

APPENDIX 6

THE STATUTE OF LIMITATION

Limitation periods¹

Civil proceedings

Each Australian jurisdiction has a limitation statute setting out the rules governing the period of time in which a plaintiff must commence a civil proceeding. However, the statutes do not cover the field. For example, some classes of action may be specifically excluded from the limitation statute², some actions may be governed by other legislation.

The general limitation statutes in each jurisdiction are:

- *Limitation Act 1985* (ACT): Actions for tortious claims must be commenced within six years. The extension provisions are similar to those in the Victorian legislation. They apply only to actions for personal injury. The only additional factor which must be considered by the court in deciding whether to allow an application for extension is the conduct of the defendant after the cause of action accrued to the plaintiff.
- *Limitation Act 1969* (NSW): Actions for tortious claims must be commenced within six years. However, personal injury actions accruing on or after 1 September 1990 must be commenced within three years. There are three sets of provisions in the NSW limitation legislation governing extension of the limitation period. One applies to causes of action for personal injury accruing prior to 1 September 1990; another applies to actions for personal injury accruing on or after 1 September 1990 and the third deals with actions for personal injury whenever arising, provided there was latent injury involved.
- *Limitation Act 1971* (NT): Actions for tortious claims must be commenced within three years. Extension provisions in the Northern Territory are very similar to those in South Australian legislation.
- *Limitation of Actions Act 1974* (Qld): Actions for tortious claims, where the damages claimed do not consist of or include damages in respect of personal injury, must be commenced within six years. Actions must be brought in three years for damages of negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or otherwise) in which the damages claimed consist of or include damages for personal injury or for the injury resulting from the death of any person.

1 The information in this appendix has been derived from a number of sources: the Queensland Law Reform Commission report, *Review of the Limitation of Actions Act 1974*, Marfording, A, 'Access to justice for survivors of child sexual abuse', *Torts Law Journal*, (1997) 5, pp.221-54, the Department of Immigration and Multicultural Affairs, and the Department of the Parliamentary Library.

2 For example, criminal proceedings are specifically excluded from the *Limitation Act 1981* (NT), section 6(3)(b) and from the *Limitation of Actions Act 1974* (Qld), section 6(3)(a).

Extension of time for the commencement of an action can be given if a material fact of a decisive character relating to the right of action was not within the plaintiff's means of knowledge until some time after the commencement of the final year of the limitation period and there is evidence to establish the right of action apart from a defence based on the expiration of the limitation period.

- *Limitation of Actions Act 1936 (SA)*: Actions for tortious claims must be commenced within six years, except for actions for personal injuries where the application limit is three years. A court may extend the time for instituting an action; doing any act or taking any step in an action; and doing any act or taking any step with a view to instituting an action. An extension of time may be granted only if, in all the circumstances, it is just to do so, and provided one of two circumstances are met.
- *Limitation Act 1974 (Tas)*: Actions for tortious claims must be commenced within six years. A Court may extend the time for bringing a personal injuries action or a dependency claim for such period as the court thinks necessary, provided the extension does not exceed six years from when the cause of action accrued. The court must be satisfied that, in all the circumstances, it is just and reasonable to permit the extension of time.
- *Limitation of Actions Act 1958 (Vic)*: Actions for tortious claims must be commenced within six years, except actions for personal injuries consisting of a disease or disorder contracted by any person. In these cases, the limitation period is still six years, but time does not begin to run until the date on which the plaintiff first knew he or she had suffered the injury and that the injury was caused by the defendant. A court may extend the limitation period for an indefinite period, but only in respect of actions which include damages for personal injuries. The Court may grant such an extension where it is 'just and reasonable so to do'. There is no requirement as to ignorance of a material fact, and an applicant is not required to provide evidence establishing a prima facie case. There are a number of matters to be considered in deciding whether to grant an extension of time.
- *Limitation Act 1935 (WA)*: Actions for tortious claims must be commenced within six years. The only type of claim for which the limitation period may be extended is an action in respect of personal injury or death caused by the inhalation of asbestos.

In the late 1990s at least two Australian jurisdictions reviewed their limitations statutes:

- Law Reform Commission of Western Australia – *Report on Limitation and Notice of Actions*, January 1997, and
- Queensland Law Reform Commission – *Review of the Limitation of Actions Act 1974 (Qld)*. Report No.53, September 1998.

Limitation periods for civil proceedings and survivors of child sexual assault

A matter of ongoing concern has been the application of limitation periods in relation to victims of child sexual assault. Depending on the circumstances, the sort of civil action instituted by a survivor of child sexual assault might include an action in battery, assault, false imprisonment, negligence, breach of duty of care or breach of fiduciary duty. The type of action instituted by the plaintiff will affect what limitation period applies. Looking at the situation in each jurisdiction is further complicated because limitation statutes in each categorise civil actions and their limitation periods in different ways. For example, in Queensland, actions for damages in negligence, trespass, nuisance or breach of duty in respect of personal injury have a limitation of period of three years. In Western Australia the limitation period is four years for an action in battery and six years for all other tortious claims.³

Provisions in limitations statutes do enable the limitation period to be extended in some circumstances. For example the *Limitation of Actions Act 1974* (Qld) provides that the limitation period for an action based on a childhood injury does not start to run until the person has legally become an adult. It is also possible for a limitation period to be extended if the action is based on fraud ie where it is argued that the adult abuser fraudulently concealed the nature of the abuse. The Queensland Law Reform Commission considered how best to deal with claims relating to child sexual abuse or domestic violence in the context of limitation statutes and recommended that the issue should be dealt with as a matter of judicial discretion and not be the subject of special legislative rules.

Proceedings to recover lost wages

Existing legal redress

Taking existing avenues of legal redress first, the situation in Queensland, Western Australia and Victoria has been examined to indicate what options may be available and the issues that arise. In order to sue for unpaid wages, a claimant would be required to establish the elements of that claim, including the existence of a contract of employment. Relevant limitation statutes would provide a substantial hurdle. In the absence of particular facts to which the relevant laws can be applied, the following advice is indicative only.

Contract

In each of Queensland, Western Australia and Victoria, an action in contract must generally be commenced within six years. There are some, albeit limited, possibilities of extension of this period. If the cause of action accrued while the claimant was a child, then in each of those States an action must be commenced within six years of the claimant ceasing to be under the legal disability of being a minor. None of the other possibilities of extension appear immediately to be of relevance.

In short, it appears that an action in contract would generally be statute-barred.

3 A tort is a civil wrong.

Industrial awards

Assuming a child migrant was the subject of an industrial award in relation to his or her employment, the following appears to be the case. In Queensland, applications may be made for payment of unpaid wages within 6 years after the amount claimed became payable. In Western Australia, the same limitation rules apply as for actions in contract. In Victoria an action would have to be brought under the *Commonwealth Workplace Relations Act 1996*, which requires an employee to sue for recovery of unpaid wages within 6 years.

In short, it appears that an action under industrial relations laws would be statute-barred.

Criminal proceedings

In general, limitation statutes do not apply to criminal proceedings. Crimes acts and statutes dealing with summary jurisdiction usually set out the general time limits which govern those proceedings. The statutory period in which proceedings must be commenced differs between different offences and different jurisdictions. In general, a limitation period applies to minor or summary offences. The limitation period in respect of criminal matters does not affect the jurisdiction of the court but provides a good defence to the charge: *Parisiennes Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 376, 389; [1938] ALR 119. Further, the laying of an information within the limitation period is not an element of the offence: *Rabczynski v Morrison* [1988] WAR 71.

Criminal proceedings are generally commenced when an information, complaint or charge is laid before a magistrate or justice. The language of the statutes cited below varies in relation to how the commencement of proceedings is described and how the relevant offences are referred to—for example, in some jurisdictions references are made to summary offences, in other jurisdictions reference is made to simple offences, or expiable offences. Sometimes limitation periods apply according to the maximum penalties applicable.

What appears below is a summary of limitation periods that generally apply in relation to criminal offences. For particular criminal offences, other statutes may stipulate a particular limitation period that applies to that particular criminal offence.

Commonwealth

In general, section 15B of the *Crimes Act 1914* (Cwlth) applies to the limitation of criminal proceedings.

In the case of a prosecution against an individual:

- if the maximum penalty that can be imposed for an offence committed by an individual includes imprisonment for more than 6 months in the case of a first conviction – there is no limitation period
- in any other case – a prosecution must be commenced within one year of the commission of the offence.

In the case of a prosecution against a corporation:

- if the maximum penalty includes a fine of more than 150 penalty units (1 penalty unit=\$110) – at any time

- in any other case – within 1 year of the commission of the offence.

In the case of a prosecution against an individual for an offence of aiding and abetting⁴ an offence committed by a corporation:

- if the maximum offence that can be imposed on the corporation in respect of the primary offence includes a fine of more than 150 penalty units in the case of a first conviction – the prosecution can be commenced at any time
- in any other case – within a year after the individual has committed the (aiding and abetting) offence.

Section 15B(3) provides that a Commonwealth law can stipulate a longer time for the commencement of a prosecution for a particular offence.

New South Wales

Under section 56 of the *Justices Act 1902* (NSW) in the case of an offence punishable on summary conviction, an information or complaint must be made within 6 months, unless some other time is specified by the particular statute dealing with the offence.

Victoria

Under section 26(4) of the *Magistrates' Court Act 1989* (Vic) the time limit for commencing proceedings for a summary offence, unless otherwise provided, is 12 months after the date on which the offence is alleged to have been committed.

Western Australia

Under section 51 of the *Justices Act 1902* (WA) unless some other time is stipulated, the time limit for laying a complaint in the case of a simple offence⁵ is 12 months after the alleged offence. See also section 574(1) of the Criminal Code (WA).

Australian Capital Territory

Under section 31 of the *Magistrates Court Act 1930* (ACT) unless otherwise provided:

- where the maximum term of imprisonment is more than 6 months for a first conviction, the prosecution may be commenced at any time after the offence is committed
- where the maximum term of imprisonment does not exceed 6 months for a first conviction, the prosecution must be commenced within one year after the commission of the offence
- where the punishment is a pecuniary penalty and no term of imprisonment, the prosecution must be commenced within 1 year after the commission of the offence.

4 A secondary offence.

5 A 'simple offence' is defined in section 4 as any offence, indictable or otherwise, punishable on summary conviction by a fine, imprisonment or otherwise.

Northern Territory

Under section 52 of the *Justices Act 1928* (NT) if no time is specified in a particular statute creating the offence the complaint must be laid within 6 months from the date of the alleged simple offence.⁶

Queensland

Under section 52 of the *Justices Act 1886* (Qld), a complaint in the case of a simple offence⁷ or breach of duty⁸ must be made within 1 year from the time the offence was committed unless some other time is specified.

South Australia

Under section 52 of the *Summary Procedure Act 1921* (SA), unless otherwise indicated, a prosecution for a summary offence must be commenced:

- in the case of an expiable offence⁹ – either within 6 months from the date the expiation notice was given to the person or, if the expiation notice was not given to the person, within 6 months from the date of the alleged offence
- in the case of an offence that is not an expiable offence, proceedings for a summary offence must be commenced within 2 years from the date of the alleged offence.

Tasmania

Under section 26(1) of the *Justices Act 1959* (Tas) a complaint must be made within 6 months of the commission of the alleged simple offence¹⁰ or breach of duty¹¹, unless otherwise indicated in the relevant statute. However, notwithstanding this provision:

- if the matter could also give rise to an indictable offence and the person has been charged with the indictable offence within 6 months from the alleged commission of the offence (or other period specified in a statute dealing with that particular offence) – a complaint for a simple offence can be made within 12 months from the date the offence was alleged to have been committed

6 A ‘simple offence’ is defined in section 4 as an offence for which a person may be imprisoned or fined or both but does not include a minor indictable offence which can only be heard and determined in a summary way.

7 A ‘simple offence’ is defined in section 4 as any offence, indictable or not, punishable on summary conviction by a fine, imprisonment or otherwise.

8 A ‘breach of duty’ is defined in section 4 as any act or omission (not a simple offence or non-payment of a mere debt) on complaint of which a magistrate can order the payment of money or make an order for a person to do or not do an act.

9 South Australian statutes may provide that a minor offence can be expiated by payment of a fine after a person has been served with an expiation notice. An example of an expiable offence in South Australian law is a minor cannabis possession offence.

10 A ‘simple offence’ is defined in section 3 as any offence, indictable or not, punishable on summary conviction before a justice by a fine, imprisonment or otherwise.

11 A ‘breach of duty’ is defined in section 3 as any act or omission (not being a simple offence) on complaint of which a justice can make an order for the payment of money or for the doing or not doing of an act.

- if the matter giving rise to the simple offence could also give rise to an indictable offence and the person has been charged with the indictable offence within the relevant time and has consented to the making of the complaint – a complaint for a simple offence may be made against a person at any time.

Churches and sexual abuse

Generally speaking, if a church has corporate status – ie legal personality – it can be sued in contract or tort (ie civil proceedings).

If a church as corporate status and the relevant criminal procedure statute provides that a corporation may be found guilty of a criminal offence, then it may be able to be prosecuted. However, the ability of a corporation to be prosecuted will depend on whether there is an express or implied contrary intention in the statute. For example, there is disagreement about whether a corporation can be found guilty of some offences against the person – including sexual assault.

It is not suggested that it would be a simple matter for a church that has legal personality to be successfully sued or prosecuted. In relation to civil proceedings, for example, there may be problems with evidence, statutes of limitations or even identifying the appropriate incorporated entity.

Legal personality

The law recognises natural persons, corporations and others as having legal personality (being legal entities) – consequentially endowing them with legal rights and responsibilities. Legal personality involves the ability to own property, enter contracts, sue and be sued and to be prosecuted for a criminal offence in its own name (although there are limitations on criminal prosecutions of corporations). Because legal personality is a creation of the law, its content varies – for example, the legal personality attributed to a corporation differs from that attributed to a natural person. Some natural persons eg children and others lacking ‘capacity’ do not have all the attributes of legal personality.

The ability to sue or prosecute a church depends, in part, on how a church is established. There are various means of doing this, including:

- a church may be established as an unincorporated association. If this is the case, the church will have no legal personality that is distinct from that of its members and therefore there will be difficulties for a person who wishes to sue in contract or tort. A plaintiff in this situation would have to sue the members of the association.
- in all Australian jurisdictions churches can be incorporated as non-profit voluntary associations. Incorporation can occur under Associations Incorporations Acts in each State and Territory. Once a religious association has become incorporated it is a legal entity and can enter contracts; buy, sell & mortgage property and sue or be sued in tort in the name of the association.
- a religious association may also be incorporated under corporations law as a company limited by guarantee. The religious association then becomes a body corporate and can then hold property, sue and be sued.
- an incorporated or unincorporated trust. These trusts are established to manage real and personal property and vest the association’s property in trustees.

- a religious trust may be established by statute. Such a statute may establish a trust corporation which holds property in trust for the particular church. An example is the *Roman Catholic Church Property Trust Act 1911* (WA).

Civil proceedings

Churches have certainly been sued civilly in Australia. In *Taylor v. Trustees of the Christian Brothers; Reidy v. Trustees of the Christian Brothers* (1994) Aust Torts Reports 81-288, the plaintiffs were two child migrants brought from England to Australia who alleged that they had been subjected to physical and sexual abuse in Christian Brothers institutions and had suffered physical injury as a result. In this case, the defendants were:

- the Trustees of the Christian Brothers, a body corporate incorporated under the *Roman Catholic Church Community Lands Act 1942* (NSW). The trustees held land and possibly other property on behalf of the Congregation of Christian Brothers. The plaintiffs' statement of claim stated that the Trustees had control of the relevant institutions at the relevant time.
- Gerald Faulkner, the Provincial of the Holy Spirit Province. The statement of claim identified this person as the successor in title and law of the Provincial Superiors of the Congregation of Christian Brothers who managed and controlled the relevant institutions and relevant Christian Brothers' activities, and
- Barry James Hickey, the Roman Catholic Archbishop of Perth. The statement of claim alleged that this person was the successor in title and law of the Archbishop at the relevant time.

The claims appear to have failed for statute of limitations reasons.

Other cases have included *Trustees of Christian Brothers v. Cardone*, unreported, Supreme Court of the ACT, 20 June 1995 in which a former pupil of St Edmunds College, Canberra sued the Trustees of the Christian Brothers, a statutory corporation, for damages as a result of an injury he suffered at the school. In this case, the appeal court (the ACT Supreme Court) increased Cardone's general damages to \$50,000. The judgment for Mr Cardone amounted to \$283,488.34.

In February 2001, in *Hogan v. The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Fricot*, a NSW jury awarded damages of \$2.5 million. The plaintiff claimed that his right hand was permanently injured when he was strapped on 8 occasions on 16 March 1984 at St John's College, Lakemba. He sued the Trustees of the Roman Catholic Church and Denis Fricot, the discipline master. He claimed the punishment had been excessive and unreasonable and that the defendants had breached their duty of care to him.¹²

12 ' \$2.5m payout over school punishment', *The Age*, 15 February 2001. On 15 February 2001, the NSW Supreme Court (Wood CJ) granted the defendants a stay of execution pending their lodgement of an appeal.

The fact that a church has legal personality may still involve difficulties for a plaintiff who is seeking to identify the appropriate manifestation of that legal personality for the purposes of a civil action. For example, in *Archbishop of Perth v. 'AA' to 'DJ'; 'DJ' v. Trustees of Christian Brothers*¹³, the NSW Court of Appeal appears to have found that the claim against the statutory corporation of the Roman Catholic Archbishop of Perth established by the *Roman Catholic Church Property Act 1911* failed because the Act established the statutory corporation to hold and dispose of real and personal property and did not contemplate 'successory responsibility for tortious conduct of the type alleged'.¹⁴

Criminal proceedings

Criminal law has traditionally emphasised the idea of individual responsibility for criminal behaviour. Further, imposing the traditional criminal punishment of imprisonment on a corporation is problematic. The Gibbs Review of Commonwealth Criminal Law stated:

While a corporation is a legal person, it has no physical existence and can neither act nor form an intention, except through its directors or servants.¹⁵

Originally, corporations could only be held liable where a criminal offence was a strict liability offence—ie offences where no mental element was required. Since the early 20th century, however, Australian courts and legislatures have expanded the scope of corporate criminal liability.

It is now the case in a number of Australian jurisdictions¹⁶ that, unless the definition of an offence or its subject matter indicates otherwise, a corporation can be criminally liable as a primary offender for any offence. For example, at Commonwealth level, section 4B of the *Crimes Act 1914* (Cwlth) provides that, unless the contrary intention appears, a corporation can be found guilty of any offence including an offence which is punishable by imprisonment.¹⁷ Section 12.1(2) of the Commonwealth Criminal Code is worded similarly. However, most traditional crimes against the person will be found in State and Territory criminal law. In New South Wales, for example, the relevant provision is section 59(1) of the *Criminal Procedure Act 1986* which reads:

Unless a contrary intention appears, a provision of an Act relating to an offence applies to bodies corporate as well as individuals.

13 Cases involving claims of sexual and physical abuse perpetrated by the Christian Brothers in Christian Brothers institutions in the late 1940s and early 1950s.

14 BC9501687, unreported, 12 October 1995, per Cole JA at 22.

15 Review of Commonwealth Criminal Law. *Interim Report. Principles of Criminal Responsibility and Other Matters*, July 1990, p.293.

16 I have not checked the situation in all States and Territories.

17 Modern criminal statutes contain formulae for converting periods of imprisonment to fines.

It is immaterial how a corporation¹⁸ has achieved its corporate status. In the Victorian context Fox remarks:

It matters not how the entity acquired its corporate status. Included are companies created under the *Corporations Law*, associations incorporated under the *Associations Incorporation Act 1981*, cooperative bodies or societies established under the *Cooperation Act 1981*; corporate entities such as universities created by charter or incorporated legislatively; or organisations such as trade union or employers' associations given corporate status under the *Industrial Relations Act 1988* (Cth)...Even crown corporations may be subject to prosecution.¹⁹

'Liability is attributed to [corporations] through the conduct of employees or agents acting within the scope of their employment and the mental states of high managerial officers of the corporation.'²⁰

Corporate criminal liability for specific offences against the person such as sexual assault

Whether a corporation can be criminally liable for a criminal offence may be expressly stated or implied from the nature of that offence. While corporations may be liable for homicide²¹, it has been suggested that there are some offences against the person that cannot be committed by a corporation. An example that is sometimes given are sexual offences. While some commentators have taken issue with this view, they do suggest that the circumstances in which a corporation might be found guilty of sexual offences would be limited—this is because the relevant act must be within the scope of an employee or agent's employment before it can be attributed to the corporation. The following extract from *Howard's Criminal Law* might be useful

It may be thought that the natural limitations on the power to punish a corporation imply that there are some crimes, notably offences against the person, that a corporation cannot commit. There seems to be no warrant for this. No theoretical reason suggests itself why, if it can be within the scope of a managing director's employment to commit fraud in what he supposes are the company's interests, it should not equally well be within the scope of his employment to commit murder, or indeed any other offence, with the same object...A contrary intention [to making a corporation liable] may be express, as where an offence is defined in terms that require the principal offender to have some personal status that only an individual can possess; examples include bigamy and company code offences relating to corporate officers. A contrary intention may also be implied, a possibility sometimes governed more by individualistic presuppositions than by an assessment of

18 Of course, in general, ie unless provided for by statute unincorporated associations cannot be prosecuted but their members can be. Fox.

19 RG Fox, *Victorian Criminal Procedure 2000. State and Federal Law*, p.12.

20 *ibid*, p.12.

21 For an Australian case, see *R v. Denbo Pty Ltd* (1994) 6 VIR 157 (SC) where a corporation pleaded guilty to manslaughter.

corporate criminal capacity. Perjury and sexual offences, so it has been suggested, inherently require conduct of which only a human is capable. It is open to question, however, whether such an implication should be drawn. If a corporation is liable for unlawful homicide on the basis of a lethal act performed by a manager or employee then it is difficult to see why a corporation should not also be liable for perjury or rape on the basis of an act of perjury or rape committed by a manager or employee. The relevant act must be within the scope of employment before it can be attributed to a corporation, but that is a different issue.²²

This author notes that: ‘Although sexual offences would hardly ever be within the scope of employment, the possibility is not inconceivable, as where Vile Video Ltd engages in the business of performing actual rather than simulated sexual offences in order to enhance the realism of its films...’

Arguably, a different conclusion might be reached about other assaults—for example, physical assault.

22 B Fisse, *Howard's Criminal Law*, 5th ed, Law Book Company, Sydney, 1990, pp.608-9.

