LIMITATION ACT 2005 (WA) AND EQUITABLE ACTIONS: A FATAL BLOW TO JUDICIAL DISCRETION AND FLEXIBILITY - HOW OTHER AUSTRALIAN JURISDICTIONS MIGHT LEARN FROM WESTERN AUSTRALIA'S MISTAKES

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Abstract

There is a legislative trend towards subjecting claims for equitable relief to a statutory limitation regime. This trend reflects the policy that, in the face of the administrative fusion of the common law and equity, common law and equitable actions and remedies should be assimilated as far as possible: if the legislation applies to common law actions and remedies there is no good reason why it should not apply to equitable actions and remedies.** This article examines the recent attempt by the Western Australian state legislature to do just this in the *Limitation Act 2005* (WA). It is argued that the provisions of the *Limitation Act 2005* (WA) are, however, inadequate and unsatisfactory insofar as they deal with claims in equity. Reforms necessary to ensure a uniform, consistent, flexible and just limitation regime for all claims regardless of their jurisdictional origins are discussed.

I INTRODUCTION

Despite equity[1] being a recognised jurisdiction in the seventeenth

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** UK Law Reform Commission, *Limitation of Actions*, Consultation Paper No 151 (1997) 379-380.

1 Equity 'is the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, supplemented and amended the common law. It softened and modified many of the injustices in common law, and provided remedies where at law they were either inadequate or non-existent': R Meagher, D Heydon and M Leeming, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) [1-005].

century,[2] the earliest limitation statute[3] introduced in that century did not cover equitable claims. Limitation legislation developed in the context of common law claims and historically applied only to such actions. Typically, early limitation legislation[4] comprised a series of specified limitation periods for different types of identified common law claims. Except in limited exceptional circumstances,[5] there was no scope for these periods to be relaxed, extended or postponed. In the face of this very rigid statutory approach to delay at common law, equity developed its own doctrines to deal with dilatory conduct by plaintiffs. In typical equitable fashion, these doctrines were flexible, discretionary and fact sensitive. They were applied contextually to ensure a just outcome in all cases.

As limitation legislation in the United Kingdom and Australia passed through various stages of reform, it gradually encroached on equitable claims. Over time a number of different equitable actions were identified in limitation statutes as being subject to specified limitation periods. The reforms did not extend to all equitable claims. The result was highly unsatisfactory; the limitation statutes applied in an arbitrary, piecemeal way to some but not all equitable claims. In the context of equitable claims, the limitation regime was bedevilled by uncertainty and complexity and was undeniably in need of overhaul.

After much academic, professional, community and parliamentary investigation, discussion and debate, the Western Australian limitation laws were overhauled in 2005 with the introduction of the *Limitation Act 2005* (WA) ('the *2005 Act*'). The *2005 Act* came into operation on 15 November 2005. In reviewing and redrafting the limitation laws, the Western Australian state legislature had the benefit of almost two decades of consideration, followed by extensive recommendations for reform by the Law Reform Commission of Western Australian

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2 Indeed, in the showdown between equity and the common law in the *Earl of Oxford's case* (1615) 1 Ch Rep 1; 21 ER 485, King James I settled the rule that when principles of equity are inconsistent with the common law, equity prevails. This principle was entrenched in *Judicature Act 1873 (Imp)* s 25(11) and is to be found in *Supreme Court Act 1935* (WA) ss 24, 25.

3 *Limitation Act 1623* 21 Jac 1 c 16 (UK). A limitation statute is legislation which stipulates time limits for commencing civil legal action. If a claimant fails to bring an action within the limitation period, generally the claim is barred and the defendant can raise the expiry of the limitation period as a complete defence to the claimant's action.

4 For eg, *Limitation Act 1935* (WA). The modern limitation statutes of all the Australian States and Territories other than the Australian Capital Territory and Western Australia retain this traditional structure.

5 For eg, *Limitation Act 1935* (WA) s 38A redefines the point when a cause of action founded in tort accrues, thereby effectively extending the limitation period in asbestos-related disease cases.

('the LRCWA'),[6] as well as many more decades of consideration and recommendation by the law reform bodies of other jurisdictions both before[7] and after[8] the publication of the LRCWA recommendations in 1997 in the LRCWA Report on Limitation and Notice of Actions ('the LRCWA Report 1997').

The *2005 Act* was intended to and does incorporate all claims (whether legal or equitable) into the limitation regime. In this regard, the *2005 Act* reflects the trend towards subjecting all claims for equitable relief to a statutory limitation regime.[9] This trend embodies the policy that, in the face of the fusion of the common law and equity, common law and equitable actions and remedies should be assimilated as far as possible: if the legislation applies to common law actions and remedies there is no good reason why it should not apply to equitable actions and remedies.[10]

The question that arises in the face of the introduction of a new legislative scheme is; does it work? This article examines the impact of incorporating equitable claims into a statutory limitation scheme. As the only Australian state to have extended its limitation statute to equitable claims generally,[11] the discussion will focus on the Western Australian experience under the *2005 Act.* It will be demonstrated by reference to equitable claims based on duress and undue influence, that the provisions of the *2005 Act* remain inadequate and unsatisfactory insofar as they deal with claims in equity. Reforms necessary to ensure

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6 LRCWA, *Limitation and Notice of Actions: Latent Disease and Injury*, Project No 36 Part I (1982); LRCWA, *Limitation and Notice of Actions*, Project No 36 Part II (1985); LRCWA, *Limitation and Notice of Actions*, Project No 36 Part II (1997) ('LRCWA, Report 1997').

7 See, UK Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334; UK Law Revision Committee, *Report of the Committee on the Limitation of Actions* (1949) Cmd 7740; UK Law Reform Committee, *Twentieth Report (Interim Report on Limitation of Actions: In Personal Injury Claims)* (1974) Cmnd 5630; UK Law Reform Committee, *Twenty-first Report (Final Report on Limitation of Actions)* (1977) Cmnd 6923; New Zealand Law Commission, *Limitation Defences in Civil Proceedings*, Report No 6 (1988); Alberta Law Reform Institute, *Limitations* Report No 66 (1989); Ontario Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991).

8 See, Queensland Law Reform Commission, *Review of the Limitation of Actions Act (1974)* (Qld): Report No 53 (1998); New Zealand Law Commission, *Tidying the Limitation Act*, Report No 61 (2000); UK The Law Commission, *Limitation of Actions*, Report No 270 (2001); Commonwealth Review Panel, *Review of the Law of Negligence*, Final Report (2002).

9 UK Law Commission, *Limitation of Actions* (1997) Consultation Paper No 151, 380.

10 UK Law Commission, above n 9, 379.

11 A similar extension has been included in s 11 *Limitation Act 1985* (ACT).

a uniform, consistent, flexible and just limitation regime for all claims regardless of their jurisdictional origins are recommended.

II *Limitation Act 1935* (WA)

A *Direct Application*

The *Limitation Act 1935* (WA) ('the *1935 Act*') (like the early limitation statutes of the other Australian States and Territories) follows the traditional structure of the early English limitation laws. It comprises specified limitation periods for different types of claims. While most of the particularised claims are of common law origin, the *1935 Act* does extend to certain equitable claims. Section 24, for example, stipulates a twelve year limitation period for entry, distress or recovery of land or rent but is extended in s 4 to claims for recovery of an equitable interest in land or rent.[12] The categories of equitable claims to which the *1935 Act* applies are, however, very limited. There are many equitable claims which do not fall within the regulatory net of the *1935 Act*. For example, claims founded on undue influence or unconscionable dealing and claims for breach of fiduciary duties are not expressly subject to the statutory limitation regime under the *1935 Act*.

Under section 38(1), the limitation period for claims specified in the *1935 Act* starts running at the time that the cause of action accrues. A cause of action accrues on the 'date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact, which, ... it would be necessary for the plaintiff to prove in order to support his right to judgment'[13] regardless of the plaintiff's knowledge. Generally, the limitation periods imposed are not subject to extension or postponement.

B *Application of the 1935 Act by Analogy*

1 *Basis of the Analogy*

Although the *1935 Act* does not apply generally to all equitable claims, a court may apply a statutory limitation period by analogy to an equitable claim that is analogous to a common law claim ('the

12 Similar extensions are to be found in *Limitation Act 1969* (NSW) s 36; *Limitation of Actions Act 1974* (Qld) s 16(1); *Limitation of Actions Act 1936* (SA) ss 3, 4; *Limitation Act 1974* (Tas) s 13(1) and *Limitation of Actions Act 1958* (Vic) s 11(1).

13 *Central Electricity Generating Board v Halifax Corporation* [1963] AC 785, 805 (Lord Guest). See also, *Read v Brown* (1888) 22 QBD 128, 131; *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 245 (Wilson J).

doctrine of analogy').[14] The doctrine of analogy reflects the principle that equity follows the law.[15] Lord Westbury LC in *Knox v Gye*[16] stated the principle as follows:

> For where the *remedy* in Equity is correspondent to the *remedy* at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the *remedy* it affords the same limitation … Where a Court of Equity frames its *remedy* upon the basis of the Common Law, and supplements the Common Law by extending the *remedy* to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the *remedy* it affords.[17] (emphasis added)

Lord Westbury LC suggests that it is the equitable remedy sought that must be analogous to some form of relief at law in order to invoke the doctrine of analogy. This is the view adopted in many, but not all, of the cases.[18] On this approach a far larger number of claims are likely to be dealt with under the limitation legislation by analogy than would be the case if the analogy was drawn between the cause of action (which is the basis of the remedy) rather than the remedy itself.

Undue influence provides a useful example. While the common law often referred to the common law probate doctrine allowing a will to

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14 I C F Spry, *The Principles of Equitable Remedies* (7th ed, 2007) 419; '[h]ence it must be seen first whether there is a special statutory provision that affects directly, whether expressly or by implication, the particular equitable right that is in question. But if there is no such provision, the court may decide that the material equitable right is so similar to legal rights to which a limitation period is applicable that that limitation period should be applied to it also. In this latter case the limitation period is said to be applied by analogy'.

15 *The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2004] SASC 415.

16 (1872) LR 5 HL 656.

17 *Knox v Gye* (1872) LR 5 HL 656, 674-675; See also *Gibbs v Guild* (1882) 9 QBD 59, 74.

18 See for eg, *Friend v Young* [1897] 2 Ch 421, 431 (Stirling J): 'for where the *remedy* in equity is correspondent to the *remedy* at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute' (emphasis added). In *Cohen v Cohen* (1929) 42 CLR 91, Dixon J found that where the defendant husband was called upon to account for the actual money (notes and coins) received by him as trustee for his plaintiff wife, there being no analogous common law remedy, the plaintiff's claim was not barred 'by the direct operation of the Statute or by analogy to it'. In respect of money collected on behalf of the plaintiff wife for which the defendant husband was not specifically accountable, the limitations statute was applicable by analogy. Similarly in *Fitzgerald v Masters* (1956) 95 CLR 420, [7] a case involving a claim for specific performance of a contract for the sale of land, Dixon CJ and Fullagar J found that the case was not one 'in which a court of equity would or indeed could, "apply by analogy", or have any regard to, any statute of limitation governing legal *remedies*' (emphasis added). J Young expressed the view that 'a common law limitation period will be applied by analogy if there is a sufficient "correspondence" between the *remedies* available at common law and in equity' (emphasis added), J Young, 'Contractual Limitation Provisions' (Paper presented at the Seminar of the Law Society of Western Australia, Perth, 20 September 2006) 17.

be set aside on the grounds of 'overpowering' pressure[19] or 'coercion'[20] as probate undue influence, it is widely accepted that this doctrine resembles the common law doctrine of duress more closely than it does the equitable doctrine of undue influence.[21] It was suggested as early as 1939 that the probate doctrine be referred to as 'coercion' or 'duress' rather than 'undue influence'.[22] It follows that the doctrine of undue influence dealing with circumstances in which a plaintiff is induced into conferring a benefit on the defendant by the undue influence (either actual or presumed) of the defendant or some third party, is a purely equitable doctrine.[23] There is no common law cause of action analogous to the equitable doctrine of undue influence. Accordingly, there is no basis upon which the limitation legislation could apply by analogy to undue influence cases.

If, however, the analogy is to be drawn between the jurisdictional remedies, the position may be different. In the vast majority of undue influence cases the relief sought is rescission of the transaction. In those cases where rescission is inappropriate, it may be that the plaintiff seeks equitable compensation as alternative relief.[24] In either case there is an analogous common law remedy[25] and therefore, it is open to a court to apply by analogy the statutory limitation period applicable to common law rescission or a common law claim for damages.[26] Thus analysed, litigants may find themselves in the incongruous and uncertain position of the cause of action being dealt with under the flexible discretionary equitable doctrines of laches and/or acquiescence (discussed below) while the remedy sought is barred under the more rigid statutory limitation provision applied by analogy.

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19 *Hall v Hall* (1868) LR 1 P & D 481, 481.

20 *Bridgewater v Leahy* (1998) 194 CLR 457, 475.

21 W Winder, 'Undue Influence and Coercion' (1939) 3 *Modern Law Review* 97, 108; P Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review*, 617, 621; J Edelman and E Bant, *Unjust Enrichment in Australia* (2006) 197.

22 Winder, above n 21, 108.

23 The equitable doctrine of undue influence as used in this context does not include those cases which have been pleaded and decided as actual undue influence cases but which are widely recognised as being equitable duress or illegitimate pressure cases. See for eg, *Williams v Bayley* (1866) LR 1 HL 200; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389; *Governor and Company of the Bank of Scotland v Bennett* [1998] EWCA Civ 1965; Winder, above n 21, 110-119; N Seddon, 'Compulsion in Commercial Dealings' in P D Finn (ed) *Essays on Restitution* (1990) 138, 144; Ridge, above n 21, 618; Edelman and Bant, above n 21, 196.

24 *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810; *Smith v Glegg* [2005] 1 Qd R 561; *Nattrass v Nattrass* [1999] WASC 77. See, N Skead, 'Undue Influence and the Remedial Constructive Trust' (2008) 2 *Journal of Equity*, 77.

25 Rescission is a remedy available at common law and equitable compensation is analogous to common law damages.

26 *Companhia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112.

2 *Judicial Discretion*

It should be noted that even in cases where limitation legislation does apply by analogy, the weight of authority supports the view that 'equity will not apply a limitation period by analogy where there are circumstances which make the application of the statute unconscionable',[27] or when it would be unjust to enforce the analogy.[28] The relevant principle is explained by I C F Spry as follows:

> [T]he principles that govern cases of this kind are that if there is a sufficiently close similarity between the exclusive equitable right in question and legal rights to which the statutory provision applies a court of equity will ordinarily act upon it by analogy but that it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so.[29]

More recently LaForest J in *KM v HM* expounded:

> However, even if an analogy could be drawn that is not to say that it must be applied. As I noted earlier, equity retains a residual discretion on this point, which is the point of distinction from acting in obedience to the statute. In this respect the analogy takes on the character of laches.[30]

In applying limitation legislation by analogy it is clear that equity retains the flexibility that is a distinguishing feature of the jurisdiction. Courts of equity are courts of conscience guided by overriding notions of unconscionability. Even in applying strict law by analogy, equity will not permit that application to unconscientiously undermine the notions of fairness and justice that are the very bedrock of the jurisdiction.

3 *Running of Time*

The notion of equity as a jurisdiction of conscience is similarly reflected in the approach taken by equity to the time the limitation period starts running in analogous cases. Under limitation legislation the limitation period generally begins to run when the cause of action accrues as determined in accordance with common law principles.[31] While the common law approach to the commencement of the limitation period

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27 *Hewitt v Henderson* [2006] WASCA 233, [25] (Buss JA). See also, *Sterndale v Hankinson* (1827) 57 ER 625; *In re Greaves, deceased* (1881) 18 Ch D 551; *Metacel Pty Ltd v Ralph Symonds Ltd* [1969] 2 NSWR 201, 208 (Asprey JA); *The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2004] SASC 415; *KM v HM* (1993) 96 DLR (4th) 289; *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, 509 (Kirby P); *Barker v The Duke Group Ltd (in liq)* (2005) 91 SASR 167; *Malacca Nominees Pty Ltd v Morrone* [2006] WASC 226, [42] (E M Heenan J); J Story, *Commentary on Equitable Jurisprudence* (1st Eng ed, 1884) at § 64a; Meagher, Heydon and Leeming, above n 1, [34-085]; *Cassis v Kalfus* [2001] NSWCA 460.

28 Spry, above n 14, 422; John Brunyate, *Limitation of Actions in Equity*, (1932) 12, 14.

29 Spry, above n 14, 419-420.

30 *KM v HM* (1992) 96 DLR (4th) 321, 330. See also, *The Crown v McNeil* (1922) 31 CLR 76, 100 (Isaacs J).

31 See eg, *Re Mason* [1929] 1 Ch 1, 5 (Lord Hanworth MR).

provides a high degree of certainty and, in the majority of cases, does not result in any injustice, there are cases in which the limitation period may commence running, and indeed even expire, before the plaintiff has discovered or has had a reasonable opportunity to discover that he or she has an enforceable right. In common law actions, where transactions are impugned on the grounds of the plaintiff's consent having been vitiated as a result of duress, for example, the cause of action will arise on the date of receipt of the benefit by the defendant even though at that time and, indeed, for long after the limitation period has expired, the plaintiff might still be labouring under the pressure or duress tainting the transaction.[32]

Equity's approach to the running of time recognises the injustice inherent in the approach at common law. In assessing a plaintiff's delay in equity, time starts running when the plaintiff either discovers or, with the exercise of reasonable diligence, ought to have discovered that he or she is entitled to relief.[33] In *Baker v Courage & Co*, Hamilton J rationalised equity's approach as follows:

> In cases of fraud … they hold that the statute runs from discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this Courts of equity differ from Courts of law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud. … [W]here a party had not the means of knowing the truth equity would not consider laches to be attributable to him, and therefore the equitable period of limitation would not run against him.[34]

There is some authority for the proposition that the common law rule relating to the commencement of the limitation period applies in cases where the doctrine of analogy is invoked,[35] and that it is only in cases of fraudulent concealment of the existence of a claim that the running of time is postponed under equitable principles.[36] There is, however, stronger support for the contrary view that where a statutory limitation period is applied to an equitable claim based on equitable fraud (including duress and undue influence)[37] or mistake,[38] by analogy, the

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32 *Maskell v Horner* [1915] 3 KB 106.

33 Alberta Institute of Law Research and Reform, '*Limitations*' Report for Discussion No. 4 (1986) ('AILRR, Report 1986') [2.12]. See eg, *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581, 596 dealing with the recovery of money paid under a mistake.

34 *Baker v Courage & Co* [1910] 1 KB 56, 63.

35 *Re Robinson* [1911] 1 Ch 502; *Re Mason* [1929] 1 Ch 1; *Re Blake* [1932] 1 Ch 54; LRCWA Report 1997, above n 6, [13.51].

36 *Trevelyan v Charter* (1835) 4 LJ (NS) Ch 209, 214; *Metacel Pty Ltd v Ralph Symonds Ltd* [1969] 2 NSWR 201, 452; Meagher, Heydon and Leeming, above n 1, [34-085].

37 Meagher, Heydon and Leeming, above n 1, [12-050].

38 There is some debate as to the precise meaning and scope of 'equitable fraud'. While some treat all equitable principles as being founded on equitable fraud notwithstanding the absence of any deliberate wrongdoing or intention to cheat or deceive [*Nocton v*

equitable approach to the commencement of the running of time from the date of discovery or discoverability will apply.[39] It is submitted that John Brunyate correctly stated the principle in saying:

> We should therefore expect that where the Courts act in obedience to the statute only fraud will suspend it from operating, but that where the Courts act by analogy to it, it will also be suspended by the plaintiff's ignorance of his rights, and this is probably a correct statement of the law.[40]

This latter view is preferable and more consistent with equity as a flexible jurisdiction of conscience and is the view adopted in this article.

III Laches And Acquiescence

In respect of those claims not governed by limitation legislation either directly or by analogy, equity has developed its own principles to deal with inordinate delay by a plaintiff. Equity assists the diligent, not the tardy.[41] In a famous passage in *Smith v Clay* Lord Camden LC noted:

> A court of equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the Court is passive, and does nothing.[42]

However, delay is itself not a defence.[43] As Kitto J explained in *Lamshed v Lamshed*:

Lord Ashburton [1914] AC 932, 954 (Viscount Haldane LC); J Story, *Commentaries on Equity Jurisprudence* (13th ed, 1908) Vol 1, 258; L A Sheridan, *Fraud in Equity* (1957), 210], others suggest that equitable fraud refers to those instances in which 'equitable intervention is well established but in such a manner as to defy reduction to any specific principle'; Meagher, Heydon and Leeming, above n 1, [12-050]. Regardless of the view adopted, in Meagher, Heydon and Leeming, above n 1, [12-040], the authors urge that 'one must never lose sight of the evolution of all [equitable] principles from a general concept of fraud as abhorrent to good conscience'.

39 *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581, 596; *Baker v Courage* [1910] 1 KB 56, 62-63; *Brooksbank v Smith* (1936) 2 Y & C Ex 58; *Denys v Shuckburgh* (1840) 4 Y & C Ex 42; *Harris v Harris* 29 Beav, 110; UK Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) 5334, 31-32; F A Bosanquet and J R V Marchant, *Darby & Bosanquets Statute of Limitations* (2nd ed, 1899) 242-243; William Swadling, 'Limitation' in P Birks and A Pretto (eds), *Breach of Trust*, (2002) 326.

40 Brunyate, above n 28, 17.

41 *Vigilantibus, non dormientibus, aequitas subvenit*. See Meagher, Heydon and Leeming, above n 1, [21.1].

42 *Smith v Clay* (1767) 29 ER 743, 744.

43 See eg, *Hourigan v Trustees Executors and Agency Co Ltd* [1934] 51 CLR 619; *Glasson v Fuller* [1922] SASR 148; *Fullwood v Fullwood* (1878) 9 Ch D 176, 179; *Hughes v Schofield* [1975] 1 NSWLR 8, 14.

> The bare fact of delay is not enough. Where there is nothing at all in the circumstances to justify either a conclusion that the delay has been to the prejudice of the defendant or any third party, or a conclusion that a plaintiff ought to be regarded as having abandoned any rights he ever had, specific performance is not ordinarily ordered.[44]

Accordingly, in order to rely on the plaintiff's delay as a defence, the defendant is required to establish that either:

- the plaintiff's conduct amounts to acquiescence in the defendant's conduct ('acquiescence');[45] or
- in response to the plaintiff's inaction, the defendant or a third party has acted (or failed to act) in a prejudicial manner such that it would be unjust to grant the relief sought ('laches').

A *Acquiescence*

Acquiescence in the context of delay[46] will be made out if the plaintiff, with full knowledge that the defendant has violated his or her rights, fails to institute proceedings against the defendant and expressly or impliedly represents that he or she will not seek to enforce his or her rights against the defendant.[47] While delay by the plaintiff in prosecuting his or her claim is not essential to a successful defence based on acquiescence, it is often a feature of the defence.[48]

B *Delay and Prejudice ('Laches')*

Laches is a discretionary defence available where the plaintiff's delay in prosecuting his or her claim is such that it would cause prejudice to the defendant if the court was to permit the claim to proceed.[49] In *Lamshed v Lamshed*, MacTiernan J citing with approval from the decision of the trial judge, Hogarth J, stated that 'the plaintiff will not be debarred from his remedy unless the defendant is shown to be likely

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44 *Lamshed v Lamshed* (1963) 109 CLR 440, 453. See also, *Hourigan v Trustees Executors and Agency Co Ltd* [1934] 51 CLR 619; *Archbold v Scully* (1861) 11 ER 769; *Brown v Tuck* (1895) 16 LR (NSW) Eq 182; *Fitzgerald v Masters* (1956) 95 CLR 420 (Dixon CJ and Fullagar J).

45 Michael Evans, *Equity and Trusts* (2003) 548.

46 Acquiescence as part of the equitable doctrine of delay is to be distinguished from the doctrine of equitable estoppel by acquiescence. In the latter context the quiescent plaintiff stands by knowing that the defendant is invading the plaintiff's right. The plaintiff will be estopped from later seeking relief for that invasion of rights. See eg, *Ramsden v Dyson* (1866) LR 1 HL 129; *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117, 123.

47 *Orr v Ford* (1989) 167 CLR 316; *Glasson v Fuller* [1922] SASR 148, 161-162.

48 *Allcard v Skinner* (1887) 36 Ch D 145; *Glasson v Fuller* [1922] SASR 148.

49 *Lindsay Petroleum Co v Hird* (1874) LR 5 PC 221, 239, 240 (Lord Selborne).

to suffer some prejudice as a result of the delay'.[50] In cases in which laches is raised as a defence, the length of and reasons for the delay[51] and the conduct of the respective parties are critical. Each case is decided on its own merits. The assessment is highly fact sensitive.[52]

In cases involving equitable claims to which a statutory limitation period is applied by analogy, there is much authority supporting the view that the equitable doctrine of laches continues to operate such that a plaintiff's rights may be barred before the statutory limitation period has expired. By contrast, in these cases equity will not bar a plaintiff's claim on the grounds of acquiescence before the expiry of the statutory limitation period.[53]

As noted above, for the purposes of laches, time starts running from when the claimant either discovered or, with the exercise of reasonable diligence, should have discovered that he or she had an enforceable right.[54] In undue influence claims, for example, time will only begin to run when the plaintiff 'escapes from the … influence which hampered her at the time, as soon as she becomes free'[55] and is sufficiently emancipated from the influence to be able to apply an independent judgment to the question whether to seek rescission of the impugned

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50 *Lamshed v Lamshed* (1963) 109 CLR 440, 446. *Smith v Clay* (1767) 29 ER 743; See, *Hourigan v Trustees Executors and Agency Co Ltd* [1934] 51 CLR 619, 629-630 (Rich J); *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279 (Lord Blackburn): 'From the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it'.

51 There are some cases calling for special promptitude by the plaintiff in prosecuting the claim, for example, claims for rescission of a transaction induced by undue influence (*Allcard v Skinner* (1887) 36 Ch D 145).

52 *Re Jarvis* (1958) 2 All ER 336, 342; Upjohn J noted that 'in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist'; See also, *Haas Timber & Trading Co Pty Ltd v Wade* (1954) 94 CLR 593, 9.

53 *Archbold v Scully* (1861) 11 ER 769, 774, 778; *Re Maddever* (1884) 27 Ch D 523; *Re Baker* (1881) 20 Ch D 230; *Re Pauling's Settlement Trusts Younghusband v Coutts & Co* [1961] 3 All ER; Meagher, Heydon and Leeming, above n 1, [36-045]; Brunyate, above n 28, 257-258.

54 Alberta Institute of Law Research and Reform, '*Limitations*' Report for Discussion No. 4 (1986) [2.12]; In *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279 the court pointed out that 'a court of equity requires that those who come to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by'. See also, *Lindsay Petroleum Co v Hird* (1874) LR 5 PC 239, 240.

55 *Allcard v Skinner* (1887) 36 Ch D 145, 191 (Bowen LJ); See also, 174 (Cotton LJ).

transaction.[56] This equitable approach is in stark contrast to the position at law. Equity's approach is far more flexible, sensible and just.

C *Summary of the Position under the 1935 Act*

In summary, there are three bases upon which delay in prosecuting an equitable claim may constitute a bar to that claim under the *1935 Act*:

- direct express application of the limitation statute;
- application of the limitation statute by analogy; or
- under the equitable doctrines of laches and acquiescence.

It follows that the regime entrenched in the *1935 Act* is extraordinarily complex, variable and inconsistent insofar as it relates to equitable claims. It raises difficult questions of characterisation. In the first instance a court is required to determine whether the plaintiff's claim is an equitable or common law claim and whether or not the *1935 Act* applies directly to that claim. If the *1935 Act* does not apply directly, the court is then tasked with assessing whether that equitable claim is analogous to some common law claim. If it is, the limitation statute will apply by analogy. If it is not, the court will have to consider the equitable doctrines of laches and acquiescence. The complexity of this assessment is evidenced in the plethora of case law in point and often turns on slight technical distinctions. This process may be further complicated in situations where the proceedings involve a number of different claims, some common law, some equitable and analogous and others equitable but not analogous to any common law claim. This may result in the ludicrous situation in which some of the plaintiff's claims may be subject to the statutory limitation period directly, others by analogy (the limitation periods potentially commencing at different times depending on whether the Act applies directly or by analogy) and yet other claims being governed by discretionary equitable doctrines.

Any legislative regime which entrenches such complex characterisation issues and permits one meritorious claim to proceed while barring another meritorious claim simply on the basis of the jurisdictional origins of the claim is arbitrary, deficient and clearly in need of reform. Despite the wholesale reform of the limitations scheme in the *2005 Act*, the *2005 Act* is generally not retrospective[57] and, accordingly,

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56 *Allcard v Skinner* (1887) 36 Ch D 145; *Hartigan v International Society for Krishna Consciousness Incorporated* [2002] NSWSC 810; *Reid v Reid* [1998] NSWSC 2027/97 (Unreported, Bryson J, Equity Division 30 November 1998).

57 Exceptionally the accrual provision for actions relating to personal injuries (s 55) and personal injuries – asbestos related diseases (s 56) in the *2005 Act* do apply retrospectively.

Western Australian litigants will be dealing with the flaws of the *1935 Act* for many years to come.

IV REFORM

It is widely considered that since the fusion of the administration of law and equity in the *Judicature Act 1873 (Imp)* there is no longer any rational reason to limit the application of limitation legislation principally to common law claims.[58] While historically there may well have been cogent reasons for the development of different limitation periods and provisions for different causes of action, it is difficult to justify any such difference some 130 years after the procedural fusion of law and equity.[59] That reform of the Western Australian limitations regime was needed was quite clear, the pertinent question was: what form should the new regime adopt? The Alberta Institute of Law Research and Reform ('the AILRR') has distinguished between two different strategies for a limitations system. The AILRR describes these two strategies as 'the strategy in equity' and 'the strategy at law'.[60]

A *The Strategy in Equity*

The distinctive feature of the strategy in equity is that time for the purpose of an equitable defence based on delay only begins to run when the plaintiff 'either discovered, or with the exercise of reasonable diligence should have discovered, enough information with respect to the breach of duty to have warranted his seeking an equitable remedy'.[61] The advantage of this feature of the strategy in equity is that it guards against a court denying relief until the plaintiff has had a reasonable opportunity to discover that he or she has a complaint justifying instituting proceedings. A second but equally important

58 New Zealand Law Reform Commission, Report 1988, above n 7; LRCWA Report 1997, above n 6, [12.3], [13.62]; UK Law Commission, Report 2001, above n 8, [4.268]; Attorney General of WA *Limitations Law Reform Paper* 17 May 2002, 24. There is a contrary view that 'equitable remedies should not be included in a new regime as a matter of principle, … [there are] a variety of policies underlying each remedy available in equity and … the inclusion of equitable remedies would itself involve a major reform of equity'. New Zealand Law Reform Commission, Report 1988, above n 7, 336. The Honourable Peter Foss, sitting on the Legislative Council of the Western Australian Parliament asked in relation to the Limitation Bill 2004 (WA) '[w]hy should a limitation period be imposed on picking up people who have breached a moral obligation which has been placed on them and which they have taken on? Why should there be a limitation period?' Western Australia, *Parliamentary Debates*, Legislative Council, 24 November 2004, 8432b-8435a/1 (Peter Foss).

59 UK Law Commission, Report 2001, above n 8, [4.268].

60 AILRR, Report 1986, above n 33, 49.

61 AILRR, Report 1986, above n 33, 50.

feature of the equitable approach is the judicial discretion brought to bear on the question of delay. While judicial discretion creates some uncertainty for litigants, courts exercising equitable jurisdiction do not act arbitrarily in this regard but rather in accordance with established guidelines. The principal advantage of the residual judicial discretion is that it injects flexibility into the inquiry.[62]

B *The Strategy at Law*

The strategy to limitations legislation adopted at law is characterised firstly by the use of different limitation periods of fixed duration and assigning those different limitation periods to different types of legal claims. Further, the limitation period starts running when the cause of action accrues in accordance with common law principles. The appeal of the common law approach to limitations law lies in its certainty. However, this advantage is outweighed by the significant disadvantage inherent in the arbitrariness of assigning different limitation periods to different types of similar claims and the extreme injustice in barring a plaintiff's claim before he or she has had a reasonable opportunity to discover that he or she in fact has a claim.[63]

After lengthy analysis, the AILRR concluded that a limitations system based on the strategy at law (as was the *1935 Act*) is unsatisfactory and accordingly based its recommendations for reform of the Alberta limitations legislation predominantly on the strategy in equity. It is on the basis of this strategy that the LRCWA made its recommendations for reform in the LRCWA Report 1997.[64] In essence, the LRCWA recommended a three-year 'catch all' limitation period applicable to all claims (legal and equitable) commencing from discovery or discoverability of the claim.[65] The LRCWA further recommended an ultimate or long stop period of 15 years running from the date on which the claim arose.[66] Under this recommendation, a plaintiff's claim would be barred after the expiry of 15 years from the claim accruing under common law principles, even if the plaintiff had not and/or could not have discovered that he or she had an enforceable claim.[67] It was further recommended that the potential harshness of the ultimate period be tempered by a judicial discretion to extend the two periods in exceptional circumstances. The recommendations

62 AILRR, Report 1986, above n 33, 51.

63 For a more detailed discussion on the strategies at law and in equity see AILRR, Report 1986, above n 33, Chapter 2B and 2C.

64 LRCWA Report 1997, above n 6.

65 LRCWA Report 1997, above n 6, Recommendations 1(2) and (3).

66 LRCWA Report 1997, above n 6, Recommendation 1(4).

67 LRCWA Report 1997, above n 6, [7.30-7.31].

made were considered most appropriate for striking a balance between the interests of the plaintiff, the defendant and society as a whole.

V *LIMITATION ACT 2005* (WA)

The *2005 Act* did not adopt the dual limitation period scheme recommended by the LRCWA. Despite this, the *2005 Act* heralds a marked improvement on the *1935 Act* by dispensing with the series of different limitation periods for different types of primarily common law actions and replacing them with a 'catch all' six year limitation period applicable to all claims not otherwise provided for in the *2005 Act*.[68] The *2005 Act* covers all claims whether legal or equitable. Importantly, however, the *2005 Act* retains a relic from the *1935 Act* in s 13(1) which provides that the six year limitation period commences on the date that the cause of action accrued. Further, the *2005 Act* does not incorporate a general judicial discretion to extend the limitation period in appropriate cases. In these respects, the *2005 Act* more closely resembles the common law strategy to limitations law than it does the equitable strategy. That said, the state legislature has gone some lengths to incorporate aspects of the strategy in equity into the statutory regime in an effort to ensure a more just system. These efforts are to be found in sections 27, 38 and 80 of the *2005 Act*.

A *Section 27*

Section 27 provides as follows:

> **27. Equitable actions (not analogous to other actions)**
>
> (1) An equitable action cannot be commenced after the only or later of such of the following events as are applicable –
>
> (a) the elapse of 6 years since the cause of action accrued; or
>
> (b) the elapse of 3 years since time started running, on equitable principles, for the commencement of the action.

68 *Limitation Act 2005* (WA) s 13. In this respect the WA scheme closely resembles that adopted by the Australian Capital Territory in s 11 of the *Limitation Act 1985* (ACT). As regards the remaining Australian jurisdictions, the limitation statutes continue to apply in a somewhat piecemeal way to particular specified equitable claims. For example, the *Limitation Act 1969* (NSW) specifies a limitation period for actions for an account founded on a liability at law to account (s 15), actions to enforce an equitable estate or interest in land (s 36), breach of trust (s 48) and actions against a personal representative in respect of a deceased estate (ss 11, 48). Other equitable claims are not subject to a statutory limitation period. Section 9 of the *Limitation Act 1969* (NSW) does, however, preserve the equitable doctrines of laches and acquiescence in respect of all equitable claims.

> (2) In this section –
>
> **'equitable action'** means an action –
>
> (a) in which the relief sought is in equity; and
>
> (b) for which (had a limitation period not been provided for under subsection (1) or section 13) the limitation period would not be determined in equity by analogy to the limitation period for any other kind of action.

According to John Young, the Western Australian Deputy State Solicitor, '[i]n essence, [s 27] operates to preserve the status quo in relation to the limitation principles governing equitable remedies and actions not analogous, from a limitations perspective, with common law remedies and actions'.[69] To some extent this assessment is correct. Under s 27(1)(b) the limitation period applied to non-analogous equitable claims begins to run at the same time it would have begun to run under the equitable principle of laches. However, a plaintiff in an equitable claim (whether analogous or not) may be worse off under the *2005 Act*, despite sections 13 and 27. Firstly, the limitation period under s 27(1)(b) is only three years. Secondly, by contrast to the position in equity, under the *2005 Act* the court is no longer vested with an overriding discretion to decide whether a plaintiff's delay is such as to warrant barring his or her claim. The flexibility and discretion which lies at the heart of equity's ability to do justice in a particular case has been effaced in the *2005 Act.*

The limitation of s 27 to non-analogous claims presents further concerns in relation to composite claims. Under the new regime, proceedings based on analogous equitable actions, for example (if one draws a remedial analogy) a claim for rescission or equitable compensation for undue influence must be commenced within six years of the cause of action accruing under s 13.[70] If, however, the plaintiff seeks constructive trust relief (a purely equitable remedy) based on the same cause of action[71] then under s 27 the plaintiff will have to commence proceedings within the later of six years of the cause of action accruing (under s 27(1)(a)) or three years from when the plaintiff is no longer under the influence that induced the transaction (under s 27(1)(b)). A plaintiff's claim for constructive trust relief would be treated far more

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69 Young, above n 18, 16. This view was expressed by the Honourable Sue Ellery in the cognate debate of the Western Australian Legislative Council on the Limitation Bill 2005, Western Australia, *Parliamentary Debates*, Legislative Council, 19 October 2005, 8556b-6562a/1 (Sue Ellery).

70 Western Australia, Parliamentary Debates, Legislative Assembly, 19 May 2005, 2040b-2047a/1 (Sue Walker).

71 As to the availability of constructive trust relief in undue influence cases, see Skead, above n 24.

equitably than the same plaintiff's claim for rescission or equitable compensation.

Similarly, if one is drawing the analogy based on the cause of action, a plaintiff bringing a claim based on the alternative causes of action of equitable duress (or illegitimate pressure) and undue influence may find himself or herself in the anomalous position that different limitation provisions apply to each alternative claim. As undue influence has no common law analogy[72] the limitation provisions stipulated in s 27 will apply, while s 13 will govern the alternative duress claim, there being an analogous doctrine of common law duress.

Under a reformed limitations system there is no rational basis for conferring more beneficial treatment on one cause of action or remedy than on another where both are available on the same set of facts. In this regard the *2005 Act* remains highly unsatisfactory.

In relation to equitable claims to which the doctrine of analogy applies, if, as this article submits, it is accepted that under equitable principles time only starts running on discovery or discoverability of the claim,[73] then a plaintiff may be far worse off under the *2005 Act*. Taking equitable duress (or illegitimate pressure) claims as an example; such claims are historically subject to limitation legislation by analogy to common law duress. Under the *1935 Act*, the limitation period applicable by analogy would only commence running under equitable principles once the plaintiff is relieved of the pressure. By contrast, under s 13 of the *2005 Act*, the limitation period in such a case will commence running on accrual of the cause of action. The cause of action in these cases accrues on receipt by the defendant of the benefit under the tainted transaction. Section 27, being limited to non-analogous claims, will not assist the plaintiff in this instance. Thus analysed, it cannot be said that s 27 merely retains the status quo. A plaintiff in an equitable duress action will be disadvantaged under the *2005 Act*. This analysis is also applicable to equitable mistake cases.[74]

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72 See discussion under heading II B 1 above.

73 See discussion under heading II B 3 above.

74 The view taken by the Deputy State Solicitor, J Young, in advising the Western Australian Standing Committee on Legislation was that '[t]he law of mistake is a big issue in contracts and the like. Ultimately, it was felt that the preference in such a fundamental issue, particularly in the contractual context, was as far as possible to retain the status quo'. See, Evidence to Standing Committee on Legislation, Western Australian Parliament, Perth, 2 September 2005, Session 5, 4 (J Young). Mr Young's advice was premised on the view that in equitable mistake cases dealt with by analogy time starts running at the date of the mistaken payment.

B *Section 38*

Section 38 of the *2005 Act* provides protection for plaintiffs in certain circumstances. Relevantly, s 38(2) provides that:

> a court may extend the time in which the action can be commenced up to 3 years from when the action ought reasonably to have been commenced if the court is satisfied that the failure to commence the action was attributable to fraudulent or other improper conduct of the defendant or a person for whom the defendant is vicariously liable.

This provision reflects the more sensitive approach of equity to the issue of when time starts running[75] and injects the equitable doctrine of concealed fraud[76] into the *2005 Act*. While s 27 of the *1935 Act* postpones the running of time on grounds of concealed fraud only in claims for the recovery of land and rent, s 38 of the *2005 Act* extends the grounds of postponement to 'other improper conduct' which it applies to all claims. Section 38 is at the same time innovative and regressive. It is innovative in that it is the only Australian limitation statute to include 'improper conduct' as a postponing catalyst rendering it of wider application than the equivalent provisions found in limitation schemes elsewhere.[77] On the other hand, unlike in many of the other Australian jurisdictions,[78] s 38 does not permit postponement of the limitation period in actions for relief from the consequences of a mistake.

While much of the criticism of s 38 has focused on its failure to

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75 *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581.

76 In *State of Western Australia v Wardley* (1991) 30 FCR 245, [88]; Spender, Gummow and Lee JJ explained the doctrine of concealed fraud as applying in two situations: firstly, when the action is one alleging fraud or fraud is an element in the cause of action (in which case time does not run until discovery of the fraud) and secondly, where the cause of action is one which does not involve fraud but the existence of the cause of action is fraudulently concealed by the defendant (in which case time does not run until both the discovery of the concealment and the ascertainment of the existence of the cause of action).

77 *Limitation Act 1969* (NSW) s 55; *Limitation Act 1981* (NT) s 52; *Limitation of Actions Act 1974* (Qld) s 38; *Limitation of Actions Act 1936* (SA) s 35; *Limitation Act 1974* (Tas) s 32; *Limitation of Actions Act 1958* (Vic) s 27. *Limitation Act 1985* (ACT) s 33 is in somewhat broader terms than the aforementioned provisions and closer to the 'improper conduct' formulation adopted in s 38 of the *Limitation Act 2005* (WA). Section 33 of the ACT legislation refers to 'deliberate concealment' by the defendant which may not necessarily constitute 'fraud' but would certainly fit within 'improper conduct'.

78 *Limitation Act 1985* (ACT) s 34; *Limitation Act 1969* (NSW) s 56; *Limitation Act 1981* (NT) s 35C; *Limitation of Actions Act 1974* (Qld) s 38; *Limitation Act 1974* (Tas) s 32; *Limitation of Actions Act 1958* (Vic) s 27.

adequately deal with difficult mistake cases,[79] the potential defects in s 38 can also be illustrated by reference to claims for undue influence. As noted above,[80] in undue influence actions in which the plaintiff claims constructive trust relief, the plaintiff will be protected under s 27(1)(b). In those analogous cases where the plaintiff seeks rescission or equitable compensation, the six year 'catch all' limitation period will start running under s 13 on receipt by the defendant of the benefit under the impugned transaction. This six year period may be extended under s 38 if the plaintiff's delay was attributable to the fraud or improper conduct of the defendant 'or a person for whom the defendant is vicariously liable'.

However, unlike the equitable doctrine of unconscionable dealing[81] which requires exploitation by the defendant of the plaintiff, it is submitted that, in Australia at least,[82] wrongdoing or improper conduct by a defendant (or a third party for whom the defendant is vicariously liable) is not a feature of undue influence. Undue influence focuses on the plaintiff and, more particularly, the quality of the plaintiff's consent. Equity intervenes in these cases because the plaintiff's consent to the transaction was impaired as a result of his or her excessive dependence on the defendant or a third party regardless of any wrongdoing or exploitation by that person.[83] For example, in *Allcard v Skinner*,[84] the seminal case on undue influence, the plaintiff entered a Protestant sisterhood taking vows of poverty, chastity and obedience. The plaintiff gifted virtually all her property, including railway and other shares, to the Mother Superior of the sisterhood. After eleven years the plaintiff left the sisterhood and years later sought to recover the property gifted. The English Court of Appeal found that the Mother Superior had exerted no pressure on and had not in any way exploited the plaintiff.

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79 Peter Handford, *Limitation of Actions: The Laws of* Australia (2nd ed, 2007) 289; Standing Committee on Legislation *Limitation Bill 2005 and Limitation Amendment and Repeal Bill 2005* Report 1 September 2005 ('Standing Committee Report 2005') 2.56 – 2.66; Letter from J Young to Legislative Council Standing Committee, 30 August 2005, 3-5.

80 See discussion under heading V A above.

81 See eg, *Blomley v Ryan* (1956) 99 CLR 362; *Wilton v Farnworth* (1948) 76 CLR 646; *Louth v Diprose* (1992) 175 CLR 621.

82 By contrast, the approach to undue influence in England would appear to be based on some wrongdoing and exploitation on the part of the defendant. In *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 the House of Lords repeatedly referred to undue influence as involving equitable wrongdoing in the sense of one party exploiting the power to direct the conduct of another which is derived from a relationship between them.

83 *Allcard v Skinner* (1887) 36 Ch D 145; *Quek v Beggs* (1990) 5 BPR 11,761, 11, 766; *Reid v Reid* [1998] NSWSC 2027/97 (Unreported, Bryson J, Equity Division 30 November 1998); *Hartigan v International Society for Krishna Consciousness Incorporated* [2002] NSWSC 810. See also, Skead, above n 24, for an analysis of undue influence.

84 *Allcard v Skinner* (1887) 36 Ch D 145.

Nonetheless, it was found that there was, de facto, a relationship of trust and confidence and ascendancy between the plaintiff and defendant. The plaintiff had long since ceased thinking of her own interests and habitually deferred to the interests of the defendant. Her ability to make decisions in her own best interests was impaired. The relationship gave rise to a presumption of undue influence in relation to the gifts which the defendant was unable to rebut. In reaching this decision Cotton LJ stated that 'the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the influence arising therefrom being abused'.[85]

On this analysis, s 38, which focuses on fraud and improper conduct, may not avail a plaintiff in an undue influence case. In the absence of improper conduct by the defendant, time would start running on the date of completion of the transaction regardless of whether and for how long the plaintiff continues to suffer under the undue influence. Of course, there may be undue influence cases in which the defendant does act wrongfully or improperly by knowingly and deliberately exerting direct influence over the plaintiff in order to extract the benefit.[86] The defendant's conduct in such a case may well be regarded as 'improper' and fall within s 38. However, even in these cases, the running of the limitation period will only be postponed for up to three years from when it ought to have been commenced under s 13. On the expiry of three years it may be that the plaintiff is still labouring under the undue influence in which case s 38 will be of little or no assistance.

It may be argued that the mere retention by the defendant of a benefit received in circumstances of undue influence is itself unconscionable and therefore 'improper conduct'[87] for the purposes of s 38. In *Hartigan v International Society for Krishna Consciousness Incorporated* Bryson J expressed the principle as follows:

> In the application of this basic principle, … the court does not act only for the restraint of deceptions and of intended exploitation of religious enthusiasms or beliefs; … The court's approach, … is more exacting than ordinary community standards and goes well beyond overcoming deliberate exploitation. It may be unconscionable to accept and rely on a gift which was fully intended and understood by the donor and originated in the donor's own mind, where the intention to make the gift was produced by religious belief.[88]

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85 *Allcard v Skinner* (1887) 36 Ch D 145, 171.

86 *Bank of Credit and Commerce International SA v Aboody* [1989] 1 QB 923.

87 'Improper conduct' being a 'broad term': Young, above n 18, 3.

88 *Hartigan v International Society for Krishna Consciousness Incorporated* [2002] NSWSC 810, 28. See also, *Allcard v Skinner* (1887) 36 Ch D 145; *Bullock v Lloyds Bank Ltd* [1955]1 Ch 317, 327.

Although the comments by Bryson J were made in the context of a relationship between a religious adviser and adherent, the same principle applies to other relationships of undue influence. This argument echoes the notion of unconscientious reliance upon a legal right identified by Deane J in *Muschinski v Dodds*.[89] On this analysis a plaintiff's claim based on undue influence might be adequately protected under s 38 of the *2005 Act*.

C *Section 80*

A question facing the Western Australian state legislature in reforming the limitations regime was whether the equitable doctrines of acquiescence and laches should continue to operate under the reformed regime so as to bar an equitable claim before the expiry of the limitation period. The LRCWA opined that retaining the doctrines of laches and acquiescence would 'perform a useful function in retaining important equitable doctrines without prejudicing the general scheme'.[90] The LRCWA accordingly recommended the explicit retention of these two doctrines under the new scheme.[91] This recommendation was accepted by the state legislature and is embodied in s 80 of the *2005 Act*.[92] The inclusion of s 80 was an important step in retaining some judicial discretion under the new scheme to refuse relief even before the expiry of the statutory limitation period where it is just and equitable to do so. It is anomalous, however, that the state legislature retained judicial discretion in this regard but not more generally by permitting the judicial extension of the limitation period for equitable actions where it is just and equitable to do so.

VI Conclusion

The current provisions in the *2005 Act* dealing with equitable claims are unsatisfactory. While the State Solicitor's Office adopted the view that the *2005 Act* was intended simply to retain the status quo in relation

89 (1985) 160 CLR 583, 619-620; *State of Western Australia v Wardley* (1991) 30 FCR 245, [92].

90 LRCWA Report 1997, above n 6, Recommendation 13.78.

91 LRCWA Report 1997, above n 6, Recommendation 24. This was the recommendation of many other law reform bodies, for example: Alberta Institute of Law Research and Reform, Report 1986, above n 33, Recommendation 8, 133-134, 170; New Zealand Law Reform Commission, Report 1988, above n 7, [56]; UK Law Commission, Report 2001, above n 8, [4.274]-[4.277].

92 A similar provision appears in the limitation statutes of the other Australian States and Territories; *Limitation Act 1985* (ACT) s 6; *Limitation Act 1969* (NSW) s 9; *Limitation Act 1981* (NT) s 7; *Limitation of Actions Act 1974* (Qld) s 43; *Limitation of Actions Act 1936* (SA) s 49; *Limitation Act 1974* (Tas) s 36; *Limitation of Actions Act 1958* (Vic) s 31.

to equitable causes of action,[93] it seems clear that this is in fact not the case. As demonstrated, plaintiffs in both equitable duress and undue influence cases[94] may well be worse off than they were under the *1935 Act*.[95] Equity was developed to ameliorate the sometimes harsh results of the strict application of the common law. Even if subject to a statutory limitation regime, equity can still achieve this purpose provided the flexibility inherent in the jurisdiction and, in particular, in the equitable doctrines of analogy and laches are entrenched in the statutory scheme. This flexibility might have been achieved either by the adoption of a general judicial discretion to extend the limitation period in exceptional cases[96] or by the adoption of an appropriate accrual rule based on the discovery or discoverability of the cause of action.[97] Neither recommendation was adopted in the *2005 Act* resulting in a rigid, complex, uncertain and potentially unjust limitation scheme rather than the simple, flexible and effective scheme that was intended. The need for further reform in this area is evidenced in the attitude of the State Solicitor's Office:

> [i]f the rationale for change was [sic] not clear and the change might have significant implications substantively, we should basically leave it as it is and have those matters perhaps dealt with another day in a Law Reform Commission referral, or whatever.[98]

Let us hope we do not have to wait another seventy years for 'another day'.

93 Young, above n 74.

94 As well as in other actions based on the unjust factors of mistake and duress.

95 Standing Committee Report 2005, above n 79, 2.65.

96 LRCWA Report 1997, above n 6, Recommendations 7.40, 7.42.

97 LRCWA Report 1997, above n 6, Recommendation 7.21.

98 Young, above n 79, 9.