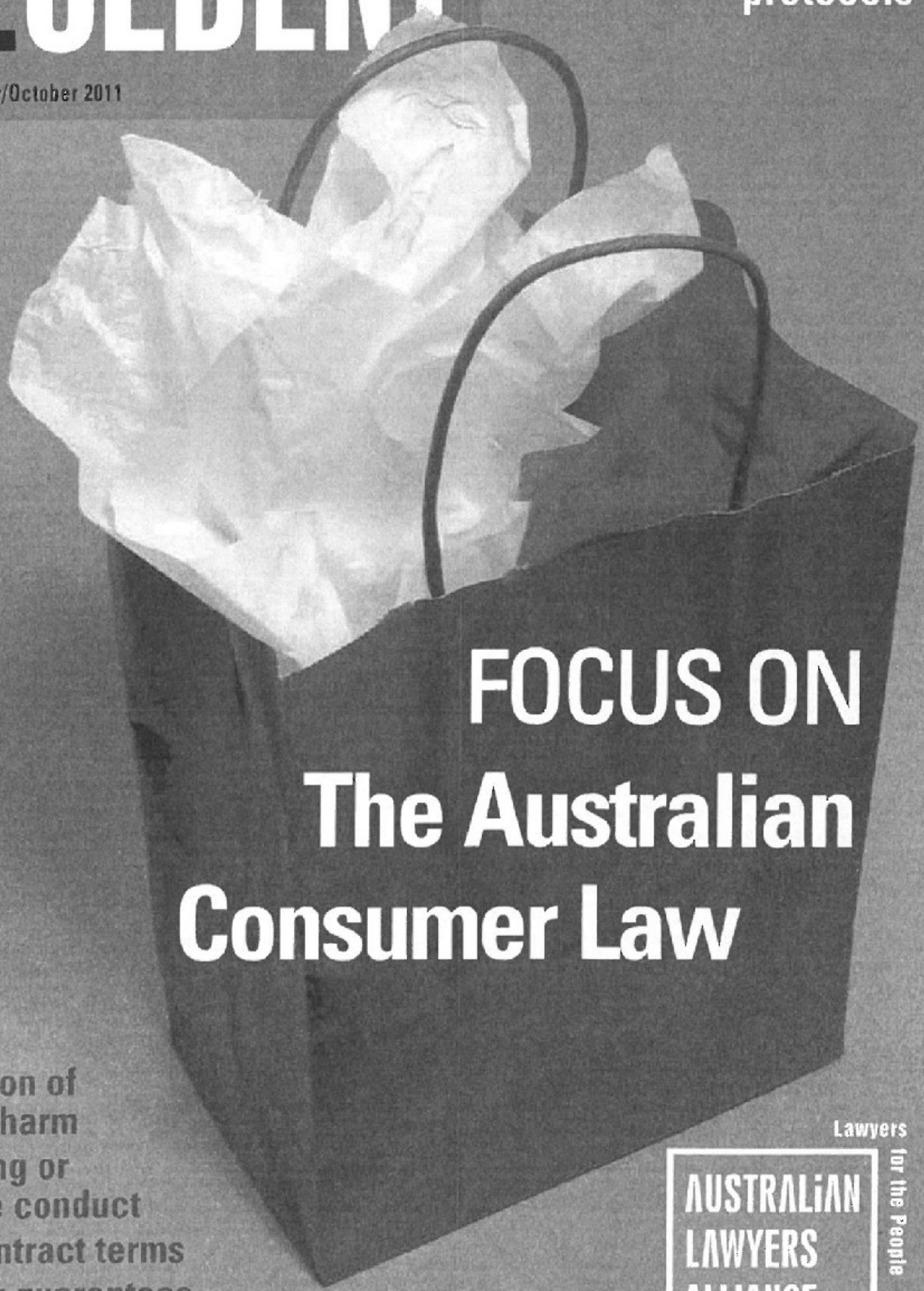
PRECEDENT

Issue 106 – September/October 2011

New pre-litigation protocols



FOCUS ON The Australian Consumer Law

- Notification of potential harm
- Misleading or deceptive conduct
- Unfair contract terms
- Consumer guarantees
- Limitation provisions

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Past presidents' annual dinner

By Tom Goudkamp

Since 2005, the immediate past president of the ALA has hosted a past presidents' dinner in his or her home city.

This tradition follows that of our US sister organisation, the AAJ (formerly ATLA), where the event is the highlight of each annual conference.

So far, our dinners have been held in Sydney (Tom Goudkamp), Canberra (Richard Faulks and Mark Blumer), Brisbane (Simon Morrison and Ian Brown), and Melbourne (Clara Davies).

On 16 September, it was Brian Hilliard's turn in Hobart, and what a great night it was for those past presidents who attended.

After pre-dinner drinks at 'Grape' at Salamanca, we repaired to Monty's restaurant where, in a private room with a roaring open fire, we embellished stories of our heroic struggles against the tide of tort law reform and lamented what has befallen many of the hapless negligently injured people in this country.

We also had a roll call of our absent past presidents, Peter Semmler QC, who started it all; Peter Cashman; the two-term Rob Davis; John Gordon; Simon Morrison; and the reclusive Ian Brown. We gave each a thunderous toast and a stiff roasting.

We look forward to next year's event, again in Hobart, the home city of our current president, Greg Barns. ■

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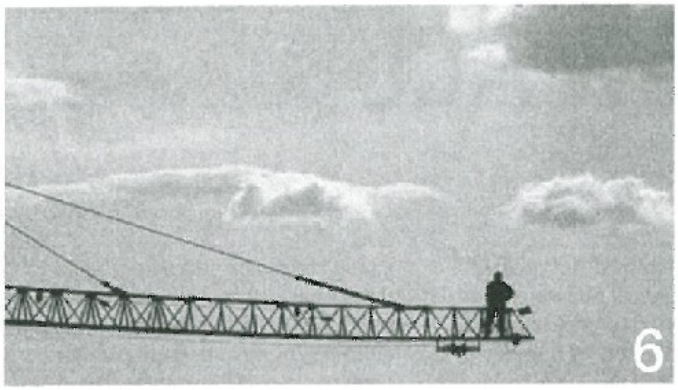

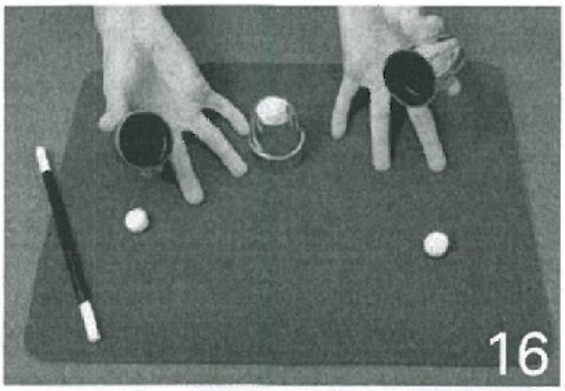

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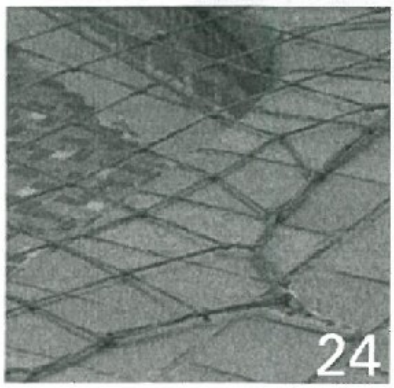

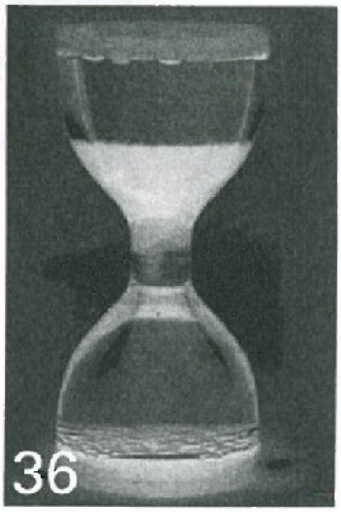

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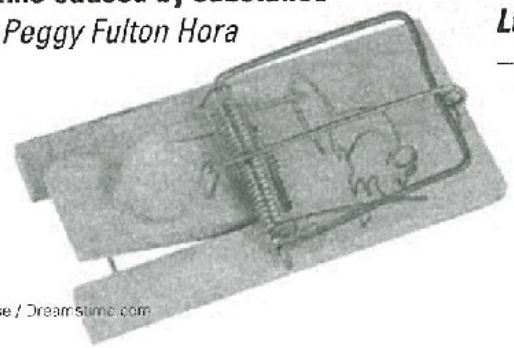

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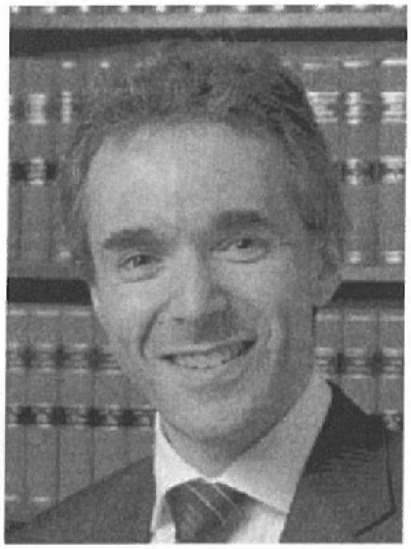

A new ACL

By Ben Zipser

Over the last four decades the Commonwealth, states and territories have enacted a growing number of consumer protection laws. The most well-known was the *Trade Practices Act 1974* (Cth) (the TPA). Each jurisdiction then enacted a *Fair Trading Act*, as well as other legislation containing consumer protection provisions. There were differences and inconsistencies between the different laws. There was also growing concern and complaints that the different laws in different jurisdictions led to uncertainty and unjustified compliance costs for businesses, and confusion for consumers as to their rights and remedies. The Productivity Commission, in a 2008 report titled *Review of Australia's Consumer Policy Framework*, recommended that a single national generic consumer law, to be called the Australian Consumer Law (the ACL), be implemented and apply equally in all jurisdictions in Australia, and replace the existing inconsistent laws.

In accordance with this recommendation the ACL came into effect on 1 January 2011. Each state and territory adopted the ACL with effect from 1 January 2011, and the consumer protection provisions in the TPA and state and territory *Fair Trading Acts* in force up until 31 December 2010 were repealed.

The ACL is contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the CCA), which is the new name for the TPA. A number of divisions of the ACL are principally the same as divisions of the (now repealed) consumer protection provisions in the TPA. Other divisions of the ACL contain modified versions of divisions of the (now repealed) consumer protection provisions in the TPA. Other divisions of the ACL provide new protections for consumers, which were not in the TPA.

This edition of *Precedent* is intended to introduce readers to the ACL. Part 2-1 of the ACL, titled 'Misleading and deceptive conduct', contains provisions that are largely the same as the provisions prohibiting misleading and deceptive conduct in the TPA and state and territory *Fair Trading Acts*. Eileen Webb's article, 'The new s52 – s18 ACL', provides an informative introduction to the new provisions. Part 2-2 of the ACL, titled 'Unconscionable conduct', contains provisions that are principally the same as the provisions prohibiting unconscionable conduct in the TPA and some state and territory *Fair Trading Acts*. Julie Clarke's article, 'Unconscionable conduct: an evolving moral judgement', provides an informative introduction to the new provisions.

Part 2-3 of the ACL, titled 'Unfair contract terms', provides new protections for consumers that were not in the TPA. The unfair contract terms provisions render void unfair terms in standard form consumer contracts, and are based on similar regimes regulating unfair contract terms in the UK and Victoria. Dr Jeannie Marie Paterson's article, 'The unfair contract terms law', introduces readers to the new provisions. Part 3-2 of the ACL, titled 'Consumer guarantees', contains a new consumer guarantees regime that replaces the regime of implied conditions and warranties in consumer contracts in the TPA and state and territory *Fair Trading Acts*. The new regime is based on similar provisions in New Zealand's *Consumer Guarantees Act 1993*. Jenny Stathis's article, 'Consumer guarantees under the ACL', introduces readers to the new regime.

Part 3-3 of the ACL, 'Safety of consumer goods and product-related services', contains divisions concerning safety standards, bans on consumer goods, recall of consumer goods, safety warning notices, and notification requirements concerning consumer goods or services associated with death or serious injury. Madeleine Kearney and Larissa Cook's article, 'When too much is never enough: the notification requirement of the ACL', introduces readers to the last of these divisions.

Chapter 5 of the ACL, 'Enforcement and remedies', contains divisions concerning various matters relating to enforcement and remedies, including pecuniary penalties, injunctions, damages, and compensation orders.

One of the many issues that arise in considering enforcement and remedies is limitation periods. This is the subject of Alex Bruce's article, 'Time's up? Limitation of actions provisions in the Australian Consumer Law'.

This edition of *Precedent* also contains general articles by Ramina Kambar and Greg Walsh on pre-litigation protocols; and by the Honourable Peggy Hora, former judge of the Superior Court of California, on drug treatment courts. ■

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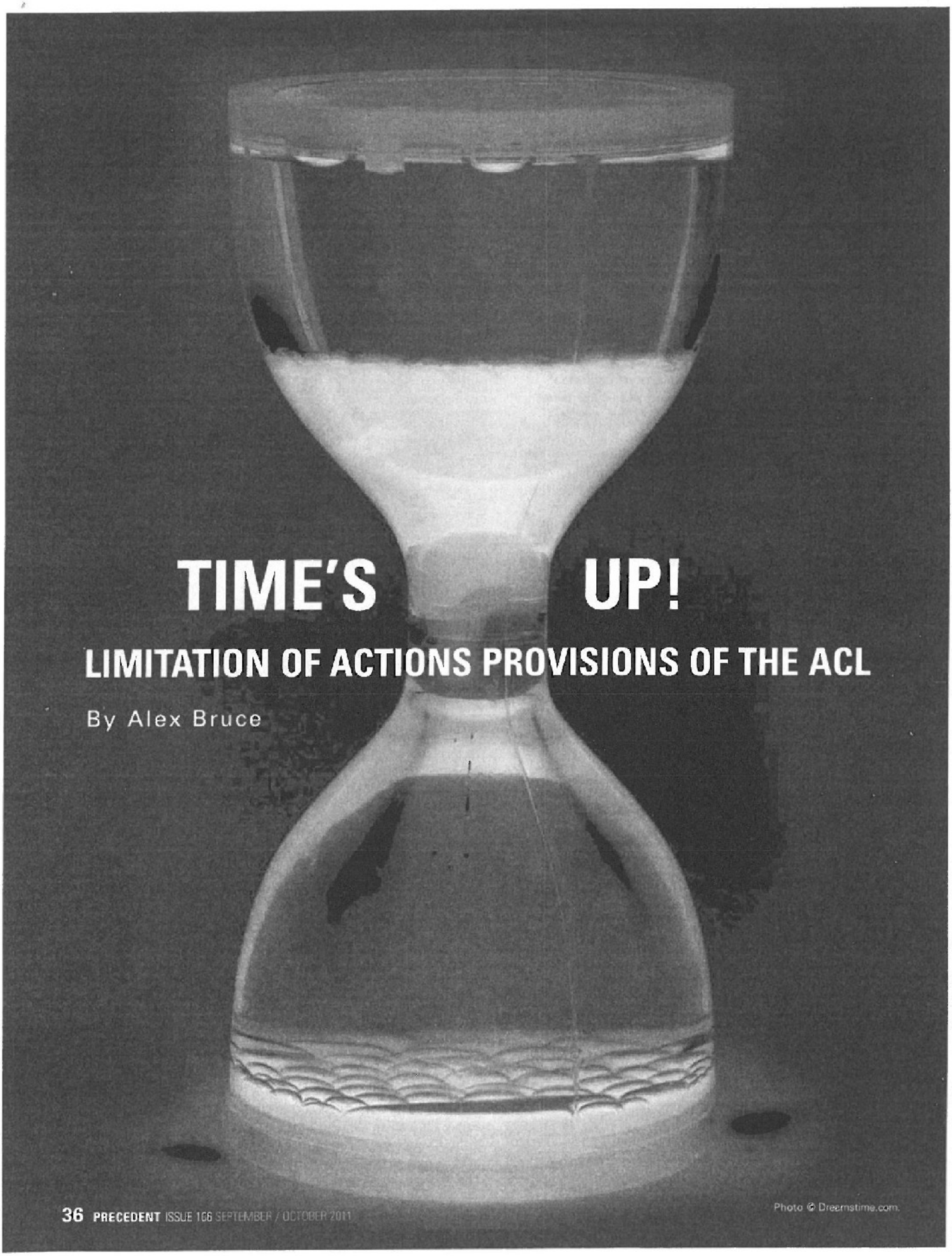

TIME'S UP!

LIMITATION OF ACTIONS PROVISIONS OF THE ACL

By Alex Bruce

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Many of the new provisions of the Australian Consumer Law (the ACL) and the causes of action provided to consumers by the ACL also contain limitation provisions.

However, identifying the various limitation provisions in the ACL and their effect is not always easy. The purpose of this practice-oriented article is to:

- clearly identify the express limitation of action provisions in the ACL;
- contrast those provisions of the ACL that, while not containing express limitation of actions provisions, nevertheless incorporate time provisions as an element of the cause of action;
- explain the way case law characterises limitation of actions provisions in the ACL; and
- given that characterisation, explore the implications for procedural challenges to causes of action under the ACL that can be made under the Federal Court Rules (the FCRs) and the *Federal Court of Australia Act* 1976 (Cth) (the FCA).

This article therefore orients itself toward the technical and procedural issues flowing from correctly identifying and characterising limitation provisions in the ACL, rather than with substantive law (such as when causes of action accrue).[1]

IDENTIFYING THE LIMITATION PROVISIONS

Chapter 5 of the ACL is the principal source of remedies available to consumers who have suffered loss or damage by another person in breach of a provision of the ACL.[2] Parts 5-2 and 5-4 of Chapter 5 contain the bulk of the applicable remedies.

These include:

(a) injunctive relief – ACL s232;
(b) damages – ACL s236;
(c) compensation orders – ACL ss237-245; and
(d) remedies against suppliers of goods or services for breach of the consumer guarantees regime – ACL ss259-277.

The limitation provisions associated with these remedies are indicated in the following table.

Remedy	Limitation Period
Injunctions – ACL s232	Not specified
Damages – ACL s236	6 years after the day on which the cause of action accrued
Compensation orders – ACL s237	6 years after the day on which the cause of action accrued or the declaration made
Actions against manufacturers of goods – failure to comply with consumer guarantee – ACL s271-272	3 years after the day on which the affected person first became aware or ought reasonably to have become aware that the relevant guarantee has not been complied with
Indemnification of Suppliers by Manufacturers – ACL s274	3 years after the earliest of (a) the day on which the supplier discharged liability to consumer or (b) the day on which the consumer commenced proceedings against the supplier
Actions against manufacturers of goods with safety defect – ACL s143	'Defective Goods Action' – 3 years after the time the person has become aware or ought reasonably to have become aware of (a) the loss (b) the safety defect and (c) the identity of the manufacturer of the goods.
Actions in respect of industry Codes of Conduct – CCA Part IVB, s82(2)	6 years after the day on which the cause of action accrued
Claims for damages or compensation for death or personal injury – CCA Part IVB, s87E, 87F	3 years after the 'date of discoverability'

Three features of the information in the table above are noticeable:

(a) there is no express limitation period applicable to injunctive relief;
(b) there are provisions of the *Competition and Consumer Act* 2010 (Cth) that continue to provide remedies to some consumers; and
(c) there are differences in both the time provided and the expression of the limitation provision.

CAUSES OF ACTION THAT INCLUDE A TIME PERIOD AS AN ELEMENT

What is missing from the table above are those causes of action under the ACL that do not contain an express limitation of actions provision but nevertheless include a time limit as an element of the contravention. These in-built time periods can function to limit the availability of the cause right or remedy in the ACL to the consumer. Three of these are relevant. >>

Liability of consumers for unsolicited supplies

Consumers who receive unsolicited goods are not liable to pay for those goods and are not liable for inadvertent loss or damage to those goods during 'the recovery period'. And after the 'recovery period', the sender of unsolicited goods is not able to institute proceedings to recover the goods.

The recovery period is defined in ACL s41(4) as either the period of three months starting on the day after the consumer received the goods, or the period of one month after the consumer gives notice providing details to the supplier about where the goods may be collected.

This recovery period is not an express limitation provision, but it nevertheless functions to limit the ability of a supplier of unsolicited goods both to institute proceedings to recover those goods and/or take action against the consumer for damage to those goods.

> Carefully identifying and understanding the express limitation of actions provisions in the ACL is crucially important in managing consumer protection litigation.

Terminating unsolicited consumer agreements

ACL Chapter 3, Part 3-2, Division 2 is a new addition to the federal consumer protection regime. The regime attempts to regulate the negotiation, formation and termination of unsolicited consumer agreements. These forms of agreement were previously regulated through state and territory *Door to Door Sales Acts*.

ACL s82 provides consumers with the ability to terminate an unsolicited consumer agreement within the 'termination period'. An attempt to terminate an unsolicited consumer agreement outside the relevant termination period is ineffective.

Again, the termination period is not an express limitation provision, but it does function to limit the time within which a consumer may exercise her or his right to terminate an unsolicited consumer agreement.

The termination period is defined in ACL s82(3) and varies from ten days to six months, starting at the start of the first business day after the day on which the agreement was made, depending on whether there has been a breach of the ACL by the supplier.

Ability of consumers to reject goods: consumer guarantees

The ACL replaces the former 'implied terms' regime contained in Part V, Div 2 of the *Trade Practices Act* 1974 (Cth) with a series of consumer guarantees. Where there is a major failure by a supplier to comply with a consumer guarantee, ACL s259(3) provides that the consumer may reject the goods. However, there are limitations on the time the consumer has in which to reject those goods.

That limitation is created by ACL s262(2) in providing for a 'rejection period': the time within which the consumer must notify the supplier of her or his intention to reject the goods. Section 262(2) does not define a specific time limit in the way that other provisions of the ACL do. It simply states that the rejection period is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with the consumer guarantee to become apparent. Whether a period of time is reasonable depends on the factors in ACL s262(2)(a)-(d).

LEGAL CHARACTERISATION OF EXPRESS LIMITATION PROVISIONS

Having identified the principal express limitation periods in the ACL, how have the courts characterised them? In *Australian Iron & Steel v Hoogland* (1962) 108 CLR 471, Justice Windeyer drew a distinction between statutes of limitation which operate to prevent the enforcement of rights of action independently existing, and limitation periods within a statute and annexed to a right created by that statute.

Where a time limit is imposed by a statute that also creates a new cause of action, it has a purely procedural character. This is the nature of the limitation period in most of the limitation provisions in the ACL identified above.

This was also the basis of the reasoning of the full Federal Court in *State of Western Australia v Wardley Australia Ltd* (1991) ATPR 41-131 *(Wardley Australia)* where Justices Spender, Gummow and Lee stated [at 52,927-52,928]:

> 'In our view, in stating that an action under subs(1) may be commenced at any time within the three-year time limit specified in s82(2), that latter provision is to be regarded as having a procedural character. That is to say, s82(2) is a condition of the remedy rather than an element in the right and prerequisite to jurisdiction which cannot be waived. It follows that it is for a defendant to assert non-compliance, rather than for a plaintiff to assert compliance with s82(2) as an element of the cause of action.'

The observations are directly applicable to s236(2) of the ACL, which mirrors the wording of the former s82(2) of the TPA.

Other limitation periods in the ACL relating to the manufacturer's liability regime in ACL Chapter 5, Part 5-4, Div 2 and the manufacturer's liability for goods with safety defects in ACL Chapter 3, Part 3-5 function to similar effect. The court in *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2001] FCA 703 (12 June 2001) stated [at 36]:

> 'As a matter of construction, therefore, neither s74J nor s75AO operates to extinguish the causes of action to which it applies.'

In reaching this conclusion the court drew upon established authorities.[3]

It is important to keep in mind that this characterisation applies only to the explicit limitation periods in the ACL such as ACL s236(2). It does not apply to the in-built time limits attached to the liability of the consumer under the unsolicited supplies regime; the ability of consumers to terminate unsolicited consumer agreements; and the ability of the consumers to reject goods under the consumer guarantees regime.

This characterisation of the limitation periods in the ACL has important implications for procedural challenges to causes of action under the ACL.

IMPLICATIONS FOR PROCEDURAL CHALLENGES

All rules of court, whether in the form of the Uniform Civil Procedure Rules in states or territory jurisdictions or the Federal Court Rules (FCRs) in the federal jurisdiction, permit a defendant or respondent to challenge the adequacy of the plaintiff/applicant's pleadings.

In relation to limitation provisions, the most obvious include:

- one of the parties seeks an order for summary judgment under s31A of the *Federal Court of Australia Act* 1976 (Cth) on the basis that the other party has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding;
- one of the parties (usually the respondent) filing an interlocutory motion for dismissal brought under O20 r5(1)(a) or (b) of the FCRs on the basis that the cause of action is frivolous, vexatious or an abuse of process;
- a challenge may be made where one of the parties (usually the plaintiff) seeks an order under O13 r2 FCR amending its application and Statement of Claim to include a new cause of action that the respondent then alleges is time-barred; or
- a respondent simply pleading the limitation issue in its defence.

Because the express limitation provisions in the ACL function as a condition of the remedy rather than an element in the right and prerequisite to jurisdiction, challenging a cause of action under the ACL on the basis of non-compliance with a limitation provision raises several unique procedural issues. These procedural issues are discussed below.

Interlocutory applications to strike out time-barred cause of action

A respondent to a cause of action under the ACL arguing at an interlocutory stage in the proceedings that the action should be struck out on the basis of a limitation point faces some difficulty.

Courts have consistently expressed reluctance to resolve limitation issues on interlocutory challenges. The clearest expression of this reluctance is found in the comment of the High Court in *Wardley Australia Ltd v Western Australia* (1992) ATPR 41-189 where the majority stated [at 40, 575]:

> 'We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question.'

These comments have been echoed and applied to varying degrees by courts since – see, for example, *National Mutual Life Association Australasia Ltd v Reynolds* (2000) FCA 26; *The Bell Group Ltd v Westpac Banking Corporation* (2000) 173 ALR 427 (at para 103); and *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2001] FCA 703 (12 June 2001) (at para 40).

Despite these comments, courts have struck out time-barred proceedings in 'very clear' cases – see *Magman International Pty Ltd v Westpac Banking Corporation* (1992) ATPR 41-161. What can be determined is that where it is very clear that the relevant limitation period has expired, the court will consider that it has power to strike out a pleading.

This does not violate the warning in *Wardley Australia* because, as the court in *Saunders v Glev Franchisees Pty Ltd* (1996) ATPR 41-450 observed [at 41,519]:

> 'What the High Court in *Wardley* was cautioning against was deciding an uncertain limitation question in an interlocutory context... the limitation question here is not of the "kind under consideration" in *Wardley*. In any event, it is in my view a very clear case.'

If a cause of action can be struck out at an interlocutory stage in a very clear case, what might those cases be? >>

Attacking a cause of action outside the limitation period as disclosing no reasonable cause of action

If an applicant is seeking damages under ACL s236(1) to recover loss suffered as a result of, for example, misleading or deceptive conduct, and the six-year limitation period has expired, can a respondent seek an order for summary judgment under s31A of the FCA?

Section 31A was inserted into the FCA by the *Migration Litigation Reform Act* 2005 (Cth) and provides that an applicant can seek summary judgment where the respondent has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding. The background to the introduction of s31A of the FCA was explained by the High Court in *Spencer v Commonwealth* (2010) 269 ALR 233 at 240-1.

Prior to the 2005 amendments, O20 r2(1(a) of the FCRs provided the court with power to stay or dismiss a proceeding on the basis that it disclosed no reasonable cause of action. Accordingly, relevant case law concerns the former FCRs.

In *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398, Donaldson LJ stated [at 404-405]:

> 'Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts. Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the court and support his application with evidence. But in no circumstances can he seek to strike out an action on the ground that no cause of action is disclosed.'

Because limitation provisions in statutes such as the ACL are not part of the essential elements of an applicant's cause of action, compliance with them is not a condition precedent to the institution of proceedings. The full court in *Commonwealth v Mewett* (1995) 140 ALR 99 explained [at 104]:

> 'Compliance with a limitation period under a true statute of limitations does not form part of the essential elements of a cause of action... nor is compliance with the time limit a condition precedent to the exercise of the right... Once a relevant limitation period has expired, it is irrelevant until such time as a defendant raises the plea in bar to the remedy. Otherwise the question of limitation does not arise for consideration by the court.'

However, where an applicant's cause of action is flawed on several grounds, including expiration of a limitation period, then an order under s31A of the FCA can be sought. For example, in *Lim v Rail Corporation New South Wales* [2011] FCA 261, an action by Ms Lim under the former *Trade Practices Act* 1974 (Cth) was summarily dismissed under s31A of the FCA on application by Rail Corporation New South Wales.

Ms Lim's causes of action were not only outside the relevant limitation provision but were also misconceived, since the Rail Corporation was entitled to shield of the Crown immunity from consumer protection claims under the TPA.[4]

Without more fundamental legal problems with the foundations of an applicant's case, a respondent must therefore attempt to argue that the institution of proceedings outside the ACL six-year time limits is frivolous, vexatious or an abuse of process.

Attacking a cause of action outside the limitation period as frivolous or vexatious

There is authority for the proposition that in a 'very clear case' of an action instituted out of time, a respondent can attempt to have the action struck out on the basis that it is frivolous or vexatious. In *The Bell Group Ltd v Westpac Banking Corporation* (2000) 173 ALR 427 it was argued (unsuccessfully) that the action commenced out of time was instituted to fabricate federal jurisdiction.

However, given the non-extinguishing nature of the limitation provision in ACL s236(1), it would appear to be difficult for a defendant to plead that the mere institution of proceedings out of time by the plaintiff is either vexatious or frivolous.

This was the basis of the reasoning of the court in *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2001] FCA 703 (12 June 2001) that stated [at 38]:

> 'To plead a cause of action which is, on the face of it, out of time cannot, without more, amount to an abuse of process where the expiry of the limitation period does not extinguish the cause of action. For until the respondent has pleaded it is not known whether the statutory time bar will be raised. And if the time limitation is pleaded, the applicant may raise in reply some plea such as waiver or estoppel on the part of the respondent.
>
> 'It is not always the case that a respondent will plead the limitation point.
>
> In some cases, particularly when the respondent has been aware of the applicant's concerns for a long time and that action is a possibility, it may regard it as inappropriate to raise the plea. For the same reasons, it cannot be said that the commencement of proceedings out of the time defined by a non-extinguishing limitation provision is frivolous or vexatious.'

Attacking an application to amend pleadings to include a cause of action outside the limitation period

A defendant/respondent is now unable to rely on the rule in *Weldon v Neal* (1887) 19 QBD 394 in relying on O13 r2 of the FCRs to challenge an application to amend pleadings to add a time-barred cause of action. Despite some continued confusion and argument to the contrary (see *The Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia* (1997) ATPR 41-565), the rule in *Weldon v Neal* has been overcome by amendments in 1994 to the *Federal Court of Australia Act* 1976 and then to the FCRs themselves.

These amendments were considered necessary to

overcome the effect of obiter remarks of Justice Toohey (with whom Justice Deane expressly agreed) in *Wardley Australia Ltd v The State of Western Australia* that the terms of O13 r2 were not wide enough to permit the court to amend pleadings to add a new cause of action outside the limitation provision in the TPA/CCA.

There should now be no doubt that the court does have power under O13 r2 to allow a plaintiff to seek an order allowing amendments to pleadings that would have the effect of adding a new cause of action outside the relevant limitation period in the TPA – see *Harris v Western Australian Exim Corporation* (1995) ATPR 41-412.

Where a plaintiff/applicant seeks an order to amend his or her pleadings under O13 r2 of the FCRs to include a new cause of action that might be outside the limitation period, a respondent might attempt to argue bad faith. In effect, an applicant attempts to argue that the respondent is seeking to add the time-barred cause of action for some ulterior motive.

In *Australian Competition and Consumer Commission v Pacific Dunlop Limited* (2001) ATPR 41-823, the ACCC attempted to amend its pleadings to seek orders that the respondents alleged were statute barred. The respondents alleged (*inter alia*) that the ACCC's application was made in bad faith. While the court found that no time limit in fact applied, it stated [at 43] that even if the time bar did apply, O13 r2(3) would have permitted the court to make the amendment.

CONSEQUENCES OF FAILING TO PLEAD EXPIRATION OF IMITATION PERIOD

If a respondent fails to plead the limitation period in defence, or seek to have the issue determined as a preliminary issue under O20 r5 of the FCRs, the respondent is taken to have waived his or her right to plead the limitation period as a defence.

In *State of Western Australia v Wardley Australia Ltd* (1991) ATPR 41-131, the full court of Justices Spender, Gummow and Lee stated [at 52,928]:

> 'The need for compliance with sub-s 82(2) may be waived by the defendant and an estoppel may prevent the defendant denying such a waiver. If the defendant fails to plead the limitation, this may be taken as a waiver of the need for compliance with sub-s 82(2).'

Similar comments were made by the court in *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2001] FCA 703 (12 June 2001) at [37].

CONCLUSION

Carefully identifying and understanding the nature of the express limitation of actions provisions in the ACL is crucially important in managing consumer protection litigation. In this article, I have identified the principal limitation of actions provisions expressly provided for in the ACL. I have also identified those causes of action in the ACL where a time period is an essential element in pleading the cause of action.

The difference between these two forms of provisions lies in the way courts have characterised limitation of actions provisions initially under the former *Trade Practices Act* 1974 (Cth) and now under the *Competition and Consumer Act* 2010 (Cth) and the ACL. Decisions such as *Australian Iron & Steel v Hoogland* (1962) 108 CLR 471 clearly characterise these limitation of actions provisions as a condition of the remedy, rather than an element in the cause of action.

This characterisation of the express limitation provisions stands in contrast to those provisions of the ACL that do not contain an express limitation of actions provision but nevertheless include a time limit as an element of the contravention. Satisfying the temporal requirements of these provisions does function as an element in the cause of action under the ACL.

Challenging ACL causes of action under the *Federal Court of Australia Act* 1976 (Cth) or the FCRs therefore raises important procedural issues. Generally speaking, courts are reluctant to strike out a cause of action on a limitation point at an interlocutory stage. And because the limitation provisions in the ACL do not function as an element in the cause of action, it is not possible to challenge a pleading *solely* on the basis that it discloses no reasonable cause of action.

Nor is it likely that a cause of action under the ACL that is outside the limitation period will be struck out *solely* on the basis that it is frivolous, vexatious or an abuse of process.

Instead, the cases suggest that the most appropriate challenge to a cause of action under the ACL that is outside an express limitation provision is to plead the limitation by way of defence. In turn, this underscores the importance of both identifying relevant limitation periods in the ACL and understanding their nature. A failure by a respondent to plead the limitation point in defence amounts to a waiver by that respondent to require compliance with the limitation provision. And the cause of action may then proceed because the limitation period does not function as an element of right, or remedy. ■

Notes: 1 The substantive law underlying limitation provisions in the TPA was the subject of an excellent article by Gronow, 'Limitation of Civil Actions under the *Trade Practices Act* 1974', (1998) 6 *Competition and Consumer Law Journal* 1. **2** However, this is not always the case. In addition, there are other causes of action under the ACL that do not contain express limitation of actions provisions but are nevertheless limited in their scope by time periods as an element of the contravention. **3** See *White v Eurocycle Pty Ltd* (1995) 64 SASR 461 and *Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia Pty Ltd* (1997) 146 ALR 120. **4** Today the Rail Corporation would be subject to the ACL as an applied law of the state of New South Wales – *Fair Trading Act* 1987 (NSW) s36.

This article has been peer-reviewed in line with standard academic practice.

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