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Kay Lauchland

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Amendments to Amendments

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This paper summarises the scheme of rules for various types of amendments to proceedings, and looks particularly at issues concerning amendment to proceedings out of time, including:

- the nature of the discretion to be exercised by the court in allowing amendments out of time;
- the source of power to order amendments after the running of a relevant time limit; and
- the effect of time limits imposed by statutes other than the *Limitation of Actions Act* Qld.
Introduction

The scheme of rules relating to amendments of parties, causes of action and proceedings generally, as found in the repealed Supreme Court Rules (RSCR), has been substantially followed in the new Uniform Civil Procedure Rules (UCPR). A rough equivalence between the new and old rules relating to amendment of proceedings is outlined in Appendix 1, and the rules are compared side-by-side in Appendix 2. In relation to the amendment of parties or causes of action after a limitation period has expired, however, the Uniform Civil Procedure Rules, together with s 81 of the Supreme Court Act 1991 (inserted in 1998\(^1\)) appear to make some significant changes to the previous practice and principles.

This paper will summarise the relevant rules for various types of amendments, and look particularly at issues concerning amendment to proceedings out of time, including:

- the nature of the discretion to be exercised by the court in allowing amendments out of time;
- the source of power to order amendments after the running of a relevant time limit; and
- the effect of time limits imposed by statutes other than the *Limitation of Actions Act* Qld.

Relevant rules for various types of amendment under the Uniform Civil Procedure Rules

Under the new rules, the same broad scheme applies for amendments of parties, and amendments to causes of action, originating process, pleadings and proceedings generally.

Amending parties

Joinder and removal of parties are dealt with primarily by rule 69 UCPR. Whether the addition or substitution of a party is sought within time or after the time allowed for commencing an

\(^1\) *Civil Justice Reform Act* 1998.
action against such a party has run out, the court will consider relevant the factors applicable to inclusion of multiple parties when commencing proceedings. These are set out in UCPR rules 62 (necessary parties), 63 (joint entitlement), 64 (joint or several liability\(^2\)), and the primary rule, rule 65 (multiple parties\(^3\)), as well as rules 75-77 (representative parties\(^4\)).

Where the inclusion or substitution of a party is sought after the end of a limitation period, under rule 69(2) UCPR the court must not allow the new party unless one of the specified circumstances exists. These are extensive and include where the new party is necessary:

- as legal titleholder to prevent defeat of a claim for an equitable interest;
- as possessor/tenant in a claim for possession;
- because the proceeding was or may have been started in or against the name of the wrong person;
- as joint and not several claimant or defendant/respondent;
- as Attorney-General in what should have been a relator proceeding;
- as a company whose right a shareholder is seeking to enforce;
- in the interests of justice, due to a change in the law or for other reason.

Amendments to parties are effected pursuant to sub-rules 74(1)-(3) by, within 10 days of the order, filing and serving an amended copy of the originating process on all continuing parties, and (within the time ordered) serving it on any new party.

For the purpose of continuing the amended proceedings, the proceeding against a new defendant or respondent starts on the filing of the originating process: UCPR rule 74(4). This will be relevant for costs, among other things. For the purpose of any time limit defence, however, the proceeding against a new defendant or respondent is deemed started when the proceeding started against the original defendant(s)/respondent(s), unless otherwise ordered: UCPR rule 74(5). The court’s power to allow amendments out of time and defeat a time limit is supported by s 81 of the *Supreme Court Act* 1991, and will be discussed further below.

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\(^2\)Cf O 3 r 7 RSCR

\(^3\)This rule roughly covers the same ground as O 3 r 1 (several plaintiffs), r 5 (several defendants), r 8 (doubt as to correct defendant).

\(^4\)O 3 r 10 RSCR
Where the amendment is sought after time has run, in addition to the general power to amend parties under rule 69 UCPR, the court has specific power under rule 376(2) UCPR to:

- give leave to make an amendment correcting the name of a party, even if it is alleged that the effect of the amendment will be to substitute a new party, if -
  (a) the court considers it appropriate; and
  (b) the court is satisfied that the mistake sought to be corrected -
     (i) was a genuine mistake; and
     (ii) was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

Similarly, under rule 376(3) UCPR amendment may be made to the capacity in which a party sues. Where these specific rules are applicable, application should be made under them rather than rule 69.

Amendments pursuant to rule 376 UCPR are effected under rule 382 UCPR by writing on the document amended, or by filing and serving an amended document. However, amendment to the originating process to effect the change of party is made pursuant to rule 74 UCPR (rule 382(5) UCPR) (see above).

**Consequential amendments to proceedings**

The addition of a new party will necessarily entail the addition of a new cause of action. Leave to add a cause of action, in time, is obtained under rule 375 UCPR. However, rule 74 UCPR, which provides for the effecting of a change of party by filing and serving amended originating process may obviate the need for an additional application to amend proceedings where the cause of action against the new party is the same as that already mentioned in the originating document.

Any new cause of action, or further consequential amendments to proceedings because of a change of parties may need technical authorisation under rule 375 UCPR. It would be

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appropriate in such cases, therefore, to apply for leave to add a party under r 69 UCPR, and at
the same time apply for leave for consequential changes to proceedings under rule 375 UCPR.

**Change of cause of action**

Amendments which effect the cause of action are permitted, by leave or direction of the court, under rule 375 UCPR. Inclusion of a cause of action arising after the proceeding was started (and presumably still in time) is permitted (rule 375(2) UCPR).

Where addition of a cause of action is sought after expiration of time to commence fresh proceedings on that cause of action, leave may be obtained under rule 376(4) UCPR, which provides:

The court may give leave to make an amendment, even if the effect of the amendment is to include a new cause of action, if-
(a) the court considers it appropriate; and
(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.

It may be possible to obtain an amendment out of time, even if it does not fall within rule 375(4), since rule 376(5) expressly provides that this rule does not limit the court’s powers under rule 375, although the court would require some persuasion to exercise its discretion in such a case.

**Other amendments to originating process**

Rule 377 UCPR requires that leave be obtained from the registrar or court for technical amendments to an originating process, and leave of court be obtained for other amendments to the originating process. Rule 375 UCPR authorises the court to grant leave for amendments to the claim, anything written on a claim, or an application.

**Amendments to pleadings**
As under the RSCR, amendment of pleadings is permitted without leave. The right to make such amendments has, however, been substantially increased. Under the repealed rules, amendment to the statement of claim, counterclaim or set-off could be made once, at an early stage of pleadings, without leave (O 3 rr 3 & 4 RSCR). Under rule 378 UCPR any party may make amendments to pleadings as often as necessary, without leave, until filing (or signing (rule 470 UCPR)) the request for trial date: rules 467 & 469 UCPR. Similar provisions apply as under the repealed rules regarding objection to such amendment: Rule 379 UCPR (O 32 r 5 RSCR), or pleading to it, or amending responsive pleadings: rule 385 UCPR (O 32 r 6 RSCR).

**Amendments to documents**

Rule 375, unlike the old O 32 r 1(1) specifies that amendments to documents may be ordered. The re-wording of this rule makes even clearer that it relates to the substance of the claim and the written matter involved in proceedings, and not joinder or removal of parties, which is dealt with elsewhere. Further, this rule permits amendment of documents other than originating process and pleadings.

‘Claim’ is defined in Schedule 4 UCPR as a document under chapter 2, part 3 starting a proceeding, and is deemed to include an application where the court orders a proceeding started by application to continue as a claim. Indeed all originating process and pleadings are ‘documents’, but since they are specifically mentioned in rule 375, the reference to ‘document’ must go further and include other court forms. It would probably also include correspondence exchanged between parties prior to interlocutory applications regarding further and better particulars, directions and any failure to comply with rules or court orders, which can now be used as evidence on such applications: rules 442 ff UCPR.

**Amendment out of time - historical background**
After a decade of confusing and conflicting cases in Queensland concerning joinder of parties or causes of action which would otherwise be statute barred due to expiry of time limits\(^6\), the Full Court of the Supreme Court in *Lynch v Keddell (No 2)*\(^7\) delivered a judgment which comprehensively addressed the various issues, and clarified the relationship of various rules to amendment of aspects of proceedings.

In *Lynch v Keddell*, the plaintiff had issued her writ against Keddell in 1981. Some time later, and after the three year time limit for personal injuries had run against her, she sought to add further defendants. Leave to do so was granted by a chamber judge, and that order was appealed unsuccessfully\(^8\). In their defences, the new defendants then raised the expiration of the time limit as a complete defence. Kneipp J then ordered, pursuant to O 3 r 13 RSCR, that the new parties be deemed joined prior to the expiration of time. The defendants appealed this decision to the Full Court\(^9\) which canvassed several questions.

1. Should an application for joinder of parties be made pursuant to O 3 r 11 RSCR or as an amendment to the proceedings, pursuant to O 32 RSCR?

2. Does the court have a general discretion to order joinder out of time or should it only grant leave for joinder where there are ‘special or peculiar circumstances’\(^10\)?

3. Is a joinder ordered under O 3 RSCR effective from the date of the Writ (so as to avoid any subsequent expiry of a Limitation period) or from the date of the order for joinder?

4. If joinder is ordered pursuant to O 3 r 11 RSCR, is it permissible to make a subsequent order under O 3 r 13 RSCR specifying a deemed date of joinder prior to the running of time?

As to the last two questions, the Full Court held that O 3 r 13 RSCR does permit of an order at a date later than the order permitting the joinder of a party, but recommended that, as a matter of course, the appropriate order be made under O 3 r 13 RSCR at the time joinder is ordered under O 3 r 11 RSCR. In any event, the Chief Justice, with whom McPherson J concurred\(^11\) RSCR,


\(^7\)[1990] 1 Qd R 10.

\(^8\)Lynch v Keddell [1985] 2 Qd R 103.

\(^9\)Lynch v Keddell (No 2) [1990] 1 Qd R 10.

\(^10\)As required by the rule of practice in Weldon v Neal (1887) 19 QBD 394.

considered\textsuperscript{12} “... it should be said that when, after argument, leave has been granted in the exercise of the narrow discretion to add a defendant after the statutory limitation period has expired, the right of the added defendant to plead the statute is gone.” Derrington J did not reach the same conclusion, preferring to rely solely on the power to make an order back-dating the joinder pursuant to O 3 r 13\textsuperscript{13}.

These principles did not remain unchallenged, and will be canvassed further below.

In regard to the appropriate rules applicable to various types of amendment, the Full Court confirmed that “Order 3 deals with the addition of parties... Order 32 deals with the quite different matter of general amendment of process, a wide category indeed, which is to be distinguished from the topic of joinder of parties which receives particular treatment in Order 3\textsuperscript{14}.” Indeed, joinder of a party will necessarily entail the joinder of a cause of action, and may also require consequential amendment of documents, especially the originating process\textsuperscript{15}.

The discretion to allow amendments after time has run was held to be limited by reference to the need for the applicant to prove the existence of ‘special or peculiar circumstances’. Macrossan CJ commented that “[a]ny uncritical widening of the class of the exception would involve an unjustified intrusion into the area intended to have statutory protection, thereby subverting the statute itself\textsuperscript{16}.”

Doubts continued as to how the existence of any circumstances could justify the court in allowing parties and causes of action to be joined into continuing claims, despite the fact that the statute of limitations would prevent fresh actions against such parties, or for such causes of action, from being commenced\textsuperscript{17}. This will be considered further below.

\textsuperscript{12}Lynch v Keddell (No 2) [1990] 1 Qd R 10 at 17.
\textsuperscript{13}Lynch v Keddell (No 2) [1990] 1 Qd R 10 at 27.
\textsuperscript{14}Lynch v Keddell (No 2) [1990] 1 Qd R 10 at 13.
\textsuperscript{15}Cf Derrington J in Lynch v Keddell (No 2) [1990] 1 Qd R 10 at 25.
Nature of the discretion to allow amendments out of time

Under the repealed rules, the Queensland Supreme Court had held that amendments to parties\textsuperscript{18} and causes of action\textsuperscript{19} out of time, except those which fell within the specific provisions of O 32 sub-rules 1(2)-(5), were only permitted where the applicant proved ‘special or peculiar circumstances’ as required by the rule in \textit{Weldon v Neal}\textsuperscript{20}. The specific provisions allowing amendment out of time in O 32 r1(2)-(5) RSCR, were held to permit the court to exercise its discretion generally, only where the case fell within the specified categories of:

- change of name / misnomer;
- change of capacity; and
- new cause of action based on substantially the same facts as an existing cause of action.

These categories are reflected in the UCPR at rule 376.

\textbf{Impact of decisions from other jurisdictions}

The RSCR provisions, inserted in the rules in 1965\textsuperscript{21}, were basically the same as the English provision O 20 r 5. The English courts, in \textit{Mitchell v Harris Engineering Co Ltd} [1967] 2 QB 703 interpreted the changed rules broadly. This was even though the English rule equivalent to O 32 r 1(1) RSCR is expressed to be subject to the equivalent sub-rules (2)-(5). O 32 r 1(1) was not expressed to be subject to O 32 rr 1(2)-(5).

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\textsuperscript{17}Hayward v Darling Downs Aircraft Services Pty Ltd [1993] 2 Qd R 153 per McPherson J.
\textsuperscript{18}Hayward v Darling Downs Aircraft Services Pty Ltd [1993] 2 Qd R 153; Lynch v Keddell (No 2) [1990] 1 Qd R 10 at 15.
\textsuperscript{19}but contra see Adam v Shiavon [1985] 1 Qd R 1 (disapproved in obiter in Lynch v Keddell (No 2) [1990] 1 Qd R);
\textsuperscript{20}(1887) 19 QBD 394.
\textsuperscript{21}Queensland Government Gazette 14/12/65 p 1431.
In *McGee v Yeomans*\(^2\), the New South Wales Court of Appeal took the view that the equivalent rules should be interpreted broadly, and indeed, the court should exercise a general discretion to allow amendments, unfettered by the special and peculiar circumstances principle, in all cases. While the New South Wales rules do not subject the general power to the specific provisions (similar to Queensland O 32 RSCR), they also expressly state that the specific subrules do not limit the powers of the Court under the general rule permitting amendment. This was a substantial point of distinction from the Queensland construction.

Glass JA, with whom Moffitt P agreed, said in *McGee’s case*\(^2\):  

> By providing in r 4(3)-(5) that an amendment may be authorized which allows the substitution of a new party, the suing by the plaintiff in a new capacity and the substitution of a new cause of action, the rule was, in those circumstances, totally destroyed. I am unable to accept that it continued, nonetheless, to operate in circumstances outside their terms with undiminished vigour. *When it is further provided that the abrogation of the settled rule of practice in certain defined situations shall not in any way abridge the width of the general power to amend, there is in my view an implication that other amendments might in the exercise of discretion be properly allowed in situations not expressly dealt with by the rule, notwithstanding that they introduce causes of action then barred by the expiry of a period of limitation.*

The Full Court of the Queensland Supreme Court in *Adam v Shiavon*\(^2\) took a liberal approach to these provisions, preferring the approach in *McGee’s case* to more conservative authorities. This decision was, however, disapproved by a differently constituted Full Court in *Lynch v Keddell (No 2)*\(^2\). Subsequent cases tended to address the requirements of O 32 r 1(3) and (5), perhaps by implication accepting that amendment under O 3 r 11 and O 32 r 1(1) required the even harsher test of establishing ‘special or peculiar circumstances’. In several cases, applications to amend have been dismissed where they have failed to establish that the new cause of action arose out of the same facts or substantially the same facts as an existing cause of action (O 32 r 1(5)), without any attempt to bring the amendment within O 32 r 1(1). The Queensland courts also followed a conservative line in interpreting O 32 subrules 1(2)-(5).

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\(^2\)[1985] 1 Qd R 1
In 1991, the High Court adopted a broad interpretation of the Victorian equivalent to the Queensland misnomer provision (rule 376(2); O 32 r 1(3)) in *Bridge Shipping Pty Ltd v Grand Shipping*[^26] This led to some liberalising of the approach to joinder of parties[^27], and may also have led to a re-consideration of the application of the *Weldon v Neal* test for amendments of parties and causes of action generally[^28].

**Amendments to amendment rules under the UCPR**

The amendment to the provisions regarding joinder of parties and amendment of proceedings in the UCPR has overtaken the debate about the continued application of the rule in *Weldon v Neal*. The express inclusion of rule 376(5) ‘this rule does not limit the court’s powers under rule 375’ must be intended to bring the Queensland rules into line with the New South Wales rules, and result in the abolition of the rule in *Weldon v Neal* in all cases of amendment under those rules. Rule 74 UCPR also expressly deals with joinder out of time, by implication abolishing the rule in *Weldon v Neal* in cases falling under rule 74.

It is clear that a general discretion resides in the court in the case of all amendments out of time, although the expiry of time will remain an important matter for consideration.

The power of the courts to allow amendments out of time is still not entirely unfettered. It may be that the rules are insufficient to authorise joinder of parties or causes of action to defeat a time limit imposed not by the *Limitation of Actions Act* (Qld), but by Commonwealth legislation or by other State legislation.

How can the courts allow amendments which defeat a time limit?

Relation Back

One theory relied on to justify amendments which defeat time limits is that when an amendment is made to a document, that amended document is treated as if made at the time of the original document\(^{29}\). In the case of a cause of action inserted into an originating document on amendment, the added cause of action is read as if there from the first filing of that document, for the purpose of determining if the claim is in time. This is applied in the UCPR by rule 387(1).

This does not, however, assist a party to avoid a time limit by amending a statement of claim without leave, as the new claim is not treated as effective from the date of the original statement of claim or writ\(^{30}\).

It is a little more difficult to apply the relation back principle to joinder of parties. Traditionally added parties are considered parties only from the date of joinder\(^{31}\). Nonetheless, the relation back principle could, in theory, be applied to joinder out of time\(^{32}\). It might be argued that because of the combined operation of the rules for joinder of parties and amendment of proceedings, the document which originates the proceeding, once amended by the addition of the name of a new party, is read at its original date. If, then, one tests whether party X was sued in time, one is obliged to test the question as at the date of issue of the originating document, which now includes that party. The weight of authority, however, is against the application of relation back to joinder of parties\(^{33}\).

Statutory power to back date joinder of parties

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\(^{30}\)Wilkinson *v Rockdrill Contractors Pty Ltd* [1997] 1 Qd R 560.

\(^{31}\)Ketteman *v Hansel Properties Ltd* [1987] AC 189.

\(^{32}\)This view is supported by the judgment of Macrossan CJ, with whom McPherson J agreed, in *Lynch v Keddell (No 2)*, [1990] 1 Qd R 10, but not expressly in the judgment of Derrington J.
In any event, the Queensland Court had an express power to specify a date of deemed joinder under O 3 r 13 RSCR, but this applied only in relation to joinder of defendants. Even in relation to defendants, more recently, doubts had been raised over the use of O 3 r 13 to backdate joinder to defeat the operation of a limitation provision.

The Court of Appeal in *Hayward v Darling Downs Aircraft Services Pty Ltd*\(^{35}\), although expressing doubts, accepted that a court could make an order which would operate to defeat a time limit by back dating the joinder of a defendant (O 3 r 13) or a plaintiff (O 3 r 11). Pincus JA and Ambrose J said\(^{36}\):

> “it should be taken as settled that an order may be made on joinder of a plaintiff under O 3 r 11 of such a kind as to treat the joinder as effective from a date earlier than the date of the order, although not of course earlier than the issue of the relevant writ. This may be done in ‘special or peculiar’ circumstances and if it is done, the operation of the *Limitation of Actions Act 1974* on the cause of action vested in the newly joined party is affected.”

While it may still be questioned whether a relation back theory, or procedural rules justify the courts in abrogating the effect of primary statutes, the question has been put beyond doubt in relation to general Queensland time limits.

**Statutory authority**

The amendment to s 81 of the *Supreme Court Act 1991* (inserted in 1998\(^ {37}\)) resolves the difficulty in regard to time limits imposed by the *Limitation of Actions Act* (Qld). Section 81 provides:

1. This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.
2. The court may order an amendment to be made, or grant leave to a party to make an amendment, even though -

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\(^{33}\) *Ketteman v Hansel Properties Ltd* [1987] AC 189; *Bridge Shipping Pty Ltd v Grand Shipping* (1991) 173 CLR 231, per Dawson J; *Hayward v Darling Downs Aircraft Services Pty Ltd* [1993] 2 Qd R 153.


\(^{35}\) [1993] 2 Qd R 153.

\(^{36}\) *Hayward v Darling Downs Aircraft Services Pty Ltd* [1993] 2 Qd R 153 at 160.

\(^{37}\) Civil Justice Reform Act 1998.
(a) the amendment will include or substitute a cause of action or add a new party; or
(b) the cause of action included or substituted arose after the proceeding was started; or
(c) a relevant period of limitation, current when the proceeding was started, has ended.
(3) This section applies despite the Limitation of Actions Act 1974.

Section 118 of the Supreme Court Act 1991 authorises the Governor in Council to ‘make rules of court under this Act for - (a) the practices and procedures of the Supreme Court, the District Court or the Magistrates Courts, .or their registries or another matter mentioned in schedule 1; ...’ Schedule 1 of the UCPR allows the court to make rules regarding ‘cl 3 parties and proceedings’ and ‘cl 10 court supervision ... (c) amendments, both with and without leave’.

Rule 74 UCPR, in relation to joinder of parties, expressly provides in sub-rule (5) that for limitation purposes the proceeding is deemed started when the proceedings originally commenced. Rules 378(1) specifies that an amendment of a document takes effect on and from the date of the document that is amended, and rule 376 expressly allows amendment out of time.

The amendment to the Supreme Court Act 1991 does not however do away with the problem of time limits imposed by Commonwealth or other State legislation.

**Time Limits traditionally procedural matters in control of the courts**

The courts have also supported the existence of a jurisdiction to abrogate the effect of time limitation provisions by characterising limitation rules as merely procedural, and therefore subject to the court’s power to regulate practice and procedure.\(^{38}\)

Typical limitation periods have traditionally been regarded as matters of procedure rather than of substantive law.\(^{39}\) This is largely a matter of statutory interpretation, and some time limits, because of their terms, are considered substantive. Procedural time limit had to be pleaded; the

\(^{38}\)Brickfield Properties Ltd v Newton [1971] 1 WLR 862; The King v Foster [1937] St R Qd 67; The Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia Pty Ltd [1997] Qd R 149.
Court would not raise a time limit point, so if a defendant did not plead a statute, then the action could properly proceed to judgment. Where a defendant failed to plead the expiry of a limitation period, but at a later date sought to amend the pleading to include such a defence, there was no doubt that the Court had power to refuse such an amendment, in the interests of justice\(^\text{40}\). Logically, the Court must also have had the same power to prevent the defendant relying on a time limit by allowing the plaintiff to make an amendment to pleadings\(^\text{41}\).

On the other hand, a time limit characterised as substantive would bind the courts and could not be avoided by the application of rules of court designed to regulate procedural matters\(^\text{42}\).

**Difficulties imposed by substantive time limits**

Pursuant to a legislative scheme for Australia and New Zealand, directed at difficulties encountered in conflict of laws cases, s 43A was inserted into the *Limitation of Actions Act* 1974 to declare State time limits substantive\(^\text{43}\). The object of the *Choice of Law (Limitation Periods) Act* 1996 (Qld), and similar Acts passed by other States, Territories and New Zealand, is to ensure that limitation laws are treated as substantive law by courts applying choice of law rules\(^\text{44}\). This legislative scheme is designed\(^\text{45}\) to avoid problems raised by High Court decisions in interstate tort conflict of laws cases\(^\text{46}\), although doubt has been raised as to the premise for and effect of the scheme\(^\text{47}\).

A consequence of this legislation is that a Queensland Court considering a Queensland time limit is bound to treat it as substantive, so that without additional legislative intervention, it

\(^{39}\)Maxwell *v* Murphy (1957) 96 CLR 261.

\(^{40}\)Joint Coal Board *v* Adelaide Steamship Co Ltd [1964] NSWR 1126.

\(^{41}\)See eg Moynihan J in *The Fibreglass Pool Works (Manufacturing)* Pty Ltd *v* ICI Australia Pty Ltd [1997] Qd R 149 at 154; Cl Macrossan CJ in *Lynch* *v* *Kedell* (No 2) [1990] 1 Qd R 10.

\(^{42}\)For example, *In Re Tiller* [1963] SASR 117 where the Court, on a testator’s family maintenance application would not permit other children to join the existing action and thereby defeat the 6 months limitation period which was substantive in nature.

\(^{43}\)Inserted in 1996 by the *Choice of Law (Limitation Periods) Act* 1996.

\(^{44}\)Explanatory Notes, *Choice of Law (Limitation Periods) Bill* 1996.


\(^{47}\)Gardner *v* Wallace (1995) 184 CLR 95 per Dawson J; Commonwealth of Australia *v* Mewett (1997) 71 ALJR 1102 per Dawson J.
would not be possible for a court to allow amendment to proceedings which would permit a party to avoid a time limit. Section 81 of the *Supreme Court Act* 1991 provides over-riding statutory authority for the court rules which permit such amendments. This provision is almost duplicated in rule 376 UCPR. That provision, however, expressly overrides the *Limitation of Actions Act*. It says nothing of time limits prescribed by other Acts.

There remain, therefore, difficulties for litigants seeking to amend proceedings where time limits are imposed by other statutes. The explanatory memoranda for the amendment to the *Supreme Court Act* 1991 does not indicate why the provision does not also override other statutory time limits. It is likely that parliament has deliberately chosen not to detract from stringent time limits imposed by Queensland statutes such as the *Workcover Act* and the *Motor Accident Insurance Act*.

A further difficulty exists in relation to federal legislation. Muir J said in *Henry v Calamvale Estates Pty Ltd*\(^48\) ‘the rules of the Supreme Court cannot override Commonwealth legislation’. However, if the time limits imposed by federal statutes are merely procedural, it may be possible for courts to override them\(^49\). Toohey J (with whom Deane J agreed) in obiter in *Wardley Australia Ltd v State of Western Australia*\(^50\) expressed doubts as to the power of the Federal Court to override the time limit imposed by s 82(2) of the *Trade Practices Act*. It may be that his Honour construed the time limit as substantive; and he clearly confined his remarks to the particular provision. Further, different considerations apply to the Federal Court, which is a statutory creature, than apply to State courts, and this may also have informed his remarks, which discuss the statutory jurisdiction of the Federal Court.

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\(^49\) *White v Eurocycle* (1995) 64 SASR 461 (but the Full Court in this case rely on the decision of the Full Federal Court in *Wardley v WA*, and do not mention the contrary dicta in the subsequent High Court decision *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514); *The Fibreglass Pool Works (Manufacturing) Pty Ltd v ICI Australia Pty Ltd* [1997] Qd R 149.

\(^50\) *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514.
A question therefore remains as to the power of state courts to override federal time limits. It also remains uncertain whether procedural time limits can be overridden simply because courts have power to regulate their practice and procedure.

**Conclusion**

The UCPR amendment rules will be easy for practitioners to work with. They closely follow the scheme of the repealed rules, and have been amended to clarify problems with amendments out of time.

Amendments after the running of time limits imposed by Commonwealth legislation, and State legislation other than the *Limitation of Actions* Act will likely be constrained, and this may be a fruitful area for litigation for some time.

It is to be hoped that the Queensland Supreme Court will take the opportunity provided by the new rules to accept the High Court’s challenge in *Bridge’s* case and adopt a consistently liberal approach to the interpretation and application of rules 74, 375 and 376.
Appendix 1

Rough equivalence of provisions in UCPR and Repealed Supreme Court Rules

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<td>O 32 r 1(4)</td>
<td>Rule 376(3)</td>
</tr>
<tr>
<td>O 32 r 1(5)</td>
<td>Rule 376(4)</td>
</tr>
<tr>
<td>NEW</td>
<td>Rule 376(5) This rule does not limit the court’s powers under rule 375</td>
</tr>
<tr>
<td><strong>Amendment of originating process</strong></td>
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<tr>
<td>NEW</td>
<td>Rule 377 - leave required</td>
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<tr>
<td>O 24 r 1 - as to claim by statement of claim</td>
<td>no longer appropriate as claim and statement of claim are filed and served together</td>
</tr>
<tr>
<td>O 32 r 2 - how made</td>
<td>Rule 382</td>
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<tr>
<td><strong>How amendments made</strong></td>
<td></td>
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<tr>
<td>O 32 r 9</td>
<td>Rule 382 (1), (3), (4) &amp; (7)</td>
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<tr>
<td>O 32 r 10</td>
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</tr>
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<td>O 32 r 11</td>
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<td>Rule 383 - court may order party, registrar, judge’s associate or other appropriate person to make amendment</td>
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<td><strong>Failure to amend after order</strong></td>
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<td>O 32 r 8</td>
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<tr>
<td><strong>Amendment without leave</strong></td>
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<td>O 32 r 3 - amendment of statement of claim</td>
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<td>O 32 r 4 - amendment of counterclaim or set-off</td>
<td>Rule 378 (pleadings &amp; ‘documents’)</td>
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<td>O 32 r 5 - disallowance of amendment</td>
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<td><strong>Amendment with leave</strong></td>
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<td><strong>Costs</strong></td>
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<td>O 32 r 14</td>
<td>Rule 386</td>
</tr>
</tbody>
</table>
### Appendix 2

#### Comparison of provisions in UCPR and Repealed Supreme Court Rules

<table>
<thead>
<tr>
<th>UCPR</th>
<th>Repealed Supreme Court Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rule 69(1)</strong> The court may at any stage of a proceeding order that -&lt;br&gt; (b) any of the following persons be included as a party -&lt;br&gt; (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;&lt;br&gt; (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.</td>
<td><strong>O 3 r 11. Misjoinder and Nonjoinder. Striking out and adding parties. Consent of Plaintiff or next Friend.</strong> The Court shall not refuse to determine a cause or matter by reason only of the misjoinder or non joinder of parties; and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.</td>
</tr>
<tr>
<td>(2) However, the court must not include or substitute a party after the end of a limitation period unless 1 of the following applies:</td>
<td>The Court or a Judge, may, at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order that the names of any persons improperly joined, whether as plaintiffs or as defendants, be struck out, or that the names of any persons who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added, either as plaintiffs or defendants.</td>
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<tr>
<td>(a) the new party is a necessary party to the proceeding because -&lt;br&gt; (i) [property vested]</td>
<td>Note also <strong>O 3 r.3</strong>: action in name of wrong plaintiff - can add plaintiff: ‘When an action has been commenced in the name of the wrong person as plaintiff, or it is doubted whether an action has been commenced in the name of the right plaintiff, the court of a judge may order that any other person be substituted or added as plaintiff upon such terms as may be just.’</td>
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<td>(ii) [possession of land]</td>
<td></td>
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<td>(iii) the proceeding was started in or against the name of the wrong person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court’s intention to make the order; or</td>
<td></td>
</tr>
<tr>
<td>(iv) the court considers it doubtful the proceeding was started in or against the name of the right person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court’s intention to make the order; or</td>
<td></td>
</tr>
<tr>
<td>(b) the relevant cause of action is vested in the new party and the plaintiff or applicant jointly but not severally;</td>
<td></td>
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<tr>
<td>(c) [AG]</td>
<td></td>
</tr>
</tbody>
</table>
(d) [company]
(e) [sued jointly]
(f) [change in law or practice]

(g) for another reason the court considers it just to include or substitute the party after the end of the limitation period.

(3) If the court makes an order including or substituting a party, the court may give directions about the future conduct of the proceedings.

Rule 74 (3) Within 10 days after an order is made including or substituting a person as a defendant or respondent, the applicant for the order must serve a copy of the order on every continuing party and on every person who becomes a party because of the order, unless the court orders otherwise.

(4) If an order is made including or substituting a person as a defendant or respondent, the proceeding against the new defendant or respondent starts on the filing of the amended copy of the originating process.

(5) However, for a limitation period, the proceeding against the new defendant or respondent is taken to have started when the proceeding started against the original defendant or respondent unless the court otherwise orders.

Rule 375(1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application, or a document in a proceeding in the way and on the conditions the court considers appropriate.

(2) The court may give leave to make an amendment correcting the name of a party, even if it is alleged that the effect of the amendment will be to substitute a new party, if -
   (a) the court considers it appropriate; and
   (b) the court is satisfied that the mistake sought to be corrected -
       (i) was a genuine mistake; and
       (ii) was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court or Judge is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party suits (whether as

O 3 r 13: ‘When Defendant Added. When a defendant is added or substituted, he shall, unless he waives such service, be served with the amended originating proceedings, or with notice in lieu of service, as the case may be, and the proceedings as against him shall, unless otherwise ordered, be deemed to have begun only on such service being effected.’

‘Such service shall, unless otherwise ordered by the Court or a Judge, be effected in the same manner in which original defendants are served.’

O 32 r 1(1) The Court or a Judge may, in any cause or matter, at any stage of the proceedings, allow or direct either party to alter or amend the writ of summons, or any endorsement thereon, or any pleadings or other proceedings, in such manner and on such terms as may be just.

(2) Where an application to the Court or a Judge for leave to make the amendment mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court or a Judge may nevertheless grant such leave in the circumstances mentioned in that subrule if the Court or Judge thinks it just to do so.
plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if
the capacity in which, if the amendment is made, the party will sue is one in
which at the date of issue of the writ or the making of the counterclaim, as the
case may be, the party might have sued.

(4) The court may give leave to make an amendment, even if the effect of
the amendment is to include a new cause of action, if-
   (a) the court considers it appropriate; and
   (b) the new cause of action arises out of the same facts or substantially the
same facts as a cause of action for which relief has already been claimed in the
proceeding by the party applying for leave to make the amendment.

(5) An amendment may be allowed under subrule (2) notwithstanding that the
effect of the amendment will be to add or substitute a new cause of action if the
new cause of action arises out of the same facts or substantially the same facts as
a cause of action in respect of which relief has already been claimed in the action
by the person applying for leave to make the amendment.

(5) This rule does not limit the court’s powers under rule 375.

Rule 375(2) Subject to rule 376, the court may give leave to make an amendment
even if the effect of the amendment would be to include a cause of action arising
after the proceeding was started.

(6) Subject to this rule, an amendment may be allowed under this rule
notwithstanding that the effect of the amendment would be to add or substitute a
cause of action arising after the issue of the writ of summons or other
proceedings by which the proceedings were commenced.

Rule 378 (1) An amendment made under this part, of a document takes effect
on and from the date of the document that is amended.

(2) However, an amendment including or substituting a cause of action
arising after the proceeding started takes effect on and from the date of the order
giving leave.