

LIMITATION BILL 2004

EXPLANATORY MEMORANDUM

Part 1 - Preliminary

Part 1 contains the title of the Act, the commencement provision, definitions of terms used within the Bill, a provision relating to limitation periods under other written laws and a provision relating to the application of the Bill to the State.

Clause 2 provides that the Act is to come into operation on the day on which it receives the Royal Assent.

Clause 3 contains a number of important definitions. Note, in particular, the definitions of "**action**" which includes all claims or relief in equity; the specific definitions for "**guardian**" depending on whether a person is under 18 years of age or has a mental disability; and "**personal injury**" which includes a disease, impairment of a person's physical condition and mental disability.

Clause 4 provides that the limitation periods provided for under the Act apply only to causes of action that accrue on or after the commencement day. The "**commencement day**" is defined to mean the day on which the Act comes into operation. The proposed limitation regime is not to be retrospective save for two exceptions:

Firstly, the test for the accrual of a cause of action for personal injuries, which is set out in **clause 50(2)**, is to apply even though the time for commencing the action had expired before the commencement day. This means that past causes of action for latent injury will accrue not from when the injury occurred but from when the injury first manifested itself in a not insignificant form, even though the limitation period might have expired before the commencement day. However, in the case of asbestos-related diseases, a cause of action will continue to accrue when knowledge of key facts was acquired as provided by section 38A *Limitation Act 1935*, provided that the disease first manifested itself in a not insignificant form before the commencement day.

Secondly, the Act applies to actions in respect of injuries sustained in the course of childbirth which were not commenced before the commencement day and where the limitation period had not expired before the commencement day. The Bill provides that the limitation period for these actions is six years from the commencement day. However, that limitation period may be extended in certain circumstances under Part 3 of the Bill.

Clause 5 provides that the Act does not affect the operation of a limitation provision in another written law.

Clause 6 provides that the Act binds the State and the State has the benefit of the Act. However, there will be no time limitation for the State to recover tax or interest on a tax or to forfeit a ship (**clause 6(2)**) or for the State to recover land (**clause 15(2)**). Adverse possession also does not apply in the case of the State (**clause 69**).

Part 2 - Limitation periods

Division 1 - Preliminary

Clause 7 provides that the limitation periods in **Part 2** can be extended or shortened under **Part 3**.

Division 2 - General limitation period

Clause 9 provides for a default limitation period of six years. Under the current *Limitation Act 1935* there is no default period. The limitation periods are set in relation to actions specified in that Act.

Division 3 - Limitation periods for particular causes of action

Division 3 provides for specific limitation periods which are either shorter or longer than the default period of six years. In particular:

Clause 10 provides that an action for damages relating to a personal injury to a person cannot be commenced if three years have elapsed since the cause of action accrued and an action under the *Fatal Accidents Act 1959* for damages relating to the death of a person cannot be commenced if three years have elapsed since the death.

Clause 11 provides that an action relating to the publication of defamatory matter cannot be commenced if six months have elapsed since the person alleged to be defamed became aware of the publication or six years have elapsed since the publication whichever occurs first.

Part 3 - Extension or shortening of limitation periods

Division 1 - Extension for persons under 18 years when cause of action accrues

Clause 25 provides that the limitation periods for a person who is under 15 years of age when a cause of action accrues will range from six years after the date of accrual depending on the type of cause of action.

Clause 26 provides that a person who is 15, 16 or 17 years of age when a cause of action accrues has at least until they turn 21 years of age in which to sue.

Clause 27 provides that the time during which a person under the age of 18 years of age is without a guardian does not count in the reckoning of the limitation period. However, the person cannot commence an action if he or she has reached 21 years of age or such longer period as is provided for under the Act.

Clause 28 relates to a situation where the person under 18 years of age is in a close relationship with a defendant. The purpose of the clause is to make sure that a wrongdoer should not be able to avoid being sued by putting pressure on the victim not to bring proceedings or by ensuring that the victim is denied knowledge of facts essential to the formulation of a cause of action. However, an action on the cause of action cannot be commenced if the person has reached 25 years of age.

Clause 29 provides that the limitation period for defamation actions can be extended for a person under 18 years of age but not for more than six years from the date of publication of the defamatory matter.

Division 2 - Extension for persons with mental disability

Clause 30 applies to persons who suffer a disability before, as a result of or after a cause of action accrues so that the time during which the person is without a guardian does not count in the reckoning of a limitation period for commencing an action on the cause of action. However, an action cannot be commenced if 12 years have elapsed since the accrual of that cause of action.

Clause 31 makes provision for a person with a mental disability who is in a close relationship with a defendant. However, an action on the cause of action cannot be commenced if 30 years have elapsed since the cause of action accrued.

Clause 32 provides that the limitation period for defamation can be extended for a person with a mental disability but not for more than 6 years from the publication of the defamatory matter.

Division 3 - Extension by courts

Division 3 enables a person to apply to a court for an extension in specified circumstances where the limitation period has expired.

Clause 33(2) provides that on an application a court may extend the time in which the action can be commenced up to 3 years from when the action ought reasonably to have been commenced if the Court is satisfied that the failure to commence the action was attributable to fraudulent or other improper conduct of the defendant or a person for whom the defendant is vicariously liable.

Clause 34 gives a court a discretion to extend a limitation period in relation to actions for personal injury or under the *Fatal Accidents Act 1959*.

Clause 34(3) provides that the court must be satisfied that, when the limitation period expired, a person to whom the cause of action accrues -

- (a) was not aware of the physical cause of the death or injury;
- (b) was aware of the physical cause of the death or injury but was not aware that the death or injury was attributable to the conduct of a person; or
- (c) was aware of the physical cause of the death and injury or that the death or injury was attributable to the conduct of a person but after reasonable inquiry, had been unable to establish the identity of the person mentioned in paragraph (b).

Clause 34(4) provides that on an application a court may extend the time in which the action can be commenced up to 3 years from when a person to whom the cause of action accrues became aware, or ought reasonably to have become aware of the physical cause of the death or injury, that the death or injury was attributable to the conduct of a person (whether a defendant or not) and of the identity of that person.

Clause 35 enables a court, if it thinks it just to do so, to extend the time in which a defamation action can be commenced up to 12 months from when a person to whom the cause of action accrues became aware, or ought reasonably to have become aware of the defamation and the identity of a person who published the defamation (whether a defendant or not).

Clause 36 provides that where a person was under 18 years of age when a cause of action accrued and had a guardian, the court may extend the limitation period up until the time when the person reaches 21 years of age if the court is satisfied that in the circumstances it was unreasonable for the guardian not to

commence the action within the limitation period for the action. However, an action relating to the publication of defamatory matter cannot be commenced if 6 years have elapsed since the publication.

Clause 37 provides that where a person suffers a mental disability at any time after a cause of action accrues to that person and has a guardian, the court may extend the limitation period up to 12 years from when the cause of action accrued if the court is satisfied that in the circumstances it was unreasonable for a guardian not to commence the action within the limitation period. However, an action relating to the publication of defamatory matter cannot be commenced if 6 years have elapsed since the publication.

Clause 38(5) provides that an extension application can be sought or determined at any time before or after the issue, or close of, pleadings.

Clause 39 provides that a court, when considering an extension application, is to have regard to whether the delay in commencing the action would unacceptably diminish the prospects of a fair trial of the action and may refuse to grant the application if extending the time would significantly prejudice the defendant (other than by reason only of the commencement of the proposed action).

Division 4 - Extension or shortening by agreement

Clause 40 retains any common law rights a person may have to extend or shorten a limitation period by agreement subject to the provisions protecting persons under 18 years of age or with a mental disability who are in a close relationship with a defendant or where there has been fraud or improper conduct on the part of a defendant.

Division 5 - Extension by confirmation

Division 5 modernises the current law contained in section 44 *Limitation Act 1935* concerning acknowledgment and part payment.

Division 6 - Extension of limitation periods - other matters

Clause 47 provides that where a person is under 18 years of age when a cause of action accrues to that person and during any time after that time the person is suffering a mental disability, the limitation period for commencing an action is the most beneficial of those limitation periods applying to those persons.

Part 4 - Accrual of particular causes of action

The common law provides for when particular causes of action accrue and, for the most part, it will continue to do so. However, specific statutory provision has been made for causes of action referred to in **Divisions 1 and 2 of Part 4**.

Division 1 - Accrual of certain causes of action other than to recover land

Clause 50 is of particular significance in that it changes the common law in relation to when a cause of action accrues for damages relating to personal injury. This test will apply even though the time for commencing an action had expired before the commencement day (**clause 4(3)**). Under the current law, a cause of action for a personal injury claim accrues when the injury or disease occurs. **Clause 50(2)** provides that a cause of action for damages relating to a personal injury to a person accrues when the only or earlier of such of the following events as are applicable occurs -

- (a) the person becomes aware that he or she has sustained a not insignificant personal injury;
- (b) the first manifestation consistent with the person having sustained a not insignificant personal injury.

Clause 50(1) defines "**manifestation**" to mean a symptom, clinical sign or other objectively determinable physical manifestation of personal injury.

The test set out in **clause 50** will apply to all personal injuries, including latent injuries. Consequently the special provisions relating to the accrual of a cause of action in relation to asbestos-related diseases are to be repealed under the *Limitation Amendment and Repeal Bill 2004*. However, in the case of asbestos-related diseases, a cause of action will continue to accrue when knowledge of key facts was acquired as provided by section 38A *Limitation Act 1935*, provided that the disease first manifested itself in a not insignificant form before the commencement day.

Division 2 - Accrual of certain causes of action to recover land

The provisions in **Division 2** are modelled on provisions in the limitation legislation of the other States and Territories, in particular New South Wales.

Part 5 - Effect of expiration of limitation period

Clause 68 continues the effect of section 30 *Limitation Act 1935*.

Clause 69 continues the effect of the section 36 *Limitation Act 1935*.

Clauses 70 and 71 are based on corresponding provisions in other States.

Clause 70 deals with the time when future interests in land are extinguished.

Clause 71 deals with the extinguishment of the estate of a trustee.

Part 6 - Miscellaneous

Clause 72 deals with the burden of proof. The defendant has the burden of proving that the limitation period has expired in a particular plaintiff's case. However, if a person seeks to have a limitation period suspended under **clauses 27 or 30**, then that person has the burden of proving the matters in those provisions. Also, if a person seeks an extension of a limitation period, that person has the burden of proving that the court should extend.

Clauses 79 and 80 are the same provisions as sections 37B and 37C *Limitation Act 1935*.