



LONG TAIL CLAIMS

INTRODUCTION

1. A feature of modern litigation is the increase in the “long-tail” claim.
2. There are many reasons for this. Some relate to society’s general awareness of rights and the belief in the aggrieved that society may now vindicate them. Into this category falls claims such as sexual abuse. Others arise because of the manifestation of practises or dangers which were acceptable or courted in years gone by, but produce loss or injury many years later. Into this category fall claims such as the effects of asbestos and environmental damage.
3. These are but examples of a general class where there is the late or delayed onset, often insidious, of a loss or injury caused by a delictual occurrence occurring years, sometimes decades, beforehand.
4. My research revealed that there are many and various definitions within the legal business and insurance areas of what a long tail claim, or a long tail liability, is.
5. A definition, from an insurer’s perspective, is as follows:-

“With long-tail liability business, claims can be presented to the insurance company a long time after the occurrence of the trigger event. As a result, the insurer is exposed to claims for a number of years after subscription, even though the risk may no longer be covered; estimating the likely cost of such claims can be difficult. This exposes the insurer to deterioration of its claims experience due to changes in the legal environment for instance. Asbestos and environmental claims are typical examples of claims made under long-tail liability contracts.”¹
6. Another one is:-

“Liability for claims that do not proceed to final settlement until a length of time beyond the policy year. High incurred, but not reported (IBNR) claims contribute to this ‘tail’ effect, since these losses are usually not settled until several years after the expiration of the policy in question.”².
7. From the financial or business perspective, a definition of “long-tail liability” is:-

“One where an injury or other harm takes time to become known and a claim may be separated from the circumstances that caused it by as many as 25 years or more. Some examples: exposure to asbestos which sometimes results in lung disease called asbestosis; exposure to coal dust which might

¹ Taken from the UK website of Prudential <http://www.prudential.co.uk/prudential-p>.

² IRMI.com.



cause black lung disease; or use of certain drugs that may cause cancer or birth defects.

These long-tail liabilities became very expensive for many corporations in the 1970s and 1980s, also causing problems for insurers because it was unclear when the situation that gave rise to a claim happened and who should pay the claim. One theory, the manifestation/injury theory, states that the insurer is responsible whenever the disease is diagnosed. The other view, the occurrence/injury theory states that the insurer must pay only when the person is injured.”³

8. A more legalistic definition, focusing on personal injuries, is that there are occasions when:-
 - Corporations have acted in a way which may give rise to enforceable claims against them (such as by the manufacture of faulty or dangerous products);
 - Their victims have suffered, or are likely to suffer, consequential personal injuries;
 - Evidence of the injuries necessary to enable litigation, has not emerged, and may not emerge during the latency period of the injuries.⁴
9. Each of these definitions, although similar, brings a slightly different perspective from the area from which it springs.
10. Long-tail claims thus raise issues for the law, underwriting and financial provision in the corporate sector.
11. It is not possible in this paper to address all of the issues that arise from each of these different perspectives, but I thought it important to touch upon some issues of concern from each area.

LEGAL ISSUES

LIABILITY

12. Some of the liability issues which a long-tail claim will give rise to are self evident. These type of problems include missing witnesses, fading memories, lost documents and the like which are all too familiar and are the subject of the

³ Taken from www.allbusiness.com.

⁴ From an article by Ian Frectelton, Barrister, Owen Dixon Chambers, Melbourne in an article “Long Tail Liability Law Reform” (2007) 17(2) JLM 171.



- now famous passage of McHugh J in *Brisbane South Regional Health Authority v. Taylor*⁵ that I extract below.
13. Others are more insidious, like the long-tail claim themselves, a matter which McHugh J also refers to in *Taylor*. Often the prejudice cuts both ways. The Plaintiff lacks evidence of corroboration and often will have to confront new laws which are unfavourable to them such as laws curtailing heads of damage or requiring new procedures to be followed, such as the *Personal Injuries Proceedings Act 2002* (Qld) in this state. However, I venture to suggest, it is often the Defendant which has the greater prejudice. The Plaintiff, at least, has the Plaintiff's own evidence and recollections and can point towards other evidence which may be elicited. After many years, the Defendant, often knows little about the circumstances of the Plaintiff's complaint and has great difficulty locating people, places and things to assist. Further, and this is often overlooked, the legal environment in which the claim will be heard, as well as the social environment, has often dramatically altered, unfavourably to the Defendant, since the time when the delictual act or omission occurred. Often what was done then as a matter of practise was acceptable but is later viewed as unacceptable or, alternatively, new legal rights, either by decisional law or by statutory intervention, exist which heretofore did not exist and were not even contemplated at the time the delictual act or omission concerned occurred.
 14. This is not to decry changing social norms. Many of the current understandings and acceptances of, for example, psychological injury brought on by treatment of children, even if it does not amount to sexual abuse, are simply a growing understanding of the effects of practises gone by. Further, society's willingness to understand that the practises of the past were unacceptable or, even more so, to actually believe what in years gone by would have been unbelievable, (e.g. that people in positions of trust such as priests, teachers, scout masters and the like could offend in a manner which beggars belief) is, of course, to be admired, rather than depreciated.
 15. Nonetheless, these are real difficulties which defending parties have.
 16. In this paper, on this point, I propose to concentrate, not on these forensic issues, but to deal with two more generally practical issues that arise in numerous cases:- limitation periods and the now non-existent or unidentifiable Defendant.

⁵ (1996) 186 CLR 541.



Limitation periods and other procedural bars

17. One cannot have any discussion about the importance of limitation periods, and the legislative intent behind them, without making mention of the judgment of McHugh J in *Brisbane South Regional Health Authority v. Taylor*⁶ which is a forceful exposition of the rationales behind the enactment of limitation periods and the problems which administering justice faces without them:-

“... For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that “[w]here there is delay the whole quality of justice deteriorates.”⁷ Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*⁸, “what has been forgotten can rarely be shown”. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now “knowing” that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.

Even before the passing of the Limitation Act 1623 (Imp), many civil actions were the subject of time limitations⁹. Moreover, the right of the citizen to a speedy hearing of an action that had been commenced was acknowledged by Magna Carta itself¹⁰. Thus for many centuries the law has recognised the need to commence actions promptly and to prosecute them promptly once commenced. As a result, courts exercising supervisory jurisdiction over other courts and tribunals in their jurisdictions have power to stay proceedings as abuses of process if they are satisfied that, by reason of delay or other matter, the commencement or continuation of the proceedings would involve injustice or unfairness to one of the parties¹¹.

The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators

⁶ *Infra* at pages 551-553.

⁷ *R v Lawrence* [1982] AC 510 at 517 per Lord Hailsham of St Marylebone LC.

⁸ (1972) 407 US 514 at 532.

⁹ Bacon, *New Abridgment of the Law*, 5th ed (1798), vol 4 at 461 et seq.

¹⁰ cap 40, Magna Carta.

¹¹ *Walton v Gardiner* (1993) 177 CLR 378.



have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost¹². Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed¹³. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them¹⁴. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period¹⁵. As the New South Wales Law Reform Commission has pointed out¹⁶: "The potential defendant is thus able to make the most productive use of his or her resources¹⁷ and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided.¹⁸ To that extent the public interest is also served."

Even where the cause of action relates to personal injuries¹⁹, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible²⁰.

18. It will be observed that His Honour makes note of the effect long delay before a claim will have on insurers. The financial arrangements of Defendants is one of a number of reasons underpinning the rationales for limitation periods to otherwise defeat a good cause of action.

¹² *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704.

¹³ *RB Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82.

¹⁴ New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50 at 3; The Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, (1992) Project No 36, PtII at 11.

¹⁵ In *Limitation of Actions for Latent Personal Injuries*, (1992) Report No 69 at 10, the Law Reform Commissioner of Tasmania said: "The need for certainty can be justified in many cases. For example, manufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty before embarking on future development. Under modern circumstances, an award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business. Limitation periods may allow for more accurate and certain assessment of potential liability."

¹⁶ New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50 at 3.

¹⁷ Kelley, "The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience", (1978) 24 *Wayne Law Review* 1641 at 1644.

¹⁸ "Developments in the Law, Statutes of Limitations", (1949-1950) 63 *Harvard Law Review* 1177 at 1185.

¹⁹ The vast majority of defendants in personal injury actions are insured. Consequently, the amount of the verdict will not be met by the defendant. Nevertheless, it is a charge on the revenue of the insurer for the relevant year and is ultimately met by the shareholders of the insurer or the individual proprietors of the insurance business if the insurer is not incorporated. Although the burden of the plaintiff's claim is spread in such cases, the consequences for the proprietors of the insurance business can be significant. When a large number of claims are allowed to be brought out of time, as has been the case in respect of some types of injuries or in some industries in recent years, the financial consequences for an insurer can be drastic.

²⁰ New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50 at 3; The Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, (1992) Project No 36, PtII at 11.



19. The manifestation of a long tail claim can have a considerable prejudicial effect on the proposed Defendant, often in ways that are not thought of immediately. Recently, in giving reasons dismissing a claim for want of prosecution where similar considerations arise, a Brisbane District Court Judge observed:-

“The threat of litigation hanging over the head of a professional person cannot be underestimated. The requirements of the professional indemnity policies relating to disclosure have to be met. It will be relevant to the risk under the policy and can be reflected in premium levels.”²¹

20. These considerations have provoked a market response, not only with extended run-off cover but, as I shall discuss below, an underwriting response which, if widely adopted, may leave insureds without any or any adequate cover.
21. Generally, endeavours to outflank the expiration of a limitation period have failed. For example, endeavours to rely upon equitable principles, not captured by the statutory limitation periods, have, usually, failed. Equity, whether in its primary or auxiliary jurisdiction, will generally follow the law such that where the suit in equity corresponds with an action at law, equity will not allow its remedies to frustrate Parliament’s intent²².
22. Statutory causes of action such as section 52 of the *Trade Practices Act 1974* are usually subject to their own limitation periods²³ and some statutory causes of action have extinguishment provisions, as opposed to limitation provisions²⁴.
23. However, the limitation enactments have within themselves a number of exceptions and it is here that the parties to a long tail claim enter a mystifying labyrinth of variations between each state and territory.

A. Disability

24. One such exception is the Plaintiff who is under a disability. The nature of these disabilities can be, and are, various. I take as my example the section I am

²¹ Per Forde DCJ in *Sami v. Mgweso* [2008] QDC 200 at paragraph [19] citing Derrington and Ashton “The Law of Liability Insurance”, 2nd edition, Butterworths at [11-459]; and [11-460].

²² *Knox v. Gye* (1872) LR 5 HL 656; *Belan v. Casey* (2003) 57 NSWLR 670 at [144]-[152]; *Woodhead v. Elbourne* [2001] 1 Qd R 220.

²³ Sections 82 and 87 of the TPA. Note that part VIB has specific time limits and extension provisions for personal injuries and death.

²⁴ For example, the *Civil Aviation (Carriers Liability) Act 1959* (Commonwealth); *Airlink Pty Ltd v. Patterson* (2005) 223 CLR 283; *Agrack (NT) Pty Ltd v. Hatfield* [2005] 223 CLR 251.



familiar with which is section 29 of the *Limitation of Actions Act 1974* (Qld) (“LOAA”).

25. Some examples of how a claim can arise from the distant past as a long tail claim and escape the application of the limitation statute, besides persons under the age of majority (which I deal with separately below), include:-

- Prisoners. The LOAA provides that for the purposes of that Act, a person shall be taken to be under a disability while the person is a convict who after conviction is undergoing a sentence of imprisonment. Subsection 5(2) of the LOAA, even now, has that definition, notwithstanding that the inability of a prisoner to commence proceedings has by successive amendments to sections 91, 92 and 95 of the *Public Trustee Act 1978*, by largely re-instated sections 91 and 92 now allow the public trustee to re-vest the management of the prisoner’s estate from the public trustee to the prisoner. Section 95 now makes it clear that an action commenced without the consent of the public trustee is not void, as, without the amendment, it has been held to be²⁵ but, rather, is subject to a stay so that it is merely irregular²⁶.

In *Lewis v. Hillhouse*²⁷, it was held that a former Queensland Police Commissioner, who had been convicted of corruption, and who had the management of his estate re-vested to him on 4 October 1993, could nonetheless sue his former solicitors for alleged negligence in 2004, by reason of his disability. The Plaintiff had been on a work to release programme since 1996. Nonetheless, Fryberg J held, that as the Plaintiff was still a convict undergoing a sentence of imprisonment within the meaning of the *Corrective Services Act*, section 29 of the LOAA applied and, indeed, the limitation period had still not commenced to run²⁸. The potential absurdities in this conclusion, including that a person serving, for example, a term of life imprisonment, could be in a better position to bring a long tail claim than an ordinary member of the community were

²⁵ *Tyler v. Krause* [2003] 1 Qd R 453.

²⁶ Which is the position under the equivalent New South Wales provisions; *Jol v. State of New South Wales* (1998) 45 NSWLR 283.

²⁷ [2004] QSC 311.

²⁸ Ultimately the action was struck out as an abuse of process amounting to a collateral challenge to his conviction:- *Lewis v. Hillhouse* [2005] QCA 316.



not lost on His Honour. However, His Honour considered it was not a matter which could be overcome by a purposive construction but only by legislative amendment.

- Physical and mental disability. This is particularly important. Two situations must be distinguished. The situation here under consideration is when, at the time of the accrual of the cause of action, the Plaintiff was under such a disability. This is to be distinguished from where the Plaintiff subsequently succumbs to a disability. The second category may be relevant to an extension of the limitation provision, but time has started running. In the former category, time does not start to run. Once time begins to run, it continues to run, notwithstanding the intervention of any further disability²⁹. However, if the Plaintiff has at all times been under a disability, even if one ceases and another commences so there is one unbroken period of disability, time is suspended until all disabilities cease³⁰.

Although the Plaintiff will bear the onus of proof³¹, this provision has been successfully utilised³².

This type of argument has some particular use in claims of child sexual abuse. Sometimes it can be established that the Plaintiff was, at all material times, under a disability³³, although often its best use is in the application of an extension to either show that it was not within the reasonable means of knowledge of the Plaintiff or its decisive character was not known³⁴. A variation on this theme exists. In *Wilson v. Horne*³⁵, Evans J held (and Cox CJ in obiter supported) the view that,

²⁹ *Purnell v. Roche* [1927] 2 Ch 142 at 149; see the list of authorities prior to *Purnell* contained in footnote 1 at paragraph [168] of Halsbury's "Laws of England" (4th edition), volume 28 "Limitation of Actions"; see also the authorities at footnote 1 to paragraph 1 at [55] of "Laws of Australia", volume 5, Civil Procedure, part 1, chapter 7, part B.

³⁰ *Burrows v. Ellison* (1871) LR 6 Ex Ch 128.

³¹ *King v. Coupland* [1981] 1 Qd R 121 per Macrossan J at 123; *Mulcahy v. Curramore Pty Ltd* [1974] NSWLR 464 (Court of Appeal).

³² *Flemming v. Gibson* [2001] QCA 244; *Smith v. Advanced Electrics* [2005] 1 Qd R 65.

³³ See the article "Sexual abuse claims and *Limitation of Actions Act 1984*" 68 LIJ 503.

³⁴ See for example *Teirnan v. Teirnan* (unreported, Queensland Supreme Court, Byrne J, 22 April 1993), considered and approved by the High Court in *State of Queensland v. Stephenson* (2006) 226 CLR 297.

³⁵ (1999)8 Tas R 363.



applying the comments of Deane J in *Hawkins v. Clayton*³⁶, in circumstances where memory was suppressed by the actions of a child sexual abuser and the wrongful conduct effectively precluded discovery of the cause of action, the cause of action did not crystallise until the time of its recollection. This may be rationalised on other footings also, including that the decisive character (under the Queensland legislation) may not be known until later³⁷ or that recognition was a material fact.

Such an approach is obviously of great significance to institutions, such as churches and schools, who may many years later be confronted with multiple claims because of predatory depraved behaviour of employees in the distant past³⁸.

B. Extensions of Time

26. The most significant exception to the limitation bar is the power granted to Courts to extend the limitation period.
27. There are great differences between the States and Territories. These differences cannot be addressed fully in this paper. I propose to note some of them which are of interest.
28. In New South Wales, for example, there appear to be several different limitation periods. There are provisions applying to causes of action for personal injury arising before 1 September 1990. There are provisions apply to causes of action for personal injury and damages for loss of dependency accruing on or after 1 September 1990 but before 6 December 2002. There are separate provisions applying to actions for personal injury and damages for loss of dependency, in the case of latent injury, accruing before 6 December 2002. There are also provisions permitting an extension of “12 year long stop limitation period” for causes of action accruing on or after 6 December 2002. There is also an extension of the limitation period for minors where there has been an “irrational failure” to bring an action on behalf of the minor.

³⁶ (1998) 164 CLR 539 at 587.

³⁷ *Queensland v. Stephenson* (infra).

³⁸ That of course gives rise to significant issues in itself beyond the scope of this paper; see for example *New South Wales v. Lepore*; *Salmon v. Queensland*; *Rich v. Queensland* (2003) 212 CLR 511.



29. It should also be noted that in relation to dust diseases, such as those arising from asbestos, there is no limitation period in New South Wales³⁹.
30. The “latent injury” provisions in New South Wales for personal injury are of particular interest as they are perhaps the paradigm of the long tail personal injury claim. The Court is given power to extend the period if it decides that “it is just and reasonable to do so”. There is a maximum 30 year limitation period⁴⁰. The question to be decided is whether the Plaintiff was unaware of the connection between the injury and the act at the relevant time⁴¹.
31. The potential of this provision is quite considerable to impose long tail liability in the circumstances which attract it. The possibility of a permanent stay, as discussed below in relation to *Batistatos v. RTA of New South Wales*⁴² would also be of significance here.
32. In Queensland, obtaining an extension of time is aided by a number of propositions emerging from the authorities, including:-
- (a) “Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can be reasonably expected from that actual person in the circumstances of the applicant”⁴³, rather than a hypothetical reasonable person. So, for example, an Applicant, who needs the assistance of a solicitor or an expert, may not know of a material fact of a decisive character, acting reasonably, until a progressive state of awareness is complete by obtaining that expert evidence. This may mean that a person may, acting reasonably, not become so aware until many years after the accident until an expert is prepared to support the Plaintiff’s claim⁴⁴;
 - (b) an Applicant may know of a material fact but that its decisive character may not be within the reasonable means of knowledge of the Applicant until a later time, at which later time the composite phrase is then satisfied⁴⁵;

³⁹ See section 12A of the *Dust Diseases Tribunal Act 1999* (NSW).

⁴⁰ Section 51 of the *Limitation Act 1969*.

⁴¹ *Harris v. Commercial Minerals Limited* (1996) 186 CLR 1.

⁴² (2006) 226 CLR 256.

⁴³ See for example *Jocumsen v. Thiess Pty Ltd* [2005] QCA 198 at paragraphs [9] and [10] at [42] and [45].

⁴⁴ See for example *Dick v. University of Queensland* [2000] 2 Qd R 476.

⁴⁵ *Stephenson v. Queensland* (2006) 226 CLR 197.



- (c) the knowledge which is the subject of the phrase “reasonable means of knowledge” is the knowledge of the Applicant, not the Applicant’s agent such as a solicitor⁴⁶.
33. The South Australian and Northern Territory legislation is of some interest as it is not confined to personal injury or death, although it ought be noted that in significant respects, common law rights of action for personal injury and death have been abolished in that state and territory. The legislation in South Australia and the Northern Territory confers on the Courts a power to extend the time limits⁴⁷ which can be exercised in one of two circumstances. In both of those circumstances the Court must be satisfied “that in all the circumstances of the case it is just to grant the extension of time”. The first of the circumstances is that the Court must be satisfied that the facts material to the Plaintiff’s case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of the limitation period and that the action was instituted within 12 months. Alternatively, the Court must be satisfied that the Plaintiff’s failure to institute the action within the limitation period resulted from representations of conduct of the Defendant or a person whom the Plaintiff reasonably believed to be acting on behalf of the Defendant and was reasonable in view of those representations or that conduct and other relevant circumstances.
34. The breadth of this discretion was confirmed by the High Court in *Optical Australia Pty Ltd v. Mills*⁴⁸. The High Court noted, inter alia, that unlike the Queensland legislation (which was based on the British model), there was no requirement for decisiveness. The Court was of the view that the breadth of the legislation had relevantly left the discretion unfettered and that all such matters fell for weighing in the appropriate case in the exercise of the discretion judicially.
35. In all jurisdictions, one of the most fundamental considerations is that the Plaintiff must show that a fair trial can still be had and that the Defendant is not prejudiced in accordance with the reasoning in *Taylor*. There is both

⁴⁶ *Neilson v. Peters Ship Repair Pty Ltd* [1993] 2 Qd R 419.

⁴⁷ *Limitation of Actions Act 1936* (South Australia), sections 47 and 48; *Limitation Act 1991* (Northern Territory), section 44.

⁴⁸ (1987) 163 CLR 628.



presumptive prejudice and, if it can be established, actual prejudice. The latter of course will be given greater weight than the former.

36. However, in this day and age of record keeping and, in cases of personal injuries in many jurisdictions, compulsory notice giving and information gathering, being able to point to prejudice, even after many years, becomes a more difficult task.
37. Often this prejudice can be pointed to, however, by the Defendant's inability, for example, to disentangle.
38. The type of prejudice which the Defendant suffers in this respect was referred to by Fraser JA *Ward v. Wiltshire Australia Pty Ltd*⁴⁹:-

“The second respondent might be held liable for such a claim if it could not introduce evidence that showed that the appellant's additional incapacity was attributable to some cause other than the accident⁵⁰ ... the respondent might in such a case be prejudice by the appellant's delay in pursuing her claim because it might be difficult for it now to obtain such evidence”⁵¹.

C. Children⁵²

39. An infant with a civil claim is perhaps the archetypal long tail claim. The suspension of time during the disability of infancy effectively allowed Claimants until age 21 to commence proceedings in most jurisdictions, being the age of majority plus three years limitation for personal injury.
40. In 2002/2003, New South Wales, Victoria and Tasmania introduced tougher restrictions as part of the “liability insurance crisis” reforms.
41. These reforms effectively provide that the general rule is that an infant's personal injury action must be brought within three years but all jurisdictions have a provision for an extension.
42. In *Curnow v. Roman Catholic Trust Corporation Diocese of Melbourne*⁵³, these provisions were considered and an extension of time granted.
43. The legislation in these three jurisdictions does have exceptions for the situation where the child is injured by his or her protector or guardian such as

⁴⁹ [2008] QCA 93.

⁵⁰ His Honour citing *Watts v. Rake* (1960)108 CLR 158 at 160, 164; *Purkess v. Crittenden* (1965) 114 CLR 164 at [167]-[168] and [171].

⁵¹ At paragraph [87].

⁵² This part of the paper is drawn from an article by Pru Vines (2007) 3(10) ACL1, the influence of which is acknowledged.

⁵³ [2006] VSC 364.



- sexual abuse. They may also have application in accidents at the home. The question may then be whether it is reasonable for the parent or guardian not to bring the action within the normal limitation period.
44. The Western Australian provisions are different. There are special provisions for children whose causes of action accrue at certain ages. There is provision⁵⁴ that if a person is less than 15 years of age when the cause of action accrues, the action must be brought within six years. If a person is between 15 and 18 years old when the action accrues, the action cannot be brought after the person reaches 21. Section 32 provides that if a person is without a guardian for some of that time, time will not run during the period without guardianship. However, 21 years remains the outer limit. There is provision for time not to run when the children are actually harmed by the guardian or person in a close relationship with them. Even in that case, however, there is an outer limit of age of 25.
 45. This legislation marks a significant shift emphasising parental or custodial responsibility.
 46. So, for example, section 41 of the WA legislation, whilst it is possible to extend time up to the time when the Plaintiff reaches age 21, the Court is not to extend the time unless the Court is satisfied in the circumstances it was unreasonable for a guardian or parent of the Plaintiff not to commence the action within the limitation period.
 47. In Queensland, no such legislation exists but under the *Personal Injuries Proceedings Act 2002*, section 20C, a parent or legal guardian of the Claimant must give a part 1 Notice of Claim under section 9 for the Claimant before the earlier of six years after the parent or legal guardian knew, or ought to have known, of the personal injury or the day 18 months after the parent or guardian first consulted a lawyer about the claim. If notice is not given within that time, the Defendant can apply for an order that the claim not proceed. An extension can be sought from the Court.
 48. In South Australia, under section 45A of the *Limitation of Actions Act 1936*, where a child suffers personal injury, the Act extends the time for bringing the action to more than six years from the day of the incident causing the injury,

⁵⁴ Section 30 of the *Limitation Act 2005* (WA).

notice of an intended action must be given within six years after the relevant date by and on behalf of the child.

THE NON-EXISTENT OR UNIDENTIFIABLE DEFENDANT

49. Another common feature of the long tail claim is that often corporate Defendants no longer exist, natural persons have died or the Defendant is unidentifiable.
50. It is another quirk of the limitation enactments, and, in one sense, perhaps counter-intuitive to their rationales as explained by McHugh J, that, during a period of deregistration of a company, and until reinstatement (if any), a limitation period for liquidated damages ceases to run because of the non-existence of the Defendant⁵⁵. Therefore, the period between the deregistration and any order reinstating the company is not to be counted for limitation purposes⁵⁶.
51. A company may be reinstated pursuant to section 601AH of the *Corporations Act 2001*. Orders can be obtained validating any steps taken prior to reinstatement. The power to reinstate is almost invariably exercised where there is evidence that there is an insurer for the relevant period standing behind the deregistered company⁵⁷.
52. Otherwise, the orders in proceedings that have been brought against a non-existent entity are a true nullity⁵⁸.
53. Another means of overcoming the non-existent corporate Defendant is for the liability insurer to be pursued, if that could be ascertained and identified. This right of recourse exists under section 601AG of the *Corporations Act 2001*. There is also section 51 of the *Insurance Contracts 1984* (“ICA”) in relation to natural persons but note also that there is authority that will apply to a dissolved corporation⁵⁹. This use of subsection 51(1)(b) of the ICA has probably been overwhelmed from 1 July 1998 by the introduction of section 601AG of the *Corporations Act 2001*.

⁵⁵ See for example *Pagnon v. WorkCover Queensland* [2001] 2 Qd R 492.

⁵⁶ See the reasons of McPherson JA in *Pagnon* at paragraph [15].

⁵⁷ *Ex Parte Walker* (1982) 6 ACLR 423.

⁵⁸ *Deveignea v. Askar* (2007) 69 NSWLR 327.

⁵⁹ *Norsworthy v. SGIC* (unreported, SA Supreme Court, Olsen J, 30 November 1999).



54. Section 601AG requires that the company “had a liability” to the Plaintiff and that the insurance contract covered “that liability” immediately before deregistration. Section 601AG is couched in the past tense. It requires the de-registered company to have had a liability to the Plaintiff immediately before deregistration⁶⁰.
55. The question arises then as to whether if at a time when deregistration occurred, the limitation period had already expired (therefore it had not been suspended at any point by the deregistration) whether the former insured had a liability i.e., there was a complete defence in the form of a limitation bar.
56. A five member bench of the New South Wales Court of Appeal considered a similar issue in *Kinzett v. McCourt*⁶¹. The Court considered the question of when the limitation period ran in respect of the section 6 of the *Law Reform Act (Miscellaneous Provisions) Act 1946* (NSW). This section allows direct recourse against an insurer and was the inspiration for section 601AG⁶². In *Kinzett*, Spigelman CJ⁶³ found that the ordinary limitation period applicable to the original action against the insured applied to the proceedings and time commenced at the same time as the cause of action in tort or contract accrued to the Claimant against the insured. The learned Chief Justice stated that, to find otherwise, would be to find that there was no real limitation period. In effect, the limitation period would be deferred indefinitely, if and when a company became deregistered.
57. However, particular difficulties may arise when there is statutory insurers involved to which neither section 601AG of the *Corporations Act 2001*, nor section 51 of the ICA applies. For example in Queensland, until 1 November 1978, there was no facility to sue the Workers Compensation Board of Queensland, or its statutory successor, WorkCover Queensland, if the employer has died or been dissolved. This is a particular problem for long term asbestos sufferers who may have been exposed over a long latency period dating back to the 50s⁶⁴.

⁶⁰ *Suncorp Metway Insurance Limited v. Clonmel Pty Ltd* [2001] 2 Qd R 94 at paragraphs [18]-[20] per Muir J.

⁶¹ (1998) 46 NSWLR 32.

⁶² See the explanatory memorandum in relation to section 601AG extracted at paragraph [30] of *Hutchinson v. ASIC* [2001] 40 ACSR 198.

⁶³ At paragraphs [50]-[52], with whom Mason P (with an interesting qualification at page 53), Priestly and Handley JJA agreed (Meagher JA dissenting).

⁶⁴ See now subsection 300(2) of the *Workers Compensation and Rehabilitation Act 2003*.



D. *A Permanent Stay?*

58. In *Batistatos v. RTA of New South Wales*⁶⁵, the High Court (by majority of 4:3) upheld a permanent stay imposed upon litigation commenced by a mentally disabled Plaintiff born with congenital defects who was catastrophically injured in a motor accident leaving him paralysed by quadriplegia. The proceedings were brought within the ultimate 30 year long stop provision, but 29 years after the events. The majority observed that the inherent jurisdiction to issue a stay operated independently of the statute and that the right of a Plaintiff with a common law action was not at large and was subject to the Court's inherent jurisdiction to issue a stay in certain circumstances where the proceedings would unduly vex the Defendant. In that case, the majority held that there was, in practical terms, nothing of significance to place before the Court to establish what was held not to be an untenable cause of action⁶⁶.

BROKER'S LIABILITY⁶⁷

59. There is English authority that an insurance broker may owe the insured a duty of care to retain policy documents and details of insurance over many years.
60. In *Grace v. Lesley and Goodwin Financial Services Ltd*⁶⁸, the Plaintiffs were members of Syndicate 964 at Lloyds in 1956. They reinsured certain liabilities of the Sturge Syndicate. The Defendant was the broker for the Plaintiffs in reinsuring part of their liabilities to Sturge with a number of companies. The insurance broker issued cover notes to the Plaintiff which indicted the risk had been placed but did not identify with whom. Twenty eight years later the Plaintiff sought to claim on the reinsurance but the broker was unable to locate any documents which would enable it to identify the names of the relevant reinsurers – the person who placed the risk having since died. The policy documents were accepted as being lost.

⁶⁵ (2006) 226 CLR 256.

⁶⁶ Note the vigorous dissent by Kirby J. In that dissent he was joined by Callinan and Heydon JJ but no member of the minority doubted the existence of the jurisdiction to stay the proceedings permanently but Kirby J described it as "exceptional".

⁶⁷ What follows is largely drawn from a case note found at (1995) 7 ILJ by Angela Christopher, the import of which to this part of this paper is acknowledged.

⁶⁸ (16 May 1995, Queens Bench Division, unreported).



61. The central issue is whether, in contract or in tort, the broker owed a duty to the Plaintiffs to retain policy documents so as to be in a position to collect claims on their behalf when called upon to do so.
62. After considering expert evidence, the Court held that it was the universal practise of Lloyds brokers to collect claims and, thus, a duty of this sort should be implied.
63. The Court also held that a broker owed a duty of reasonable care and skill to retain documents so as to be able to ascertain the name of the insurer so that the broker may advance a claim on behalf of an insured. In practise, the Court thought this meant the broker must retain the slip but it was not required to retain the policy which was the property of the insured. The Court also held where there is no policy the broker should not destroy the slip without receiving proper instructions from the insured.
64. The Court also considered whether or not the duty to retain documents was absolute. Expert evidence was presented by both parties. It was ultimately found that in the special circumstances of the case, where the reinsurance concerned “long tail business”, and where claims had, in fact, been made by Sturge under its reinsurance policies infrequently up until the early 80s when asbestos became a matter of real concern that the time never really came when the broker could have destroyed the slip because a reasonable broker would throughout have regarded a claim as possible.
65. The decision was to this extent fact driven. There may well be circumstances when a slip could be destroyed.
66. The Court found that in allowing the documents to be lost, the broker was in breach of its duty to the insured as its system of retaining documents was not up to the task. The Court accepted that if the documents had been destroyed accidentally, such as in a fire, that would be different. The situation established in the case was that the broker simply did not have an adequate document retention system. The claim against the broker was not statute barred as the duty to retain the documents was continuing and the loss did not arise until the broker was unable to comply with the demand to produce the relevant records.

67. The Plaintiff was not found guilty of contributory negligence but because it was the practise of insureds in the 50s not to have retained a permanent record. Evidence could of course now be led as to current insurance practises.

UNDERWRITING ISSUES

68. There are two important features of traditional liability insurance. Firstly, the subject matter of the insurance is the insured's liability to a third party. Secondly, the cover applies if the events giving rise to the liability occur during the period of insurance, even though the actual liability may not arise until many years after the policy has expired.
69. Initially the market response to the prospect of a long tail was the "claims made" or "claims made and notified" type of policies most commonly found in professional indemnity policies and D&O policies. These generally provide for cover against loss arising from claims made against the insured or simply against claims.
70. Kelly and Ball⁶⁹ state there at least four types of claims made cover⁷⁰ but observe that the third and fourth types are that normally adopted. They are:-
- (a) Cover against claims made against the insured during the period of insurance and claims made and notified after that period that arise from facts notified to the insurer during it; and
 - (b) Cover against claims made against the insured and notified to the insurer during the period of insurance and claims made and notified after that period that arise from facts notified to the insurer during it.
71. The authors observe that claims arising from circumstances that occurred before a specific "retroactive" date are usually excluded from claims based cover, as are claims arising from circumstances of which the insured is aware at the time the contract was entered into. Of course proposal forms normally seek information in relation to "known circumstances".
72. Also, later claims are usually covered through a clause which "deems" later claims to be made during the period of insurance if they arise from

⁶⁹ "Law of Liability Insurance".

⁷⁰ Paragraph [14.0010].



circumstances notified during it. Many policies contain a provision imposing an obligation on the insured to notify the insurer of any circumstances that might give rise to a claim about which it becomes aware during the period of insurance.

73. The High Court recently considered the effect of a “known circumstance” provision in *CGU Insurance Limited v. Porthouse*⁷¹.
74. In a rare unanimous (five member) decision, the Court considered an exclusion from a barrister’s liability policy where a known circumstance was defined to include any fact, situation or circumstance which a reasonable person in the insured’s professional position would have thought, before the policy began, might result in someone making an allegation against an insured in respect of a liability that might be covered by the policy.
75. In the Court of Appeal in New South Wales, the barrister had succeeded because it was found that he had, subjectively, not considered the circumstances might give rise to the possibility of a claim against him. The unanimous High Court held that the exclusion posited an objective standard with a modification relating to professional, not personal matters⁷². Their Honours said:-

“The phrase described a hypothetical reasonable person with the experience and knowledge of the insured couple with the capacity of such a reasonable person to draw a conclusion (whether it is plain or obvious or not) as to the possibility of someone making an allegation against the insured.”⁷³

76. Their Honours also stated⁷⁴:-

“There is nothing in the context or language of the policy to suggest that there is to be imputed to the hypothetical person the insured’s personal idiosyncrasies or the insured’s state of mind, which may reflect an unreasonable assessment of ‘[a]ny fact, situation or circumstance’ known to the insured or an unreasonable conclusion about the possibility of an allegation being made.

There is also nothing in the language to support reading down a reasonable person’s capacity to draw conclusions as limited to conclusions which are plain and obvious. A reasonable person’s conclusions may involve matters of judgment. For such conclusions to be reasonable, in the relevant sense, they may need to command a consensus, among those in the same professional position, as the insured, that they are reasonable conclusions”⁷⁵.

⁷¹ [2008] HCA 30.

⁷² At paragraph [56].

⁷³ At paragraph [56].

⁷⁴ At paragraph [57].

⁷⁵ Underlining added.



77. This passage suggests that, in an appropriate case, it may be necessary for the professional person, confronted with a similar wording, to call colleagues to establish that a given position which was subsequently wrong, was a widely held mistaken belief, possibly something akin to the old *Bolam* test.
78. The Court also considered whether such a reasonable person “would have thought [it] might result in” a claim. The Court observed⁷⁶ that, in the context of that policy, the expression is a reference to a supposed conclusion reached by the hypothetical reasonable person. Once that it established, and the facts, situation or circumstance known to the insured is imputed to that reasonable hypothetical person, then the further enquiry “requires a conclusion by the hypothetical person that there was a real (not a fanciful or remote) possibility (not a certainty) of an allegation being made.”
79. The Court also observed that it was not necessarily an error for the primary judge to take account of evidence of what the insured actually thought in seeking to determine what a reasonable person in the insured’s professional position would have thought. However, that was an entirely separate consideration from whether or not the insured’s state of mind is to be imputed to the reasonable hypothetical person. The evidence of what the insured thought without more did not suffice as evidence of what a reasonable barrister in the insured’s position would have thought. The clause referred to two separate reference points. The insured’s actual knowledge and the standard of a reasonable person in the insured’s position which moderated the subjective test⁷⁷.
80. Importantly, in relation to the type of evidence that might need to be produced in relation to the objective test of what the reasonable person (as defined above) would have thought the Court observed:-

“[72] Evidence of a particular practice or standard of conduct, whether laid down by a professional body or sanctioned by common usage, may be relevant to establishing a standard of care in a case of professional negligence,⁷⁸ although expressions of personal opinion about what an

⁷⁶ At paragraph [64].

⁷⁷ Paragraphs [66] and [67]. As an aside, it is noted that there was an attempt to tender opinion and evidence on what a reasonable person in the insured’s position would have thought but it had been rejected because of its late production; at paragraph [68].

⁷⁸ *Boland v. Yates Property Corp Pty Ltd* (1999) 74 ALJR 209 at 219 [47]–[48] per Gleeson CJ, 229 [99] per Gaudron J and 230 [110] per Gummow J; 167 ALR 575 at 588, 601, 603; [1999] HCA 64; *Rosenberg v. Percival* (2001) 205 CLR 434 at 439 [6]–[7] per Gleeson CJ; [2001] HCA 18.



individual would have hypothetically done, if in the same position as a defendant in a negligence action, might be thought to be of little assistance.⁷⁹ While the legal criterion here is not the standard of care for professional conduct, similar considerations might arise. It is not inconceivable that an occasion, or set of facts, could arise where it is necessary for an insurer to prove common practices or attitudes in order to prove what a hypothetical reasonable person "would have thought" so as to establish that it is not liable to indemnify the insured."

81. In the result, the barrister failed and the insurer succeeded. The Court concluded that "there was no clear foundation for the primary judge's finding that the respondent's knowledge coincided with what a reasonable person in the insured's professional position would have thought it included in respect of the undisputed facts and circumstances known to the insured. The Court commented that this additional condition was:-

"An important practical protection for insurers. It protected the insurer from a genuine, but unreasonable or unrealistic, estimate or understanding of the insured. It introduced a necessary element of objectivity into the final conclusion to be reached. It had to be given proper application in the present case."⁸⁰

82. No doubt all professionals will now be reviewing their policies and deciding whether or not there was anything more than a far fetched or fanciful chance that they may have an allegation of negligence made against them and giving due notice. In any event, that was probably an advisable course in seeking the protection of section 40 of the ICA, having regard to the disappearance of the "claims made and notified" policies, largely, from the market in the wake of the High Court's decision in *FAI General Insurance Co Ltd v. Australian Hospital Care Pty Ltd*⁸¹.
83. The effect of section 40 is to extend cover to claims made later in respect of circumstances or facts notified during the period of cover.
84. In *GIO General Ltd v. Newcastle City Council*⁸², it will be recalled, that the Council gave notice to its insurer of possible liability in performance of building and inspection functions. The Council gave notice of these potential

⁷⁹ *Hawkins v. Clayton* (1988) 164 CLR 539 at 573 per Deane J; [1988] HCA 15. See also *Cross on Evidence*, 7th Aust ed (2004) at [29105]–[29125]. Distinctions between the differing uses which might be made of expert evidence, and the differing approaches to the admissibility of such evidence in cases concerning negligence by members of the legal profession, are usefully summarised by Young J in *Permanent Trustee Australia Ltd v. Boulton* (1994) 33 NSWLR 735 at 738–739.

⁸⁰ At paragraph [74].

⁸¹ (2001) 204 CLR 641.

⁸² (1997) 191 CLR 85.



claims. The claims that were eventually made were made outside the policy period. The Council relied upon subsection 40(3) of the ICA. The insurer declined. The High Court rejected an argument that there was a “simple claims made” policy but there was no reason for him to distinguish between a claims made policy and a claims made and notified policy when confronting the plain language of section 40.

85. The breadth of section 40 was integral, I suggest, to the result in *Australian Hospital Care* itself. The application of *Australian Hospital Care* to claims made and notified policies and claims made policies is well known and gallons of ink has been used analysing it. I do not propose to further analyse it here. However, it is worth noting that, at least at intermediate appellate level, it appears that it has been established that section 54 cannot be used to overcome the absence of giving notice under subsection 40(3) of the ICA. The issue arose in *CA & MEC McInally Nominees Pty Ltd v. HW Valuers (Brisbane) Pty Ltd*⁸³, which was approved and applied in *Gosford City Council v. GIO General Limited*⁸⁴. In *McInally Nominees*, Chesterman J held that failure to comply with subsection 40(3) cannot be regarded as a failure to give notice under the contract. Subsection 40(3) creates rights when its terms are complied with. It does not create right when they are not complied with. This view was accepted in *Gosford City Council*.
86. However, the view adopted in *McInally* and also *Gosford* has attracted criticism. Kelly and Ball argue that the effect of the decision:-

“Permits an insurer to avoid the application of section 54 by not including a circumstance’s notified extension in its claims-made policy. The problem that section 40 was intended to address was precisely the failure by some insurers to include those extensions in claims made policies... It is the substance of section 40(3) and not its form that should count. It would be unfortunate if section 40(3) had the unintended effect of providing liability insurers with a means of avoiding the operation of section 54 in relation to a failure to notify circumstances within the policy period as required by section 40(3). Section 54 shall apply on the basis that the insurer’s right to deny liability is, indeed, the ‘effect of the contract’ against the background of the Act including section 40(3). After all, ‘the effect of the contract’ referred to in section 54 is in effect produced not by the contract alone, but by the contract in light of the applicable principles of law. There is no reason why section 40(3) should not be regarded as part of that legal background.”⁸⁵

⁸³ [2001] QSC 388.

⁸⁴ (2002) 12 ANZ Insurance Cases 61-527.

⁸⁵ At paragraph [14.0020.1].



87. One suspects, therefore, that as the High Court is yet to speak on the issue, the last word on the point has not been heard and this type of “long tail claim” may yet not be avoided by insurers adopting the practise described by Kelly and Ball.
88. There are other market responses to “long tail claims” including run-off cover but, also, what, importantly, is termed “manifestation” cover.
89. In an interesting paper “Insurance Cover for the Long Tail and Unforeseeable”, by Michael Mendelowitz, the appropriate triggers for long term cover are explored and the author suggests that Courts in the US have identified four different triggers in the context of toxic tort or environmental claims. The triggers were developed in the asbestos context but have then been applied to pollution claims:-
- (a) The “exposure” trigger under which all policies are risked during the period when persons or property were exposed to hazardous products or contaminants must respond.
 - (b) The “injury in fact” trigger under which any policy on risk when actual injury or damage is proved must respond.
 - (c) The “manifestation” trigger which triggers the one policy on risk when the injury or damage manifests itself; that is, when the injury or damage becomes known to the insured (or possibly when an injury becomes capable of diagnosis or damage discoverable, even if not actually diagnosed or discovered);
 - (d) Finally, the “continuous” trigger which triggers all policies in effect from the date of first exposure to the date of manifestation.
90. Of these four, it appears that the “manifestation” cover is that which is the most direct response to the prospect of a “long tail” claim. Under this type of trigger, it is not an accident, occurrence or event which triggers the insured’s right to an indemnity but he manifestation of the injury or damage to a third party.
91. The insured’s entitlement to an indemnity is dependent upon the happening of the injury or damage during the period of insurance and the time of the accident, occurrence or event is irrelevant.



92. The “manifestation” wordings are often supported in respect of injuries by clauses which “deem” an injury to have taken place when it is first diagnosed.
93. The intent of such a wording appears to be to shift the burden or the risk to the insurer that takes the premium later for the injury when it arises rather than the insurer that took the premium many years before. The object appears to be to allow the insurers who take the insurance cover years afterwards, to explore the possibilities of latent onset injuries and decide whether or not to take the cover through proposals and investigations.
94. Whilst this may appear to be a sensible commercial object, it could lead to uninsured losses by insureds. As Kelly and Ball comment⁸⁶:-
- “One effect is to create the possibility of gaps and coverage for insureds. In applying for renewal of a policy, an insured may be required by the duty of disclosure to disclose the existence of an occurrence which has not yet led to injury or damage. That disclosure may well lead to the exclusion from cover of any claims that arises from that occurrence.”
95. For insurers relying upon a manifestation cover, the duty of utmost good faith may have particular resonance, I suggest, insurers should be very careful to draw attention to the effect of the provisions and explain them. There is still some debate about whether there is any duty to “act” in good faith in a proactive way. Section 37 of the ICA also may have application as a manifestation cover may be one that is “not usually included in contracts of insurance that provide similar insurance cover”.

FINANCIAL ISSUES

96. As a result of the enquiry into James Hardie when the liability shortfall of that company for its long tail asbestos claims became known, a reference was made to the “Corporations and Markets Advisory Committee” (“CMAC”). This was to consider measures to improve the position of potential personal injury Claimants in the course of ongoing management of a company or in the external administration of a company where the company has acted in such a way that there may be enforceable claims against it of a long tail nature.

⁸⁶ At [14.0030].



97. The CMAC report was provided in May 2008. It made various recommendations as to how to protect what are termed “unascertained future Claimants” (“UFCs”).
98. The CMAC made several recommendations which, if adopted, will affect corporate financing to deal with long tail claims. These include:-
 - (a) In relation to solvent companies, the share capital reduction, buy-back and financial assistance provisions should be amended to require that a proposed transaction not materially prejudice the company’s ability to pay its creditors or meet its contingent or other liabilities including UFCs liabilities. Also, a solvent company which projected UFCs liabilities that may render it insolvent at some future time should have the right to seek a Court order confirming a plan to deal with these claims as they arise.
 - (b) In involuntary administration, a representative for UFCs should have standing to challenge in Court a proposed deed of company arrangement. The representative would have the onus to prove undue detriment to UFCs under the proposed deed.
 - (c) In schemes of arrangement, the scheme provisions should be amended to permit schemes involving a company and a closed class of UFCs.
 - (d) In liquidations, the Courts should have a power to order the setting aside of funds in trust for UFCs, where the Court considers that that is worthwhile taking into account the available distributable assets.
99. The CMAC also considered an anti-avoidance provision but was not persuaded the need for, or utility of, a specific provision of that kind. Nonetheless, the CMAC considered a prohibition provision modelled on part 5.8A of the *Corporations Act 2001*. That prohibits entering into an agreement or transaction with the intention of preventing a recovery of employee’s entitlements or significantly reducing those entitlements, the company need not be insolvent when the transaction was entered into and it does not matter how long ago the transaction was entered into.
100. The CMAC considered a model where:-
 - (a) There is a mass future claim afoot (obviously the wave of asbestos claims against James Hardie is the example); and

- (b) The company has a threshold level of information about the nature of expected claims.
101. What it proposed is that criminal, and civil, liability would attach to a breach of the prohibition. The breach would require proof only of the existence of the proscribed intention which would not need to be the dominant or sole intention⁸⁷. The targeted parties would be not just directors and other companies in a group but any person who was a party to the transaction or arrangement and therefore could potentially involve the lawyers or accountants involved. Compensation may be recovered by the liquidator as a debt due to the company. If the liquidator does not sue for compensation, the parties affected may sue.
102. Support for inclusion of such a provision came from the ALA. The “Chartered Secretaries of Australia”, stated it had no objection in principle to it. It was opposed by the Australian Institute of Company Directors, inter alia, on the ground that the threshold test of information was unclear.
103. It remains to be seen what the current Federal Government will do with the CMAC recommendations including the anti-avoidance provision but, one would have thought, that there will be a greater prospect now of the introduction of the CMAC proposals and, further, that the anti-avoidance provision, which the CMAC drafted and considered, but did not recommend, may also be adopted.

K F Holyoak
Sir Harry Gibbs Chambers

⁸⁷ See paragraph 9.2 of the CMAC report.