

SA Law Reform Commission

Presentation

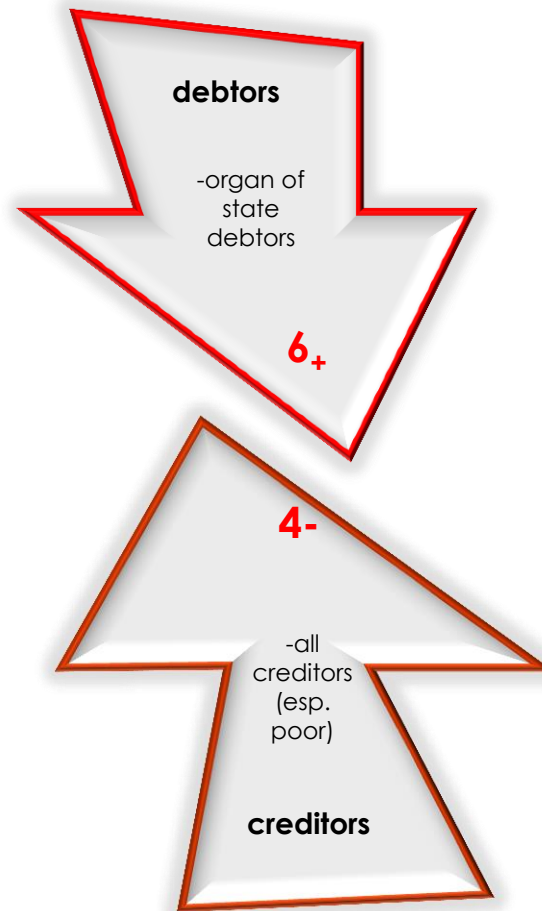
Revised Discussion Paper on Prescription Periods

Part E: Special time limits

FOR NOTING PURPOSES

- **Special prescription provisions** (as opposed to **special time limits**) are also dealt with in Part F of the paper (**but only for the purposes of harmonisation**), on the basis that some of these provisions **fall short of the requirements of the Prescription Act**, for example, the provisions contained in COIDA, RAF, the Apportionment of Damages Act, *etcetera*
- These **special prescription provisions**, for the most part, do not exhibit fatal characteristics

THE PRESCRIPTION [im]BALANCE



WHERE DO SPECIAL TIME LIMITS FIT?

Extinctive Prescription



Prescription of debts

Special time limits
(notice /limitation)



Special time limits

Prescription

WHAT ARE THEY?

- Referred to individually as notice and limitation, they embody a distinct form of extinctive prescription that do not affect substantive rights, but merely **bar** a creditor from obtaining a remedy, thus forming part of **procedural law**.
- They confer special protection to-
 - certain organ of state debtors; and
 - certain other debtors.
- They operate with a **fatal** effect.

ORIGIN / ENABLING LAWS

- Common law
 - English law;
 - Roman-Dutch law; and
 - Court judgements
- Prescription Act
 - Section 16(1): Application of this Chapter

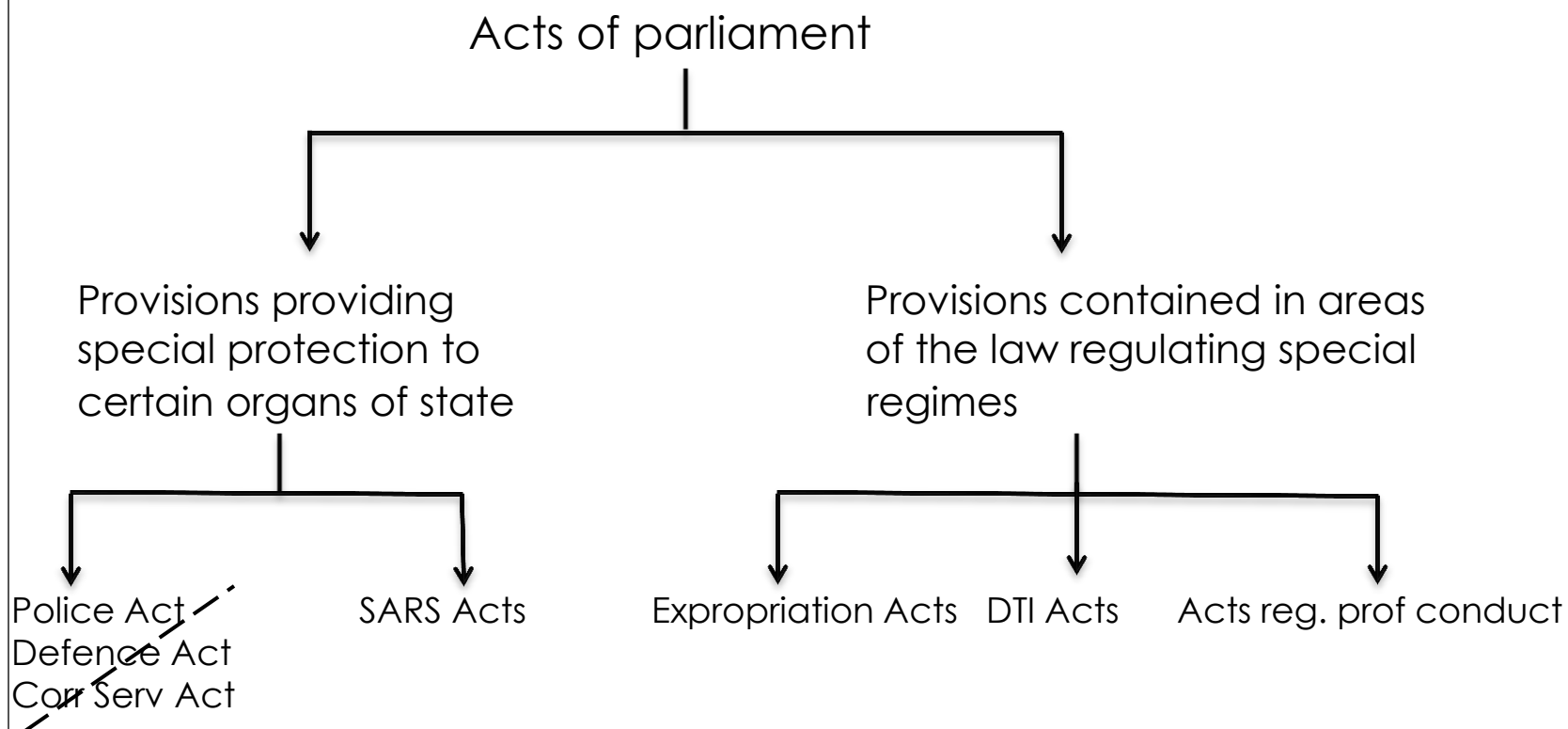
Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, **save** in so far as they are **inconsistent** with the provisions **of any Act of Parliament** which prescribes **a specified period within which a claim is to be made or an action is to be instituted** in respect of a debt or imposes **conditions on the institution of an action for the recovery of a debt**, apply to any debt arising after the commencement of this Act

- Section 11(d): Periods of prescription of debts

The periods of prescription of debts shall be the following:

- (d) **save where an Act of Parliament provides otherwise**, three years in respect of any other debt

WHERE CAN THEY BE FOUND?



HOW CAN THEY BE IDENTIFIED?

Notice	Limitation
<ul style="list-style-type: none"> • provisions requiring creditors to give notice- 	<ul style="list-style-type: none"> • provisions providing for the lapsing of a creditor's right to institute legal proceedings-
<ul style="list-style-type: none"> ○ as a condition precedent to the instituting of legal proceedings; ○ within too short a period from the date a cause of action arises; 	<ul style="list-style-type: none"> ○ after the expiry of certain very short time periods; ○ from the date a cause of action arises ○ without regard to a creditor's ability to timeously assert a right
<ul style="list-style-type: none"> • provisions requiring creditors to wait for the lapsing of certain time periods after giving notice and before instituting legal proceedings 	

EFFECT OF SPECIAL TIME LIMITS

- They **bar (prevent)** the institution of legal proceedings in instances where notice or limitation is successfully pleaded
- They **must be applied**, unless a debtor **waives the right** to rely on such provisions
- They have a **fatal/guillotine effect**, and therefore run regardless of circumstances that deter a creditor from enforcing a right
- The periods are not interrupted by an admission of liability on the part of the debtor
- Interruption by way of judicial process requires the mere issuing of summons; judicial interruption in terms of the Prescription Act requires service

POLICY UNDERLYING SPECIAL TIME LIMITS

- **Generally-**

- The need for social certainty and quality adjudication (similarly to the principles applicable regarding the prescription of debts)

- **Special protection to the state-**

- The need to overcome practical difficulties associated with its extensive activities, volume of work, large and constantly shifting workforce, constant threat of litigation and cumbersome consultation processes required for considering policy issues and the need to obtain legal advice from variously stationed state attorney offices
- Notice is said to provide the state with time to investigate claims with the goal of reaching early settlement in order to minimise legal costs, thus allowing it to properly budget for potential liability
- Shortened limitation periods are said to ensure that the state avoids dealing with old claims; that extended periods have a negative effect on the state's record-keeping abilities thus exacerbating problems associated with the loss or destruction of evidence

PROBLEMS WITH THE CURRENT LAW

Lack of uniformity

Questionable basis

Severity of impact

Curtailment of rights contained in the Bill of Rights

PROBLEMS WITH THE CURRENT LAW

Lack of uniformity

- **Number and variety of enactments containing special time limits-**
 - the list harmonised by the Commission contained 28 enactments. They are administered by different departments, legislate on a variety of topics, contain differently worded provisions and cover a varied combination of areas relating either to notice and limitation provisions, notice and prescription provisions or simply just limitation provisions
 - in the Canadian regime of Saskatchewan, the following was said about special time limits:

Perhaps the single greatest problem plaguing Saskatchewan limitations law is the proliferation of special limitation periods. Numerous special limitation provisions are scattered throughout the statutes of Saskatchewan.

PROBLEMS WITH THE CURRENT LAW

Lack of uniformity

Special limitation rules appear to be enacted on an ad hoc basis. The unique rules that govern each special period differ. Some special limitation provisions require notice to be given before an action is commenced; a few permit the court to extend an expired limitation period. In some the running of time commences when the conduct complained of occurs; in others time begins to run when the defendant's services are terminated. That there are so many periods creates a hidden trap for the unwary lawyer. The variation in wording among the various special limitation periods invites litigation on trivial distinctions, and hinders the development of principles applicable to general limitations law.

- although ILPACOS harmonised the notice periods in respect of enactments applicable to certain organs of state and repealed certain limitation provisions, the continuing proliferation of special time limits is an indication that the call for harmonisation is not unwarranted. In any event, the question whether ILPACOS went far enough by harmonising notice periods to six months calls for re-evaluation, in light of arguments that they still place an unfair burden on creditors who have claims against the state.

PROBLEMS WITH THE CURRENT LAW

Lack of uniformity

- as a result, Saskatchewan and New South Wales were of the view that-

... the preponderance of modern policy ... is against continuing to favour public authorities with the benefit of special notice of action. In summary, the objections to the benefit are that it suggests favouritism, creates an obstacle to litigation, increases costs and is, and has been, a source of injustice. Moreover, the law on the subject is scattered, hard to find, and uncertain because of variable word[s], from one Act to another;

and

These special notice provisions are generally known only to lawyers. It is not reasonable to expect that a person involved in an accident will have sought legal advice within a week or a month of an accident. Even under the Ontario proposal, many claimants will be forced to go before a court and attempt to overcome the heavy onus of establishing that the failure to notify was justified and that the defendant was not prejudiced.

Throughout this report the Commission has embraced the idea that the law of limitations should not give preferential treatment to certain groups of defendants at the expense of their victims.

- in this regard, it was maintained that all actions that were not genuinely unique should attract the same limitation rules, and that as far as possible, these rules should be brought within the general limitation of actions statute

PROBLEMS WITH THE CURRENT LAW

Questionable basis

- In response to the question whether policy considerations or the wording of special time limits provide sufficient justification for excluding the application of delay or the late acquisition of knowledge principles, thus leading to the inequitable result that time also runs against a creditor who lacks the capacity to enforce a particular right, the following was stated:

- *Yu Kwam-*

In these circumstances I have come to the conclusion that, save where the words of another statute clearly indicate the contrary, the general provision of the Prescription Act [of 1943], as to such matters as the interruption or suspension of prescription and the like, are of application to extinctive prescription generally.

- *Apalamah-*

Where the Prescription Act has a voice on an aspect relating to prescription in respect of which the "other" Act is silent there is not necessarily inconsistency between the two Acts and the voice of the Prescription Act must needs be heeded.

PROBLEMS WITH THE CURRENT LAW

Severity of impact

- Fatal effect/guillotine effect-
 - the cumulative effect of sections 11(d) and 16(1) is to provide for the creation of a special regime that overrides the general and more generous one provided for by the Prescription Act
 - in this regard, limitation provisions have been interpreted to exclude some or all of the following features:
 - an actual and constructive knowledge requirement, having the effect of delaying the commencement of a period; and
 - mitigating factors, serving to delay the running of a period
 - so drastic are their effect, that they have been described as guillotine or fatal provisions

PROBLEMS WITH THE CURRENT LAW

Questionable constitutionality

It must be emphasised, at the outset, that the regulation of special time limits is not, in itself, unconstitutional. In fact, and in line with the basic rationale of prescription, the need for regulating special time limits has been affirmed time again by the courts as follows:

- *Mohlomi* (1997)-

Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.; and

- *Mdeyide* (2011)-

In the interests of social certainty and the quality of adjudication, it is important though that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.

PROBLEMS WITH THE CURRENT LAW

Questionable constitutionality

A problem will arise however, in instances where a provision makes serious inroads into the rights of creditors, and in this regard, it has been held in *Mohlomi* that-

*What counts ... is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the **availability of an initial opportunity to exercise the right** that amounts, ..., to a real and fair one. ... **A handy yardstick against which to measure the limitation imposed ... on the action it controls will be found in chapter III of the Prescription Act (68 of 1969).***

Emphasis added

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right to equality and to equal protection and benefit of the law-**
 - regarding the question of special protection to the state, the England and New Zealand Law Reform Commissions argue as follows:
 - the state is not the only large organisation conducting varied activities and employing large and constantly changing work-forces; certain companies face the same problems. Furthermore, certain smaller organisations that do not receive large numbers of claims and that do not employ large workforces, for example, small municipalities, remain protected by shorter periods;
 - the time-consuming procedures involved in investigating claims can be streamlined through improved management techniques and better communication channels.

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right to equality and to equal protection and benefit of the law-**
 - although the wasting of public funds on unfounded claims is not condoned, short limitation periods have the effect of indiscriminately barring unfounded as well as founded claims;
 - theoretically speaking, short limitation periods ought to facilitate the proper investigation and settlement of well-founded claims in order to save costs. Arguably however, the opposite appears to be achieved in practice, by creating unnecessary litigation because insufficient time exists for the proper investigation of claims and the negotiation of settlements; and
 - organisations protected by special time limits rely on the protection as a matter of course, often evading liability for well-founded claims

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right of access to courts-**

- in *Mohlomi vs Minister of Defence* (1996);

- the plaintiff sued the defendant for damages as a result of injuries sustained when he was shot by a soldier whilst he was still a minor. After the shooting, the plaintiff was hospitalised for seven weeks. A few months later, he sought legal assistance. Due to a mistaken impression that he was shot by a police officer, notice of legal action was sent to the Minister of Safety and Security instead of the Minister of Defence;
- by the time a renewed notice was sent, it was three days too late, and thus wanting of compliance with section 113(1) of the former Defence Act, which provided for-
 - ❑ the barring of civil action if not instituted within six months from the date a cause of action arose; and
 - ❑ the barring of civil action if written notice of intention to institute such action was not given one month prior to the commencement thereof.

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right of access to courts-**

- the court was required to determine the constitutionality of section 113(1) on the basis of the defendant's special plea that the action was barred for want of proper notice
- the court found that section 113(1) of the Defence Act failed to afford claimants an adequate and fair opportunity to seek judicial redress
- the infringement was found to be unreasonable and unjustifiable, and in this regard, section 113 of the Defence Act was declared to be inconsistent with the Interim Constitution and therefore invalid

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right of access to courts-**

- in *Moise vs Transitional Local Council ...* (2001), the court remarked as follows, after finding that the purpose of special statutory provisions that singled out particular kinds of proceedings against specific kinds of claimants and set special extraneous preconditions for the institution of such proceedings had an unfair tendency to lean towards protecting the interests of the state:

*The requirement of written **notice** as a **precondition to the institution of legal proceedings** is in itself an obstacle to such legal proceedings. If it is considered in conjunction with the “**very limited period**” of **90 days** after the due date, “as part and parcel of a composite scheme”, it is apparent that it amounts to a real impediment to the prospective claimant’s access to a court. The time period is very short, the notice has to be served on the prospective debtor and it has to contain significant information regarding the occurrence and of the damages allegedly suffered. And, of course, failure to comply with the notice requirement vitiates the claim unless, under section 4 of the Act, a court can be satisfied as to the absence of prejudice to the debtor or the existence of special circumstances exculpating timeous non-compliance.*

*Moreover, the **condonation opportunity** afforded to a prospective claimant by section 4 **does not render the impediment immaterial**. The obstacle remains regardless of this potential amelioration of his harshness.*

Emphasis added

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right of access to courts-**

- In the minority judgement of *Barkhuizen vs Napier* (2007), the following was stated in relation to the length of the period (90 days), which was found to be unreasonably short:

First, to require a claimant to find litigation funds, appoint an attorney, cause counsel to be briefed and issue and serve summons within a period of 90 days of repudiation of the claim, is unreasonable and unconscionable. The likely impact or tendency of this brief time bar is to release the insurer from liability to its considerable financial gain and to the irreparable prejudice of the insured.

Second, it is not clear what legitimate purpose is served by this unseemly haste. Once the claimant has given timely notice of an intention to claim, the insurance company is afforded the opportunity to investigate the claim and to preserve evidence for trial. One must wonder why this one-sided rush is necessary to protect the interests of the insurance company. The likely harm to the insured that the provision wreaks seems disproportionate to the interest the insurance company seeks to protect.

Third, the attenuated time bar is not reciprocal. The insurance agreement does not contain any time bar to the insurer's right of action against the insured. It may repudiate the claim when it chooses and any claim it may have against the insured seems to be limited only by the three-year prescription period of general application.

PROBLEMS WITH THE CURRENT LAW

Question of constitutionality

- **Right of access to courts-**

Fourth, at least since the advent of our democracy, Parliament seems to have adopted a new approach to ameliorate the consequence of time limitation clauses in statutes. Here I have in mind the Institution of Legal Proceedings against certain Organs of State Act.

In the present matter, the impugned time bar clause, on its terms, does not provide for extension of time on good cause shown, and is enforceable whatever the reason is for failure to comply. In other words, the clause may be enforced however unfair or unjust its consequences may be.

The clause is, on its face, unreasonable and unjust. It denies the applicant a reasonable and adequate opportunity to seek legal redress and is therefore at odds with public policy.

PRELIMINARY LAW REFORM PROPOSALS

Issues for consideration in formulating proposals for harmonisation

General	Notice	Limitation
Is the special time limits landscape proliferate; providing for provisions that lack uniformity and that are unreasoned, harsh and inflexible?	Should wholesale repeal be considered of notice/Should certain organs of state/other bodies still obtain the benefit of notice?	Should wholesale repeal be considered of limitation?/Is there a basis for certain enactments to utilise a specialised regime?
Should regulation of the law of extinctive prescription take place in terms of one body of law of general application?	Did ILPACOS go far enough in harmonising notice?	Does the principle of "barring" still have a role to play if the Prescription Act is considered to be the yardstick for regulating prescription?
What are the lessons learned from <i>Mohlomi, Moise, Barkhuizen</i> , etc?		Are there still enactments left behind after ILPACOS which accord special protection to the state in relation to limitation after provisions in Defence Act, Police Act, etc were repealed?
What are the lessons learned from other jurisdictions?		Are there enactments that make provision for the regulation of limitation that are non-encroaching of a creditor's right to access the more beneficial regime of the Prescription Act?

PRELIMINARY LAW REFORM PROPOSALS

Issues for consideration in formulating proposals for harmonisation

Principle:

Consideration must be given to the fact that from moment to moment, we exist through space and time as both debtor and creditor.

PRELIMINARY LAW REFORM PROPOSALS

Regulation in terms of special time limits regime: Notice

Prescription Bill / ILPACOS Amendment Bill

- **Proposing regulation of the notice provisions contained in the undermentioned enactments in a uniform manner, in terms of one body of law (ILPACOS):**
 - Expropriation (Establishment of Undertakings) Act, 1951
 - Expropriation Act, 1975
 - **Tax Administration Act, 2011**
 - Legal Practice Act, 2014
 - **Customs Control Act, 2014**
- **Proposing amendment of ILPACOS in the following manner:**
 - Broadening the definition of the term: “creditor”
 - Repealing the provision requiring that notice should be provided within six months from the due date of debt, thus making it possible for notice to be provided at any stage, as long as it is done before a claim prescribes. In this way, the need to apply for condonation no longer becomes necessary and the late knowledge requirement becomes superfluous

Discussion

Comments received-

- Harmonisation of “SARS” enactments should not be pursued-
 - Unique legislative schemes
 - Claims are peculiar
 - SARS does not choose its debtors so cannot investigate its debtors before granting credit/cannot demand security in instances of non-payment;
 - Finality is important for budgetary and fiscal planning;
 - Customs Act: “Notice”-
 - does not serve as a condition precedent to the institution of legal proceedings;
 - only regulates a “waiting” period, which is only 30 days, and thus less than the 90-day period proposed by SALRC. They need this period to investigate the matter and proceed with settlement to prevent waste of litigation costs;
 - ILPACOS regulates “debts”, the enactment regulates both “debt” and “non-debt” matters;
 - ameliorates any likelihood of “harsh” operation;

PRELIMINARY LAW REFORM PROPOSALS

Regulation in terms of special time limits regime: Notice

Prescription Bill / ILPACOS Amendment Bill	Discussion
<ul style="list-style-type: none"> ○ Providing for suspension of the running of prescription once notice has been served, provided that a claim has not yet prescribed ○ Increasing the number of days in which a creditor must await the service of summons after notice has been served, from 60 days to 90 days 	<p style="text-align: center;">Comments received-</p> <ul style="list-style-type: none"> ○ Tax Admin Act: "Notice"- <ul style="list-style-type: none"> ▪ Section 11 covers a narrow range of tax related proceedings in the High Court; ▪ ILPACOS only applies to "debts", defined as "debts" for which the outcome will be a claim for "damages"; ▪ Decision not to authorise a refund subject to objection and appeal under dispute resolution procedures, external adjudication lies with Tax Board/Tax Court; ▪ Etc

PRELIMINARY LAW REFORM PROPOSALS

Regulation in terms of special time limits regime: Limitation

Prescription Bill

- **Proposing regulation of the limitation provisions contained in the undermentioned enactments in a uniform manner, in terms of a separate “Special Time Limits” regime forming part of the Prescription Act (Part B):**
 - Competition Act
 - National Credit Act
 - Companies Act
 - Consumer Protection Act
- **Proposing amendment of the Prescription Act by providing for the uniform regulation of limitation provisions that operate outside of the “Prescription of Debts” provisions:**
 - Authorising the regulation of such provisions only under the following circumstances:
 - If the overall objects of the enactment is to provide for the speedy resolution of disputes in a cost-effective manner in a forum other than a court
 - If the limitation period provided for is no less than two years from the date of act/omission
 - If it provides for the non commencement or the suspension of the running of prescription in instances where it is impossible for a creditor to timeously assert a right
 - If it provides for a power to extend the period in question on good cause shown
 - If it provides for a power to extend the period in question in instances where a debtor unreasonably refuses to grant such extension

Discussion

Comments received-

- Caution needs to be exercised when considering harmonisation of the National Credit Act and Consumer Protection Act. The definition of “debt” will have to be considered. Thus, in instances where a consumer alleges that a credit agreement was recklessly granted, will the general prescription period be applicable? When will such debt become due? Both enactments provide debtors with other forms of recourse outside of the National Consumer Tribunal
- Regard will have to be had to the findings in *Food and Allied Workers' Union* regarding the applicability of the Prescription Act to arbitration awards issued in terms of the Labour Relations Act to the effect that-
 - the provisions contained in the Labour Relations Act are not in conflict with the Prescription Act;
 - the running of prescription is interrupted by referral of a dispute to CCMA; and
 - prescription will remain interrupted until dismissal of review proceedings by the Labour Court.
- In instances where an enactment fails to comply with the provisions contained in clause 23 of the Bill, then provision should be made for the Prescription Act’s “Prescription of Debts” provisions to operate automatically

PRELIMINARY LAW REFORM PROPOSALS

Harmonisation of outstanding limitation provisions

Prescription Bill

- **Harmonising the laws contained in the following provisions in line with the “Prescription of Debts” provisions of the Prescription Act (Part A):**
 - Expropriation (Establishment of Undertakings) Act, 1951
 - Expropriation Act, 1975
 - Compensation for Occupational Injuries and Diseases Act, 1994
 - Road Accident Fund Act
 - National Nuclear Regulator Act
 - Consumer Protection Act (section 61)
 - **Tax Administration Act, 2011**
 - **Customs Control Act, 2014**

Discussion

Comments received-

- Harmonisation of “SARS” enactments should not be pursued-
 - Customs Act: “Limitation”-
 - If constitutionality tested, likely to be found to be justifiable
 - Uniqueness, question of certainty and finality
 - Rigidity of short period ameliorated by “delay” provisions and extension provisions
 - In any event, the way provision worded similar to SALRC proposal
 - SARS could consider amending the time limit to two years