

**LITIGATION AND  
DISPUTE MANAGEMENT  
(CIVIL PROCEDURE)  
LAW  
SUMMARY  
2010**



**LAWSKOOL.COM.AU**

**LAWSKOOL PTY LTD**

## CONTENTS

<b>LIMITATION OF ACTIONS</b>	<b>3</b>
Policy and Background	3
Limitation Periods	3
Accrual – When does the limitation period begin?	4
Suspension and Extension of Time	5
<b>PARTIES AND JOINDER</b>	<b>8</b>
Types of Parties	8
<b>SUING/BEING SUED BY PARTICULAR PARTIES</b>	<b>9</b>
Joinder of Parties: Introduction	10
Joinder: Plaintiffs	11
<b>JOINDER: DEFENDANTS</b>	<b>12</b>
Adding, Removing or Substituting Parties (Addition)	12
Representative Actions	13
Joinder of Causes of Action/Consolidation	16
Res Judicata and Issue Estoppel	16
<b>COMMENCING PROCEEDINGS</b>	<b>18</b>
Jurisdiction	18
Originating Process	20
<b>SERVICE</b>	<b>23</b>
Service of OA inside the jurisdiction (within ACT)	23
Service of OA outside the jurisdiction but within Australia	25
Service Outside of Australia	26
Substituted Service	27
<b>APPEARANCE/CHALLENGING SERVICE</b>	<b>28</b>
Challenging Service	28
Appearance	28
<b>PLEADINGS</b>	<b>30</b>
What are pleadings?	30
Rules of Pleadings	30
Statement of Claim	32
Defence	32
Reply and Defence to Counterclaim	34

Third-party Proceedings	35
Challenges to Pleadings	35
<b>AMENDMENT</b>	<b>36</b>
General Amendment Power	36
Adding a Party – With Leave	36
Adding a Cause of Action	37
<b>URGENT APPLICATIONS</b>	<b>38</b>
Interlocutory Injunctions	38
Order 52 (Orders about Property)	38
Anton Piller Orders	39
Mareva Orders	40
<b>PRELIMINARY DISCOVERY (PRE-COMMENCEMENT)</b>	<b>42</b>
Preliminary Discovery	42
<b>DISCOVERY AND INFORMATION GATHERING</b>	<b>44</b>
Proper Discovery	44
Discoverability	44
Orders and Discovery and Production	45
Non-party Production	46
Subpoenas	47
<b>PRIVILEGE</b>	<b>49</b>
Legal Professional Privilege (Client Legal Privilege)	49
Privilege Against Self-Incrimination: Privilege Against Exposure to a Penalty	54
Public Interest Immunity	54
Without Prejudice Privilege	55
<b>DISPOSITION OF PROCEEDINGS BEFORE TRIAL: BASELESS CLAIMS + SETTLEMENT</b>	<b>59</b>
Default Judgement	59
Summary Judgement	60
Abuse of Process/Vexatious Litigants	61
Discontinuance	62
Judgement by Consent	62
Payment into Court	63
Calderbank Offers	63

<b>COSTS</b>	<b>64</b>
<b>CASE MANAGEMENT</b>	<b>65</b>
What is CM?	65
CM in the ACT Supreme Court	65
Challenging CM Sanctions	65
<b>ALTERNATIVE DISPUTE RESOLUTION</b>	<b>67</b>
Types of ADR	67
Fisher and Ury's Interest-based Negotiation Model	68
LEADER Model of Mediation	68
Court-annexed ADR	70
Enforcement of Agreements to Mediate	70
Confidentiality	71

**SAMPLE ONLY**

# 01 Limitation of Actions

---



**General common law limitation period is 6 years** (s 11(1), LA). NB exceptions –

- Defamation – 1 year from publication (s 21B) unless P did not know – then 2 yrs.
- Personal injury – 3 years after injury *or* the day on which P discovered the injury.

**Trade Practices Act** (s 52 etc → s 82 damages or s 87 remedies): **6 years** (ss 82(2), 87(1CA)).

## 1.1 Policy and Background

---

The policy behind limitation periods exemplifies the tension between justice and certainty (McGee, 1990). Why?

- See ***Brisbane South Regional Health Authority v Taylor*** (1996, HC) – McHugh J –
  1. As time goes by, evidence may be lost,
    - Documents go missing, memory errors, witnesses die or cannot be found.
    - Attainment of justice would be precarious where an action continues with these imperfections.
  2. Oppressive, even 'cruel' to a D to allow an action to be brought long after the circumstances giving rise to the claim have passed,
    - Unfair to defendants to have proceedings hanging over their heads for too long.
  3. People should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them,

- Especially insurers, public institutions and limited liability companies.
  - People should be able to get on with their lives and businesses.
4. Public interest requires that disputes to be settled as quickly as possible.
- Litigants should be encouraged to bring their claims within a reasonable period.
- 
- McHugh J notes that the limitation period should not be seen as an arbitrary cut off point, but also reasserts the authority of the legislative decree to make this judgment in the interests of society, even though that a good cause of action may be defeated.

## 1.2 Limitation Periods

---

A cause of action is not maintainable if it is brought after **6 years** from the date when the cause of action **first accrues** – *Limitation Act 1985 (ACT)* s 11(1).

This does not apply if another limitation period is specified in the Act (s 11(2)), including:

- **Defamation:**
  - 1 year from publication (s 21B(1)), but
  - 2 years from publication if P could not have known within one year (s 21B(2)).
- **Personal Injury:**
  - s 16A – workers compensation proceedings: 3 years after injury.
  - s 16B – other claims: 3 years after the day of injury *or* the day on which P knew about the injury.

### **1.2.1 Federal Causes of Action**

Prima facie, the *Limitation Acts* of states and territories are not applicable to federal causes of action. Two situations may arise:

1. A Cth statute may nominate its own limitation period.
  - E.g. actions under *Trade Practices Act* pt V (s 52 etc) – **6 years** (*TPA* ss 82(2), 87(1CA)).
2. Otherwise, the limitation period of the state/territory applies to the court  
*Judiciary Act 1903* (Cth) s 79.

### **1.2.2 Equitable Causes of Action**

Some equitable causes of action (eg relating to trusts) are expressly mentioned in the *LA*. Otherwise:

- **In the ACT** – the *LA* is applicable to equitable causes of action: ***Paramasivam v Flynn*** (1998)
  - Facts: P was 32 at time of hearing. He had met F in Fiji when he was about 12. P alleged sexual contact between them there and in Australia. D agreed to look after and educate P in Australia, P alleged sexual contact in NSW and ACT when he was about 15. P claimed in tort (assault) and breach of fiduciary duty.
  - Issue: claim was brought in 90s, but last of alleged incidents was more than 15 years ago – clearly statute-barred under the *LA*. Does the *LA* bar equitable claims?
  - Held (Gallop J): action was statute-barred, and both CL and equitable claims were out of time. Interpretation of ‘action and ‘cause of action’ in s

11, as defined in s 8 meant that the bar in s 11 also applies to equitable actions.

- Also held that it was acceptable to decide the issue early to protect D's summary judgment rights (cf. *Cubillo* – a full hearing was conducted before a decision was made on limitation periods)
  - Upheld by full Federal Court, also relying on evidentiary and prejudice justifications for limitation periods.
- **In other jurisdictions** – different rules apply. Limitation of actions for equitable causes of action is based on the doctrine of laches.
    - A court may, in its discretion, refuse to grant equitable relief where the P's delay has made it unfair to award relief. Court looks at the length of delay and the nature of the action (*Lindsay Petroleum Co v Hurd*).
    - However, some caselaw suggests that limitation periods may be used by way of analogy.
    - See eg *Williams v Minister for Aboriginal Land Rights* (1994) – P sought equitable compensation (inter alia). NSW CA Held: The NSW *Limitation Act* did not apply to an equitable action except by analogy. Analogous application does not necessarily mean exact application of its terms. Here – limitation period was extended by 30 years, although claim was ultimately unsuccessful.

### 1.3 Accrual – When does the limitation period begin?

---

Generally, a cause of action accrues or arises on the day on which the cause of action is complete.

- E.g. tort (negligence) – duty of care, breach, damage; contract – existence of contract, breach

- The same facts may give rise to a number of cause of action, with different effects on accrual: eg no damage needed for contract, so CoA may arise earlier.

### **1.3.1 Torts: Personal Injury**

**Traditionally**, the limitation period began to run when damage was suffered, regardless of whether P knew about that damage.

- This is problematic for '**latent injuries**', particularly dust diseases.
- E.g. *Cartledge v Joplings and Sons* – limitation period ran and expired before Ps were diagnosed. Law Lords called for reform.
- NSW LA has no limitation period for dust diseases: s 60I.

**Now** – there is a general principle of having the limitation period run from the date of discoverability, based on the knowledge of P – see **s 16B**.

## **1.4 Suspension and Extension of Time**

---

### **1.4.1 Stopping the limitation period**

The limitation period is **stopped** by the effective commencement of proceedings.

- i.e. when originating process is issued by the P.
- But P must commence and sustain proceedings.

However, if the process is unsuccessful, time is calculated again from the original accrual date. P may be out of time to commence proceedings again.

### **1.4.2 Suspending the limitation period**

A number of factors can suspend the limitation period. The reason is **suspension for a legal disability**.

- Disability is defined in **s 8(3)** – where a person is:
  - (a) Under 18 years old, or,
  - (b) For more than 28 days, incapable or substantially impeded in the management of their affairs in relation to the cause of action (ie unable to give instructions) because of:
    - (i) Intellectual retardation or disability, mental illness, brain damage, senility or physical disability, or
    - (ii) War or warlike operations, or
    - (iii) Circumstances arising out of war or warlike operations.
- **Section 30** suspends the limitation period for the duration of the disability (with conditions).

### **1.4.3 Extending the limitation period**

**Section 36** appears to give the court power to extend the limitation period for personal injury, where it is **just and reasonable** to do so.

- But **NB** s 36(5) – the section does not apply where s 16B or the alternative regime in the *Civil Law (Wrongs) Act 2002* applies. **DJ v RHS (2004)** – **the effect of this is that the court no longer has discretion to give an extension of time for personal injury**.
- Older cases:
  - *Ives v ACT and Hehir* (1995) – facts: P had undergone an emergency hysterectomy in 1974. In 1994, she had a chest x-ray which showed a needle in her heart, negligently left over from the hysterectomy. P sued both the doctor and the hospital (the ACT). Evidence suggested that the

strength of the case against the doctor was relatively weaker than the hospital (based on the type of needle used).

- The court considered the relative strength of the P's case, potential prejudice to the D (who had no insurance cover).
  - Held: limitation period extended for claim against hospital, but not against doctor.
- *A v D* (1995) – facts: civil action for damages for assault by a doctor, which was alleged to have occurred in 1969. P had complained to police at the time but this was not pursued. In 1994, the incident was the subject of an article in the *CT*, and other people reported similar incidents. P commenced a civil action but 2 proceedings were already underway against the doctor – a criminal charge and a disciplinary proceeding.
- (*LA* does not apply to criminal or disciplinary proceedings, but both can be stayed if an abuse of process – from court's inherent jurisdiction).
  - Issue: D attempted to strike out the civil action and stay the criminal/disciplinary proceedings on public interests grounds (evidence, etc)
  - Argument was unsuccessful in the disciplinary matter in the full FC. Unfairness to D was not a relevant factor; public interest outweighed it.
  - But in civil proceedings: Miles CJ held that unfairness was determinative here: not just and reasonable to extend time under s 36.

**Section 40** also allows the extension of the limitation period for latent damage to property or for economic loss where it is just and reasonable.

#### **1.4.4 The effect of expiration**

A theoretical point with some interesting practical consequences: what happens when an action is statute-barred? There are two schools of thought:

1. **Only the remedy is barred (the procedural model)** – the enforcement of rights are somewhat autonomous to the action being brought.
  - Traditionally, limitation statutes say that an action ‘shall not be brought’ after the period has expired. As such, the right remains in existence but cannot be enforced – only the remedy is barred.
  
2. **The right itself is extinguished (the substantive model)**
  - Some limitation periods expressly exclude the right after the limitation period has expired: eg the right to assert title against adverse possession. Here, title extinguishes with the passing of time.
  - *Georgiadis v Aust and Overseas Telecommunications Corp*– facts: a retrospective Act sought to take away the right to sue for economic loss against the Cth by its employees.
    - Issue: what about claims already in the system?
    - Held: a claim in negligence amounts to a *chose in action*. Like a property right, it has some value which cannot just be taken away. Under s 51(xxxi) of the *Constitution*, the Commonwealth must acquire property ‘on just terms’. AS such, the claim could not be taken away except on just terms.
  - *Cth v Mewett* (1997, HC) – issue: is a statute-barred right also a property right for the purposes of s 51(xxxi)?
    - Held: High Court unanimously agreed that it was, but reason differed. Eg Dawson J relied on construction of the *LA*,

- Gummow and Kirby JJ: Constitutional rights act as a guarantee. The substance of a cause of action may still be valuable: 'the existence of a direct curial remedy is not coextensive with the juridical existence of the right.'

There is a movement to bring limitation law within substantive law, for fear that procedural laws may frustrate substantive law (eg in conflict of laws cases).

- Limitation periods are a particular issue because of forum shopping due to differing limitation periods.
- Now: all LA have similar provisions that if the substantive law of another place is to govern the action, the limitation period of that place is to be regarded as part of the substantive law and applied accordingly.
- *Pfeiffer v Rogerson*: HC Held: for the purpose of a tort claim, 'laws that bear upon the existence, extent or enforceability of rights, remedies or obligations should be characterised as substantive and not procedural.' i.e. there is no independent operation of procedural law when merged.



**If you have any queries regarding the litigation and dispute management law (civil procedure) law summary please email - [info@lawskool.com.au](mailto:info@lawskool.com.au)**