those outside the institution is possible, this would be a difficult onus to discharge; but there might be extraordinary circumstances - perhaps some form of solitary confinement - where the onus would be able to be discharged. When such an issue arises, it will have to be decided as a question of fact by the court.

261 Finally we see no reason to exclude claims for penalty or forfeiture from the scope of disability (or other extension) provisions, unlike s.24(g) of the 1950 Act, or to exclude those who succeed to a cause of action while under a disability, unlike s.24(c) and (d).

IX

Extension of the Standard Period - Agreement, Acknowledgement, Alternative Forum

262 In this third and final chapter on extensions, we consider three situations which focus on the relationship between the parties to a dispute -

(a) where the parties have agreed that the limitation defence will not be pleaded, or not until some period other than the statutory period has elapsed;

(b) where one party relies on a representation or indication by the other that a claim is not contested; and

(c) where a claim has been referred to a dispute resolution process which is ultimately found to lack jurisdiction to determine the dispute.

AGREEMENT

263 English statutes of limitation and legislation based on them, such as the 1950 N.Z. Act, have made no reference to the effect of agreement between the parties relating to the operation of a limitation period. There is a body of case law which recognises the ability of parties to a contract to stipulate that legal or arbitral proceedings may be commenced within a shorter period of time than is provided for in a statute of limitations, and that this is not contrary to public policy as tending to oust the jurisdiction of the court; see Chitty on Contracts (25th ed), Vol. 1, paras 986 and 1891, citing Atlantic Shipping Co. Ltd v. Louis Dreyfus & Co. [1922] 2 AC 250, HL. On the other hand, s. 18(6) of the Arbitration Amendment Act 1938 gives the court a discretion to override any such contractual stipulation relating to the commencement of an

arbitration ``if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused''.

264 A number of submissions made in response to our discussion paper expressed concern at the possibility that one party to a contract possessed of superior bargaining power could impose an extremely short limitation period on the other party in a way that might be oppressive or unfair. In our discussion paper we suggested that a compromise between a prohibition on contractual reduction of the limitation period and a complete freedom of contract might be a minimum period of, say, six months, which could not abrogated by agreement.

265 We have come to the conclusion that we should not change the law in this respect. On reflection, we think our compromise proposal may be too inflexible for all situations; and we are concerned at the potential for uncertainty which a broad discretion (such as s.18(6) of the 1938 Amendment) may involve. The perceived problem relates to inequality of bargaining power in contract and is one which must be addressed more fully and generally in the context of substantive contractual or consumer protection law reform. We note, for example, that the Australian Trade Practices Act has recently been amended to prohibit unfair and unconscionable conduct in trade - thus going beyond the New Zealand Fair Trading Act 1986 which is based on the Australian legislation but merely prohibits deceptive and misleading conduct.

266 Although there is no substantial body of case-law suggesting that a contract to extend limitation periods is valid, we see no reason why parties to a dispute should not be able effectively to agree that a limitation defence not be taken for a particular period (or at all). This also follows from the nature of the limitation defence, which does not extinguish the underlying right, and may be waived by a defendant by simply choosing not to pleas passage of the limitation period as an affirmative defence.

267 We have also considered the question of whether an agreement to extend or reduce limitation periods should be in writing, noting that the present provisions relating to acknowledgement require that such be in writing and signed by the maker, but have been unable to see any good reason why the ordinary rules for proof of a contract should not apply. There would of course be an onus of proof of the agreement on the party who sought to rely on it - the claimant where the agreement alleged involved extension, and the defendant where the agreement alleged involved reduction of the relevant period.

ACKNOWLEDGEMENT

268 Although the 1623 English Act did not refer to acknowledgement or part payment as grounds for extension of a limitation period, the English courts held that a fresh promise to pay an existing debt would start the time running again. This approach was incorporated in England in the Statute of Frauds Amendment Act 1828, and in similar legislation throughout the Commonwealth, including New Zealand.

269 In the 1950 N.Z. Act, ss.25-27 make provision for the fresh accrual of certain causes of action on acknowledgement or part payments. Thus, for example, s.25(4) provides:

Where any right of action has accrued to recover any debt or other liquidated precuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of acknowledgement or the last payment.

Acknowledgement and part payment apply also to claims for recovery of land, and

foreclosure under a mortgage or personal property, but not other causes of action. Further, every acknowledgement is required to be in writing and signed by the person making it: s.26(1).

270 The principle originally underlying these judge-made concepts was that a promise (often implied, rather than expressed) to pay a debt, although something less than a contract, was enough to revive the cause of action. The requirement of a promise to pay has been eroded by subsequent legal developments, the result of which has been the creation of a complex and rarely used body of law. The British Columbia LRC report (1974) includes a concise survey of that law (at pages 86-89), but we will not attempt a similar exercise here.

271 The 1967 New South Wales LRC report recommended that acknowledgement and part payment (to be combined under the general title of ``Confirmation'') should apply to all causes of action, and that recommendation has been given effect in s.54 of the 1969 N.S.W. Act. But the Canadian reform proposals have not included any widening of the application of these concepts.

272 We have considered whether the provisions relating to acknowledgement and part payment should simply be dropped from a new statute. Our proposal for repeal without replacement of any existing provisions relating to actions to recover land would leave only a narrow scope for the operation of the present ss.25-27 of the 1950 Act. On the other hand, there have been and will continue to
be some (albeit rare) situations where a claimant has been prejudiced through inactivity based on reliance on what may broadly be described as a representation by the (potential) defendant that the matter in question (which later becomes the subject of a claim) was not a matter of dispute, and that the title or claim of the claimant was accepted.

273 On balance, we believe the potential for inequitable results in some situations is sufficient to justify a separate extension provision based on acknowledgement or part payment. As with other extensions, we would favour this extending to all types of disputes and claims. However, we would also favour a more restrictive requirement insofar as a claimant should be required to prove reliance on the acknowledgement or part payment - in other words, that but for the acknowledgement/part payment the claimant would have taken steps to avoid the situation where a defendant becomes (otherwise) entitled to rely on a limitation defence. Like other extensions, this would be subject to the 15 year long stop provision.

274 Other statutory provisions on acknowledgement and part payment (such as s.5 of the B.C. Act, Appendix H to this report) contain considerable detail on who is bound by, and who may take the benefit of, an acknowledgement/part payment. We have not recommended detailed rules on these points, leaving the matter to be governed by ordinary principles of agency law, although we do favour (as the draft new statute shows, see Chapter XV) clarification of the point that an acknowledgement or part payment in relation to interest also extends to a principal sum.

ALTERNATIVE FORUM

275 The third situation we consider in this chapter is not dealt with in the 1950 Act, nor was it addressed in our discussion paper. It developed from a helpful discussion of that paper with members of the Crown Law Office in Wellington where mention was made of the situation where a citizen with a grievance against a government agency chooses to complain to the Ombudsmen rather than engage in the expense of litigation at the outset. Given that the Ombudsmen's investigations may take some time,it was suggested that a worthy claimant might find themselves defeated by a limitation defence if the

Ombudsmen were finally unable to achieve satisfaction of the claim and the standard limitation period was reduced to three years as we propose.

276 We accept the force of that argument, and consider that the passage of time should not prejudice the potential defendant to the same degree as in other situations because the essence of (and persistence in) the complaint will be well known from the investigation process.Similar reasoning applies to claims taken to the Human Rights Commission and the Race Relations Conciliator. Further, we think the same logic applies where a claimant commences an arbitration which is ultimately found to lack jurisdiction to determine the dispute, or commences proceedings in the wrong court (for example, in the High Court rather than the District Court, or in an overseas court rather than in New Zealand), before commencing proceedings in the correct forum - and meanwhile the passage of time may have laid the basis for a limitation defence.

277 We have also considered whether this logic can be extended to apply to the process of negotiation, but have concluded that the imprecise and informal nature of that process distinguishes it from those mentioned in the proceeding paragraph.

278 Accordingly, we recommend that the standard limitation period may be extended to compensate for any period during which a claimant has caused the essence of the claim to be considered by the Ombudsmen or by another agency with a statutory responsibility to seek resolution of disputes, or to be submitted to arbitration, or to be put before a court, and the result of that process has been that the agency, arbitrators, or court (as the case may be) have lacked power or jurisdiction to determine the claim on its merits.

279 The extension - like that for disability - may also apply to a limitation period which has already been extended by reason of, say, absence of knowledge.

X

the ``Long Stop'' Limitation Period

280 The Commission sees extension of limitation periods, particularly on the ground of non-discoverability, as enhancing fairness, although at some cost to the object of certainty and to the legitimate interests of the defendant. Those interested can, however, be promoted by a ``long stop'' or ultimate limitation period - an overall limit measured from the date of the act or omission alleged against a defendant.

281 The concept is not a new one. The 1950 N.Z. Act allows for an extension of the limitation period where the claimant is under a disability, but it effectively provides for a long stop of 30 years from the time the action accrued
if the claimant's action is to recover land or money charged on land (s.24(1)(e)).

282 Like New Zealand, New South Wales' limitations law had its origins in the old English legislation - which also includes a long stop but only in relation to land actions. When the New South Wales Law Reform Commission considered reform of limitation law in 1967, it decided that there should be a general long stop of 30 years applying to all actions. That was the same period as applied to land under the 1939 English Act. It reasoned that there should not be an indefinite time for the bringing of actions due to the extensions on the round of disability.

283 In Scotland too, the idea of a long stop (called long negative

prescription) is not new. The Scottish Law Commission's 1970 report considered that the length of the long stop should remain unchanged at 20 years. It considered that the extinction of the creditor's right to enforce an obligation in less than 20 years would result in hardship - especially in cases 10 year long stop with an extension where the claimant is under a disability was rejected because of the uncertainty it would introduce.

284 the recognition that there ought not be an indefinite time for bringing claims where a claimant is within the scope of an extension assumes new importance when the grounds for extension are more generous. Indeed, the combination of a discoverability formula and a long stop has been a consistent feature in the recent limitation reforms in several Canadian Provinces and the United Kingdom, and it is at the centre of our recommendations for reform.

285 It is through the long stop that one of the basic thrusts of a limitations statute - the need for certainty -is to be achieved. This is particularly so against a background of expanding tort liability (see Chapter IV). The underlying concern was well expressed by the prominent U.S./ Judge, Benjamin Cardozo, in Ultramares v. Touche (225 N.Y. 170, 179 (1931)) when he observed that defendants ought not be exposed to a liability ``in an indeterminate amount for an indeterminate time to an indeterminate class''.

THE INSURANCE FACTOR

286 Even though the number of claims brought to court a long time after the conduct which gave rise to them is small, their impact has far-reaching financial effects because of the system by which insurance premiums are calculated. The premium cost increases according to the number of ``claims'' which are made against the insured regardless of whether they are ever proceeded with on a formal basis or of whether they have any chance of success. Given the recent but comprehensive change to ``claims made'' indemnity policies (i.e. covering claims made against the insured in a particular year or years - not errors made by the insured then), once a professional retires, insurance must be maintained for the rest of the professional's life in order to cover ``long-tail claims''. The current premium level of such ``run-off'' insurance for building professionals begins at 1% of gross income earned in the last year in the work force and progressively decreases. Thus a continuing and not insignificant expenditure is required during a period when professional income has ceased.

287 The present premium cost of professional indemnity insurance for building professionals in New Zealand is approximately 1.5% to 3.0% of gross practice income. IN addition to premium costs, where there are mutual funds (as with Architects' and Engineers' insurance schemes) the professional must contribute to the payment of subsequent claims for which the existing assets are insufficient. Where there is no such mutual fund the relationship between claims experience and premium is less direct (and the premiums more expensive). The amount paid for insurance in New Zealand is currently a lot lower than in other countries (it is reported that architects in the U.K. have paid up to 12% of their gross annual income). It is this overseas experience which prompts the concern of the New Zealand building professions for the future.

288 the cost of potential claims which surface a long time after the event which gave rise to them not only creates difficulties in planning insurance, in managing premium reserves,and in maintaining insurance after the professional has retired, but also directly affects the consumer in a detrimental way. The increase in insurance costs pushes up the cost of the product or service to the consumer (where the increased cost of the product or service to the consumer (where the increased cost can be passed on), the increased cost may be met by a reduction in wages or by an increase of rates or taxes; or it may force the removal of the product or service altogether.

289 For the building industry in particular, the expansion of liability has led to defensive (``belt and braces'') architectual and design practices which are not justifiable economically - e.g. over specification, overdesign and the recent local body practice of employing consultants to inspect properties before the building permit is given (the consultants sometimes travelling many miles to do so). The architects in particular feel that innovation is being inhibited. None of this can be desirable for society as a whole.

290. The situation has been described by Professor George L Priest of the Yale Law School as the ``Current Insurance Crisis'' in modern tort law-

The most fundamental of the conceptual foundations of our modern law is that the expansion of tort liability will lead to the provision of insurance along with the sale of the product or service itself, with a portion of the insurance premium passed along in the product or service price. Expanded tort liability thus is a method of providing insurance to individuals, especially the poor, who have not purchased or cannot purchase insurance themselves. This insurance rationale suffuses our modern civil law and must be acknowledged as one of the great humanitarian expressions of our time.

The paradox exposed by my theory is that the expansion of tort liability has had exactly the opposite effect. The insurance crisis demonstrates graphically that continued expansion of tort liability on insurance grounds leads to a reduction in total insurance cover available to the society, rather than to an increase... [T]he parties most affected... are the low income and the poor, exactly the parties the court hoped most to aid. (Yale Law Journal, Vol. 96 at p.1525)

291 Obviously there are a number of factors which contribute to the ``crisis''. We believe the situation in the United States is unlikely to be precisely repeated here, in large part became of the presence of the Accident Compensation scheme. But a state of limitations can ensure that defendants are not subject to liability for an ``indeterminate time'' and we have kept this in mind in formulating our recommendations generally, especially in endorsing the concept of a long stop.

PERSONAL INJURY CASES

292 Personal injury cases with long latency periods presently not covered by that scheme include those involving accidents which occurred prior to the operation of the scheme (1 April 1974) but failed to manifest themselves until afterwards (common with spinal injuries), as well as cases where sexual abuse occurred prior to 1974 and has subsequently manifested itself in emotional harm, and occupational disease resulting from employment which ceased before 1974.

293 We reiterate our recommendation in our recent report on Accident Compensation. Personal Injury: Prevention and Recovery (NZLC R4) that these categories of injury be included in a revised scheme without prejudice to accrued rights (paras. 167-170 and 24). Claims under the scheme would therefore not be the subject to litigation nor subject to any long stop. The recommendation is in large part recognition that litigation is neither an effect nor an appropriate forum for resolving grievances such a long time after their cause.

294 Personal injury litigation throws up many sad and hard cases and natural sympathy for these has had a major impact in shaping limitation regimes overseas. One recent example is the 1986 N.S.W.LRC report which recommends a three year period subject to an unlimited extension with leave of the court in such cases. As mentioned earlier in this report, we believe the coverage of such

cases by the Accident Compensation scheme removes a factor which complicates statutes of limitation - and their reform - elsewhere.

LENGTH OF THE LONG STOP

295 The reaction of our proposal for a long stop - outlined in our discussion paper - has been very favourable. We heard no objections to the proposal in its general terms. A more difficult question is the length of the long stop. In our preliminary paper, we suggested following the U.K. Latent Damage Act provision for a 15 year long stop. An extract from the Scarman committee report which led to that reform, demonstrates how difficult that choice can be:

We have considered periods of twelve, fifteen years and twenty years. We have come to the conclusion that a period of twelve years, although it would probably work satisfactorily in most cases, might also bar some worthy claims. At the other extreme we think that a twenty year period might permit some very stale claims and expose many defendants to the risk of litigation for an unreasonable length of time. We have concluded that a fifteen year period strikes the right balance between justice for claimants and certainty for defendants and we so recommend. (para. 72)

296 The Alberta paper opts for a 10 year period. Its reasoning is that after 10 years from the time the conduct occurred -

... the class of remaining potential claimants will have become very small, but without an ultimate period, the entire society of potential defendants will remain subject to a tiny group of claims... By this time the cost burden imposed on potential defendants, and through them on the entire society, of maintaining records and insurance to secure protection from a few possible claims will become higher than can reasonably be justified relative to the benefits which might be conferred on a narrow class of possible claimants. (para. 2.197)

297 The paper then discusses the merits of 10 years as opposed to 30 years (the long stop under the present Alberta Act) -

Obviously, more claims will be caught by a period of 10 years than by one of 30 years, although we think that the difference will be exceedingly slight. We have little doubt that it was sensitivity to the plight of meritorious claimants which led to the choice of 30 years in the B.C. Act. But, with greatest respect to those who made this judgement, we do not think that it gives proper weight to the interests of the defendants... By the time that 10 years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision. At this point adjudication will as likely result in a judicial remedy for a claimant with a spurious claim as one with a meritorious claim. Adjudication under these circumstances can only detract from the credibility of the judicial system and undermine its effectiveness. (para. 2.198)

298 There was some divergence of opinion among the people we heard from on the issue of the length of the long stop. Two submissions suggested that the long stop should be 20 years - particularly in cases which involve minors and land.

299 The most consistent advocates of a shorter long stop (10 and sometimes 12 years) were representatives of the building and insurance industries. There concerns are sometimes interrelated. The most comprehensive was the submission favouring a 10 year long stop made by the Interprofessional Committee on Liability representing the professional associations of architects, engineers,

valuers and surveyors. The statistics they gathered indicate that a long stop of 10 years would shut out few claims. Of those claims, they considered the majority to be unmeritorious. The result of no ultimate bar was either arbitrary litigation of those claims or settlement because the events were simply not capable of being proved.

300 We do not think the issue is merely whether the claim is meritorious. There are claims for latent building damage (which have been successful under the current law) which would be excluded by the 154 year long stop. Dennis v. Charnwood Borough Council [1983] QB 409 is such a case. In that case the Council approved plans to build on a concrete raft foundation in 1955. the site was an infilled sand pit. Cracks began to appear in 1966 which were investigated by a jobbing builder and declared to be the result of normal settlement. In 1976 more serious cracks appeared and it was discovered that the concrete raft was inadequate foundation for the type of land involved and was badly constructed.The owners of the building sued the local authority in 1978 - 21 years after it negligently issued the building permit.

301 The evidence we have suggests that the period of latency in the Dennis case was quite extraordinary. Exclusion of such a claim by a fixed long stop period will seem harsh to some, but must be weighted against the more diffuse but nonetheless real costs which are involved in permitting such claims to be litigated. It may also be reiterated that the validity or otherwise of such claims cannot be assumed in advance, and that actual evidence of matters occurring two decades earlier will often be problematic. Further, as recently observed by Lord Templeman in a House of lords decision, there is an understandable tendency to assume ``that for every mischance in an accident-prone world someone solvent must be liable in damages'' (see CBS Songs Ltd v. Amstrad PLC [1988] 2 All ER 484, at 497).

302 There is no absolutely right answer, as the Scarman Committee observed, but, like them, we have concluded that 15 years strikes the right balance. We were not persuaded that the benefits to society as a whole of a 15 year long stop would be significantly less than that of a 10 year long stop. A long stop of 15 years would ensure the continued availability of insurance for (and therefore practice of) the activities which members of the building industry pursue. The Insurance Council of New Zealand (representing its 46 members in the fire, general and marine insurance market) said that (while they would prefer a 10 year long stop) the introduction of some real certainty in this area of the law should have the effect of enabling insurance to be more cheaply obtained or at least have the effect of postponing some premium cost increases.

DELIBERATE CONCEALMENT

303 Another important issue for the provision of certainty is whether there are any circumstances where the long stop should be overridden. The tentative view in our preliminary paper was that the long stop should not apply where there is fraudulent concealment on the part of the defendant. There was a strong measure of support for this proposal in the submissions we received. We would emphasise that the conduct must be deliberate and designed to conceal. We favour something more than a simple `fraud'' exception because of the wide scope of ``equitable fraud'' and the risk of expansion of the exception at the expense of the primary object of the long stop. In this we share the approach approved in the Alberta ILRR paper. Indeed, we hesitate to add another layer to the scheme but think that in cases of deliberate concealment a further extension best serves basic concepts of justice. Such cases will be extremely rare and, we are advised, unlikely to affect the insurance situation - apart from rarity, insurance companies are most unlikely to indemnify their clients for their deliberate fraudulent acts.

TRUSTS - FRAUD, CONVERSION

304 A somewhat similar situation in which we consider the long stop requires modification relates to certain breaches of trust. It is a feature of many express trusts that they may last for some decades, including the common situation of a testamentary trust where a surviving spouse receives income from estate assets for life with the remainder held on trust for children until the survivor's death. At present s.21(2) provides a standard six year limitation period for actions for breach of trust, but this is subject to two important qualifications:

(a) no limitation period applies in relation to fraud or conversion of trust property by a trustee (s.21(1)); and

(b) accrual of a cause of action for breach of trust where a beneficiary has a future interest is deemed to be postponed until that interest fails into his or her possession (s.22(2) proviso).

305 For most ``ordinary'' claims of breach of trust our proposed limitation defences will readily apply. It has been suggested to us that recent changes to the Trustee At 1956 to permit trustees to invest on a ``prudent trustee'' basis, rather than in accordance with the previous authorised ``list'', may increase the scope for such claims. Mindful also of the scope for beneficiaries whose interest in a trust has not yet vested to query a trustee's actions under the 1956 Act, we have concluded that a new statute should not re-enact the deemed postponement for actions by such beneficiaries presently found in the proviso to s.21(2) of the 1950 Act.

305 On the other hand, we have concluded that the policy underlying s.21(1) of the 1950 Act should be continued in the new statute, and that claims for fraudulent breach of trust, and for conversion of trust property, against trustees should not be subject to any long stop limitation defence. The standard limitation period - subject, of course, to the absence of knowledge and other extensions - would remain applicable.

INFANTS

307 As mentioned earlier (in para. 255), we have been persuaded by submissions in response to the discussion paper that there may be cases where a 15 year long stop limitation period would operate unfairly against an infant. Accordingly, we recommend that in cases where a claimant is able to rely on the extension for infancy the 15 year period be extended to a date which allows three years from the claimant attaining 18 years. As this would apply only in relation to cases where the relevant act or omission occurred before the claimant was six years old, we think such cases will be extremely rare, and that this further exception to the long stop would not prejudice the general objective of certainty and repose.

EXTINCTION OF RIGHTS

308 The question of whether the expiry of the long stop period should result in the automatic extinction of rights of action, rather than a separate defence which a defendant may establish, involves factors similar to those considered in Chapter VI in relation to the proposed standard limitation period. We repeat our referral to the detailed discussion of the right/remedy issue in the 1967 N.S.W. and 1986 Alberta ILRR papers. The fact that the long stop would not be an absolute bar - given the qualifications outlined above - is perhaps the major factor in our conclusion that, on balance, the passage of the long stop period should result in a defence against the seeking of a court remedy rather than the automatic extinction of the right asserted. That conclusion is consistent with our approach elsewhere to the new statute - that it is directed

to limitation defences, and only incidentally to matters to right and title; it also takes account of the fact that the practical effect will be confined to exceedingly rare situations.

309 To summarise: We recommend that, notwithstanding that grounds for extending the standard three year limitation period continue, there be a separate positive defence available if 15 years has passed between the date of the act or omission on which a claim is based and the date on which the defendant is served with notice of the claim. This additional defence would be subject to three exceptions; fraud or conversion by defendant trustees; deliberate concealment by the defendant; and the infancy of the claimant.

XI

The Scope of a New Statue - General

310 The scope of the 1950 Act is based on the express inclusion within its provisions of various ``causes of action''. These have been added to English statutes of limitation over several centuries earlier. Nevertheless, the inclusion of claims based on contract or tort or some statutory entitlement (s.4(1)(a) and (d)), and those relating to land, means that the 1950 has an extensive coverage of civil proceedings.

311 For the reasons that have persuaded us that there should be a new general statute with the features outlined in earlier chapters, we believe that such a statue should be as comprehensive as possible. Such an approach - effectively presuming inclusion of all types of civil proceedings except where good policy reasons can be shown to the contrary - is supported by our statutory obligation to seek clarity in the law. Although most submissions received accepted the general thrust of our tentative proposals for the scope of the new limitations regime, few gave extended reasons. The New Zealand Law Society submission emphasised the advantages in simplifying the law and achieving as universal a limitation period as possible. However, there are undoubtedly situations where it may be unnecessary or undesirable to have any limitation period, or the period may be of a different length than that which we recommend generally or the period may be extended in the exercise of judicial discretion.

312 In this chapter we consider the scope of a new statute in general terms, while matters relating to land and also specific limitation provisions outside that statute are considered in separate following chapters.

313 We believe that a new statute should apply to all civil claims brought before the ordinary courts - that is, the District and High Courts - except where there is a specific statutory exception either in the new statute or in some other enactment. As mentioned in earlier chapters, the essence of the limitations system is the provision of a defence against claims brought before courts. Claims before or against other bodies or agencies involve different considerations, as do such ``self-help'' remedies as the right to distrain (that is, take and sell) a lessee's goods to recover arrears of rent. These matters are addressed later in this chapter.

314 In referring to the District and High Courts, we exclude the senior appellate courts (the Court of Appeal and the Judicial Committee of the Privy Council) as no claims are first filed there. But we include the special Divisions of the District Courts - Family Courts and Small claims Tribunals. Although there are some aspects of proceedings in the family law area which do not raise any question of limitations, or where the limitations rules we recommend generally are inappropriate, we see no basis for a general exclusion of the Family Courts.

315 Similarly the special role of the Small Claims Tribunals should be exercised within the confines of the standard limitation rules. All the factors which lead us to favour such rules of the more formal traditional courts apply with equal force to the Tribunal Act 1976 is not completely clear under existing legislation, and we recommend that the application of a new statute of the 1976 Act (or its recently passed but not yet commenced replacement, the Disputes Tribunals Act 1988) should be made explicit.

316 Likewise, we consider that the claims for wage arrears, unfair dismissal and in relation to the economic torts (conspiracy, inducement of breach of contract, and the like) which may be brought before the Labour Court should be subject to the new limitation rules we propose.

317 We have thought carefully about the position of claims before the Maori Land and Appellate Courts established under the Maori Affairs Act 1953. It has been suggested that the different cultural approach of Maori to disputes might best be recognised by express exclusion of proceedings relating to that Act from the new regime we propose. On the other hand, those courts are presently subject to the 1950 Act - they are clearly ``courts of law'' (in terms of the definition of ``action'' in that Act).There is also the important fact that a substantial Maori input will continue to be focused on the Maori Affairs Bill - intended to replace the 1953 Act - now before Parliament. Overall, we have concluded that the question of time limits for proceedings in the Maori Land Courts is one we should leave to those charged with shaping the new Bill, and that claims brought in those courts should not be covered by the new statute.

318 The military system of Courts Martial, including appeal proceedings, would not be included under our proposals. The reason for not including military court proceedings is that they are essentially criminal in nature - notwithstanding some provisions for ordering compensation or restitution - and thus outside our present review.

CLAIMS MADE TO OTHER BODIES

319 There are statutes which make provision for claims to be made to an official (for example, the Minister of Lands were land is compulsorily acquired under the Public Works Act 1981) or an agency (for example, the Corporation where a claim is made under the Accident Compensation Act 1982) and within a specified time. These statutes provide for appeals from decisions made on such claims, and we make no recommendations for changes consequential on any enactment of the new statute we propose. Nevertheless, we do recommend that any future review of such statutes should include a contemporary consideration of whether the time limits provided are justified in the light of the principles which we have outlined as underlying the general system of limitations.

320 The specific statutory provisions which we have identified which fall into this category are as follows:

Accident Compensation Act 1982, s.98 - 12 months to claim compensation from the Corporation - with a discretion to extend. (The Corporation does not in fact insist on this limit and we have already proposed that it should be omitted from any new legislation.)

Police Complaints Authority Act 1988, s.18 - discretion for the Authority to refuse to take action if the claimant has known of the matter for more than 12 months.

Public Works Act 1981, s.78 - two years to claim compensation for land against the Minister of Lands or a local authority - with a discretion to extend.

SELF-HELP REMEDIES

321 Although primarily concerned with time limits on court proceedings, the 1950 Act also applies to what may be called ``self-help'' remedies - in particular, the exercise of powers of possession and sale of assets under mortgages and leases where there are outstanding sums of money owning. Thus s.2(5) of the Act provides that that:

References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rent charges, to distrain for arrears of rent; and references to the bringing of such an action shall include references to the making of such an entry or distress.

Similarly, s.19 makes specific reference to the fact that `No action shall be brought, or distress made, to recover arrears of rent... after... six years''.

322 We do not think that our review of the 1950 Act is an appropriate vehicle for reaching conclusions on whether or not these self-help remedies should be retained, but are satisfied that the governing principle is that such remedies should be regarded as accessory to the principal obligation (usually payment of a debt). As the N.S.W. Law Reform Commission report (1967) observed:

On this approach it is right that the accessory remedies against the property should last as long as the principal debt remains recoverable but no longer. (para. 215)

323 The N.S.W. LRC approach was endorsed in the British Columbia LRC report (1974) and it provided for in the 1975 B.C. Act by defining ``action'' to include ``any exercise of a self help remedy''. However, the British Columbia drafting formula is not available in a statute which is phrased, as we recommend, in terms of the creation of a limitation defence rather than as the present N.Z. and B.C. Acts are, in terms of a prohibition (``No action shall be brought...'').

324 There is another question which bears on the organisation of the statute book: whether time limits on a self-help remedy should be located in a general limitations statute, or in a specific statute - such as those parts of the Property Law Act 1952 which deal with leases and mortgages. We have concluded that these time limits are better located in the general statute we propose, although a cross reference in the specific statutes may be of assistance in avoiding any misunderstanding.

325 In summary, we recommend that the new statute provide that where one person owes money or is under some other obligation to another who exercises to self-help remedy in relation to property owned or possessed by the first, that remedy may be enjoined and set aside (and appropriate consequential orders made) by a court of competent jurisdiction if proceedings to recover the money owning would have been defeated by a limitation defence. (The application of this proposal to mortgages registered under the Land Transfer Act 1952 is considered in Chapter XII.)

ENFORCEMENT OF JUDGEMENTS

326 In our discussion paper (paras. 83-84) we suggest that enforcement proceedings could not be clearly justified as an exception to the standard regime we proposed. At the present time there are three provisions of relevance to this topic:

(a) Section 4(4) of the 1950 Act states that ``an action shall not be brought upon any judgement which has been obtained subsequent to the commencement of this Act after the expiration of 12 yeas from the date on which the judgement

became enforceable... and no arrears of interest in respect of any judgement debt shall be recovered after the expiration of six years from the date on which the interest became due''.

(b) Section 80 of the District Courts Act 1947 states that no judgement or order of that court more than six years old shall be enforced without the leave of the court unless the party liable has made some payment into court during the previous 12 months.

(c) Rule 556(2) of the High Court Rules provides that no execution process shall issue without leave of the High Court - ``(b) After six years have elapsed since the date of the judgement''.

327 The Alberta ILRR paper recommended that claims requesting enforcement orders should be excluded from the coverage of a new limitations regime for two reasons;

(1) The Act is designed to ensure that claims requesting remedial orders are brought within a reasonable time, and that an enforcement order will not be issued unless the initial claim was brought within the prescribed limitation period and the objectives of the Act were satisfied.

(2) Enforcement orders are procedural in nature and are governed by the Rules of Court. If the time available to a claimant to request an enforcement order should be limited, the limitation should be included in the Rules of Court.

328 The submission of the Department of Justice strongly supported the Alberta ILRR approach and its conclusion. We agree that the enforcement of judgements does not involve the evidential and other difficulties with which a limitation regime is particularly concerned, but we suspect that the six year periods specified in s.80 of the 1947 Act and Rule 556 of the High Court Rules are intended to echo the standard (six year) limitation period found in the 1950 Act. If that is so, then a change in the standard limitation regime would leave the periods in s.80 and Rule 556 to stand alone without a rational point of reference.

329 If the matter is examined from a policy point of view,it may be seen that the provisions mentioned in para. 326, incorporate the view that there should be some time limit within which a judgement must be enforced, and s.4(4) of the 1950 Act in limiting arrears of interest on judgement debts provides an incentive for early action on this point. Thus it seems to us that, although strictly outside the standard limitation regime, it would be appropriate for the periods in s.80 and Rule 556 to be reduced to three years but with retention of the provision for extension with leave as presently provided for. (See also Chapter XII, below.)

DECLARATORY PROCEEDINGS

330 In our discussion paper we noted also that the Alberta ILRR paper recommends that declaratory proceedings should be excluded from a new limitation regime on the basis that (as stated at para. 54):

A declaration of rights and duties, legal relations or personal status has no creative effect. Rather, it reflects a judicial determination of what rights and duties, legal relations or personal status existed under the law before the declaration, albeit in dispute, and declares what they were and are. Properly understood, a declaration is not a judicial remedy for it remedies nothing; it does not order anyone to do, or to refrain from doing, anything.

331 On the other hand , we are pointed out, out Declaratory Judgement Act 1908 provides that a declaration made by the courts shall bind the parties as if it

were a judgement. This point was emphasised in a submission from Dr D L Mathieson QC who suggested that the Alberta approach:

... ignores the truth that departments and public bodies and companies, partly because of the potential for further actions based upon the declaration, voluntarily comply with it. Where the declaration relates to a monetary entitlement the practical effect, in such cases, is equivalent to judgement for a sum of money.

He went on to suggest that declaratory proceedings should be subject the standard limitation period with, however, a carefully drafted exception for declarations as to family relationships.

332 The only other submission to address this matter (on which we expressed no tentative view in the discussion paper) at any length was that of the Department of Justice which stated a different view:

We are not aware of any instances where declaratory relief has been used as an alternative to statute-barred substantive relief. As the paper points out (para. 92) the court has a wide discretion to refuse a declaration. This should be sufficient to prevent stale claims.

As there is no obvious mischief to be remedied, there appears to be no reason to subject declaratory proceedings to a limitation regime.

To do so would, in any event, present serious difficulties. Section 3 of the Declaratory Judgement Act 1908 provides for declaratory orders determining any question as to the construction or validity of any statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument. The Commission has not explained from which point in time the limitation period should begin to run. Should this be the commencement date of the statute,regulation, bylaw, or the date of the memorandum, articles, deed, will, document of title or instrument? This would be quite inappropriate and cause injustice to persons whose interest in the construction of a statute etc arises many years after enactment or making the memorandum etc.

In our view no convincing reason has been presented for the application of a new Act to declaratory proceedings.

333 The matter is not any easy one, but we have concluded that the essentially discretionary nature of the declaration is critical in this area, and that the courts can be relied on to resist attempts by litigants to use declaratory relief as a ``back door'' means of achieving relief which would otherwise be subject to a limitation defence in ordinary proceedings. In other words, at this stage we are inclined to give the benefit of the doubt so as to exclude declaratory proceedings from the new regime. If our proposals are enacted and subsequent cases demonstrate that this inclination was erroneous, then it may be necessary to legislate for the inclusion of such proceedings.

JUDICIAL REVIEW

334 Factors such as those mentioned in the preceding paragraph, similarities (and some overlap) with declarations, and the general requirement that they be brought promptly, have led us to resile from the tentative view expressed in our discussion paper and, on balance, recommend that proceedings for judicial review of statutory powers and powers of decision (as defined in the Judicature Amendment Act 1972) should also be excluded from the application of the limitation defences we propose. In this we reach the same conclusion as the Alberta ILRR paper which considered judicial review proceedings as ``functionally ... akin to appeals'' (para. 3.57).

EQUITABLE RELIEF

335 As mentioned in our discussion paper, the 1950 Act contains exceptions relating to claims for equitable relief, probably reflecting the ancient division between equity and the common law in English courts and jurisprudence. We on to express our tentative view that the advantages of a general limitations regime apply to equitable claims as well as to others, although any existing discretion of the courts to refuse relief on the grounds of delay should not be eroded by virtue of inclusion in a new and wider limitations regime.

336 Mr J C Corry of Wellington, Barrister, and editor of the chapter on limitations in the N.Z. Supplement to Halsbury's Laws of England, submitted that equitable remedies should not be included in a new regime as a matter of principle, pointing to the variety of policies underlying each remedy available in equity and suggesting that the inclusion of equitable remedies would itself involve a major reform of equity - a task more suited to a specific review of equitable remedies.

337 We have considered these submissions, together with the approaches taken by legislatures and law reform agencies in overseas jurisdictions but have confirmed our tentative view that the advantages of a general limitations regime apply to equitable claims as well as to others. We have already noted that
equitable relief may be subject to limitation periods ``by analogy'' (See Chapter III), and believe that our proposals would not involve fundamental change to, or unduly limit the effectiveness of, equitable remedies. Further, we subscribe to the view that any attempts to keep equity and its remedies separate from the common law and its remedies more than a century after the fusion of common law and equity are unhelpful.

ADMIRALTY

338 The law relating to ships,l known as ``admiralty'' law, is particularly specialised and, in part, involves international treaty obligations. The 1950 Act excludes proceedings enforceable in rem (against the ship itself) from the standard six year period, and s.20(5) expressly excludes mortgages over ships from the present 12 year period applicable to enforcement of other mortgages. We have consulted with specialists in this field, and found support for the view (expressed in the Orr Committee's report and th subsequent 1980 English Act) that these exclusions may have arisen more by accident than design and are not supported by compelling reasons. Accordingly, we recommend that the new statute contain no express exclusions for matters within the admiralty jurisdiction. However, international treaty complications have persuaded us that the separate limitation regime for ship collisions (Shipping & Seamen Act 1952, s.471A) should be retained (see also Chapter XIII).

339 Our recommended requirement for service of a claim (rather than filing) before time stops running towards a limitation defence (see Chapters VI and XIV) would clearly necessitate and application for directions as to service as a precaution in cases where in rem proceedings are taken but the ship is not within New Zealand waters. At present it is not uncommon for an admiralty writ to be renewed regularly pending return of the vessel to which it is directed.

XII

The Scope of a New Statute - Matters Relating to Land, Charges

340 In this chapter we consider whether and, if so, how a new statute of

limitations should apply to possession of and title to land, and charges over land and other property. Both areas are complex and do not, at first sight, easily lend themselves to the standard three year period (with extensions to a maximum of 15 years) which we recommend for most other claims. We deal first with issues relating to land, then those relating to charges.

TWO LAND TITLE SYSTEMS

341 New Zealand's inheritance of English law is reflected in a continuing treatment of property rights relating to land in ways which often differ from other property rights. So the 1950 At provides for the extinction of title, and not merely a procedural defence, in relation to actions for the recovery of land. This reflects the long standing English legal policy that long-held possession of land should not be disturbed. but the 1950 Act also expressly provides that it is subject to the Land Transfer Act 1952, acknowledging both the existence and primacy of the statutory land title registration scheme which applies to most transactions relating to land in New Zealand.

342 The essence of, and relationship between, the two systems - common law prossessory title, and statutory registered title - is well summarised in Hinde, McMorland and Sim, Introduction to Land Law (2nd ed, 1986), at para. 2.003:

At common law actions for the recovery of land have always turned on the right of possession. Further, the object of these actions has not been to enquire whether the title to possession set up by the defendant is an absolute title which is good against all the world, but whether the plaintiff is able to prove a title which is relatively better than that of the defendant...

[B]ecause of the existence in New Zealand of the statutory scheme of registration of titles known as the Land Transfer System (often referred to as the Terrens System) the principles of the common law relating to title to lands seldom need to be invoked in this country. One of the essential features of the Land Transfer System is the establishment of a register of title which, by virtue of statute, records the state of the title to each parcel of land which is subject to the system; and the register is normally conclusive evidence of the title of the persons named in it.

343 The Registrar-General of Land has advised us that the land presently outside the statutory registration system may be broadly categorised as follows:

(a) Remnants of private land originally held under Crown grant pre-dating 1870, often found in the older cities and the best (and thus earliest taken) flat rural land.

(b) Crown lands never registered under the statutory registration system - in part because of conceptual difficulties with the Crown taking a statutory title (in fee simple) which is technically something less than its current absolute title.

(c) High country pastoral leasehold - in part covered by (b) above, but some of these areas are being surveyed so that leases can be registered under the statutory registration system.

ADVERSE POSSESSION - COMMON LAW

344 Section 7 of the 1950 Act provides that an action to recover any land must be brought by the Crown within 60 years (and by any other person within 12 years) from the date on which the right of action accrued. The following sections contain a number of provisions relating to when a cause of action

accrues in relation to specific interests in land, but s.18 is of particular significance in provisions that a right of action will not accrue (or continue) unless there is ``adverse possession''. then s.18 provides that, at the end of the limitation period (that is, the 60 or 12 year period of adverse possession - or where a mortgagee has been in possession of mortgaged land for 12 years: see s.16) the title of any person who might previously have brought an action to recover the land is extinguished.

345 The nature of adverse possession has been explained in McDonell v. Giblin (1904) 23 NZLR 660, per Cooper J at 662:

In order to constitute a title by adverse possession, the possession relied on must be for the full period... actual, open and manifest, exclusive, and continuous; and the onus of proof in such an action as this rests upon the plaintiff...

In order to dispossess the rightful owner the possession which is claimed to be adverse to his rights must be sufficiently obvious to give to such owner the means of knowledge that some person has entered into possession adversely to his title and with the intention of making a title against him; it must be sufficiently open and manifest that a man reasonably careful of his own interest would, if living in the locality and passing the allotment from time to time, by his observation have reasonably discovered that some person had taken possession of the land.

346 The 60 year period applying to adverse possession against the Crown dates back to the Crown Suits Act 1769 (U.K.) and appears to relate to the period of investigation required by the English deeds title system. The Wright Committee report (1936) noted that, before 1874, a purchaser of English land could investigate title back to a root of title at least 60 years old, but that legislation reduced this period to 40 years in 1874 and then to 30 years in 1925. The report suggested, and the 1939 English Act enacted, that the period be reduced from 60 to 30 years. The retention of the 60 year period in the 1950 Act, not withstanding the change in the earlier 1939 English Act, was apparently based on the fact that the Crown had occasionally relied on a period longer than 30 years.

347 The 12 year period also reflects English deeds title legislation. Before the enactment of the 1950 N.Z. Act the Real Property Act 1833 (U.K.), provided that actions to recover land must be brought within 20 years from accrual of the cause of action, and on expiry of that period the title to the land of the person who might have brought the action was extinguished. In 1874 legislation (not applicable in New Zealand) the 20 year period was reduced to 12 years, and this was reflected in the 1950 Act.

ADVERSE POSSESSION - LAND TRANSFER ACT

348 The Land Transfer Act (``LTA'') operates on a quite different basis to the common law: the title of a registered proprietor is generally paramount and `free from all encumbrances,liens, estates, or interest whatsoever'' except those noted on the register (LTA, s.62). Section 64 of the LTA provides that generally no title or interest in land can be acquired by possession or user adversely to or in derogation of the title of a registered proprietor. However, both ss.62 and 64 are expressly subject to Part I of the Land Transfer Amendment Act 1963.

349 The 1963 Amendment enables a person in adverse possession of LTA land for a continuous period of not less than 20 years (although, in practice, normally 30 years: see proviso to s.4(1)) to seek a certificate of title notwithstanding the existence of the registration of some other person as the proprietor of that land. However, the application can be defeated if after the application

has been advertised and notified through all available relevant parties, some other person establishes a better legal or equitable title. It should be noted that the Amendment does not apply to Crown land, Maori land, local authority land, land held in trust for public purposes, and land possessed by virtue of an erroneous boundary marker or a change of watercourse: see s.21.

350 The use of the 1963 Amendment is indicated by the following date supplied to us by the Registrar-General of Land on the number of adverse possession claims since 1960, as recorded in particular land registries -

Auckland 353

New Plymouth 43 (37 resulted in issue of new certificates title, remaining six were not completed)

Napier 44 (since 1964 only)

Wellington 205

Blenheim 85

Nelson 29

Christchurch 262 (4 in 1960)

Dunedin 246 (20 titles issued from deeds under Part XII of the LTA)

Invercargill 121 (plus 5 in various stages of completion)

351 Possessory title is recognised or paralleled in certain provisions of the LTA, including:

(a) Section 79 - initial certificate of title void where land is subject to valid title by adverse possession.

(b) Sections 197 and 199(3) - limited certificates of title are subject to the obtaining of title by others through adverse possession.

(c) Section 204 - the issue of a limited certificate of title operates in a manner somewhat analogous to adverse possession insofar as it extinguishes the title of all those other than persons (i) in actual possession of and rightfully entitled to the land, and (ii) in adverse possession of the land - after the expiration of 12 years the title of all others is barred and extinguished.

352 The Land Transfer Act contains its own special limitation provision (s.180) which provides a standard six year period for claims for compensation under Part IX (``Guarantee of Title''). Section 180(2) deems the date of accrual to be ``the date on which the plaintiff becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim'', and s.180(1) provides for an extension in the case of infancy or unsoundness of mind to enable an action to be brought within three years from the date on which the disability ceases.

OTHER LIMITS ON APPLICATION OF 1950 ACT

353 Section 6 of the 1950 Act sets out the limits of the application of that Act in relation to land:

(a) Nothing in the 1950 Act applies to Maori customary land'' - defined in s. of the Maori Affairs Act 1953 as ``land which, being invested in the Crown, is held by Maoris or the descendants of Maoris under the customs and usages of the

Maori people''.

(b) The 1950 Act is subject to s.157(2) of the Maori Affairs Act 1953 which provides that customary title to land is extinguished if that land was held free of such title by the Crown for the 10 years prior to commencement of the Native Land Act 1909 on 31 March 1910.

(c) There Act is also subject to s.458 of the Maori Affairs Act 1953 which provides that, for limitation purposes -

... time shall not run or be deemed to have run against a co-owner of Maori land who neglects or has at any time neglected to exercise his right of entering upon and using the common property while it remains in the occupation of another co-owner or someone claiming through or under him.

(d) The 1950 Act is subject to the Land Act 1948 in which s.172 provides that the following category of lands are not to be affected by adverse possession:

(i) land that is a road or street, or is held for any public work

(ii) land reserved for any purpose;

(iii) land deemed to be reserved for sale or other disposition under s.58 (relating to retention of a 20 metre margin along sea frontages, lakes more than eight hectares in area, and rivers and streams with an average width of three metres or more) - whether title to the land is held by the Crown, or has been vested in trust for the relevant purposes in any local authority, public body, state owned enterprise, or other person.

(e) The 1950 Act is also subject to s.51 of the Public Works Act 1981 (which replaces s.12 of the Public Works Amendment Act 1935) - this (also) provides that there can be no acquisition of rights by adverse user where land is held for public works and vested in the Crown.

(f) The 1950 Act is not to affect the right of the Crown to any minerals (including uranium, petroleum and coal).

354 These exceptions to the application of the 1950 Act mean that its provisions relating to land - primarily, the creation of rights by adverse possession - is quite limited. We note that they give primacy to the statutory title registration scheme and also to the retention of land held for specific public purposes, as well as dealing with aspects of Maori interests in land. These protections will continue if, as we recommend below, adverse possession is abolished.

OPTIONS FOR REFORM

355 Given the existing state of the law as outlined in the preceding paragraphs, the options for legislation to replace the 1950 Act provisions relating to land would appear to be as follows:

(a) retain the existing provisions in their present form;

(b) apply our general three year (extendible to 15 years) limitation period;

(c) attempt some other rationalisation of the various existing limitation periods relating to land;

(d) repeal the present provisions relating to land in the 1950 Act.

356 In general terms, the first of the options outlined above is unattractive in that it would maintain an illogical and unclear legislation framework of limited application.

357 The traditional importance placed on title to land and, more particularly, the time periods provided under the LTA 1952 - the dominant legislation in the area - make application of our standard limitations proposals somewhat difficult. If it is not possible to obtain a title based on less than 20 years possession under the LTA, it seems anomalous that a title could be obtained on land outside that system on three (or even 15) years' possession under our general proposals.

358 We have considered whether some other rationalisation - perhaps involving changes to the Land Transfer Amendment Act 1963 - could be included in our recommendations, but have concluded that any changes to that legislation should be the subject of a major review of the entire land transfer system. All of which leads us to favour option (d) and the abolition of adverse possession as a means of obtaining title.

ABOLITION OF ADVERSE POSSESSION

359 The obtaining of title to land through adverse possession was effectively abolished in British Columbia in the 1975 B.C. Act which gave effect to the 1974 report of the British Columbia Law Reform Commission. The primary basis for the BCLRC's recommendation was that adverse possession applied to a very limited range of land, and was anomalous given the primacy of the land titles registration system. The position in British Columbia in 1974 was slightly different from that in New Zealand in 1988 in that the Land Act 1970 (B.C.) had effectively abolished adverse possession as against Crown land in general terms. Nevertheless, the British Columbia example is relevant to New Zealand as an example of a process of transformation from the possessory title system involved in the earliest British settlement towards a perfection of the statutory title registration system.

360 The objectives of a system of adverse possession were identified in the Alberta ILRR paper (1986) - which recommended that new limitation legislation should not apply to any claims requesting restoration of possession of land or personal property - and thee are illuminating:

(a) adverse possession assists in crating a marketable title to land - in fact, in Alberta (and in New Zealand) this is achieved by the statutory land title registration system;

(b) adverse possession promotes the productive use of land - this was true in the 19th century, but now most productive land in Alberta (and in New Zealand) is in use and this objective is largely and perhaps completely spent;

(c) adverse possession may satisfy purchasers' expectations insofar as they believe they are purchasing a parcel of land marked by visible boundaries and if there is a boundary error, a purchaser may gain ownership of the mistakenly occupied space under adverse possession - nevertheless, there are provisions for dealing with this in other parts of the law (for example, the Contractual Mistakes Act 1977, and s.129 of the Property Law Act 1952);

(d) adverse possession may prevent unjust enrichment of a land owner where another person in adverse possession makes substantial improvements in the mistaken belief of owner-ship - on the other hand, it may be argued that the adverse possessor is unjustly enriched at the expense of a former owner where no consideration passes for the transfer of ownership rights.

361 Adverse possession as a means of obtaining title is founded on the 1950

Act. We believe that its underlying purpose is largely if not completely spent, for the reasons mentioned in the preceding paragraphs in relation to Canadian jurisdictions where there is an effective registration system for land titles, and that it should not survive the repeal of the 1950 Act that we propose. There should of course be no interference with existing title based on adverse possession.

362 That conclusion involves the repeal, without replacement, of s.18 of the 1950 Act, but also raises a question of definition of the scope of an exclusion from the general statute we propose. The abolition of adverse possession means that an original owner must be entitled to pursue proceedings for recovery of the land in issue, irrespective of the passage of more than three - or 15 - years. Obviously, an express exclusion is required, but to phrase it in terms of proceedings ``to recover land'' would include not only situations where the original dispossession amounted to trespass, but also a range of others such as proceedings by a mortgagee where a mortgagor is in default (and note the present extended definition in s.2(5) of the 1950 Act). Following the British Columbia LRC report, and the 1975 B.C. Act, we recommend that the exclusion be limited to those where the original dispossession amounted to trespass.

MORTGAGES, CHARGES

363 A number of provisions in the 1950 N.Z. Act relate to mortgages and charges. We propose that most of these be repealed and replaced by the general limitation defence - three years, extendible to 15 years - with no distinction being made between secured and unsecured lending transactions, or those incorporated in the form of a deed.

364 The repeal of s.20(3) of the 1950 Act would mean that these would be no special provision for the delayed accrual of a right to receive money secured by a mortgagee or charge over any future interest or unmatured life insurance policy. That result accords with the reasoning of the British Columbia report (1974) which considered that mortgagees of such property would be able to protect themselves by contract at the time of entry into the transaction, and that such special circumstances should not justify additional complications in a statute of limitation. We agree.

365 Repeal of s.20(5) of the 1950 Act would mean the end of the present exemption of mortgages or charges over ships from limitation provisions. Again, we see no need for additional complications in the statute when those taking security over such property can protect themselves by contract against any perceived problems over enforcement of charges on such moveable items.

366 A more complicated questions arises in relation to mortgages from the interrelationship between the statute of limitations and the Land Transfer Act 1952. At present, the right to sell contained in a mortgage registered under the LTA survives even where the right to recover the principal debt is barred by the operation of the 1950 N.Z. Act: see Hinde, McMorland & Sim, Introduction to Land Law (2nd ed, 1986) para. 8.149. The dilemma is that, on the one hand, there is the obvious anomaly and, on the other, the possibility of a registered interest under the LTA being defeated by something in the nature of adverse possession. In the end, and because we do not wish to embark on a major amendment of the LTA, we have concluded that the anomaly must be retained until such time as the LTA is the subject of a complete review. In other words, the limitation statute should continue to operate subject to the terms of the LTA.

XIII

Statutes with their Own Limitation Regimes; Consequential Amendments; Transitional Provisions

367 There are many of specific statutory limitation periods for bringing court proceedings. Most, but doubtless not all of them, are listed in Appendix E. While there are obvious advantages in consistency, we recognise that there may be special policy factors, which would justify departure from the general regime we propose.

368 The new statue should be subject to any specific legislation which provides a separate limitation regime, but we have sought to reduce the number of these to increase uniformity. Our conclusions on the many statutes involved are reflected in their inclusion or exclusion from the consequential amendment provisions of our draft statute (see Chapter XV). In this chapter we discuss only some of the statutes and areas considered in our review.

JUDGEMENTS

369 We have already mentioned actions to enforce judgements (se para. 326). To repeat, we think that the present six year periods in s.80 of the District Court Act 1947 and in Rule 556 of the High Court Rules should be reduced to three years in line with our general regime, although retaining the present additional discretion.

370 There is a more difficult question in relation to the enforcement of foreign judgements. The Reciprocal Enforcement of Judgements Act 1934 allows a judgement creditor six years after the date of judgement to register a foreign judgement in the House Court. The limitation provision raises conflict of laws questions because a judgement can be set aside even if registered in time if the judgement could not be enforced by execution in the country of the original court. We think it wise to take a conservative approach until a thorough survey of the law applying to reciprocal enforcement of judgements can be undertaken. Such a survey is included in the Commission's current work programme, but is presently in its preliminary phase. To further complicate the area, where there is a judgement from a Commonwealth jurisdiction (and no reciprocal arrangement) the judgement may be enforced in accordance with s.56 of the Judicature Act. The 12 year limitation period provided by s.4(4) of the 1950 Act presently applies, but we do not recommend that this period be preserved for this limited area.

LAND, LEASES, RATES

371 As mentioned earlier in Chapter XII, s.180 of the Land Transfer Act 1952 contains its own six year limitation period (and extensions) for actions against the Crown as guarantor of title. That section generally parallels the provision in the 1950 Act and we believe it should be subject to the new general regime. Accordingly, we propose that s.180 be repealed.

372 Section 173 of the same Act, requires that where there is such an action under s.180, notice must be given to the Attorney-General and Registrar-General at least one month before the commencement of proceedings. We recommend that the notice procedure be retained. We perceive that it is designed to enhance the opportunity for resolution without litigation, and do to see it as inconsistent with the new statute. Its actual utility will of course have to be assessed in some later overall review of the LTA.

373 Section 121 of the Property Law Act provides that application for relief against the lessor's refusal to renew a lease should be commenced within three months of the refusal. This provision is justified by a clear policy in favour of prompt determination, and we do not recommend change. The provision in s. 54 of the Residential Tenancies Act 1986 is of a similar nature and, in any event, is a claim brought before a tribunal and not a court.

374 The limitation provision for persons claiming under a lease under s.2 of the Landlord and Tenant Act 1730 is best considered within the Law Commission's intended review of ancient property statutes arising out of our report on Imperial Legislation in Force in New Zealand (NZLC R.1).

375 The Rating Act 1967 contains two limitation provisions. Section 79 of the Rating Act provides a six year limitation period for the recovery of rates. We received a submission that reduction of time in this area is undersirable as it might force local authorities to take the remedy of selling the land on which the rates are outstanding at an earlier time than under the present period and more frequently. We believe that agreement (or acknowledgement of liability) for future payment provides an alternative to sale in such circumstances, and recommend that s.79 be repealed to allow the new statute to apply. Section 153 of the Rating Act contains a time limit on the placing of a charging order for rent on Maori freehold land. We recommend that the provision should be retained in recognition of the special considerations applying to Maori land. However, our proposal for repeal of s.20 of the 1950 Act would leave s.153(9) obsolete.

TRANSPORT

376 There are a number of limitation provisions in carriage of goods and transport statutes. They provide for short limitation periods, sometimes with a notice requirement, and can be conceptually distinguished by the fact that some of the provisions actually extinguish the right and not merely the remedy. We consider that their retention is justified by the special need for promptness so that the defendant can gather evidence in this field, and also by special international treaty obligations (although not all of the treaties from which they have been derived have been ratified). the statutes in this category include:

Carriage by Air Act 1967 ss.11, 36 and 39

Carriage of Good Act 1979 ss.18 and 19

Sea Carriage of Goods Act 1940 s.11

Shipping and Seamen Act 1952 ss.76 111 and 471

Harbours Act 1950 s.262A

Marine Pollution Act 1974 s.41

ESTATES, PROBATE

377 There are various time limits and notice provisions in the probate and estates area. They generally provide for a shorter time to take claims (usually a year) together with a judicial discretion to extend that time provided the estate has not been distributed. The various provisions are not well inter-related nor of themselves easy to understand (see, for example, s.49(3) of the Administration Act 1969).

378 We believe that there is scope to challenge the underlying presumption that the deceased's property should be transferred quickly after death. For example, it was suggested to us that a statutory requirement that nothing be done until one year after the death might be more in sympathy with Maori culture. Nevertheless, this whole area is overdue for comprehensive review and, taking into account the work currently being done in the area of the Matrimonial Property Act 1963 and the Family Protection Act 1955, we believe that the policy questions involved in revising time limits in these areas are best addressed in a specific review of claims against the estates of deceased

persons. Accordingly, we recommend that the present provisions remain in the meantime.

CLAIMS AFTER DEATH

379 We propose that the special limitations in the Law Reform Act 1936 on the survival after death of some causes of action should remain until the whole of that Act can be considered.

FAMILY LAW

380 Statutes covering other aspects of testamentary and family law also provide specific limitation provisions, again usually shorter with a discretion to extend. Examples are:

Domestic Actions Act 1975, s.8(2) (claims for property arising out of agreements to marry),

Matrimonial Property Act 1976, s.24 (claims 12 months after dissolution) and Family Proceedings Act 1980, s.49 (applications for paternity orders six years after birth of child).

381 Again, we are not necessarily convinced that these time limits are appropriate, but the ara of matrimonial and de facto property is currently under review (including as policy issues whether the ``clean break principle'' should be applied), and we are inclined to leave this area also to be considered comprehensively in the course of that separate and specific review.

TAXATION, CUSTOMS

382 The 1950 Act does not apply to actions by the Crown to recover tax (s.32). Section 406 of the Income Tax Act 1976 also provides that no statute of limitations bars any action or remedy for the recovery of tax. This section also applies to Land Tax (s.51) and the Goods and Services Tax Act 1985 (s.44).

383 Advice from Inland Revenue Department indicates that it is firmly in favour of retaining these provisions on the grounds of ``public policy''. We note, however, that provisions in those Acts (ss. 419, 61, 66 respectively) provide a 10 year time limit on prosecuting for offences under that legislation. We are unable to see why there should be a 10 year limitation defence against criminal prosecution (itself unusual) yet no limitation defence in respect of civil claims.

384 Our general approach to the position of the Crown under the proposed new statute is that it should be treated no better and no worse than any other litigant. That recognises a gradual move away from the earlier notion that the Crown had to be regarded as in a unique category, separate from other litigants. the proposition that the sanctity of collection of public revenue is in a unique category is open to argument, and we suspect that there would be minimal adverse impact on the Crown (and perhaps beneficial efficiency incentives) if revenue collection were to be subject to the general regime outlined in this report, bearing in mind the provisions for extension of the standard period. In any event, the scheme of the revenue legislation is such that recovery of tax by originating litigation is uncommon.

385 Alternatively, emphasising internal consistency in the revenue legislation as well as the central limitation policies of certainty and repose, we believe that there could be a 10 year limitation period for recovery of taxes by the Crown. Such a limitation period would also be consistent with s.114(3) of the Accident Compensation Act 1982, providing a 10 year limit on the Corporation's recovery of levies under that Act.

386 Section 32 of the 1950 Act also expressly excludes proceedings for recovery of Customs duty and Customs forfeiture proceedings. We propose the repeal of s.32, and commend to the current review of the Customs legislation the question of whether that legislation should contain specific limitation provisions or should (as we suspect) be subject to the general regime we propose.

WAGES RECOVERY

387 Section 198(2) of the Labour Relations Act 1987 provides a six year limitation period for the recovery of wages. We believe that other claims in the Labour Court should be included in the scope of the new statute we propose (see Chapter XI), and recommend that this provision be repealed. Our inquiries suggest that, under the present law, there have been many instances where this limitation period has expired before the worker discovers that she or he has consistently been under paid in relation to the award. Thus the absence of knowledge extensions we propose would have scope to operate, although the period after knowledge would be reduced to three years.

FAIR TRADING

388 Both the Contractual Remedies and Fair Trading Acts provide relief for misrepresentation in relation to a contract. The limitation periods differ - the Contractual Remedies Act 1979 being governed by the Limitation Act 1950, and the Fair Trading Act 1986 having a separate provision in s.43 which gives the claimant three years from the time ``the matter giving rise to the application occurred''. There has been some uncertainty whether the three years runs from the time of the loss or from the time of the breach. The differing limitation regimes have compounded uncertainties about the availability of regimes under the two schemes (see Trotman, Misrepresentation and the Fair Trading Act Dunmore Press 1988). We recommend that the provision in the Fair Trading Act be repealed, and thus enable the new regime to apply to both Acts.

SPECIAL CROWN DEFENCES

389 One of the avowed purposes of the 1950 Act was to remove the privileged position of the Crown in relation to liability of its servants. In places, limitation provisions continue to offer special defences to the crown. Examples are s.124(4) of the Mental health Act 1969, s.40(3) of the Pawnbrokers Act 1908, and s.41A of the Penal Institutions Act 1954. We recommend that the new statute apply to these claims, and the repeal of the special time limits in those and similar statutes.

INTELLECTUAL PROPERTY

390 There would be some difficulties with proceedings under the Patents Act 1953, the Designs Act and the Trade Marks Act if the proposed regime were to apply without special provision in our Limitation Defences Act. For example the Patents Act provides that once a patent is sealed, the holder of the patent is entitled to take actions against infringement dating from time of the publication of the specification. The delay between publication and sealing of the patent can be substantial, and could, without special provision, defeat the patent holder's claims before the patent is granted. Appropriate special provisions are set out in the draft legislation (Chapter XV).

THE COOK ISLANDS AND NIUE

391 The effect of s.641 of the Cook Islands Act 1915 and s.706 of the Niue Act 1966 respectively is that any new enactment of the New Zealand Parliament dealing with the limitation of actions will automatically become part of the

law of the Cook Islands and of Niue by adoption. We recommend that the New Zealand government take an early opportunity of drawing our proposals to the attention of the Government of Cook Islands and of Niue. It will then be for the governments to consider whether they are content to adopt this law. If not they can make any provision which they consider appropriate by Act of the Cook Island Parliament of or of the Niue Assembly.

MINOR CONSEQUENTIAL CHANGES

392 Consequential amendments should be made where the Limitation Act is presently referred to in the statute book to

(a) replace the words ``Limitation Act 1950'' with the words ``Limitation Defences Act 1988'', or

(b) remove the reference to limitation regimes altogether where that is now obsolete, or

(c) take account of the transitional provisions.

The following sections are affected:

Sharemilking Agreements Act 1937 s.3(4)

Public Works Act 1981 s.132(9)

Crown Proceedings Act 1950 s.4

Land Transfer Act 1952 ss.112, 197, 199(3)

Maori Affairs Act 1953 ss.447(A)5, 458

Rating Act 1967 s.80, 153(9)

Property Law Act 1952 s.81(6)

Copyright Act 1962 s.25(1)

Contractual Remedies Act 1979 s.15(1)(f)

Carriage by Air Act 1967 s.11(3)

for more details, see Chapter XV.)

COMMENCEMENT, TRANSITIONAL PROVISIONS

393 There can be no doubt that our proposed Limitation Defences Act would represent a major change from the regime presently applying under the 1950 N.Z. Act. To allow time for full understanding of the import and implications of the new statute, we recommend that it not come into force for a period of approximately one year after it has been enacted.

394 The coming into force of a new legal regime, and the consequential repeal of the old inevitably raise questions about the transition process. The objective is to secure a proper balance between preservation of legitimate expectations under the old regime, and the early commencement of the new.The matter is somewhat complicated by the fact that the 1950 N.Z. Act deals with two matters - the period within which a limitation defence may be raised in proceedings, and the extinction of title (as under s.5(2) and s.18).

395 There is little difficulty where a title has already been extinguished by the operation of the 1950 N.Z. Act. The Acts Interpretation Act 1924 deals with the effect of repeal of statutes on rights (and the extinction thereof) under such statutes, and provides that repeal has not effect on such title. We believe that retention of the status quo as at the repeal of the 1950 At is desirable, and that the 1924 Act makes any specific reference in the new Act unnecessary.

396 A more difficult question is involved in relation to situations where time is running towards extinction of one title - and, inevitably, towards the strengthening of the title of another. Nevertheless, the effect of provisions such as s.5(2) ands.18 is not to confer a new title on, say, a person, with adverse possession, but to extinguish the title of the legal owner. Given that the policy thrust of the new Act we propose is to prevent the extinction of title by the passage of time, we do not think that it would be right to recommend that such extinction continue after the new Act comes into force. Subject to the point made in the next paragraph, our draft of the new Act is silent on the point and the basis that the repeal of the 1950 N.Z. Act will mean the cessation of operation of the extinguishing provisions of that Act, and thus no express provision is necessary.

397 We would make provision, however, for cases where adverse possession of non-Land Transfer land has begun (but title has not been perfected) at the time the Limitation Act 1950 is repealed. We propose that a consequential amendment be made to the Land Transfer Act 1952 which creates a procedure for bringing adversely possessed land under the Land Transfer system upon proof that it has been abandoned.

398 In relation to limitation defences, we recommend that all proceedings commenced before the 1950 N.Z. Act is repealed should continue to be governed by that act; conversely, all proceedings commenced after the new statute comes into force should be the subject of limitation defences in accord with that Act only.

399 However, to deal with some of the difficulties which may arise in relation to proceedings commenced after the new statute has come into force - for example, where a cause of action arose four years before the commencement of the new statute (and thus subject to a three year limitation period) - we propose a three year transition period. The effect of this would be that proceedings commenced after the new statute commences could be met with the limitation defence only before the earlier of the expiry of any limitation period provided under the 1950 Act, or three years after the commencement of the new statute. Thus, where a 12 year period is provided under the 1950 Act and time has commenced to run before the new statute applies, those proceedings will have to be brought within the three year period effectively provided under the new statute (subject to extensions in terms of that statute); but if the action had accrued, say 11 years before the new statute commenced, the limitation defence would be available at the end of that 12 year period - one year into the new regime.

400 To avoid any doubts on these points, we recommend that they be expressly provided for in the new statute.

XIV

Procedural Questions

401 The procedural aspects of reform to the law of limitations have raised many issues of great intricacy, but few obviously ``right'' answers. Underlying most

of these issues is a degree of tension between what have been described as ``limitation policies'' (consistent application of rules providing certainty and the other objectives which justify any limitations regime) and `1`civil procedure policies'' (in particular, enabling the bringing together of all issues and parties when a matter has been brought before the court so that the matter can be dealt with as a whole, and not piecemeal).

402 In this chapter we consider first questions of pleading and service,note the possibility of some summary procedure for determining limitation issues, and then proceed to the many questions involved in complex proceedings - counterclaims, third party proceedings, additional causes of action, and the like. For the most part the chapter proceeds by reference to the procedural rules in force in the High Court. That is done for convenience, and because those rules are modern (coming into force at the beginning of 1986) and likely to provide a model for revisions of the rules of other courts. It must be kept in mind, however, that the rules in other courts may differ in some respects, and in arbitrations (and Small Claims or Disputes Tribunals) there may be few precise rules.

PLEADING OF DEFENCES

403 As discussed in Chapter III, the 1950 N.Z. Act is silent on the need to expressly plead a limitation defence. That need has been a feature of English law since the early 17th century and is now reflected here in the rules governing court procedure such as R.130 of the High Court Rules. We believe that the necessity to plead the defence should remain as being consistent with the onus on the defendant (and the option not to take any point about expiry of a limitation period).

404 We have considered whether the principle underlying this requirement for pleading, which we take to be the giving of notice in advance to ensure that a claimant is not taken by surprise (and perhaps that the consequential need for an adjournment does not unnecessarily prolong the proceedings), could be extended to courts (and arbitrations) where there are not presently rules which create such a requirement. In other words, should the new statute require express advance notice of intention to rely on a limitation defence even where present procedural rules do not so require? The point is not easy but, on balance, we believe that those presiding in proceedings where the pleading requirement is absent would deal with such matters in a reasonable and proper fashion, in most cases by accepting a late limitation defence and granting any necessary adjournment, perhaps with some sanction in the form of an award of costs against the party causing the delay. However, we recommend that the various bodies responsible for formulation and review of the procedural rules of the various courts consider whether, if there is not already, there should be a notice requirement for affirmative defences.

405 We have also considered whether, although it may only be declaratory of existing procedural rules, the new statute should explicitly provide that a limitation defence must be expressly pleaded in accordance with any relevant rules governing the proceedings. On balance, we have concluded that such a provision would achieve little and do not recommend its inclusion.

DIRECTIONS AS TO SERVICE

406 As discussed at the end of the Chapter VI, we recommend that service of a claim on a defendant (rather than mere filing in court, as under the 1950 N.Z. Act) should be required in order to stop time running for limitation purposes. In cases where there are difficulties in serving a claim (e.g. if the defendant is overseas or otherwise unlocatable), we believe that time should be stopped on the filing of an application by the claimant for directions from the court on how to go about effecting service (e.g. by newspaper advertisement, or

delivery to an agent).

407 It follows that an application for directions would commonly be filed along with the original claim if difficulties with service and a possible limitation defence are at all likely. There is a possibility that such applications may lie dormant for some time. That situation would contradict one of the central policies of a new statute - ensuring that defendants are made aware of claims against them as soon as practicable - and we have considered whether the application for directions exception to the general requirement for service should itself be subject to a proviso that the application is advanced with reasonable diligence by the claimant to determination by the court. On balance, we do not recommend such a proviso, but commend the potential difficulty to the consideration of those responsible for the administration and procedural rules of the various courts.

SUMMARY DETERMINATION

408 I many cases where a limitation defence is pleaded it may be necessary to consider all the evidence relating to the claim before the validity of the defence can be decided. In other cases the defence may be so clear cut as to persuade the claimant to discontinue the proceedings. But there may be an intermediate range of cases where the limitation defence may be decisive and may be decided without the need for a full trial on the merits of the claim.

409 We have given some thought to whether the existing rules governing court procedure - such as those for striking out applications, or determination of preliminary points - would be sufficient to enable such cases to be dealt with expeditiously. The recent decision in Matai Industries v. Jensen (para. 55, above) illustrates the availability of the striking out procedure. However, the new statute we recommended - in particular, the extension for absence of knowledge - may require some procedural change. It may be that a procedure similar to that currently available for claimants to seek summary judgement in the High Court Rules - on proof by affidavit of the absence of any tenable defence - could usefully be devised for defendants confident of a limitation defence. We recommend that this matter be considered by the various bodies responsible for formulation and review of the procedural rules of the various courts.

COMPLEX PROCEEDINGS

410 Throughout this report we have discussed disputes on the convenient assumption that they occur in a simple form: a claimant (c) seeks some remedy against a defendant (D) who disputes C's entitlement to that remedy. Many disputes do reach the courts in that form, but others are more complex. Some of the complexities are as follows:

(a) C claims against D and later makes a similar claim against D2;

(b) C claims against D who counterclaims against both C and another (a countercliam defendant, CCD);

(d) C claims against D who brings third party proceedings against another (TP);

(e) C claims against D and later wishes to add further claims which may involve:

(i) different facts relating to the same incident,

(ii) different legal bases for remedies in relation to the same incident, or

(iii) a completely different incident.

411 In each of those situations the complexities increase where the parties designated as C,D, CCD, and TP are multiplied. It must also be borne in mind that some parties may not be proceeded against - or may not take an active part - by reason of lack of funds or some arrangement or relationship with one or more of the other parties.

412 In the absence of express modification, the central features of the new regime we recommend would mean that a decision on a limitation defence would relate to each defendant. Thus, in a simple case, if C claimed against D and D2 some 5 years after the act or omission complained of, it might be that one of the extensions (e.g. lack of knowledge) applied in relation to the claim against D but not that against D2; if so, the general scheme would mean that D2 has a limitation defence against C and D has not. Similarly, a counterclaim by D against C would be treated as a separate claim and may be able to be met by C invoking a limitation defence. On the other hand, civil procedures policies may be argued: if a particular set of circumstances is before the court it is best that all the parties involved should be joined to enable the court to deal with the issues in a comprehensive manner and with a just apportionment of responsibilities.

413 Before proceeding the consider these matters, it may be useful to explain some of the terminology. A ``countercliam'' against C alone may (but need not ) relate to the incident which provoked the original claim, but must so relate if it involves a claim against C together with another (CCD). A ``set-off'' is a defence to a claim (not a retaliatory claim) and generally there must be some connection between C's original claim and the set-off which D asserts in response. Et-off is itself a complex topic, but there is a helpful discussion in McGechan on Procedure (see the notes preceding R.145). A ``third party proceeding'' often relates to a situation where D claims that TP is responsible for all or part of the damage or loss which C has claimed against D, and R.75 of the High Court Rules includes as a test for such proceedings a requirement that the issues or claims between D and TP be ``related to our connected with'' the subject matter of C's claims against D. Again, the discussion of this topic in McGechan on Procedure (notes on r.75) is helpful.

THE PRESENT LAW

414 The present law relating to these various procedural complexities can only be briefly summarised here, but that may suffice to assist an understanding of overseas and our own reform proposals. The summaries that follow make reference to the High Court Rules;

(a) Additional Parties

Rule 97(1)(b) empowers the High Court to order, at any stage of a proceedings and on such terms as seen just, ``that any person who ought to have been joined, or whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceedings be added, whether as plaintiff or defendant''. Generally, the Court will refuse to add a party if that would operate to defeat a limitation defence.

(b) Counterclaims, Set-offs

Section 30 of this 1950 N.Z. Act provides that, for the purposes of the Act, ``any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the [original] action''. In other words, the limitation period available for a counterclaim by D against C (or C and CCD) must be measured from the time of commencement (filing) of C's original claim, not of the counterclaim. rule 150 provides that a countercliam

by D against C and CCD must be ``for relief relating to or connected with the original subject matter of the proceeding.''

(c) Third Parties

Section 30 does not apply to third parties, and as R.75(3) treats a third party as if he or she were a defendant in proceedings brought by the (original) defendant, TP is free to plead any available limitation defence against D on the basis that time stopped running only when the third party proceedings themselves were commenced.

(d) Additional Claims

Rule 187 generally permits any party to file an amended pleading (requiring leave after the matter has been set down for trial), but R.187(2)(a>) effectively prohibits the introduction of a cause of action which is ``statute-barred'' (outside the limitation period) - apparently determined without regard to extension provisions such as s.28 of the 1950 Act: see Meates v. Commercial Bank of Australia & Ors (Court of Appeal, unreported judgement of 11 March 1986; CA 190/85).

OVERSEAS REFORMS PROPOSALS

415 Section 30 of the 1950 N.Z. Act follows s.28 of the 1939 English Act. Although procedural questions were not discussed in detail in the Orr report (1977) which preceded the current 1980 English Act, s.35 of that Act is significantly different. It defines ``new claims'' to cover the addition or substitution of parties and causes of action as well as set-offs and counterclaims, and provides that all new claims are deemed to have been commenced on the date of commencement of the original action except that all claims in or by way of third party proceedings are deemed to have commenced when such third party proceedings were commenced.

416 A different approach has been favoured in several Canadian provinces, with the following policy conclusion - contained in Ontario LRC's 1969 report (at p.113) - apparently widely accepted:

The purpose of the Statute (of Limitations) should be to ensure that matters be litigated in a reasonable time. Once an action has been started, then all matters which were not statute barred when the [original] writ was issued and which might be dealt with at the trial of that action, should be capable of being brought before the court.

417 Section 4 of the 1975 British Columbia Act (see Appendix H) gives effect to similar views expressed in the BCLRC's 1974 report, as well as that report's recommendations that these procedural issues be dealt with in the statute and not by rules of court.

418 The key to s.4(1) of the B.C. Act is that the variation to the limitation regime is limited to claims ``related to or connected with the subject matter of the [original] action''. In relation to counterclaims by D against C alone it is narrower than s.30 of the 1950 N.Z. Act. Section 4(2) ensures that if C's claim against D is eventually found to be statute-barred, D's counterclaim cannot rely on s.4(1) to avoid being statute-barred itself.

419 Statutory provisions giving courts a very wide discretion to allow amended pleadings despite the passage of the limitation period - as in s.4(4) of the 1975 B.C. Act - were criticised in an important article published in 1975 - ``Amendment of Proceedings After Limitation Periods'' (1975) 53 Canadian Bar Review 237, at 281, by Garry D Watson.

420 Taking the U.S. Federal Rules of Civil Procedure as a model Watson proposed a new rule relating to additional claims which avoided the ``difficult, imprecise and highly conceptual inquiry as to whether or not a new cause of action is stated by the amendment.'' His new rule provided that -

The court may allow an amendment changing the claims asserted in an action, notwithstanding that since the commencement of the action a relevant limitation period has expired, whenever the claim sought to be added by amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ.

421 Watson also used U.S. procedural rules as a starting point in formulating more complex new rules relating to amendment to pleadings which add or substitute parties. He suggested that amendments to pleadings which add or substitute parties. He suggested that such amendments be allowed, notwithstanding
the expiry of a relevant limitation period since commencement of the action if:

(a) the claim to be asserted by (or against) the new party (or his or her new capacity) ``arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the action as originally constituted'', and

(b) such notice (informal or formal) of the claim to be asserted has been given to the intended defendant - within the limitation period (plus the time allowed for serving proceedings after they have been filed) - that he or she is not prejudiced in defending the claim on its merits, and

(c) (in relation to addition of plaintiffs) the addition or substitution is necessary or desirable to ensure the effective enforcement of the original claims in the action.

422 The Watson proposals were endorsed and recommended (by a majority) in the Alberta ILRR paper. The minority position was based on the proposition that the discovery extension achieved much of what Watson's proposals were designed to achieve. The minority favoured removal of limitation obstacles for counterclaims and additional claims related to the conduct/transaction/occurrence in issue in the original claim, and also favoured treating the date of service of C's claim and D as the date on which D should be regarded as having knowledge of a claim against TP.

AN EXAMPLE

423 To illustrate the issues and differences of approach in this field suppose that:

(1) C's car collides with DI's van and both vehicles are the struck (and again damaged) by D2's truck,

(2) D2 later finds that TP (a garage) may have defectively installed new brakes in the truck, and

(3) (improbably, but importantly for illustrative purposes) C does not serve the claims against D1 and D2 until the last day of the standard limitation period (measured from the date of the accident).

424 The discussion which follows considers whether a variety of further claims can be made - in the sense that they would not be defeated by a limitation defence.

425 Can D1 and D2 counterclaim against C for damage to their vehicles in the accident?

A strict adherence to limitation policies might produce the answer ``NO'', but the obvious unreasonableness and unfairness of that result has led to statutory changes such as s.30 of the 1950 N.Z. Act, s.35 of the 1980 English Act, and s.4(1)(a) of the 1975 B.C. Act. Under the new regime (as thus far described) we propose there might be an argument that D1 and D2 could invoke the absence of knowledge (of the significance of the damage) extension provision, but that is not certain - D1 and D2 may have thought the damage to them significant but have been prepared to accept their own loss and declined to become involved in litigation until it was forced on them by C. Accordingly, notwithstanding that it involves qualification of the essentials of the proposed regime outlined thus far, we believe that this question should be answered `Yes''.

426 Can D1 counterclaim against C in relation to something not directly connected with the accident but which occurred o the same day (e.g. defamation by C of D1 when discussing the accident with reporters afterwards)?

Section 30 of the 1950 N.Z. Act and s.35 of the 1980 English Act appear to produce the answer ``Yes'', while s.4(1) of the 1975 B.C. Act and the Alberta ILRR proposals might produce a ``No'' answer (unless it were held that the defamation claim was related to or connected with the accident). The absence of knowledge extension under the new regime we propose would clearly not apply. Although recognising that litigation often encourages opposing parties to drag out all possible claims against one another, we think the right answer to this question is ``No''.

427 Can D1 claim against D2 in relation to the accident?

Section 30 of the N.Z. Act (read with R.150 of the High Court Rules) would enable D1 to counterclaim against C and D2 together, but not to issue third party proceedings (relating to damage to D1's vehicle) against D2 alone; but, if the claim against D2 related to indemnity or contribution for D1's liability to C in tort, D1 could bring a separate proceeding (after C has recovered from D1) under s.17 of the Law Reform Act 1936. The 1980 English Act would also appear to prevent a third party claim against D2 alone, but the B.C. and Alberta formulae would produce a ``Yes'' answer for both counterclaims and third party proceedings. We believe that commonsense would result in a ``Yes'' answer.

428 Can D2 claim against TP in relation to the brake installation?

Under the 1950 N.Z. Act and the 1980 English Act, the answer is ``No''. Under the B.C. Act the answer is probably ``Yes'', and likewise under the Alberta ILRR proposals - there seems t be a clear connection or relationship between C's claim against D2 and D2's claim against TP (i.e. factors contributing to the accident). Under our proposed new regime D2 might be able to rely on the absence of knowledge defence - there may or may not have been some delay in making the connection between the accident and the installation of the brakes - but that is not inevitable. Again, commonsense suggests that the right answer here is ``Yes'', although it must be recognised that in a latent defect case this answer may mean the resurrection of a full range of claims between all those who may have been involved (in a building case this could extend to some or all of) architects, engineers, builders and a local authority.

429 Can C add a claim against TP?

Under the 1950 N.Z. Act, the answer is ``No'', but under the 1980 U.K. and 1975 B.C. Acts as well as the Alberta ILRR proposals - and our proposed new regime (assuming C had no knowledge of the possibly defective installation of brakes in D2's truck by TP) - the answer would be ``Yes''. The question may be a very great significance if, for example, D2 is not worth suing. If there may

already be claims between C and D2 and also between D2 and TP, it is difficult to see that TP should be protected by limitations policy from the possibility of a claim by C, and thus commonsense (again) supports a ``Yes'' answer.

CONCLUSIONS

430 Overall, we have concluded that commonsense and simplicity favour a provision in a new statute which permits counterclaims, setoffs, third party proceedings, and the addition of further parties to be undertaken without limitation complications provided that these are properly related to the subject matter of the claims in the original proceeding. As to the addition of further parties, we have concluded that the proposals contained in the Watson article discussed earlier in this chapter would add an undersirable complexity insofar as they suggest a requirement of notice and may produce results (where notice is not given) which conflict with commonsense. Accordingly, we recommend that the new statute contain provisions modelled on s.4(1) and (2) of the 1975 B.C. Act.

431 On the question of additional causes of action, we have been persuaded by the arguments in the Watson article to recommend that, provided they are properly related to the subject matter of the original claims (a question which must be left to courts to decide in the circumstances of individual cases), amendments to pleadings to add further causes of action should be permitted. That involves reversing the policy underlying R.187(2) of the High Court Rules, but we think the qualification of relationship back to the original subject matter achieves a more satisfactory result. To revert to our example, we see no harm in D2 being able to add a claim in tort (perhaps resulting from recent case law changes) to an earlier claim in contract against TP. As Watson argues, this approach ensures that disputes are determined on the factual and legal merits, and not constrained by imperfect original pleadings.

432 Apart from the removal of the present prohibition (in R.187(2)(a) against adding statute-barred causes of action, we do not suggest that there be any explicit changes to procedural rules. In particular, we make no proposals for changes to present requirements for the obtaining of the leave of the court to make certain changes to the proceedings, although we would expect that protection against ``loss of a limitation defence'' would all but disappear as a factor in the exercise of such discretions.

433 In essence, the proposals we make in this chapter are analogous to an extension of the limitation period for procedural purposes. Mindful of the additional uncertainty created, and consistently with our approach to other extensions provided in the new statute we propose, we believe that the relaxation of limitation rules outlined in this chapter should relate to the standard period and its extensions, but not to the ``long stop'' period of 15 years. Where the 15 year period has expired, we believe that the balance changes so that limitation policies outweigh civil procedure policies, and that the integrity of the ``long stop'' defence must (as in other contexts) prevail over the possibility of hard but very rare cases.

XV

A (Draft) Limitation Defence Act

434 The chapter is in many ways the most important in this report. It contains a draft of legislation which would give effect to our recommendations, and on some points set out our recommendations in greater detail than will be found in the earlier chapters of this report. The draft also illustrates an alternative style and format for legislation in New Zealand.

435 The draft Bill has been prepared for several reasons:

(a) It shows one way in which our recommendations could be given legislative effect.

(b) Translating a series of recommendations into legislative form has helped tease out some of the difficult and complex problems involved in this complex and extensive area of law.

(c) It has provided an opportunity to experiment with the format and style of draft legislation: The draft differs in a number of respects from the format and style presently used in the preparation of legislation by a Parliamentary Counsel Office.

DRAFTING FORMAT

436 A glance at the statute book of New Zealand shows that the general format of Acts has changed little over the last century, yet research over the last decade shows clearly how the general appearance of written material can aid in a readers' comprehension of it. In the Law Commission's view it is time to take advantage of some of that research. In the development of our views we have been greatly assisted by the pioneering work of the Victoria Law Reform Commission in its Report ``Plain English and the Law'' and by Professor Robert Eagleson's visit to us earlier this year.

437 The Commission will continue to experiment with the format and style of draft legislation it prepares. Its object in doing so is to make its drafts as understandable as practicable and to point to ways in which the format and drafting style of Acts might be improved.

PARTICULAR CHANGES

438 We believe that our draft shows how an Act can be given a different ``look'', and indicate some particular changes below.

(a) The long title

Traditionally the long title to Acts was used in the Westminister Parliament to confine debate to subject matter within the parameters of the long title.

The long title to Acts serves no useful purpose that the short title to an Act and a ``purpose section'' cannot serve. We believe it is time to change. Consequently we have omitted a long title from our draft.

(b) The short title

The first section of an Act is its short title. But does it need to be? The name of an Act is more obvious as the top of the first page. It need not be repeated.

(c) Commencement date

We have moved the section containing the date of the commencement of the Act to the end of the draft. The commencement date is, in our view, something more conveniently considered by Parliament after the contents of a Bill are known.

(d) Purpose section

We have included a purpose section in our draft to aid the reader's comprehension of its contents.

(e) Marginal notes (more accurately since 1955 ``shoulder notes'') In our draft we have raised the shoulder notes above the sections to which they refer. This aids the reader to pick them out more quickly and avoids them from being read into the following section or subsection. It also avoids a cluttered look to the text.

(f) Other changes

We have not used the traditional ``hanging indent'', nor the usual dash (``-'') after shoulder notes and preceding lists of paragraphs; we have used a standard form of capitalisation; and we have left more space between subsections. We have revised the margin lines of the text. This allows subsections and paragraphs to be located more easily, particularly by the occasional reader.

OTHER CHANGES CONSIDERED

439 We have considered other drafting styles that might aid the reader. For example, whether the definition section should be located at the beginning or end of an Act or whether defined words should be highlighted to alert the reader in some way. We have also considered the best way to organise the contents of the draft. Our tentative view is that no absolute rules should be laid down. Different Acts will call for different solutions. When a definition section is not located at the beginning of an Act there should be a clear indication of where it can be found. That indication might be by footnotes, highlighting or some other means. In our draft, in the section describing the general scheme of the draft, we indicate where defined words and phrases can be found.

440 We are also the view that greater use could be made of footnotes in legislation. Footnotes could be as much as aid to the reader as shoulder notes. While we have not used footnotes in our draft we expect to experiment with them in future.

DRAFTING STYLE

441 Parliamentary Counsel Office maintains a uniformly high standard of the Bills it prepares. However, we believe that a critical examination of some drafting practices could lead to an improvement of that high standard. Two examples:

* The use of Acts of the words ``of this section'' and ``of this Act'' when referring to other sections or subsections in the Act is, in the main, quite unnecessary. Those phrases are time consuming to write and to read. They also interfere with comprehension. We believe it is time for the practice to cease, except when there is a clear need for it;

* We are of the view that Acts should be drafted in the present tense. (Better to say ``This Act binds the Crown'' than ``This Act shall bind the Crown'' - Better to say ``The State Services Commission has... various powers./'' than ``the State Services Commission shall have... various powers''.) There are of course cases when it is not appropriate to draft n the present tense but, in our view, those situations should be an exception to the general rule. We strongly endorse the move towards drafting in the present tense.

442 We would be interested in the views of others on these changes and other stylistic changes that might be considered. (For example, it has been suggested to us that the words ``and'' and ``or'' used in a list of paragraphs might be highlighted in some way - perhaps by creating a different margin line.) In any event, we trust that our views and experimentation with the format and style of our draft will contribute to a review of present drafting practice which in turn will lead to a continuing effort towards improving access to the

statute law.

LIMITATION DEFENCES ACT ()

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LIMITATION DEFENCES ACT ()

(Enacting words)

PART 1

PURPOSE AND APPLICATION

1 Purpose of the Act

The purpose of this Act is to provide defences against stale claims made in civil proceedings, and in so doing

(a) provide a fair balance between the interests of claimants in having access to adjudication of their claims and the interests of defendants in being protected from claims in respect of long past acts or omissions;

(b) encourage claims to be brought without undue delay;

(c) provide a degree of certainty that a limitation defence will be successful if claims are not served within the times described in the Act.

2 Scheme of the Act

(1) the Act has the following central features:

(a) a standard limitation defence which may be raised to defeat a claim served more than 3 years after the date of the actor omission on which the claim is based;

(b) provision for extension of that 3 year period if a claimant proves an inability to bring a claim (for example, as a result of lack of knowledge, incapacity or youth of the claimant);

(c) a long stop defence which, in most cases, may be raised to defeat a claim when 15 years has passed between an act or omission and the service of a resulting claim.

(2) Part 4 (sections 18 to 20) defines

``claims'';

``claimant'';

``defendant'';

``limitation defence'';

``date on which the defendant was served with the claim'' (in relation to both court and arbitration proceedings);

``date of the act or omission'' when used in connection with

(a) claims based on an obligation that is not enforceable until a demand is made;

(b) claims for conversion;

(c) claims for wrongful detention of personal property;

(d) certain claims for contribution or indemnity;

(e) certain claims for infringement of designs, patents or trade marks.

3 Application of the Act

(1) The defences in this Act may be raised in respect of

(a) any claim commenced in the High Court, a District Court or the Labour Court; or

(b) any claim submitted to arbitration,

except those described in subsection (2).

(2) the defences in this Act may not be raised in respect of

(a) a claim to enforce a judgement or order of a court (including a judgement or order of a court outside New Zealand) or any decision or award which may be enforced as if it were an order or judgement of a court; or

(b) a claim that is or could be brought in an application for review under the Judicature Amendment Act 1972; or

(c) a claim under the Declaratory Judgements Act 1908; or

(d) a claim for recovery of possession of land when the person entitled to possession has been dispossessed in circumstances amounting to trespass; or

(e) proceedings commenced in the Maori Land Court and removed for hearing to the High Court or a District Court; or

(f) a claim in respect of which another Act prescribes the time within which a claim must be brought or the manner in which the time is to be fixed or determined.

(3) This Act binds the Crown.

PART 2

LIMITATION DEFENCES

Division 1

Statutory Defences

4 Standard limitation defence

It is a defence to a claim if the defendant proves that 3 years or more have passed between

(a) the date of the act or omission on which the claim is based; and

(b) the date on which the defendant was served with the claim,

unless the claimant proves that the date on which the defendant was served with the claim was within a time extension described in Division 2.

5 Long stop defence

(1) It is also a defence to a claim if the defendant proves that the date on which the defendant was served with the claim was

(a) 15 years or more after the date of the act or omission on which the claim is based; or

(b) if a later date described in subsection (2) applies to the claim, after that later date.

(2) The later dates are

(a) 3 years after the date the claimant against knowledge of any fact described in section 6(1) that was deliberately concealed by the defendant; or

(b) when an act or omission occurs while a claimant is under 18 years old, 3 years after the claimant becomes 18 years old; or

(c) in the case of a claim by a beneficiary against a trustee for a fraudulent breach of trust of which the trustee was aware or to which the trustee was a party, 3 years after the date the claimant gains knowledge of the fraudulent breach of trust; or

(d) in the case of a claim by a beneficiary against a trustee for

(i) the recovery of trust property in the possession of the trustee or previously received by the trustee and converted to the trustee's use; or

(ii) the proceeds of trust property describe in sub-paragraph (i),

3 years after the date the claimant gains knowledge of the breach of trust or conversion.

Division 2

Time Extensions

6 Extension when knowledge is delayed

(1) A claimant who gains knowledge

(a) of the occurrence of the act or omission on which the claim is based; or

(b) of the identity of the person to whom the act or omission is wholly or partly attributable, whether as principal, agent, employee or otherwise; or

(c) of the harm suffered by the claimant as a result of the act or omission; or

(d) that the harm was significant,

after the date of the act or omission on which the claim is based, may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years after the latest date the claimant gains knowledge of any of the facts described in subsection (1).

(3) In subsection (2), the phrase ``date the claimant gains knowledge'' means the date the claimant gains knowledge of the facts describe or any earlier date on which the claimant, in the claimant's circumstances and with the claimant's abilities, should have known of those facts.

7 Extension when alternative dispute resolution is sought

(1) If a claimant proves that, on or after the date of the act or omission on which the claim is based, there was a period or periods during which

(a) the act or omission, or the consequences of it, was investigated or considered by an Ombudsman; or

(b) there was an attempt to effect a resolution of the dispute relating to the act or omission, or the consequences of it, by a person or body having statutory authority to seek resolution of disputes; or

(c) the act or omission, or the consequences of it,was previously raised between the claimant and defendant before another court or arbitrator (whether in New Zealand or elsewhere),

the claimant or the person bringing the claim on behalf of the claimant, may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years after the date of the act or omission on which the claim is based, plus any period or periods described in subsection (1).

(3) If 2 or more of the periods referred to in subsection (1) overlap, the period of the overlap shall not be counted twice.

8 Extension for persons under 18 years old

(1) If a claimant, or a person bringing a claim on behalf of the claimant, proves that the act or omission on which the claim is based occurred before the claimant became 18 years old, the claim maybe be brought within the time extension described in subsection (2).

(2) The time extension is 3 years after the claimant becomes 18 years old.

9 Extension because of incapacity or impairment

(1) If a claimant, or a person bringing a claim on behalf of the claimant, proves that on or after the date of the act or omission on which the claim is based the claimant was incapable of, or substantially impeded in, managing the claimant's affairs with respect of the act or omission on which the claim is based for any period or periods of 28 consecutive days or more because of

(a) physical or mental condition; or

(b) lawful or unlawful detention; or

(c) war or warlike operations or circumstances arising from them,

the claimant, or person bringing the claim on the claimant's behalf, may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years after the date of the act or omission on which the claim is based, plus the period or periods described in subsection (1).

(3) If 2 or more of the periods referred to in subsection (1) overlap, the period of the overlap shall not be counted twice.

10 Cumulative time extension

(1) A claimant may establish a time extension by adding together any 2 or more of the following periods:

(a) the period before which a claimant gained knowledge of the facts describe din section 6(1);

(b) the period or periods described in sections 7 and 9 that may be added to the 3 year period;

(c) the period between the date of an act or omission on which a claim is based and the date on which the claimant became 18;

(d) the 3 year period following the date of the act or omission on which a claim is based.

(2) If 2 or more of the periods referred to in subsection (1) overlap, the period of the overlap shall not be counted twice.

11 Acknowledgement and part payment

(1) If a claimant proves that the defendant

(a) acknowledged, to the claimant, a liability to, or the right or title of, the claimant; or

(b) made a payment, to the claimant, in respect of liability to, or the right to title, of the claimant,

in reliance on which the claimant did not bring a claim, or did not bring a claim in sufficient time to defeat a standard limitation defence raised under section 4, the claimant may bring the claim within the time extension described in subsection (2).

(2) The time extension is 3 years from the date of the acknowledgement or payment described in subsection (1).

(3) For the purposes of this section, payment or part payment of interest shall be deemed to be an acknowledgement of liability to pay both the interest and the principal in respect of which the interest was paid.

12 Claims by a personal representative

(1) In this section, `personal representative'' means the personal representative of the estate of a deceased person who brings a claim on behalf

of the estate.

(2) A personal representative may take advantage of any unexpired balance of a time extension described in section 6 of which the deceased could have taken advantage had he or she not died.

(3) If a personal representative gains knowledge of any of the facts described in section 6(1) of which the deceased was unaware, the personal representative may take advantage of ta time extension under section 6 in respect of that acquired knowledge.

(4) A personal representative may take advantage of a time extension described in section 7 and 9 of which the deceased could have taken advantage had he or she not died, but only with respect to any period or periods between the date of the act or omission on which the claim is based and the date of death of the deceased.

(5) If a personal representative proves that, after the death of the deceased.

(a) there was a period during which any of the circumstances described in section 7(1)(a) to (c) applied; or

(b) the personal representative was incapable of, or substantially impeded in, managing the estate of the deceased for any period or periods of 28 consecutive days or more because of any of the circumstances described in section 9(1)(a) to (c),

the personal representative may bring the claim within the time extension of 3 years from the date of the act or omission on which the claim is based, plus any period or periods described in paragraph (a) or (b) or both, but if 2 or more of the periods overlap, the period of the overlap shall not be counted twice.

(6) A personal representative may take advantage of any time extension described in section 8 of which the deceased could have taken advantage had he or she not died, but only for that period of time between the date of the act or omission on which the claim is based and the date of death of the deceased, plus 3 years.

(7) If a deceased person could have taken advantage of any time extension described in section 10 had he or she not died, the personal representative may take advantage of any unexpired balance of that period together with any period or periods described in this section, but if 2 or more of the periods overlap, the period of the overlap shall not be counted twice.

(8) A personal representative is in the same position with respect to an acknowledgement or payment described in section 11, whether acting as claimant or defendant, as the deceased would have been had he or she not died.

PART 3

MATTERS RELATED TO THE LIMITATION DEFENCES

13 Self help remedies

(1) In this section ``self help remedy'' means the acquisition by a person, without an order or judgement of a court or award of an arbitrator, of possession of, or title to, land or personal property of another person as a consequence of a default in the performance of statutory or contractual obligations by that other person.

(2) A person against whom a self help remedy is exercised may apply to the court

for an order setting aside the self help remedy and if the applicant proves that, had a claim been brought by the person exercising the self help remedy, the applicant would have raised a successful limitation defence, the court

(a) shall make an order setting aside the self help remedy; and

(b) may grant to the claimant such relief by way of restitution, compensation or otherwise as the court in its discretion thinks fit.

14 Ancillary claims

(1) In this section ``ancillary claims'' means

(a) a claim arising from or resulting in the addition of one or more parties to a claim; or

(b) a counterclaim; or

(c) a claim by way of set off; or

(d) a claim added to or substituted for any other claim in a civil proceeding,

that relates to or is connected with the act or omission on which the original claim is based.

(2) When an ancillary claim is brought in a proceeding a limitation defence to the ancillary claim may be considered by the court or arbitrator only if

(a) the defendant to the original claim raises a successful limitation defence or could have raised a successful defence but failed to do so; or

(b) it is a long stop defence under section 5.

15 Bona fide purchaser

Neither a time extension described in sections 6 to 12, nor the provisions of section 14, shall operate to the detriment of the title of a bona fide purchaser for value.

16 Agreement to vary time for limitation defences

Nothing in this Act prevents the enforcement of an agreement

(a) altering the time at which a defendant may raise a limitation defence or the time within which a claimant may bring a claim without a limitation defence being raised; or

(b) varying or adding to the circumstances under which a claimant may bring a claim without limitation defence being raised at all or within a specified period; or

(c) not to raise a limitation defence,

but this section does not affect the operation of any other Act.

17 Adverse possession of unregistered land abolished

No right or title to land that has not been brought under the Land Transfer Act 1952, nor any right or interest in that land, may be acquired or extinguished by adverse possession or use.

PART 4

INTERPRETATION

18 Definitions

In this Act,

claim'' means a claim in a civil proceeding;

claimant'' means a person who brings a claim before a court or arbitrator;

defendant'' means a person against whom a claim is brought;

limitation defence'' means a defence under this Act.

19 Definitions of ``served'' in court and arbitration proceedings

(1) In this Act, ``date on which the defendant was served with the claim'' means, in relation to court proceedings, the date described in subsection (2) or the date on which a statement of claim (or other document filed or lodged in court containing the claim), was

(a) personally served, or when rules of court provide a means by which personal service may be or is deemed to be effected, served by that means; or

(b) when rules of court provide some other means by which a statement of claim or document may be served (other than by direction of the court), served by that other means; or

(c) when an Act provides a means by which a statement of claim or document is to be or considered to be served, served by that means; or

(d) if the claimant and defendant agree as to the means of service of a statement of claim or document, served by that means.

(2) If directions are sought from the court as to service of a statement of claim or other document files or lodged in court containing the claim, the ``date on which the defendant was serviced with the claim'' means the date on which an application for directions as to service is filed with the court.

(3) In this Act, ``date on which the defendant was served with the claim'' means, in relation to arbitration proceedings, the date on which a notice described in subsection (4) was:

(a) personally served; or

(b) left at the usual or last known place of residence in New Zealand of the defendant; or

(c) sent by registered post of the defendant's usual or last known place of residence in New Zealand; or

(d) served in accordance with any other Act providing for the means of service of the notice; or

(e) served by the means provided for in the arbitration agreement.

(4) The notice must be in writing and

(a) require the other party to appoint an arbitrator or to agree on the

appointment of an arbitrator; or

(b) if the arbitration agreement provides that the arbitrator be a person named or designated in the agreement, require the other party to submit the dispute of the person so named or designated.

20 Date of an act or omission in special class

(1) When a claim is based on an obligation that is not enforceable until a demand is made, the ``date of the act or omission'', for the purposes of this Act, is the date on which the defendant defaulted after demand was made.

(2) When a claim is brought for conversion or wrongful detention of personal property, the ``date of the act or omission'', for the purposes of this Act, is the date of the original conversion of the property or the date of the first wrongful detention of the property, as the case requires.

(3) When a claim for a sum of money by way of contribution or indemnity is made, the ``date of the act or omission'' on which the claim is based, for the purposes of this Act, is the date on which the sum of money in respect of which the claim is made is quantified by a decision of a court or arbitrator or by agreement.

(4) Subsection (3) does not apply to claims to which section 14 applies.

(5) When a claim is made in respect of

(a) an infringement of a design under the Designs Act 1953; and

(b) the infringement is alleged to have occurred between the date of the application for registration of the design and the date on which the registration was granted,

the ``date of the act or omission'', for the purposes of this Act, is the date on which the certificate of registration was issued.

(6) When a claim is made in respect of

(a) an infringement of a patent sealed under the Patents Act 1953; and

(b) the infringement is alleged to have occurred between the date of the publication of a complete specification described in section 20 of the Patents Act 1953 and the date the patent is sealed,

the ``date of the act or omission'', for the purposes of this Act, is the date the patent was sealed.

(7) When a claim is made in respect of

(a) an infringement of a trade mark registered under the Trade Marks Act 1953; and

(b) the infringement is alleged to have occurred between the date of the application for registration of the trade mark and the date a certificate of registration is actually issued, the ``date of the act or omission'', for the purposes of the Act, is the date the certificate of registration of the trade mark was issued.

PART 5

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

Division 1

Transitional Provisions

21 Former proceedings

Court or arbitration proceedings commenced before this Act comes into force shall be continued to their conclusion as if this Act has not come into force and the Limitation Act 1950 had remained in force.

22 Causes of action arising before the Act comes into force

If

(a) an act or omission occurs before this Act comes into force; and

(b) the claim would not have been statute barred under the Limitation Act 1950 if it had remained in force; and

(c) a claim in respect of that act or omission is commenced on or within 3 years after the date this Act comes into force,

the claim cannot be defeated by a standard limitation defence raised under section 4.

23 Application of section 13 limited to future agreements

No application may be brought to set aside a self help remedy under section 13(2) when the agreement under which the self help remedy is exercised was made before the commencement of this Act.

Division 2

Consequential Amendments

24 Carriage by Air Act 1967

(1) the Carriage by Air Act 1967 is amended by this section.

(2) Section 11 is amended

(a) in subsection (3) by striking out the words:

``and subsections (3) and (4) of section 29 of the Limitation Act 1950 (which determines the time at which an arbitration is deemed to have commenced) shall apply for the purposes of this subsection.''

(b) by adding the following subsections:

(4) For the purposes of subsection (3), an arbitration shall be deemed to commence when one party to the arbitration serves on the other party or parties a notice requiring that party to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring the party to submit the dispute to the person so named or designated.

(5) Any notice under subsection (4) may be served either

(a) by delivering it to the person on whom it is to be served; or

(b) by leaving it at the usual or last known place of abode in New Zealand of that person; or

(c) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in New Zealand,-

as well as in any other manner provided in the submission; and, where a notice is sent by post in manner prescribed by paragraph (c) service thereof shall be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

Note: Section 11(3) of the Carriage by Air Act 1967 presently reads:

(3) There foregoing provisions of this section and the provisions of the said Article 29 shall have effect as if references in those provisions to an action included references to an arbitration; and subsections (3) and (4) of section 29 of the Limitation Act 1950 (which determines the time at which an arbitration is deemed to have commenced) shall apply for the purposes of this subsection.

Section 29(3) and (4) of the Limitation Act 1950 described how an arbitration commences and the means of service. The reference of the Limitation Act 1950 will be replaced by the new subsections (4) and (5) which are a virtual copy of sections 29(3) and (4) of the Limitation Act 1950.

25 Contractual Remedies Act 1979

Section 15(f) of the Contractual Remedies Act 1979 is repealed.

Note; Section 15(f) of the Contractual Remedies Act 1979 presently reads:

15. Savings - Except as provided in sections 4 (3), 6 (2),l and 14 of this Act,nothing in this Act shall affect -

(f) The Limitation Act 1950:

The reference becomes unnecessary as a result of the repeal of the Limitation Act 1950. Nothing needs to replace it because there is nothing in the Contractual Remedies Act 1979 that would affect the Limitation Defences Act ().

26 Copyright Act 1962

Section 25(1) of the Copyright Act 1962 is amended by striking out:

``Provided that if, by virtue of subsection (2) of section 5 of the Limitation Act 1950 (which relates to successive conversions or detentions),l the title of the owner of the copyright to such a copy or plate would (if he had then been the owner of the copy or plate) have been extinguished at the end of the period mentioned in that subsection or corresponding provision, he shall not be entitled to any rights or remedies under this subsection in respect of any thing done in relation to that copy or plate after the end of that period.''

Note: Section 25(1) of the Copyright Act 1962 presently reads:

25. Rights of owner of copyright in respect of infringing copies, etc. - (1) Subject to the provisions of this Act, the owner of any copyright shall be entitled to all such rights and remedies, in respect of the conversion or detention by any person or any infringing copy, or of any plate used or intended to be used for making infringing copies, as he would be entitled to if he were the owner of every such copy or plate and had been the owner thereof since the time when it was made;

Provided that if, by virtue of subsection (2) of section 5 of the Limitation Act 1950 (which relates to successive conversions of detentions),l the title of the owner of the copyright to such a copy or plate would (if he had then been the owner of the copy or plate) have been extinguished at the end of the period mentioned in that subsection or corresponding provision,he shall not be entitled to any rights or remedies under this subsection in respect of any thing done in relation to that copy or plate after the end of that period.

The question of how far back a person may claim rights or remedies will be determined under the Limitation Defences Act ().

27 Crown Proceedings Act 1950

Section 4 of the Crown Proceedings Act 1950 is amended by striking out:

``the Limitation Act 1950 and of''

Note: Section 4 of the Crown Proceedings Act 19509 presently reads:

4. Limitation of actions by or against the Crown - The provisions of this Act shall be subject to the provisions of the Limitation Act 1950, and of any other Act which limits the time within which proceedings may be brought by or against the Crown.

The repeal of the Limitation Act 1950 and the change in nature of the defences under the Limitation Defences Act () means that it is no longer necessary to refer to the Limitation Act 1950 in section 4 of the Crown Proceedings Act 1950.

28 Deaths by Accident Compensation Act 1952

Section 10 of the Deaths by Accident Compensation Act 1952 is repealed.

Note: Section 10 of the Deaths by Accident Compensation Act 1952 presently reads:

[10 Limitation of actions - (1) Except as provided in this section, no action shall be brought under this Act after the expiration of 2 years from the date of the death of the deceased person.

(2) Application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 65 years from the date of the death of the deceased person; and the Court may, if it thinks it is just to do so,l grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake b=or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.

(3) Where any person who is under a disability at the date of the death of the deceased person is entitled, under the proviso to subsection (1) of section 6 of this Act, to bring an action in respect of that death, that action may be brought, without the leave of the Court, within 2 years from the date when he ceased to be under a disability or sooner died, or an application for leave to bring that action may be made under subsection (2) of this section within 6 years from the date when he ceased to be under a disability or sooner died, if when the action (without such leave) is commenced or the application is made, as the case may be, -

(a) No other person has commenced an action under this Act in respect of the

death of the deceased person or made an application for leave to bring such an action; and

(b) No grant of administration and no order to or election by the Public Trustee to administer (other than a grant or order or election made more than 5 years from the date of the death of the deceased person) has been made in New Zealand in respect of the estate of the deceased person.

(4) For the purposes of this section, a person shall be deemed to be under a disability while he is an infant or of unsound mind.]

To the extent that the limitation of actions regime is still operative under the Deaths by Accident Compensation Act 1952 it will be superseded by the Limitation Defences Act ().

29 Disputes Tribunals Act 1988

Section 10(5) of the Disputes Tribunals Act 1988 is amended by striking out the words ``Limitation Act 1950'' and substituting ``Limitation Defences Act ()''

Note: Section 10(5) of the Disputes Tribunals Act 1988 presently reads:

(5) Subject to this Act and the Limitation Act 1950, the jurisdiction of a tribunal shall extend to a claim based on a cause of action that accrued before the commencement of this Act.

30 District Courts Act 1947

Section 80(1) of the District Court Act 1947 is amended by striking out ``6 years old'' and substituting ``3 years old''.

Note: Section 80(1) of the District Court Act 1947 presently reads:

80. Enforcement of judgements more than 6 years - (1) No judgement or order of the Court more than 6 years old shall be enforced without the leave of the Court unless some payment has been made into Court by or on behalf of the party liable therefor within the 12 months immediately before the issue of the proceedings for enforcement.

The amendment will provide for consistency between the period for judgement enforcement and the standard limitation defence regime of 3 years proposed by the Limitation Defences Act ().

31 Fair Trading Act 1986

Section 43(5) of the Fair Trading Act 1986 is repealed.

Note: Section 43(5) of the Fair Trading Act 1986 presently reads:

(5) An application under subsection (1) of this section may be made at any time within 3 years from the time when the matter giving rise to the application occurred.

Section 43(1) provides for an application for making various orders under the Act.

32 Income Tax Act 1976

Section 406 of the Income Tax Act 976 is repealed.

Note: Section 406 of the Income Tax Act 1976 presently reads:

406. No limitation of action to recover tax - No statute of limitations shall bar or affect any action or remedy for the recovery of tax.

The repeal of section 406 will permit a taxpayer to raise the Limitation Defences Act () as a defence to a claim for taxes in appropriate cases.

The repeal proposed will also mean that a taxpayer may raise a limitation defence
in respect of claims for land taxes and goods and service tax .

33 Labour Relations Act 1987

Section 198(2) of the Labour Relations Act 1987 is repealed.

Note: Section 198(2) of the Labour Relations Act 1987 presently reads:

2) Notwithstanding section 203 of this Act, an action under this section may be commenced within 6 years after the day on which the money became due and payable.

Section 198 of the Labour Relations Act 1987 deals with the recovery of wages.

The effect of the proposed amendment would be that the Limitation Defences Act () would apply to actions to recover wages. In most cases it would mean that an action would have to be commenced within 3 years of wages becoming payable although this period can be extended under the rules proposed in Limitation Defences Act ().

34 Land Transfer Act 1952

(1) The Land Transfer Act 1952 is amended by this section.

(2) Add the following after section 32:

32A Adverse possession under the Limitation Act 1950 - (1) In this section ``adverse possession of land'' means possession of land that would have been considered adverse possession of land under the Limitation Act 1950.

(2) Land which has not become subject to this Act maybe e brought under this Act in accordance with this section.

(3) An application may be made for a certificate of tile under this section if a person was in adverse possession of land on(insert date of Limitation Defences Act commences).

(4) An application under this section shall be made to the Register, in a form and manner prescribed by the Registrar, by the person in adverse possession of land on (insert date the Limitation Defences Act commences) or by a person claiming through that person.

(5) The Registrar shall cause notice of an application under this section to be advertised in the Gazette and 1 or more newspapers published in the district, and each advertisement shall limit and appoint a time, not less than 1 month from the publication of the advertisement, within which caveat may be lodged forbidding the bringing of the land under this Act.

(6) If it appears to the Registrar that any person interested is not a party to an application or that evidence adduced by the applicant in support of the application is insufficient, the Registrar may

(a) reject the application; or

(b) direct one or more of the following notices to be issued at the cost of the applicant:

(i) a notice by advertisement, as described in subsection (5), to provide a further time within which caveat may be lodged forbidding the bringing of land under this Act;

(ii) a notice to be served on any person having an estate or interest in the land or who may be interested in the application;

(iii) a notice to be published in any gazette or newspaper in New Zealand or elsewhere;

(iv) a notice to be served on any other person that the Registrar considers should be notified,

in a form and manner specified by the Registrar, and the Registrar may require the applicant to provide such further or other evidence as is necessary for a decision to be made on the application.

(7) If it appears to the Registrar that all necessary notices have been given and that no caveat has been lodged, and if the Registrar is satisfied that

(a) the applicant was in adverse possession of land the subject of the application of (date the Limitation Defences Act commences) or the application is claiming through a person in adverse possession of the land on that date; and

(b) the land the subject of the application has been abandoned by the person having power legally or equitably to dispose of the fee simple in possession; and

(c) any person having an estate or interest in the land has consented to the application or has been notified that his estate or interest will lapse if a title is issued under this section,

the Registrar shall proceed to bring the land describe in the application under this Act by issuing to the applicant, or to such person as the applicant in writing directs, a certificate of title in Form No. 2 of the Second Schedule.

(8) The issue of a certificate of title under subsection (7) extinguishes any other title to, and any estate or interest in,the land in respect of which the certificate of title is issued.

(3) Section 112(1) is amended by striking out:

``would be barred by the provisions of the Limitation Act 1950''

and substituting:

``would, if pleaded, by met by a successful defence under the Limitation Defences Act () or would be barred by''

(3) Section 180 is repealed.

(4) Section 197 is amended by striking out:

``Limitation Act 1950 or any other statute of limitation''

and substituting

``any statue of limitation''

(5) Section 199(3) is amended by striking out:

``Limitation Act 1950''

and substituting:

``the former Limitation Act 1950''

Note: Sections 112(1), 180, 197 and 199(3) of the Land Transfer Act 1952 presently reads:

112 Discharge of mortgage where remedies thereunder are statute barred - (1) Notwithstanding anything to the contrary in section 64 of this Act, on application made to the Supreme Court by the registered proprietor of any estate or interest in land that is subject to a registered mortgage, the Court, if it is satisfied that any action by the mortgagee for payment of the moneys secured by the mortgage would be barred by the provisions of the Limitation Act 1950 or any other statute of limitation, and that but for the provisions of the said section 64 the remedies of the mortgagee in respect of the mortgaged land would be likewise barred, may, in its discretion, make an order directing the mortgage to be discharged, and upon the production of an office copy of the order the Registrar shall enter a memorandum thereof in the register and on the outstanding instrument of title, and when the entry is made the mortgage shall be deemed to be discussed.

180 Limitation of actions - (1) No action for recovery of damages as aforesaid shall lie or be sustained against the Crown unless the action is commenced within the period of 6 years from the date when the right to bring the action accrued; but any peso under the disability of infancy or unsoundness of mind may bring such an action within 3 years from the date on which the disability ceased.

[(2) For the purposes of this section, the date when the right to bring an action accrued shall be deemed to be the date on which the plaintiff becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim.]

197 Registrar may require proof that estate of registered proprietor of limited title not extinguished - The Registrar may, in his discretion, before -

(a) Issuing an ordinary certificate of title in substitution for a certificate that is limited as to parcels or as to title or as to parcels and title; or

(b) Constituting such a limited certificate of title an ordinary certificate of title; or

(c) Removing the limitations as to title of a certificate that is limited as to parcels and title; or

(d) Registering any dealing with the land comprised in a certificate that is limited as to parcels or as to title or as to parcels and title, -

require to be satisfied that the estate or interest of the registered proprietor has not become extinguished by the operation of the Limitation Act 1950 or any other statute of limitation.

Section 199(3)

(3) Notwithstanding the provision of section 64 of this Act, the issue of a limited certificate of title for any land shall not stop the running of time under the Limitation Act 1950 in favour of any person in adverse possession of that land at the time of the issue of the certificate, or in favour of any person claiming through or under him.

These amendments result from the repeal of the Limitation Act 1950 and the abolition of the doctrine of adverse possession.

35 Law Reform Act 1936

Section 17(1)(c) of the Law Reform Act 1936 is repealed and the following substituted;

``(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor

(i) who is liable in respect of the same damage; or

(ii) who, if the tortfeasor had no limitation defence and had been sued, would have been liable in respect other same damage,

whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the tortfeasor in respect of the liability in respect of which the contribution is sought.

Note: Section 17(1)(c) of the Law Reform Act 1936 presently reads:

17. Proceedings against, and contribution between, joint and several tortfeasor - (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -

(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

36 MAORI AFFAIRS ACT 1953

(1) the Maori Affairs Act 1953 is amended by this section.

(2) Section 447(A)(5) is amended by striking out:

``Nothing in section 20 of the Limitation Act 1950 shall apply so as to bar''

and substituting:

``The Limitation Defences Act () shall not be used to establish a defence against''

(5) Section 458 is repealed and the following substituted:

458. Co-owners of Maori land not affected by limitation defence - (1) Notwithstanding anything to the contrary in any Act imposing a limitation on actions, time shall not run or be deemed to have run against a co-owner of Maori land who neglects or has at any time neglected to exercise his right of entering upon an using the common property while it remains in the occupation of

another co-owner or someone claiming through or under him.

(2) The Limitation Defences Act () shall not be used to establish a defence by one co-owner of Maori land against another co-owner in respect of proceedings for the recovery of title or possession of co-owned land.

Note: Sections 447(a)(5) and 458 of the Maori Affairs Act 1953 presently read:

Section 447A(5):

(5) Nothing in section 20 of the Limitation Act 1950 shall apply so as to bar any action or other proceeding for the enforcement of any such charge or the recovery of the amount due thereunder.

458. Co-owners of Maori land not bound by Limitation Act - Notwithstanding anything to the contrary in the Limitation Act 1950 or any other Act imposing a limitation on actions, time shall not run or be deemed to have run against a co-owner of Maori land who neglects or has at any time neglected to exercise his right of entering upon and using the common property while it remains in the occupation of another co-owner or someone claiming through or under him.

The intention of the amendments is to leave the present law unchanged.

37 Maternal Mortality Research Act 1968

Section 16 subsection (4) and (5) of the Maternal Mortality Research Act 1968 are repealed.

Note: Section 16(4) and (5) of the Maternal Mortality Research Act 1968 presently read:

(4) Leave to bring such proceedings shall not be granted unless application for the leave is made within 6 months after the act complained of, or, in the case of a continuance of injury or damage, within 6 months after the cessation of the injury or damage.

(5) In granting leave to bring any such proceedings, the Judge may limit the time within which the leave may be exercised.

Section 16 provides legal protection for persons acting in the administration of the Act. Legal proceedings may only be taken with leave.

The effect of the repeal of section 16(4) of the Act will be that proceedings will still require leave but the Limitation Defences Act () will govern the period within which proceedings may be brought.

38 Mental Health Act 1969

Section 124 subsections (4) and (5) of the Mental Health Act 1969 are repealed.

Note: Section 124(4) and (5) of the Mental Health Act 1969 presently read:

(4) Leave to bring such proceedings shall not be granted unless application for such leave is made within six months after the act complained of, or, in the case of a continuance of injury or damage, within six months after the ceasing of such injury or damage:

Provided that in estimating the said period of six months not account shall be taken of any time or times during which the person injured was detained, whether lawfully or unlawfully, as a mentally disordered person, or was ignorant of the

facts that constitute the cause of action, or of any time or times during which any defendant was out of New Zealand.

(5) In granting leave to bring any proceedings as aforesaid, the Judge may limit the time within which such leave may be exercised.

Section 124 provides legal protection for persons acting under the authority of the Mental Health Act 1969. Legal proceedings may only be taken with leave.

The effect of the repeal of section 124(4) of the Act will be that proceedings will still require leave but the Limitation Defences Act () will govern the period within which proceedings may be brought.

39 Pawnbrokers Act 1908

Section 40(3) of the Pawnbrokers Act 1908 is repealed.

Note: Section 40(3) of the Pawnbrokers Act 1908 reads:

(3) All such actions shall be commenced within 3 months next after the cause thereof has arisen.

The ``actions'' referred to in section 40(3) of the Pawnbrokers Act 1908 deal with actions of a District Court Judge,Justice or constable under the Act. The effect of the amendment is to allow actions to be brought, in most cases,up to three years after the act or omission complained of.

40 Penal Institutions Act 1954

Section 41A(7) of the Penal Institutions Act 1954 is repealed.

Note: Section 41A(7) of the Penal Institutions Act 1954 presently reads:

(7) No compensation shall be awarded under this section unless the application has been made within one year from the time the loss or damage occurred; but the Court may, at any time before or after the expiry of the said period of one year, extend the time for making an application for any further period if in the circumstances of the case the Court thinks it just to do so.

The Limitation Defences Act () will govern the time within which compensation maybe e sought. In most cases, persons seeking compensation will have three years
from the date of loss or damage to do so.

41 Property Law Act 1952

Section 81(6) of the Property Law Act 1952 is repealed.

Note: Section 81(6) of the Property Law Act 1952 presently reads:

(6) Nothing in this section shall affect the operation of section 16 of the Limitation Act 1950.

Section 81 entitles a mortgagor to an equity of redemption. Section 16 of the Limitation Act 1950 will be repealed. The effect of the repeal, coupled with the Limitation Defence Act (), is that actions for redemption must be brought within 3 years of the date the mortgagee refuses to accept payment of arrears. (If the mortgagor waits longer than 3 years the mortgagor could be met with a successful limitation defence). In practice however a mortgagee will continue to sell promptly, eliminating the possibility of an action for redemption.

42 Public Works Act 1981

Section 132(9) of the Public Works Act 1981 is amended by striking out

``Nothing in the Limitation Act 1950 or in any other Act''

and substituting

``Nothing in any other Act''

Note: Section 132(9) of the Public Works Act 1981 presently reads:

(9) Nothing in the Limitation Act 1950 or in any other Act or any rule of law shall cause or be deemed to have caused the right or title of the controlling authority of the road or the authority in which the road is vested to be extinguished by reason of the road being occupied by any structure, and nothing in this or in any other Act or any rule of law shall entitle any utility authority to compensation otherwise than under this section for the removal of any structure from any road or in respect of the re-erection of any such structure (or equivalent structure), or in respect of any alteration of any road that necessitates any such removal or re-erection.

Removes an unnecessary reference to the Limitation Act 1950.

43 Rating Act 1967

(1) The Rating Act 1967 is amended by this section.

(2) Section 79 is repealed.

(3) Section 80 is amended by striking out:

``but subject to the provisions of section 20 of the Limitations Act 1950.''

(4) Section 153(9) is amended by striking out:

``the provisions of section 20 of the Limitation Act 1950 and subject also to:''

Note: Sections 79, 80 and 153(9) of the Rating Act 1967 presently read:

79. Limitation of time for recovery of rates - (1) No action for the recovery of any rate due shall be commenced in any Court after the expiration of 6 years from the date on which the rate became due and payable or, where the rates re required to be paid by instalments, the date on which the last instalment is require to be paid.

(2) Where the payment of the whole or part of any rate is postponed under this Act and the rate or part thereof is not subsequently written off, the provisions of subsection (1) of this section shall apply to the rate or part thereof so postponed as if that rate or part thereof became due and payable on the date to which payment has been postponed in accordance with this Act.

80. Registration of charge for rates - (1) Where any charging order issued under rule 314 of the Code of Civil Procedure in respect of a judgement for any rate is registered, whether before or after the commencement of this Act, against any land pursuant to rule 315 of the Code, then, notwithstanding anything in rule 319 of the Code, but subject to the provisions of section 20 of the Limitation Act 1950, the charging order shall continue in force until a memorial of satisfaction of the judgement in the action in which the order was issued is registered pursuant to rule 318 of the Code.

153(9) Subject to the provisions of section 20 of the Limitation Act 1950, and subject also to the provisions of any partial discharge under section 157 of this Act, every charging order granted under this section, or under section 108 of the Rating Act 1925 and not discharged before the commencement of this Act, shall continue in force until it is discharged.

Section 79 of the Rating Act 1967 will be replaced with the limitation regime under the Limitation Defences Act (). The effect will be that in most cases an action for recovery of rates must start within 3 years of the date they become due.

The amendments to sections 80 and 153(9) of the Rating Act 1967 remove references to the Limitation Act 1950.

44 Sale of Goods Act 1908

Section 26(1) of the Sale of Goods Act 1908 is repealed.

Note: Section 26(1) of the Sale of Goods Act 1908 presently reads:

26. Revesting of property in stolen goods on conviction of offender - (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

45 Sharemilking Agreements At 1937

Section 3(4) of the Sharemilking Agreements Act 1937 is repealed.

Note: Section 33(4) of the Sharemilking Agreements Act 1937 presently reads:

[(4) Notwithstanding any other provision of this section, the Limitation Act 1950 shall be read subject to the terms and conditions specified in the Schedule hereto.]

The Schedule to the Sharemilking Agreements Act 1937 establishes a minimum set of
terms and conditions for sharemilking agreements, including times within claims must be made.

The time limits described in the Limitation Defences Act () can be altered by agreement and would be subject to the Schedule in the Sharemilking Agreement Act 1937. As a result section 3(4) can be repealed.

46 Tuberculosis Act 1958

Section 24 of subsection (4) and (5) of the Tuberculosis Act 1948 are repealed.

Note: Section 24(4) and (5) of the Tuberculosis Act 1948 presently read:

(4) Leave to bring such proceedings shall not be granted unless application for such leave is made within 6 months after the act complained of, or, in the case of a continuance of injury or damage, within 6 months after the ceasing of the injury or damage.

(5) In granting leave to bring any proceedings as aforesaid, the Judge may limit the time within which such leave may be exercised.

Section 24 provides legal protection for persons acting pursuant to the Act. Legal proceedings may only be taken with leave.

The effect of the repeal of section 24(4) of the Act will be that proceedings will still require leave but the Limitation Defences Act () will govern the period within which proceedings may be brought.

Division 3

Repeal and Commencement

Repeal

47 The Limitation Act 1950 is repealed.

Commencement

48 This Act comes into force on (.....)

APPENDIX A

List of Conclusions and Recommendations

The list below sets our all the conclusions and recommendations articulated in the body of this report. Some of these are not reflected in the draft legislation set out in Chapter XV as they require no legislative action. On the other hand some points re not articulated in the text but have been developed to a greater level of detail in the drafting process itself. A shorter outline of the central recommendations precedes Chapter I. The list below is arranged under chapter headings and commences with Chapter V, Chapters I-IV being concerned with introductory and background matters.

CHAPTER V (THE NEED FOR A GENERAL STATUTE)

1 There are good reasons for the existence of a general statute of limitations. [Para. 100.]

2 The Limitation Act 1950 has many deficiencies in substance and drafting and should be replaced. [Para.116.]

3 Legislation to replace the 1950 Act should not be based on the conferring of a general judicial discretion to waive specified time limits. [Para.126.]

CHAPTER VI (A SHORTER STANDARD LIMITATION PERIOD)

1 A new limitations regime should be of fairly general application with three central features not found in the 1950 Act: a standard three year limitation period; extension in certain circumstances, in particular where the claimant shows absence of knowledge of relevant matters of fact; and a ``long stop'' limitation period of 15 years. {para.128..]

2 The standard limitation period should be reduced to three years for several reasons including the need to ensure that claims are commenced reasonably soon after the events to which the relate (and not up to six years afterwards, as the 1950 Act presently provides), the recognition of international trends which indicate the practicality and desirability of a shorter standard limitation period, and recognition of the ability to avoid potential for hardship through extension provisions (in particular, for absence of knowledge). [Paras.132, 166.]

3 The standard limitation period should be measured from the date of the act or omission of the defendant on which a claim is based. [Para.168.]

4 The new statute should be phrased in terms of positive limitation defences to recognise that a defendant may fail to defend a claim or chose to defend it on the merits and not take the limitation point; the onus of proof of the defence would rest with the defendant. [Para.172.]

5 The new statute to replace the 1950 Act would be accurately and concisely described as the ``Limitation Defences Act''. [Para.172.]

6 The new statute should not seek to extinguish rights after the expiry of the standard limitation period. [Para.173.]

7 The limitation period should be measured back from the date of service on the defendant of the statement of claim or other formal document setting out the claim; in cases where there is difficulty in effecting prompt personal service, time should be measured back from an application to the court for directions as to service. [Para.174.]

CHAPTER VII (EXTENSION OF THE STANDARD PERIOD - ABSENCE OF KNOWLEDGE)

1 The ancient disabilities of feme covert, imprisonment, and absence overseas should not be restored. [Para.178.]

2 The standard three year limitation period should be extended where claimants prove that there was a period where they lacked knowledge of any of the following facts -

(a) the occurrence of the act or omission;

(b) the identity of the person responsible;

(c) the act or omission having caused harm; or

(d) that the harm was significant.

[Paras.180, 181.]

3 Constructive as well as actual knowledge must be taken into account when considering this extension, but constructive knowledge should be considered having regard to the circumstances and particular abilities of the claimant in question. [Paras.201, 206.]

4 The new statute should be attempt to set out circumstances which constitute constructive knowledge, this being a matter to be left to the courts to determine on a case by case basis. [Para.202.]

5 Knowledge of the existence of a ``worthwhile cause of action'' (the prospects of success as a matter of law) should not be relevant to this extension. [Para.212.]

6 The new statute should provide for time to run against owners of property as a class in relation to latent defects, and any subsequent owner should be entitled to take advantage of the absence of knowledge extension. [Para. 223.]

7 The Building Industry Commission could well address the topic of registration on the Land Transfer register of notice of defects and judgments and settlements based on defects in buildings. [Para.225.]

8 Where a potential claimant dies the absence of the knowledge extension should operate so that the deceased's estate is in no better nor worse position than the deceased would have been had death not occurred. [para.228.]

9 The extensions to the standard limitation period provided in the new statute should not operate to the detriment of a bona fide purchaser for value; thus at the expiry of the standard three year limitation period the position of an innocent bona fide purchaser would be substantially improved as against that of the innocent original owner whose property has been converted. Further, s.26(1) of the Sale of Goods Act 1908 (which revests property in the original owner on conviction of the thief) should be repealed. [Para.234.]

10 A new statute should continue to treat the date of conversion of goods as that of the first conversion (or detention in bailment situations). [Para.234.]

11 The new statute should not provide for extinction of title to goods. [Para.234.]

CHAPTER VII (EXTENSION OF THE STANDARD PERIOD - DISABILITY, INFANCY)

1 Persons who are under the age of majority or having some impairment which affects their ability to conduct their own affairs are not necessarily incapable of conducting their own affairs or without other persons protecting their interest; on the other hand, they are not necessarily protected by the existence of parents, guardians or other care givers. [Para.256.]

2 There should continue to be a general presumption of incapacity in relation to children and young persons, and thus the standard limitation period should be extended by a period equivalent to the time between the occurrence of the act or omission on which a claim is based and the date upon which the claimant attains the age of 18 years. [Para.257.]

3 There should be a further extension where a claimant proves that impairment of their physical or mental condition, restraint of their person, or war or warlike operations or conditions resulted in their being actually incapable of (or substantially impaired in) managing their affairs in relation to the claim for a continuous period of 28 days or more, the standard limitation period being extended by a time equivalent to such periods of incapacity. [Para.258.]

4 The new statute should not contain provisions for a minimum period for commencement of proceedings at the conclusion of any period of disability; nor should the new statute contain mechanism where by a potential defendant can give a ``notice to proceed'' to a potential claimant which would impact on the limitation defences. [Para.258.]

5 The various grounds for extension should be able to be relied on in a cumulative fashion, provided that no period of time is counted more than once, and that any cumulative total should be subject to the long stop limitation defences. [Para.259..]

6 Extensions for disability (and in relation to other matters) should apply to all causes of action. [Para.261.]

CHAPTER IX (EXTENSION OF THE STANDARD PERIOD - AGREEMENT, ACKNOWLEDGEMENT, ALTERNATIVE FORUM)

1 Agreements to extend, reduce, or exclude the limitation periods provided in a new statute should continue to be enforceable subject to express statutory prohibitions. [Paras.265, 266.]

2 There should be a separate extension provision based on acknowledgement or part payment where a claimant proves that but for the acknowledgement/part

payment the claimant would have taken steps to avoid a situation where a defendant becomes (otherwise) entitled to rely on a limitation defence. [Para.273.]

3 There should also be an extension in relation to periods during which a claimant has caused the essence of the claim to be

(a) considered by the Ombudsmen or any other statutory agency empowered to seek resolution of disputes, but no resolution was achieved, or

(b) put before any court or arbitrator (where inside or outside New Zealand), but that court or arbitrator was later found to decline or lack jurisdiction to determine the claim on the merits.

[Para.278.]

CHAPTER X (THE ``LONG STOP'' LIMITATION PERIOD)

1 The interests of certainty can be promoted by a ``long stop'' or ultimate limitation period - an overall limit measured from the date of the act or omission alleged against a defendant, thus ensuring the defendants are not subject to liability for an indeterminate time. [Paras.280, 291.]

2 The coverage of personal injury cases by the Accident Compensation scheme removes a factor which complicates statutes of limitation and their reform in other parts of the world. [Para.294.]

3 The ``long stop'' limitation period under the new statute should be 15 years. [Para.302.]

4 The log stop limitation defence should not apply where

(a) absence of knowledge on the part of the claimant was caused by deliberate concealment of the central facts by the defendant;

(b) the claim is brought against trustees for fraudulent breach of trust, or for conversion of trust property; and

(c) at the end of the 15 year long stop period, the claimant is aged less than 21 years.

[Paras.303, 306, 307.]

5 Where a beneficiary has a future interest, there should be no provision (such as s.21(2) of the 1950 Act) which postpones the operation of the limitation period until such interests fall into possession. [Para.305.]

6 The expiry of the 15 year long stop limitation period should not result in the extinction of rights of action. [Para.308.]

CHAPTER XI (THE SCOPE OF A NEW STATUTE - GENERAL)

1 the statute should be as comprehensive as possible, and there should be a presumption that it covers all types of civil proceedings brought before a court or an arbitrator except where good policy reasons are shown to the contrary. [Para.311.]

2 The new statute should apply to all civil claims brought before the High Court and District Court (including Family Courts and Small Claims/Disputes Tribunals), and the Labour Court except where there is a specific statutory exception. [Paras.313-316.]

3 The new statute should not apply to claims brought before the Maori Land and Appellant Courts; the question of time limits for proceedings in those courts should be left to those charged with shaping legislation to replace the Maori Affairs Act 1953. [Para.317.]

4 The new statute should not extend to the military system of Courts Martial. [Para.318.]

5 The new statute should not accept claims made to officials or agencies other than the courts, although future reviews of statutes which impose time limits on such claims should reconsider such limits in the light of the new statute we recommend. [Para.319.]

6 ``Self-help'' remedies such as distress for rent arrears should be regarded as accessory to the principal obligation (usually payment of a debt), and such remedies should last as long as the principal obligation remains recoverable but not longer; thus the exercise of a self-help remedy should be able to be enjoined and set aside by the court if proceedings to enforce the principal obligation would have been defeated by a limitation defence. [Paras.322, 325.]

7 The six year periods provided for enforcement of judgements under Rule 4556 of the High Court Rules and s.80 of the District Courts Act 1947 should be reduced to three years but with retention of the present provisions for extension with leave of the court. [Para.329.]

8 Declaratory proceedings should be excluded from the new statute, but if experience shows that this exception is being used as a ``back door' means of achieving relief which would otherwise be subject to a limitation defence or ordinary proceedings, the exception should be reviewed. [Para.333.]

9 Proceedings for judicial review (as defined in the Judicature Amendment Act 1972) should be excluded from the application of the new statute. [Para.334.]

10 There should be no exception from the application of a new statute for claims for equitable relief, although any existing discretion of the courts to refuse relief on the grounds of laches or other matters related to delay should not be regarded as diminished by the enactment of the new statute. [Paras.335, 337.]

11 The new statute should not re-enact the exceptions relating to admiralty nor contained in the 1950 Act; although the present limitation regime for ship collisions (Shipping & Seamen Act 1952, s.471A) should be retained. [Para.338.]

CHAPTER XII (THE SCOPE OF A NEW STATUTE - MATTERS RELATING TO LAND, CHARGES)

1 The doctrine of adverse possession should be abolished, with the repeal and non replacement of the provisions of the 1950 Act which presently provide that title to land is extinguished after a specified period of adverse possession. [Paras.358, 361.]

2 The time periods provided in the Land Transfer Amendment Act 1963, relating to adverse possession of land under the Land Transfer system, should be reconsidered during the anticipated major review of the Land Transfer Act 1952.

[Para.358.]

3 The new statute should not apply to proceedings to recover land where the claimant has been dispossessed in circumstances amounting to trespass. [Para.362.]

4 The new statute should not re-enact special provisions found in the 1950 Act relating to mortgages and charges, but should apply generally without distinction being made between secured and unsecured leading transactions, or those incorporated in the form of a deed.

5 It is anomalous that a right to sell contained in a mortgage registered under the Land Transfer Act 1952 survives even where the right to recover the principal debt is barred by a statute of limitation, but this anomaly should be retained until completion of the major review of the 1952 Act. [Para.366.]

CHAPTER XIII (STATUES WITH THEIR OWN LIMITATION REGIME; CONSEQUENTIAL AMENDMENT; TRANSITIONAL PROVISIONS)

1 The new statute should be subject to specific limitation regimes created in other statutes, although these should be kept t a minimum to increase uniformity. [Para.368.]

2 The six year period provided for registration of a foreign judgement under the Reciprocal Enforcement of Judgments Act 1934 should be retained pending completion of the Law Commission's current review of that act. [Para.370.]

3 The six year limitation period for actions against the Crown as guarantor of land transfer title (Land Transfer Act 1952, s.180) should be repealed, but the requirement for the giving of one month's notice before the commencement of such a claim should be retained. [Paras.371, 372.]

4 The present three months' time limit on applications for relief against a lessor's refusal to review a lease (Property Law Act 1952, s.121) should be retained. [Para.373.]

5 The limitation provision contained in sl.2 of the Landlord and Tenant Act 1730 is best considered within the Law Commission's intended review of ancient property statutes arising out of our report on Imperial Legislation in Force in New Zealand (NZLCV R1). [Para.374.]

6 The new statute should cover claims for recovery of rates under the Rating Act 1967, but s.153 of that Act (containing a time limit on replacing the charging order of full rent on Maori freehold) should be retained in recognition of the special consideration applying to Maori land. [Para.375.]

7 The new statute should not apply to a range of transport statutes which contain separate provisions (often in accordance with international treaty obligations) or short limitation periods. [Para.376.]

8 It is not clear that the standard one year time limit (normally measured from the date of probate) for claims against deceased person's estates is well founded, but this time limit should be reconsidered in the context of a comprehensive review of the law relating to testamentary claims, with present provisions retained in the meantime. [Paras.377, 378.]

9 Special limitation provisions in the Law Reform Act 1936 relating to the survival after death of certain causes of action should be retained until that Act can be fully reviewed. [Para.379.]

10 It is not clear that the current time limits for proceedings in family law

matters are well founded, but these should be retained until they can be reconsidered in a course of specific review of the particular family law statutes.

11 Under the new law statute the Crown should be treated no better and no worse than any other litigant, and proceedings to recover taxation, customs duties, and
other revenue should be subject to the new statute; alternatively, the revenue statutes should be amended to provide for a 10 year limitation period for recovery by the Crown of outstanding taxes. [Paras.384-386.]

12 The new statute shall apply to proceedings for the recovery of wags, and s.198(3) of the Labour Relations Act 1987 should be repealed. [Para.387.]

13 The new statute should apply to claims under the Fair Trading Act 1986, and the separate time limit contained in s.43 of that Act should be repealed. [Para.388.]

14 The short time limits given for applications for leave to bring claims against the Crown and its officers under such statutes as the Mental Health Act 1969, the Pawnbrokers Act 1908, and the Penal Institutions Act 1954, should be repealed to permit the new statute to apply, although the provisions requiring leave of the court for commencement of such proceedings should be retained. [Para.389.]

15 The new statute should make special provision for this situation which may arise under the designs, patents, and trade marks legislation where the right to bring infringement proceedings is delayed during the period proceeding the final grant of the intellectual property rights sought under such statutes, thus ensuring that holders of such rights are not prejudiced in relation to claims for pre-grant infringement. [Para.390.]

16 Our report and its recommendation should be drawn to the attention of the government of the Cook Islands and of Niue to enable them to consider whether they would wish to adopt the new statute we recommend. [Para.391.]

17 The new statute should not come into force for a period of approximately one year after it has been enacted so as to allow time for full understanding of the import and implications of its provisions. [Para.393.]

18 The new statute need not include provisions recognising the effect of extinction of title under the 1950 Act,this being recognised by the Acts Interpretation Act 1924. [Para.395.]

19 On the repeal of the 1950 Act and the coming into force of the new statute we recommend, the provisions of the 1950 Act as to extinction of title for property should cease to operate, but the Land Transfer Act 1952 should be amended to create a procedure permitting those in adverse possession of abandoned land outside that Act but without title to bring it under the 1952 Act. [Para.397.]

20 Limitation questions arising in proceedings commenced before the commencement of a new statute should be governed by the 1950 Act; all proceedings commenced after the new statute commences should be subject to the new limitation defences; but there should be a three year transition period after commencement of the new statute when proceedings which would be defeated by a limitation defence under the new statute but which would not have been statute-barred under the 1950 Act may be commenced. [Para.399.]

CHAPTER XIV (PROCEDURAL QUESTIONS)

1 The various bodies responsible for formulation and review of procedural rules

for the various courts where claims will be subject to the new statute should consider whether, if there is not already, there should be a notice requirement for parties relying on limitation and other affirmative defences. [Para.404.]

2 The new statute should not expressly declare that, where existing procedural rules so provide, a limitation statute must be explicitly pleaded by the party relaying on it. [Para.405.]

3 The potential for unnecessary filing of applications for direction is as to service - the alternative to actual service which would stop time running for limitation defence purposes under the new statute - could well be considered by those responsible for the administration and procedural rules of the various courts. [Para.407.]

4 The scope for a summary procedure to determine limitation questions under the new statue could well be considered by those responsible for formulation and review of the procedural rules of the various courts. [Para.409.]

5 There are civil procedure policy reasons which favour the inclusion in the new statute of provisions which permit counterclaims, set-offs, third party proceedings, and the addition of further parties to be undertaken without limitation complications provided these are properly related to the subject matter of the claim in the original proceeding. Similarly, amendments to pleadings to add further causes of action should also be permitted provided these are properly related to the subject matter of the original claims, and the present prohibition against adding statute-barred causes of action in Rule 187(2)(a) of the High Court Rules should be removed. However, the provisions relating to the addition of ancillary claims and new causes of action should not apply where the original claim is defeated by a limitation defence (or could have been, if the point were taken), and where a ``long stop'' limitation defence is relied upon by any party. [Paras.430-433.]

APPENDIX B

Consultative Activities, Acknowledgements

Prior to the production of the discussion paper the Commission undertook preliminary consultations with:

John Forgarty, Barrister

Building Industry Commission: Ross Jansen, Boyd Dunlop

Advisor to the Building Industry Commission and 1984 Review of Planning and Building Controls: Jack Searle

Cigna Insurance (local body insurer): Alan Beele

Professor Alan Forbes, Psychologist, Victoria University

Joanne Morris,Law Lecturer

NZ Insurance Council: Trevor Roberts

NZ Municipalities Association

Michael Okkerse, Barrister

Wellington Maori Lawyers Association

Approximately 900 copies of the Discussion Paper NZLC PP3 were sent out. That

distribution included:

County associations (97)

Government departments (28)

Insurance companies (59)

Interest groups (28)

Local bodies (133)

Members of the building profession (15)

Members of the judiciary (41)

Members of the law profession, including 30 district law societies (187)

Members of Parliament (96)

Maori tribal authorities (14)

N.Z. Society of Accountants (10)

The media (37)

A further 100 copies were supplied on request.

The response to our paper was disappointing. Only 27 formal replies were received:

Association of Consulting Engineers

Building Industry Commission

Judge Cadenhead

Robert S Chambers, Barrister

The Chief Ombudsman

Mr J C Corry

Mr R M Daniell

J A L Gibson QC

Gisborne City Council

Insurance Council of N.Z.

The Interprofessional Committee on Liability

Roderick Joyce QC

Justice Department, Law Reform Division

Kapiti Borough Council

Department of Labour

Don Mathieson QC

Ministry of Consumer Affairs

N.Z. Law Society

N.Z.Master Builders' Federation (Inc.)

N.Z. Society of Accountants, Companies & Securities Committee

Onehunga Borough Council

Colin Pidgeon QC

Silerpeaks County Council

Mr C L Riddet

Margaret Vennell

Wairarapa South County Council

Youth Law Project

The lack of response from the Maori interest groups we solicited may reflect cultural unease with a consultation process which takes place through a medium of the written word.

Because of the poor response further consultation was undertaken more informally to gauge the reaction of people with specific knowledge in various subject areas.

In the preparation of the final recommendations, further consultation was undertaken with:

Alexander Stenhouse: Dennis Adam

Bowring Burgess (professional indemnity insurer to lawyers and accountants): Gary Thomas

Cigna Insurance: Alan Beele

Insurance Council of N.Z.: Trevor Roberts

Interprofessional Committee on Liability representing: N.Z. Institute of Architects, N.Z. Institute of Professional Engineers, N.Z. Institute of Surveyors, N.Z. Institute of Values

Auckland District Law Society Members: C Pidgeon QC, A A Hall, A P Randeson

J C Corry, Barrister

Crown Law Office

Professor John Farrar, Canterbury University

John Fogarty, Barrister

Brad Giles, Solicitor

Professor Grant Hammond, University of Auckland

Inland Revenue Department: Virginia Flaus, Office Solicitor

Manuka Henare

Maori Affairs Department: John McSorily, Deputy Office Solicitor

Maori Land Court: Maihi Maniapoto, Chief Registrar

Joanne Morris, Victoria University

N.Z. Local Government Assn: Brian McLay, Chief Executive

Registrar-General of Lands: Brian Hayes

Rudd Watts & Stone (Common Law Department), Wellington: H S Hancock, A D MacKenzie, R A Dobson, K B Johnston, J R Allen

Wellington District Law Society Members: M F Dunphy, J A L Gibson QC, K T Matthews, S McLean, D M T T Hall

John Wild, Barrister

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APPENDIX C

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APPENDIX D

Limitation Act 1950 (N.Z.)

R.S. Vol. 6

845

1

REPRINTED ACT

[WITH AMENDMENTS INCORPORATED]

LIMITATION

REPRINTED AS ON 1 NOVEMBER 1980

NOTE: Except where otherwise indicated, all references to money in decimal currency in square brackets were substituted for references to money in the former currency by s.7 of the Decimal Currency Act 1964, all references to Her Majesty in square brackets have been updated from references to His Majesty, and all references to the High Court in square brackets were substituted for references to the Supreme Court by s.12 of the Judicature Amendment Act 1979.

INDEX

In this index ``(n)'' after a page number indicates that the enactment is referred to in a note on that page.

ANALYSIS

THE LIMITATION ACT 1950

1950, No. 65

An Act to consolidate and amend certain enactments relating to the limitation actions and arbitrations

[1 December 1950

1. Short Title and commencement - This Act may be cited as the Limitation Act 1950, and shall come into force on the 1st day of January 1952.

The law of the Cook Islands and of Niue as to limitations is the same as the law in force for the time being in New Zealand. See s. 641 of the Cook Islands Act 1915, and s. 706 of the Niue Act 1966.

2. Interpretation - (1) In this Act, unless the context otherwise requires, -

``Action'' means any proceeding in a Court of law other than a criminal proceeding:

``Arbitration'', ``award'', and ``submission'' have the same meaning respectively as in the Arbitration Act 1908:

``Land'' includes corporeal hereditaments and rent-charges, and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale, but save as aforesaid does not include any incorporeal hereditament:

``Parent'' has the same meaning as in [the Deaths by Accident Compensation Act 1952] as for the time being extended by any other enactment;

``Personal estate'' and ``personal property'' do not include chattels real:

``Rent'' includes a rentcharge and rent service:

``Rentcharge'' means any annuity or periodical sum of money charged upon or payable out of land, except a rent service or interest on a mortgage on land:

``Ship'' includes every description of vessel used in navigation not propelled by oars:

``Trust'' and ``trustee'' have the same meanings respectively as in [the Trustee Act 1956] as for the time being extended by any other enactment.

(2) For the purposes of this Act, a person shall be deemed to be under a disability while he is an infant or of unsound mind.

(3) For the purposes of the last preceding subsection but without prejudice to the generality thereof, a person shall be conclusively presumed to be of unsound mind while he is detained or kept in custody (otherwise than as a voluntary boarder) under any provision of [the Mental Health Act 1969].

(4) A person shall be deemed to claim through another person if he became entitled by through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be deemed to claim through the person so entitled:

Provided that a person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be deemed to claim through the appointor.

(5) References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges, to distrain for arrears of rent; and references to the bringing of such an action shall include references to the making of such an entry or distress.

(6) References in this Act to the possession of land shall, in the case of rentcharges, be construed as references to the receipt of rent; and references to the date of dispossession or discontinuance of possession of land shall, in the case of rentcharges, be construed as references to the date of the last receipt of rent.

(7) In Part II of this Act references to a right of action shall include references to a cause of action and to a right to receive money secured by a mortgage or charge on any property or to recover proceeds of the sale of land, and to a right to receive a share or interests in the personal estate of a deceased person; and references to the date of the accrual of a right of action shall -

(a) In the case of an action for an account, be construed as references to the date on which the matter arose in respect of which an account is claimed:

(b) In the case of an action upon a judgment, be construed as references to the date on which the judgement became enforceable:

(c) In the case of an action to recover arrears of rent or interest, or damages in respect thereof, be construed as references to the date on which the rent or interest became due.

(8) For the purposes of this Act a period of limitation which is prescribe by any of the enactments mentioned in the Second Schedule to this Act (as amended by this Act) shall not be deemed to be prescribed by this Act.

Cf. Limitation Act 1939, s. 31 (U.K.)

In subs. (1) the Deaths by Accident Compensation Act 1952 and the Trustee Act 1956, being the corresponding enactments in force at the date of this reprint, have been substituted for the repealed Deaths by Accident Compensation Act 1908 and the repealed Trustee Act 1908.

In subs. (3) the Mental Health Act 1969, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Mental Health Act 1911.

PART I

PERIODS OF LIMITATION FOR DIFFERENT CLASSES OF ACTION

3. Part I to be subject to provisions of Part II relating to disability, acknowledgement, fraud, etc. - The provisions of this Part of this Act shall have effect subject to the provisions of Part II of this Act, which provide for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud, and mistake.

Cf. Limitation Act 1939, s. 1 (U.K.)

Actions of Contract and Tort and Certain Other Actions

4. Limitation of actions of contract and tort, and certain other actions - (1) Except as otherwise provided in this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,-

(a) Actions founded on simple contract or on tort;

(b) Actions to enforce a recognisance;

(c) Actions to enforce an award, where the submission is not by a deed:

(d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

(3) An action upon a deed shall not be brought after the expiration of 12 years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter

period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgement which has been obtained subsequent to the commencement of this Act after the expiration of 12 years from the date on which the judgement became enforceable or on any judgment which has been obtained before the commencement of this Act after the expiration of 20 years from the date on which the judgment became enforceable; and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression ``penalty'' shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) An action to have any will of which probate has been granted, or in respect of which letters of administration with the will annexed have been granted, declared or adjudicated to be invalid on the ground of want of testamentary capacity in the testator or on the ground of undue influence shall not be brought after the expiration of 12 years from the date of the granting of the probate or letters of administration.

[(7) An action in respect of the bodily injury of any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:

Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law other than the provisions of this subsection or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.]

(8) Subject to the provisions of [section 76 of the Shipping and Seamen Act 1952], subsection (1) of this section shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the [High Court] which is enforceable in rem.

(9) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.

Cf. Limitation Act 1939, s. 2 (U.K.); 1908, No. 89, s. 95

Subs. (7) was substituted for the original subs. (7) (as amended by s. 2 of the Limitation Amendment Act 1962) by s. 2(1) of the Limitation Amendment Act 1970.

In subs. (8), s. 76 of the Shipping and Seamen Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for s. 4 of the repealed Shipping and Seamen Amendment At 1948.

Subs. (4); As to the enforcement of District Courts judgments more than 6 years old, see s. 80 of the District Courts Act 1947, reprinted 1980, R.S. Vol. 5, p. 1.

5. Limitation in case of successive conversions, and extinction of title of owner of converted goods - (1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion of wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid expires without his having commenced action to recover possession of the chattel, the title of that person to the chattel shall be extinguished.

(3) Nothing in this section shall affect the provisions of subsection (1) of section 26 of the Sale of Goods Act 1908.

Cf. Limitation Act 1939, s. 3 (U.K.)

As to the effect of this section in relation to infringement of copyright by infringing copies, see s. 25 of the Copyright Act 1962.

Actions to Recover Land and Rent, and Accrual of Rights and Causes of Action

6. Application of Act to land of the Crown, Maori customary land, and land subject to the Land Transfer Act - (1) Subject to the provisions of the next succeeding subsection, nothing in this Act shall apply to any Maori land which is customary land within the meaning of [the Maori Affairs At 1953].

(2) This Act shall be subject to [the Land Transfer At 1952], the Land Act 1948, [subsection (2) of section 157 and section 458 of the Maori Affairs Act 1953], and section 12 of the Public Works Amendment Act 1935, so far as it is inconsistent with anything contained in those enactments.

(3) Nothing in this Act shall affect the right of [Her Majesty] to any minerals (including uranium, petroleum, and coal).

In subs. (1) the Maori Affairs Act 1953, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Maori Land Act 1931.

In subs. (2) the Land Transfer Act 1952, being the corresponding enactment if force at the date of this reprint, has been substituted for the repealed Land Transfer Act 1915; and ss. 157(2) and 458 of the Maori Affairs Act 1953, being the corresponding enactments in force at the date of this reprint, have been substituted for ss. 115 and 554 of the repealed Maori Land Act 1931.

As to the Land Transfer Act 1952, see ss. 197 and 199(3).

7. Limitation of action to recover land - (1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or to some person through whom the Crown claims.

(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued

to him or some person through whom he claims:

Provided that, if the right of action first accrued to the Crown, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the crown, whichever period first expires.

Cf. Limitation Act 139, s. 4 (U.K.)

As to the extinguishment after 12 years of interests excepted from limited certificates of title, see s. 204 of the Land Transfer Act 1952.

8. Accrual of right of action in case of present interests in land - (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

(2) Where any person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and was the last person entitled to the land to be in possession thereof, the right of action shall be deemed to have accrued on the date of his death.

(3) Where any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him, or to some person through whom he claims, was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged, and no person has been in possession of the land by virtue of the assurance,the right of action shall be deemed to have accrued on the date when the assurance took effect, was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

Limitation Act 1939, s. 5 (U.K.)

9. Accrual of right of action in case of future interests - (1) Subject as hereafter in this section provided, the right of action to recover any land shall, in a cases where the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and no person has taken possession of the land by virtue of the estate or interest claimed, be deemed to have accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest or otherwise.

(2) If the person entitled to the preceding estate or interest was not in possession of the land on the date of the determination thereof, no action shall be brought by the person entitled to the succeeding estate or interest -

(a) After the expiration of 60 years from the date on which the right of action accrued to the Crown where the Crown is entitled to the succeeding estate or interest; or

(b) In any other case, after the expiration of 12 years from the date on which the right of action accrued to the person entitled to the preceding estate or interest, or 6 years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.

(3) The foregoing provisions of this section shall not apply where the preceding estate or interest is a leasehold interest other than one which is determinable with life or lives or with the cesser of a determinable life interest.

(4) The foregoing provisions of this section shall not apply to any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.

(5) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

(6) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Act, no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.

Limitation Act 1939, s. 6 (U.K.)

10. Provisions in case of settled land and land held on trust - (1) Subject to the provisions of subsection (1) of section 21 of this Act, this provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as they apply to legal estates, and accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.

(2) Where any land is held by any trustee (including a trustee who is also tenant for life ...) upon trust, including a trust for sale, and the period prescribed by this Act for the bringing of an action to recover the land by the trustee has expired, the estate of the trustee shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustee shall be extinguished.

(3) Where any settled land is vested in a tenant for life or a person having the statutory powers of a tenant for life or any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the tenant for life or person having the powers of a tenant for life or trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the tenant for life or person having the powers of a tenant for life or trustees would, apart from this provision, have been barred by this Act.

(4) Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, no right of action to recover the land shall be deemed for the purposes of this

Act to accrue during such possession to any person in whom the land is vested as tenant for life, person having the powers of a tenant for life, or trustee, or to any person entitled to a beneficial interest in the land or the proceeds of sale.

Cf. Limitation Act 1939, s. 7 (U.K.)

In subs (2) the words ``or who, by virtue of the Settled Land Act 1908, has also the powers of a tenant for life'' were omitted by s. 89(2) of the Trustees Act 1956.

11. Accrual of right of action in case of forfeiture or breach of condition - A right of action to recover land by virtue of a forfeiture or breach of condition shall be deemed to have accrued o the date on which the forfeiture was incurred or the condition broken:

Provided that, if such a right has accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by virtue thereof, the right of action to recover the land shall not be deemed to have accrued to that person until his estate or interest fell into possession.

Cf. Limitation Act 1939, s. 8 (U.K.)

12. Accrual of right of action in case of certain tenancies - (1) A tenancy at will or a tenancy determinable at the will of either of the parties by one month's notice in writing shall, for the purposes of this Act, be deemed to be determined at the expiration of a period of one year from the commencement thereof, unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date on which it is determined or deemed to be determined as aforesaid:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.

(2) A tenancy from year to year or other period without a lease in writing (but not a tenancy to which the last proceeding subsection applies) shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.

(3) Where any person is in possession of land by virtue of a lease in writing by which a rent at a rate of not less than [$2] a year is reserved, and the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no rent is subsequently received by the person rightfully so entitled, the right of action of the last-mentioned person to recover the land shall be deemed to have accrued at the date when the rent was first received by the person wrongfully claiming as aforesaid and not at the date of the determination of the lease.

(4) Subsections (1) and (3) of this section shall not apply to any tenancy at will or lease granted by the Crown.

Cf. Limitation Act 1939, s. 9 (U.K.)

13. Right of action not to accrue or continue unless there is adverse possession - (1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession), and, where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued, and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession.

(3) For the purposes of this section,-

(a) Possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge; and

(b) Receipt of rent under a lease by a person wrongfully claiming, as mentioned in subsection (3) of the last preceding section, the land in reversion shall be deemed to be adverse possession of the land.

Cf. Limitation Act 1939, s. 10 (U.K.)

As to this section, see ss. 197 and 199 (3) of the Land Transfer Act 1952.

14. Accrual of cause of action on claim for contribution of indemnity - For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

15. Cure of defective disentailing assurance - Where a person entitled in remainder to an entailed interest in any land has made an assurance thereof which fails to bar the issue in tail or the estates and interests taking effect on the determination of the entailed interest, or fails to bar the last-mentioned estates and interests only, and any person takes possession of the land by virtue of the assurance, and that person or any other person whatsoever (other than a person entitled to possession by virtue of the settlement) is in possession of the land for a period of 12 years from the commencement of the time at which the assurance, if it had then been executed by the person entitled to the entailed interest, would have operated, without the consent of any other person, to bar the issue in tail and such estates and interests as aforesaid, then, at the expiration of that period, the assurance shall operate, and be deemed always to have operated, to bar the issue in tail and those estates and interests.

Cf. Limitation Act 1939, s. 11 (U.K.)

16. Limitation of redemption actions - (1) Notwithstanding anything contained in [section 81 of the Property Law Act 1952], or in any other enactment,when a mortgagee of land has been in possession of any of the mortgaged land for a period of 12 years, no action or redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him.

(2) This section shall not apply in respect of any land that is subject to [the Land Transfer Act 1952].

Cf. Limitation Act 1939, s. 12 (U.K.)

In subs. (1), s. 81 of the Property Law Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for s. 70 of the repealed Property Law Act 1908.

In subs. (2) the Land Transfer Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Land Transfer Act 1915.

17. No right of action to be preserved by formal entry or continual claim - For the purposes of this Act, no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon, and no continual or other claim upon or near any land shall preserve any right of action to recover the land.

Cf. Limitation Act 1939, s. 13 (U.K.)

18. Extinction of title after expiration of period - Subject to the provisions of section 10 of this Act, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

Cf. Limitation Act 1939, s. 16 (U.K.)

19. Limitation of actions to recover rent - No action shall be brought, or distress made, to recover arrears to rent or damages in respect thereof, after the expiration of 6 years from the date on which the arrears become due.

Cf. Limitation Act 1939, s. 17.

Actions to Recover Money Secured by a Mortgage or Charge or to Recover Proceeds of the Sale of Land

20. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land - (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale), after the expiration of 12 years from the date when the right to receive the money accrued.

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of 12 years from the date on which the right to foreclose accrued:

Provided that, if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on any personal property subject to the mortgage or charge shall not be deemed to accrue so long as the property subject to the mortgage or charge comprises any future interest or any life insurance policy which has not matured or been determined.

(4) No action to recover arrears of interest payable in respect of any sum of

money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land,or to recover damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due:

Provided that -

(a) Where a prior mortgage or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of that possession by the subsequent encumbrancer,he may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrancer or damages in respect thereof,; notwithstanding that the period exceeded 6 years:

(b) Where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(5) This section shall not apply to any mortgage or charge on a ship.

Cf. Limitation Act 1939, s. 18 (U.K.)

As to the discharge of a registered mortgage where the remedies thereunder are statute barred, see s. 112 of the Land Transfer Act 1952.

By s. 447A (5) of the Maori Affairs Act 1953 the enforcement of a charge under that section is not restricted by this section. s. 80 of the Rating Act 1967 makes a charging order issued on a judgement for rates subject to this section.

AS to charging orders for rates on Maori land, see s. 153 (9) of the Rating Act 1967.

Actions in Respect of Trust Property or the Personal or the Estate of Deceased Persons

21. Limitation of actions in respect of trust property - (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -

(a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by

any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

Cf. Limitation Act 1939, s. 19 (U.K.); 1908, No. 200, s. 94

22. Limitation of actions claiming personal estate of a deceased person - Subject to the provisions of subsection (1) of the preceding section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued, and no action to recover arrears in interest in respect of any legacy, or damages in respect of such arrears,shall be brought after the expiration of 6 years from the date on which the interest became due.

Cf. Limitation Act 1939, s. 20 (U.K.)

23.Repealed by s. 3(1) of the Limitation Amendment Act 1962.

PART II

EXTENSION OF LIMITATION PERIODS IN CASE OF DISABILITY, ACKNOWLEDGEMENT, PART PAYMENT, FRAUD, AND MISTAKE

Disability

24. Extension of limitation period in case of disability - If, on the date when any right of action accrued for which a period of limitation is prescribed by or may be prescribed under this Act the person to whom it accrued was under a disability,-

(a) In the case of any action ... in respect of the death of or bodily injury to any person, or of any action to recover a penalty or forfeiture or sum by way thereof by virtue of any enactment where the action is brought by an aggrieved party, the right of action shall be deemed to have accrued on the date when the person ceased to be under a disability or died, whichever event first occurred; or

(b) In any other case the action may be brought before the expiration of 6 years from the date when the person ceased to be under a disability or died, whichever event first occurred, -

notwithstanding that, in any case to which either of the foregoing paragraphs of this section applies, the period of limitation has expired:

Provided that -

(c) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through when the person under a disability claims;

(d) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability,to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person;

(e) No action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of 30 years from the date on which the right of action accrued to that person or some person through whom he claims; [and]

(f) Repealed by s. 2(c) of the Limitation Amendment Act 1963.

(g) This section shall not apply to any action to recover a penalty or forfeiture, or sum by way thereof, by virtue of any enactment, except where the action is brought by an aggrieved party.

Cf. Limitation Act 1939, s. 22 (U.K.)

In para. (a) the words ``to which section twenty-three of this Act applies, or of any other action'' were omitted by s. 2(a) of the Limitation Amendment Act 1963.

In para. (e) the word ``and'' was added by s. 2(b) of the Limitation Amendment Act 1963.

Acknowledgement and Part Payment

25. Fresh accrual of action on acknowledgement or part payment - (1) Where there has accrued any right of action to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and-

(a) The person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or

(b) In the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, -

the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.

(2) The last preceding subsection shall apply to a right of action to recover land accrued to a person entitled to an estate or interest taking effect on the determination of an entailed interest taking effect on the determination of an entailed interest against whom time is running under section 15 of this Act, and on the making of the acknowledgement that section shall cease to apply to the land.

(3) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land which is not subject to [the Land Transfer Act 1952], and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiation of 12 years from the date of the payment or acknowledgement.

(4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

Cf. Limitation Act 1939, s. 23 (U.K.)

In subs.(3) the Land Transfer Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Land Transfer Act 195.

26. Formal provisions as to acknowledgements and part payments - (1) Every such acknowledgement as aforesaid shall be in writing and signed by the person making the acknowledgement.

(2) Any such acknowledgement or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last preceding section, and shall be made to the person, or to an agent t=of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

Cf. Limitation Act 1939, s. 24 (U.K.)

27. Effect of acknowledgement or part payment on persons other than the maker or recipient - (1) An acknowledgement of the title to any land or mortgaged personalty by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.

(2) A payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.

(3) Where 2 or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgement of the mortgagor's title or of his equity of redemption by one of the mortgagees shall bind only him and his successors and shall not bind any other mortgagee or his successors, and, where the mortgagee by whom the acknowledgement is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt, the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.

(4) Where there are 2 or more mortgagors, and the title or right to redemption of one of the mortgagors is acknowledged as aforesaid, the acknowledgement shall be deemed to have been made to all the mortgagors.

(5) An acknowledgement of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person:

Provided that an acknowledgement made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgement.

(6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:

Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment and his successors, and shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

(7) An acknowledgement by one of several personal representatives of any claim to the personal estate of a deceased person, or to any share or interest therein, or a payment by one of several personal representatives in respect of

any such claim shall bind the estate of the deceased person.

(8) In this section the expression ``successor'' in relation to any mortgagee or person liable in respect of any debt or claim means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or bankruptcy or the dispositions of property or the determination of a limited estate or interest in settled property or otherwise.

Cf. Limitation Act 1939, s. 25 (U.K.)

Fraud and Mistake

28. Postponement of limitation period in case of fraud or mistake - Where, in the
case of any action for which a period of limitation is prescribed by this Act, either -

(a) The action or of any person through whom he claims or his agent; or

(b) The right of action is concealed by the fraud of any such person as aforesaid; or

(c) The action is for relief from the consequences of a mistake, -

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover,or enforce any charge against, or set aside any transaction affecting, any property which

(d) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(e) In the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

Cf. Limitation Act 1939, s. 26 (U.K.)

PART III

GENERAL

29. Application of Act and other limitation enactments to arbitrations - (1) This Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions.

(2) Notwithstanding any term in a submission to the effect that no cause of actin shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purposes of this Act and of any other such enactment (whether in their applications to arbitrations or to other proceedings), be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission.

(3) For the purposes of this Act and of any such enactment as aforesaid, an arbitration shall be deemed to be commenced when one party to the arbitration

serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him or them to submit the dispute to the person so named or designated.

(4) Any such notice as aforesaid may be served either -

(a) By delivering it to the person on whom it is to be served; or

(b) By leaving it at the usual or last known place of abode in New Zealand of that person; or

(c) By sending it by post in a registered letter addressed to that person at his usual or last known place of abode in New Zealand, -

as well as in any other manner provided in the submission; and, where a notice is sent by post in manner prescribed by paragraph (c) of this subsection, service thereof shall be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

(5) Where the [High Court] orders that an award be set aside, or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by this Act
or any such enactment as aforesaid for the commencement of proceedings (including arbitration) with respect to the dispute referred.

(6) This section shall apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to a submission, and subsections (3) and (4) of this section shall have effect, in relation to an arbitration under an Act, as if for the references to the submission there were substituted references to such of the provisions of the Act or of any order, scheme, rules, regulations,
or bylaws made thereunder as relate to the arbitration.

Cf. Limitation Act 1939, s. 27 (U.K.); 1938, No. 6, s. 18

Subss. (3) and (4) of this section are applied by s. 11 (3) of the Carriage by Air Act 1967 to arbitrations under s. 11 of that Act.

30 Provisions as to set-off or counterclaim - For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Cf. Limitation Act 1939, s. 28 (U.K.)

31 Acquiescence - Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

Cf. Limitation Act 1939, s. 29 (U.K.)

32 Application to the Crown - Save as in this Act otherwise expressly provided and without prejudice to the provisions of section 33 thereof, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects:

Provided that this Act shall not apply to any proceedings by the Crown for the

recovery of any tax or duty or interest thereon or to any forfeiture proceedings under the Customs Acts within the meaning of [section 3 of the Customs Act 1966], as from time to time extended by any other enactment, or to any proceedings in respect of the forfeiture of a ship.

Cf. Limitation Act 1939, s. 30 (U.K.)

The provisions of the Crown Proceedings Act 1950 are subject to the provisions of this Act, and of any other Act which limits the time within which proceedings may be brought by or against the Crown; see s. 4 of that Act.

S. 3 of the Customs Act 1966, being the corresponding enactment in force at the date of this reprint, has been substituted for s. 3 of the repealed Customs Act 1913.

33. Savings for other limitation enactments - (1) This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment, or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by any other enactment.

(2) Any reference in any enactment to any of the enactments specified in the First Schedule to this Act or to any provision of any such enactment shall be construed as a reference to the corresponding provision of this Act.

Cf. Limitation Act 1939, s. 32 (U.K.)

Other limitation enactments are-

Public Works Act 1928: s. 45.

District Courts Act 1947: s. 80

Law Reform (Testamentary Promises) Act 1949: s. 6.

Deaths by Accidents Compensation Act 1952: s. 10.

Shipping and Seamen Act 1952: ss. 111 (2) and 471.

Property Law Act 1952: s. 121.

Patents Act 1953: s. 85 (3).

Companies Act 1955: s. 432.

Family Protection Act 1955: s. 9.

Workers' Compensation Act 1956: s. 53.

Rating Act 1967: ss. 79 and 153 (2).

Domestic Proceedings Act 1968: s. 53 (3).

Armed Forces Discipline Act 1971: s. 20.

Industrial Relations Act 1973: s. 157.

Land Tax Act 1976: s. 61.

Income Tax Act 1976: s. 406.

34. Provisions as to actions already barred and pending actions - Nothing in this Act shall -

(a) Enable any action to be brought which was barred before the commencement of this Act by an enactment repealed or amended by this Act or ceasing to have effect by virtue of this Act, except in so far as the cause of action or right of action may be revived by an acknowledgement or part payment made in accordance with the provisions of this Act; or

(b) Affect any action or arbitration commenced before the commencement of this Act or the title to any property which is the subject of any such action or arbitration.

Cf. Limitation Act 1939, s. 33 (U.K.)

35. Repeals and amendments - (1) The enactments specified in the First Schedule to this Act shall at the commencement of this Act cease to have effect in New Zealand.

(2) The enactments specified in the Second Schedule to this Act are hereby amended in the manner indicated in that Schedule.

Cf. Limitation Act 1939, s. 34 (4) (U.K.)

SCHEDULES

FIRST SCHEDULE

Section 35 (1)

UNITED KINGDOM ENACTMENTS CEASING TO HAVE EFFECT IN NEW ZEALAND

31 Eliz., c. 5 - An Act Concerning Informers.

21 Jas. I, c. 16 - the Limitation Act 1623.

4 and 5 Anne, c. 3 - An Act for the amendment of the Law and the better Advancement of Justice: Sections 17 to 19.

9 Geo. III, c. 16 - The Crown Suits Act 1769.

9 Geo. IV, c. 14 - The Statute of Frauds Amendment Act 1828: Sections 1 to 4.

3 and 4 Will. IV, c. 27 - The Real Property Limitation Act 1833.

3 and 4 Will. IV, c. 42 - The Civil Procedure Act 1833: Sections 3 to 7.

Section 35 (2)

SECOND SCHEDULE

NEW ZEALAND ENACTMENTS AMENDED

Title of Act

Number of Section Affected

Nature of Amendment

1902 (Local), No. 15 -

the Dunedin District Drainage and Sewerage Act 1900

Amendment Act 1902

Sections 30 and 31

By repealing these sections.

1907 (Local), No. 30 -

The Christchurch District Drainage Act 1907

Sections 75 and 76

By repealing these sections.

1914, No. 32 -

The Local Railways Act 1914

(1931 Reprint, Vol. VII, p. 967)

Section 99

By repealing these section.

1920 (Local), No. 15 -

The Christchurch Tramway District Act 1920

Section 51

By repealing these paragraphs (b) and (c).

1928, No. 44 -

The Auckland Transport Board Act 1928

Section 74

By repealing these section.

1941 (Local), No. 7 -

The Auckland Centennial Memorial Park Act 1941

Section 51

By repealing these section.

1944 (Local),l No. 7 -

The Hawke's Bay Crematorium Act 1944

Section 37

By repealing these section.

1944 (Local), No. 8 -

The Auckland Metropolitan Drainage Act 1944

Section 67

By repealing these section.

Parts of this Schedule were repealed by the following enactments:

s. 155 (2) of the Property Law Act 1952.

s. 89 (1) of the Trustee Act 1956.

S. 245 of the Land Transfer Act 1952.

S. 413 (1) of the Municipal Corporations Act 1954.

S. 214 (1) of the Summary Proceedings Act 1957.

S. 38 (1) of the State Insurance Act 1963.

S. 71 (1) of the Milk Act 1967.

S. 142 (1) of the Gaming and Lotteries Act 1977.

Parts of this Schedule relating to the Crown Suits Act 1908, the Auckland Electric Power Board Act 1921-22, the Counties Amendment Act 1927, the Post and Telegraph Act 1928, the Hospitals Amendment Act 1936, and the Hutt Valley Drainage Act 1948 have been omitted, as those Acts were repealed by s. 34 (1) of the Crown Proceedings Act 1950, s. 111 of the Auckland Electric Power Board Act 1978, s. 453 (1) of the Counties Act 1956, s. 250(1) of the Post Office Act 1959, s. 158 (1) of the Hospitals Act 1957, and s. 88 (1) (a) of the Hutt Valley Drainage Act 1967 respectively.

Other amendments specified in this Schedule have been incorporated in the enactments affected, where they appear in the latest reprint.

THE LIMITATION AMENDMENT ACT 1962

1962, No. 112

An Act to amend the Limitation Act 1950

[6 December 1962

1. Short Title - this Act may be cited as the Limitation Amendment Act 1962, and shall be read together with an deemed part of the Limitation Act 1950 (hereinafter referred to as the principal Act).

2. (1) Repealed by s. 2 (2) of the Limitation Amendment Act 1970.

(2) In respect of any cause of action in respect of which an action or arbitration has been commenced before the passing of this Act, the said proviso shall apply as if this section had not been passed.

(3) In respect of any other cause of action which accrued before the passing of this Act, the said proviso shall apply as if this section had come into force before that cause of action accrued.

3. Protection of person acting in execution of statutory or other public duty -

(1) Section 23 of the principal Act is hereby repealed.

(2) In respect of any cause of action which accrued more than one year before the passing of this Act, and any other cause of action in respect of which an action or arbitration has been commenced before the passing of this Act, the provisions of the principal Act shall apply as if the said section 23 continued in force.

(3) In respect of any other cause of action which accrued before the passing of this Act, the provisions of the principal Act shall apply as if the said section 23 had been repealed before that cause of action accrued.

THE LIMITATION AMENDMENT ACT 1963

1963, No. 96

An Act to amend the Limitation Act 1950

[23 October 1963

1. Short Title - This Act may be cited as the Limitation Amendment Act 1963, and shall be read together with and deemed part of the Limitation Act 1950 (hereinafter referred to as the principal Act).

2. (a), (b), (c) These paragraphs amended s. 24 (a), (e), and (f) respectively of the principal Act.

THE LIMITATION AMENDMENT ACT 1970

1970, No. 78

An Act to amend the Limitation Act 1950

[27 November 1970

1. Short Tile - This Act may be cited as the Limitation Amendment Act 1970, and shall be read together with and deemed part of the Limitation Act 1950 (hereinafter referred to as the principal Act).

2. (1) This subsection substituted a new subsection for subs. (7) of s. 4 of the principal Act.

(2) Subsection (1) of section 2 of the Limitation Amendment Act 1952 is hereby repealed.

The Limitation Act 1950 is administered in the Department of Justice.

APPENDIX E

Other N.Z. Statutory Limitations Provisions

Accident Compensation Act 1982, ss. 114(3), 98

Administration Act 1969, s. 49

Armed Forces Discipline Act 1971, s. 20

Carriage by Air Act 1967, ss. 11, 36, 39

Carriage by Goods Act 1979, ss. 18, 19

Companies Act s. 432

Credit Contracts Act 1981, s. 12

Customs Act 1966, ss. 274, 275

Death by Accident Compensation Act 1952, s. 10

District Courts Act 1947, s. 80

Domestic Actions Act 1975, s. 8 (2)

Electoral Act 1956, ss. 152, 157

Fair Trading Act 1986, s. 43

Family Proceedings Act 1980, ss. 49, 71, 180

Family Protection Act 1955, s. 9

Forests Act 1949, s. 63

Goods & Services Tax Act 1985, ss. 44, 66

Harbours Act 1950, s. 262A

High Court Rules, R. 556

Income Tax Act 1976, ss. 406, 419

Insolvency Act 1967, s. 101

Judicature Act 1908, s. 56

Labour Relations Act 1987, s. 198

Land Tax Act ss. 51, 61

Land Transfer Act 1952, ss. 180, 173

Landlord & Tenant Act 1730, s. 2]

Law Reform Act 1936, s. 3

Law Reform Testamentary Promises Act 1949, s. 6

Marine Pollution Act 1974, s. 41

Maternal Mortality Research Act 1968, s. 16

Matrimonial Property Act 1976, ss. 24, 57

Mental Health Act 1969, s. 40

Pawnbrokers Act 1969, s. 40

Penal Institutions Act 1954, s. 41

Police Complaints Authority Act 1988, s. 18(1)(a)

Property Law Act 1956, s. 121

Public Works Act 1981, s. 78

Rating Act 1967, ss. 79, 153

Reciprocal Enforcement of Judgments Act 1934, s. 4

Residential Tenancies Act 1986, s. 54

Sea Carriage of Goods Act 1940, s. 11

Shipping & Seamen Act 1952, ss. 76, 111, 471

Trustee Act 1956, s. 75

Tuberculosis Act 1948, s. 24

Workers Compensation Act 1956, s. 53

APPENDIX F

Latent Damage Act 1986 (U.K.)

c. 37

Latent Damage Act 1986

1986 CHAPTER 37

An Act to amend the law about limitation of actions in relation to actions for damages for negligence not involving personal injuries; and to provide for a person taking an interest in property to have, in certain circumstances, a course of action in respect of negligent damage to the property occurring before he takes that interest.

[18th July 1986]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Time limits for negligence actions in respect of latent damage not involving personal injuries

1. The following sections shall be inserted in the Limitation Act 1980 (referred to below in this Act as the 1980 Act) immediately after section 14 (date of knowledge for purposes of special time limits for actions in respect of personal injuries or death)-

Time limits for negligence actions in respect of latent damage not involving personal injuries. 1980 c. 58.

``Actions in respect of latent damage not involving personal injuries

14A - (1) This section applies to any action for damages for negligence, other

than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either -

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above ``the knowledge required for bringing an action for damages in respect of the relevant damage'' means knowledge both -

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are -

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice

which it is reasonable for him to see;

but a person shall not be taken by virtue of the subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

Overriding time limit for negligence actions not involving personal injuries.

14B - (1) An action for damages for negligence, other than one to which section 11 of the Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission -

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that -

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section.''

2. - (1)The following section shall be inserted in the 1980 Act immediately after section 28 (extension of limitation period case of disability on date of accrual of cause of action) -

Provisions consequential on section 1.

``Extension for cases where the limitation period is the period under section 14A(4)(b).

28A. - (1) Subject to subsection (2) below, if in the case of any action for which a period of limitation is prescribed by section 14A of this Act -

(a) the period applicable in accordance with subsection (4) of that section is the period mentioned in paragraph (b) of that subsection;

(b) on the date which is for the purposes of that section the starting date for reckoning that period the person by reference to whose knowledge that date fell to be determined under subsection (5) of that section was under a disability; and

(c) section 28 of this Act does not apply to the action;

the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

(2) An action may not be brought by virtue of subsection (1) above after the end of the period of limitation prescribed by section 14B of this Act.'

(2) In section 32 of the 1980 Act (postponement of limitation period in cases of fraud, concealment or mistake), at the end there shall be added the following

subsection -

``(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).''

Accrual of cause of action to successive owners in respect of latent damage to property

3. - (1) Subject to the following provisions of this section, where -

Accrual of cause of action to successive owners in respect of latent damage to property.

(a) a cause of action (``the original cause of action'') has accrued to any person in respect of any negligence to which damage to any property in which he has an interest is attributable (in whole or in part); and

(b) another person acquires an interest in that property after the date on which the original cause of action accrued but before the material facts about the damage have become known to any person who, at the time when he first has knowledge of those facts, has any interest in the property;

a fresh cause of action in respect of that negligence shall accrue to that other person on the date on which he acquires his interest in the property.

(2) A cause of action accruing to any person by virtue of subsection (1) above -

(a) shall be treated as if based on breach of a duty of care at common law owed to the person to whom it accrues; and

(b) shall be treated for the purposes of section 14A of the 1980 Act (special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual) as having accrued on the date on which the original cause of action accrued.

(3) Section 28 of the 1980 Act (extension of limitation period in case of disability) shall not apply in relation to any such cause of action.

(4) Subsection (1) above shall not apply in any case where the person acquiring an interest in the damaged property is either -

(a) a person in whom the original cause of action vests by operation of law; or

(b) a person in whom the interest in that property vests by virtue of any order made by a court under section 538 of the Companies Act 1985 (vesting of company property in liquidator).

1985 c. 6.

(5) For the purposes of subsection (1)(b) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who has an interest in the damaged property at the time when those facts become known to him to consider it sufficienlty serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(6) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable by him only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(7) This section shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

1947 c. 44.

Transitional provisions

1939 c. 21

4. - (1) Nothing in section 1 or 2 of this Act shall -

(a) enable any action to be brought which was barred by the 1980 At or (as the case may be) by the Limitation Act 1939 before this Act comes into force; or

(b) affect any action commenced before this Act comes into force.

(2) Subject to subsection (1) above, sections 1 and 2 of this Act shall have effect in relation to causes of action accruing before, as well as in relation to causes of action accruing after, this Act comes into force.

(3) Section 3 of this Act shall only apply in cases where an interest is damaged property is acquired after this Act comes into force but shall so apply, subject to subsection (4) below, irrespective of whether the original cause of action accrued before or after this Act comes into force.

(4) Where -

(a) a person acquires an interest in damaged property in circumstances to which section 3 would apart from this subsection apply; but

(b) the original cause of action accrued more than six years before this Act comes into force;

a cause of action shall not accrue to that person by virtue of subsection (1) of that section unless section 32(1)(b) of the 1980 Act (postponement of limitation period in case of deliberate concealment of relevant facts) would apply to any action founded on the original cause of action.

Citation, interpretation, commencement and extent.

5. - (1) This Act may be cited as te Latent Damage Act 1986.

(2) In this Act -

``the 1980 Act'' has the meaning given by section 1; and ``action'' includes

any proceeding in a court of law, an arbitration and any new claim within the meaning of section 35 of the 1980 Act (new claims in pending actions).

(3) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.

(4) This At extends to England and Wales only.

APPENDIX G

Alberta ILRR (Draft) Limitations Bill

342

DRAFT LIMITATIONS ACT

Definitions

1 In this Act,

(a) ``claimant'' means the person who brings a claim;

(b) ``collateral'' means property that is subject to a security interest;

(c) ``defendant'' means the defendant under a claim;

(d) ``enforcement order'' means an order or writ made by a court for the enforcement of a remedial order;

(e) ``injury'' means

(i) personal injury,

(ii) property damage,

(iii) economic loss, or

(iv) in the absence of any of the above, the breach of a duty;

(f) ``law'' means the law in force in the Province, and includes

(i) legislative enactments,

(ii) judicial precedents, both legal and equitable, and

(iii) regulations;

(g) ``person under disability'' means

(i) a minor, or

(ii) an adult for whom a trusteeship order could be made under the provisions of the dependent Adults Act;

(h) ``remedial order'' means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages of the violation of a right;

(i) ``right'' means any right under the law and ``duty'' has a correlative

meaning;

(j) ``security interest'' means an interest in collateral that secures the payment or other performance of an obligation.

Application

2(1) Except as provided in subsection (2), this Act is applicable to any civil judicial claim requesting a remedial order, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if the claim either

(a) is brought before a court created by the Province, or

(b) arose within the Province and is brought before a court created by the Parliament of Canada.

2(2) This Act is not applicable to

(a) a claim requesting a declaration of rights and duties, legal relations or personal status,

(b) a claim requesting the enforcement of a remedial order,

(c) a claim requesting judicial review with respect to the exercise of statutory powers,

(d) a claim requesting habeas corpus,

(e) a claim requesting a remedial order

(i) for the possession of real or personal property,

(ii) for the realization of a security interest by a secured party in rightful possession of the collateral,

(iii) for the redemption of collateral by a debtor,

(iv) requiring a defendant to comply with a duty based on an easement, a profit a prendre, a utility interest, or a restrictive covenant,

(v) for the revision of a register under the land Titles Act, and

(f) a claim which is subject to a limitation provision in any other enactment of the Province.

2(3) The Crown is bound by this Act.

Limitation Periods

3(1) Subject to subsections (2) and (3), if a claim requesting a remedial order is not brought within

(a) two years after the date on which the claimant first knew, or in is circumstances and with his abilities ought to have known,

(i) that the injury for which he claims a remedial order had occurred,

(ii) that the injury was to some degree attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing an action, or

(b) ten years after the claim arose,

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability under the claim.

3(2) The limitation period provided by clause (1)(a) begins

(a) against a successor owner or a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in clause (1)(a).

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in clause (1)(a) to the principal first actually acquired that knowledge, and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if more than two years before his death,

(ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if after his appointment.

3(3) For the following claims the limitation period provided by clause (1)(b) begins at the times prescribed in this subsection:

(a) a claim based on a breach of a duty of care, when the careless conduct occurred;

(b) any number of claims, cased on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, when the conduct terminated or the last act or omission occurred;

(c) a claim based on a demand obligation, when a default in performance occurred after a demand for performance was made;

(d) a claim under the Fatal Accidents Act, when the conduct which caused the death, upon which the claim is based, occurred;

(e) a claim for contribution, when the claimant for contribution was made a defendant under, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based.

3(4) Under this section.

(a) if the defendant pleads this Act as a defence, the claimant has the burden of providing that a claim was brought within the limitation period provided by clause (1)(a),l and

(b) the defendant has the burden of proving that a claim was not brought within the limitation period provided by clause (1)(b).

3(5) Nothing in this Act precludes a court from granting a defendant immunity from liability to an equitable remedy, under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

Conflict of Laws

4 The limitations law of the Province shall be applied to any claim brought in the province, notwithstanding that, in accordance with the principles of private international law, the claim will be adjudicated under the substantive law of another jurisdiction.

Claims Added to a Proceeding

5(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through new pleadings or an amendment to pleadings, the defendant is not entitled to immunity from liability under the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.

(2) When the added claim does not add or substitute a claimant or a defendant, or
change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the requirements of clauses (3)(a) and (b) must be satisfied.

(5) Under this section,

(a) if the defendant pleads this Act as a defence, the claimant has the burden o

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of clause (3)(c), if in issue, has been satisfied,

and,

(b) the defendant has the burden of providing that the requirement of clause (3)(b) if in issue, was not satisfied.

Persons under Disability

6(1) Subject to subsection (2), the operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.

(2) The operation of the limitation period provided by clause 3(1)(b) cannot be suspended under subsection (1) for a total period of time in excess of ten years.

(3) Under this section, if the defendant pleads this Act as a defence,the claimant has the burden of providing that the operation of the limitation periods provided by this Act was suspended.

Concealment

7(1) The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant knowingly and wilfully concealed the fact

(a) that the injury for which a remedial order is claimed had occurred.

(b) that the injury was to some degree attributable to his conduct, or

(c) that the injury, assuming liability on his part, was sufficienlty serious to have warranted the claimant's bringing an action.

(2) Under this section, if the defendant pleads this Act as a defence, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.

Agreement: Acknowledgement and Part Payment

8(1) The limitation periods provided by this Act may be reduced or extended under an agreement, and may be renewed by an acknowledgement or a part payment, in accordance with this section

(2) If an agreement provides for the reduction or extension of the limitation period applicable to a claim, the limitation period is altered in accordance with the agreement.

(3) If a person liable under a claim acknowledges the claim, or makes a part payment under the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgement or part payment.

(4) A claim may be acknowledged, or a part payment made under it, only if the claim is for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to: a principal debt; rents; income; a share of estate property; and interest on any of the foregoing.

(5) A claim may be acknowledged only by an admission of the person liable under it that the sum claimed is due and unpaid, but an acknowledgement is effective

(a) whether or not a promise to pay can be implied for it, and

(b) whether or not it is accompanied by a refusal to pay.

(6) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgement of either obligation, or a part payment under either obligation, is acknowledgement of, or a part payment under, the other obligation.

(7) An agreement and an acknowledgement must be in writing and signed by the person adversely affected.

(8) (a) An agreement made by or with an agent has the same effect as if made by or with the principal; and

(b) an acknowledgement or a part payment made by or to an agent has the same effect as if made by or to the principal.

(9) A person has the benefit of an agreement, an acknowledgement or a part payment only if it is made

(a) with or to him,

(b) with or to a person through whom he claims, or

(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(10) A person is bound by an agreement, an acknowledgement or a part payment only if

(a) he is a maker of it, or

(b) he is liable under a claim

(i) as a successor of a maker, or

(ii) through the acquisition of an interest in property from or through a maker

who was liable under the claim.

Transitional

9(1) Notwithstanding this Act, if a claim which arose before this Act came into force is commenced in time to satisfy either

(a) the provisions of law governing the commencement of actions which would have been applicable but for this Act, or

(b) the provisions of this Act,

whichever time is later, the defendant is not entitled to immunity from liability under the claim.

(2) Nothing in this Act

(a) deprives a defendant of entitlement to immunity from liability under a claim, or

(b) deprives one of rights in property,

if the entitlement to immunity or the rights in property existed at the time this Act came into force and arose under provisions of law governing the commencement of actions which would have been applicable but for this Act.

Interpretation

In ascertaining the meaning of any provision of this Act.

(a) the court may consider Report No. , Limitations, issued by the Institute of Law Research and Reform, in addition to those matters which it could otherwise consider and

(b) the court shall adopt an interpretation which promotes the general legislative purpose of this Act.

APPENDIX H

British Columbia Limitations Act 1975 n

LIMITATION ACT

Definitions

1. In this Act

``action'' includes any proceeding in a court any exercise of a self help remedy; ``collateral'' means land, goods, documents of title, instruments, securities or other property that is subject to a security interest:

``judgement'' means a judgement, order or award of

(a) the Supreme Court of Canada relating to an appeal from a British Columbia court;

(b) the British Columbia Court Appeal;

(c) the Supreme Court of British Columbia;

(d) a County Court of British Columbia;

(e) the Provincial Court of British Columbia; and

(f) an arbitration under a submission to which the Arbitration Act applies;

``secured party'' means a person who has a security interest;

``security agreement'' means an agreement that creates or provides for a security interest;

``security interest'' means an interest in collateral that secures payment or performance of an obligation;

``trust'' includes express, implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a secured party in collateral.

1975-37-1.

Application of Act

2. Nothing in this Act interferes with

(a) a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;

(b) a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act; or

(c) any rule of law that establishes a limitation period, or otherwise refuses relief, with respect to proceedings by way of judicial review of the exercise of statutory powers.

1975-37-2.

Limitation periods

3. (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action

(a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

(b) for trespass to property not included in paragraph (a);

(c) for defamation;

(d) for false imprisonment;

(e) for malicious prosecution;

(f) for tort under the Privacy Act;

(g) under the Family Compensation Act;

(h) for seduction.

(2) After the expiration of 10 years after the date on which the right to do so arose a person shall not bring an action

(a) against the personal representatives of a deceased person for a share of the estate;

(b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;

(c) against a trustee for the conversion of trust property to the trustee's own use;

(d) to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;

(f) on a judgment for the payment of money or the return of personal property.

(3) A person is not governed by a limitation period and may at any time bring an action

(a) for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass;

(b) for possession of land by a life tenant or remainderman;

(c) on a judgment for the possession of land;

(d) by a debtor in possession of collateral to redeem that collateral;

(e) by a secured party in possession of collateral to realize on that collateral;

(f) by a landlord to recover possession of land from a tenant who is in default or over holding;

(g) relating to the enforcement of an injunction or a restraining order;

(h) to enforce an easement, restrictive covenant or profit a prendre;

(i) for a declaration as to personal status;

(j) for or declaration as to the title to property by any person in possession of that property.

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

(5) Without limiting the generality of subsection (4) and notwithstanding subsections (1) and (3), after the expiration of 6 years after the date on which right to do so arose an action shall not be brought

(a) by a secured party not in possession of collateral to realize on that collateral;

(b) by a debtor not in possession of collateral to redeem that collateral;

(c) for damages for conversion or detention of goods;

(d) for the recovery of goods wrongfully taken or detained;

(e) by a tenant against a landlord for the possession of land, whether or not the tenant was dispossessed in circumstances amounting to trespass;

(f) for the possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility

(6) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding and this section had been pleaded.

(7) In subsections (3) and (5) ``debtor'' means a person who owes payment or other performance of an obligation secured, whether or not he owns or has right i the collateral.

1975-37-3.

Counterclaim, etc.

4. (1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim;

(b) third party proceedings;

(c) claims by way of set off; or

(d) adding or substituting of a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person where a claim by that other person

(a) against the first mentioned person; and

(b) relating to or connected with the subject matter of the action,

is or will be defeated by pleading a provision of this Act as a defence by the first mentioned person.

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

(4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, notwithstanding that between
the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

1975-37.4

Confirmation of cause of action

5. (1) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action only if he

(i) acknowledges a cause of action, right or title of another; or

(ii) makes a payment in respect of a cause of action, right or title of another;

(b) an acknowledgement of a judgement or debt has effect

(i) whether or not a promise to pay can be implied from it; and

(ii) whether or not it is accompanied by a refusal to pay;

(c) a confirmation of a cause of action to recover interest on principal money

operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation confirmation of a cause of action to recover income falling due at a later time on the same amount.

(3) Where a secured party has a cause of action to realize on collateral,

(a) a payment to him of principal or interest secured by the collateral; or

(b) any other payment to him in respect of his right to realize on the collateral, or any other performance by the other person of the obligation secured.

is a confirmation by the payer or performer of the cause of action.

(4) Where a secured party is in possession of collateral,

(a) his acceptance of a payment to him of principal or interest secured by the collateral; or

(b) his acceptance of

(i) payment to him in respect of his right to realize on the collateral; or

(ii) any other performance by the other person of the obligation secured,

is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.

(5) For the purposes of this section, an acknowledgement must be in writing and signed by the maker.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him or to a person through whom he claims, or if made in the cause of proceedings or a transaction purporting to be under the Bankruptcy Act (Canada).

(7) For the purposes of this section, a person is bound by a confirmation only if

(a) he is a maker of the confirmation;

(b) after the making of the confirmation, he becomes, in relation to the course of action, a successor of the maker;

(c) the maker is, at the time when he makes the confirmation, a trustee, and the first mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or

(d) he is bound under subsection (8).

(8) Where a person who confirms a cause of action to

(a) recovery property;

(b) enforce an equitable estate or interest in property;

(c) realise on collateral;

(d) redeem collateral;

(e) recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of collateral or of the income or profits of collateral or by way of sale, lease or other disposition of collateral or by way of other remedy affecting collateral; or

(f) recover trust property or property into which trust property can be traced,

is on the date of the confirmation in possession of the property or collateral, the confirmation binds any person in possession during the ensuing period of limitation, not being, or claiming through, a person other than the maker who is, on the date of the confirmation, in possession of the property or collateral.

(9) For the purposes of this section, confirmation made by or to an agent has the same effect as if made by or to the principal.

(10) Except as specifically provided this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before July 1, 995.

1975-37-5.

Running of time postponed

6. (1) The running of time with respect to the limitation period fixed by this Act for an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods fixed by this Act for action

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief fro the consequences of a mistake;

(g) brought under the Family Compensation Act; or

(h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3),

(a) ``appropriate advice'', in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) ``facts'' include

(i) the existence of a duty owned to the plaintiff by the defendant; and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff;

(c) where a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person;

(d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

(5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

(6) Subsection (3) does not operate to the detriment of a bona fide purchaser for value.

(7) The limitation period fixed by this Act with respect to an action relating to a future interest in trust property does not commence to run against a beneficiary until the interest becomes a present interest.

175-37-6.

Persons under disability

7.(1) Where, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.

(2) Where the running of time against a person with respect to a cause of action has been postponed by subsection (1) of that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either

(a) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose; or

(b) such period running from the time that the disability ceased, but in no case shall that period extend more than 6 years beyond the cessation of disability.

(3) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before there expiration of the limitation period, a person
having a cause of action comes under a disability, the running of time against that person is suspended so long as that person is under a disability.

(4) Where the running of time against a person with respect to a cause of action has been suspended by subsection (3) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either

(a) the length of time remaining to bring an action at the time the person came under the disability; or

(b) one year from the time that the disability ceased.

(5) For the purposes of this section,

(a) a person is under a disability while he is

(i) a minor; or

(ii) in fact incapable of a substantially impeded in the management of his affairs; and

(b) ``guardian'' means a parent or guardian having actual care and control of a minor or a committee appointed under the Patients Property Act.

(6) Notwithstanding subsections (1) and (3), where a person under a disability has a guardian and anyone against whom that person may have a cause of action causes a notice to proceed to be delivered to the guardian and to the Public Trustee in accordance with this section, time commences to run against that person as if he had ceased to be under a disability on the date the notice is delivered.

(7) A notice to proceed delivered under this section must

(a) be in writing;

(b) be addressed to the guardian and to the Public Trustee;

(c) specify the name of the person under a disability;

(d) specify the circumstances out of which the cause of actin may arise or may be claimed to arise with such particularity as is necessary to enable the guardian to investigate whether the person under a disability has the cause of action;

(e) give warning that a cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;

(f) specify the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person delivering the notice, or his solicitor.

(8) Subsection (6) operates to benefit only those persons on whose behalf the

notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(9) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

(10) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(11) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed.

1975-37-7.

Ultimate limitation

8. (1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, or in the case of an action against a hospital, as defined in section 1 or 25 of the Hospital Act, or hospital employee acting in the course of employment as a hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose.

(2) Subject to subsection (1), the effect of sections 6 and 7 is cumulative.

1975-37-8; 1977-76-19

Cause of action extinguished

9. (1) On the expiration of a limitation period fixed by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through him in respect of that matter is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

(2) On the expiration of a limitation period fixed by this Act for a cause of action specified in column 1 of the following table, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of the table and of a person claiming through him in respect of that property is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

Column 1

Column 2

Cause of action

Property

For conversion or detention detention of goods.

The goods

To enforce an equitable estate or interest in land.

The equitable estate or interest

To redeem collateral, in the possession of the secured party.

The collateral.

To realize on collateral in the possession of the debtor.

The collateral.

To recover trust property or property into which trust property can be traced.

The trust property or the property into which the trust property can be traced, as the case may be.

For the possession of land by a person having a right to enter for a condition subsequent broken or a possibility of reverter of a determinable estate.

The land.

(3) A cause of action, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period fixed by this Act for an action between the same parties on the judgment or to recover the principal money.

1975-37-9

Conversion of detention of goods

10. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him,

(a) a further cause of action for the conversion or detention of the goods;

(b) a new cause of action for damage to the goods; or

(c) a new cause of action to recover the proceeds of a sale of the goods,

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of 6 years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

1975-37-10

Completion of enforcement process

11. (1) Notwithstanding section 3 or 9, where, on the expiration of the limitation period fixed by this Act with respect to actions on judgement, there is an enforcement process outstanding, the judgment creditor or his successor may

(a) continue proceedings on an unexpired writ of execution, but no renewal of the writ shall be permitted;

(b) commence or continue proceedings against land on a judgment registered under the Court Order Enforcement Act, Part 3, but no renewal of the registration shall be permitted unless those proceedings have been commenced;

(c) continue proceedings in which a charging order is claimed.

(2) Where a court makes an order staying execution on a judgement, the running of time with respect of the limitation period fixed by this Act for actions on the judgment is postponed or suspended for so long as that order is in force.

1975-37-11

Adverse possession

12. Except as specifically provided by this or any other Act, no right or title in or land may be acquired by adverse possession.

1975-37-12

Foreign limitation law

13. Where it is determined in an action that the law of a jurisdiction other than British Columbia is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a ore just result is proposed.

1985-37-13

Transitional provisions

14. (1) Nothing in this Act revives any cause of action that is statute barred on July 1, 1975.

(2) Subject to subsections (1) and (3), this Act applies to actions that arose before July 1, 1975.

(3) If, with respect to a cause of action that arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before July 1, 1977, the limitation period governing that cause of action shall be the shorter of

(a) 2 years from July 1, 1975; or

(b) the limitation period that formerly governed the cause of action.

(4) Subject to subsection (1), a confirmation effective under section 5 is effective, whether given before, on or after July 1, 1975.

(5) Nothing in this Act interferes with any right or title to land acquired by adverse possession before July 1, 1975.

1975-37-14, 1977-76-19

Repeal of special limitations

15. (1) Where an Act that incorporates or constitutes a private or public body contains a provision that would have the effect of limiting the time in which an action

(a) within section 3 (1), (2) and (3); or

(b) to enforce any right or obligation not specifically created by that Act, may

be brought against the body, that provision is repealed to the extent that it is inconsistent with this Act.

(2) Subsection (1) does not apply to a limitation provision that specifically provides that it operates notwithstanding this Act.

1975-37-16.

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References are to paragraph numbers

Bold numbers refer to paragraphs in draft legislation