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AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY 2019

Professional Development and Networking for the In-House Legal Community

Limitation periods - What are the implications for Commonwealth clients?

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Limitation periods and the Commonwealth

- Commonwealth agencies are subject to all Federal and State/Territory specific laws
- The Commonwealth deals with civil and commercial claims as well as applications for judicial and merits review of administrative decisions
- Limitation defences are not always the panacea they are thought to be
- Tension between access to justice and finality of liability
- Important to understand the governing legislation in the relevant jurisdiction that applies to the specific action or decision

Limitation periods and the Commonwealth

Legal Services Directions 2017 – Schedule 1, Part 1, Cl 8

- 8.1 - “Entities to get approval before waiving or agreeing to extend limitation periods”
- 8.2 - An application for an extension of a limitation period is to be opposed by the entity unless approval to consent to the application is given by the Attorney-General
- 8.3 - a non-corporate Commonwealth entity can settle a claim involving a limitation period without the approval of the Attorney-General in certain circumstances
- 8.4 - ‘limitation period’ in paragraphs 8.1 and 8.2 is intended to cover only the initial commencement of court proceedings

Around the jurisdictions

- ACT – *Limitation Act 1985*
- NSW – *Limitation Act 1969*
- NT – *Limitation Act 1981*
- QLD – *Limitations of Actions Act 1974*
- SA – *Limitations of Actions Act 1936*
- TAS – *Limitation Act 1974*
- VIC – *Limitations of Actions Act 1936*
- WA – *Limitation Act 2005*

Around the jurisdictions - Torts

- Torts

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
6 years: s 11(1)	6 years: s 14(1)(b)	3 years: s 12(1)(b)	6 years: s 10(1)(a)	6 years: s 35(c)	6 years: s 4(1)(a)	6 years: s 5(1)(a)	6 years s 13(1)
3 years personal injury s16B	3 years personal injury – s18A and Division 6 (s50A – 50F)		3 years personal injury s11	3 years personal injury s36	3 years personal injury s5A	3 years personal injury s23A	3 years personal injury s14

Around the jurisdictions – Defamation

- Defamation

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
1 year from publication: s 21B(1) - <i>Limitation Act 1985</i>	1 year from publication: s14B - <i>Limitation Act 1969</i>	1 year from publication: s 12(2)(b) - <i>Limitation Act 1981</i>	1 year from publication: s 10AA <i>Limitations of Actions Act 1974</i>	1 year from publication: s37 <i>Limitations of Actions Act 1936</i>	1 year from publication: s20A(1) - <i>Defamation Act 2005</i>	1 year from publication: s5(1AAA) <i>Limitations of Actions Act 1958</i>	1 year from publication: s15 <i>Limitation Act 2005</i>

Around the jurisdictions – Defamation

- Extension for Defamation

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Up to 3 years from publication s21B(2) <i>Limitation Act 1985</i>	Up to 3 years from publication s56A <i>Limitation Act 1969</i>	Up to 3 years from publication s44A <i>Limitation Act 1981</i>	Up to 3 years from publication s32A <i>Limitations of Actions Act 1974.</i>	Up to 3 years from publication s37(2) <i>Limitations of Actions Act 1936</i>	Up to 3 years from publication s20A(2) <i>Defamation Act 2005</i>	Up to 3 years from publication s23B <i>Limitations of Actions Act 1958</i>	Up to 3 years from publication s40 <i>Limitation Act 2005</i>

Around the jurisdictions – Contracts

- Breach of Contract (not Deed/Specialty)

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
6 years: s 11(1) (general limitation period).	6 years: s 14(1)(a)	3 years: s 12(1)(a).	6 years: s 10(1)(a).	6 years: s 35(a).	6 years: s 4(1)(a).	6 years: s 5(1)(a).	6 years: s 13(1) (general limitation period).

- Breach of Contract founded on a Deed or Specialty

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Deeds: 12 years: s13	Deeds: 12 years: s16	Deeds: 12 years: s14(1)	Specialty 12 years: s10(3)	Specialty 15 years: s34.	Specialty 12 years: s4(3)	Specialty: 15 years: s5(3)	Deeds 12 years: s18

Around the jurisdictions - Statutory Duty

- Breach of Statutory Duty

ACT	NSW	NT	QLD	SA	TAS	VIC	WA
6 years: s11(1) (general limitation period).	6 years: s14(1)(b).	3 years: s12(1)(b).	6 years: s10(1)(a).	6 years: s35(c) (general limitation period).	6 years: s4(1)(a).	6 years: s5(1)(a).	6 years: s13(1) (general limitation period).

- *Carey-Hazell v Getz Bros and Co (Australia) Pty Ltd* (2001) 112 FCR 336

Around the jurisdictions – points of difference

- Bar to commencing proceedings
- Defence to claim
- Extinguishment of claim
- Denial of remedy
- Long stop rule
 - *Lewicki v Hunter New England Local Health District* [2020] NSWSC 1037

Limitation periods in Administrative Review Applications – Why so short?

- ‘The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision’ (Lord Diplock)
- The 28 day time limit ‘provides some protection for public authorities against being left in suspense for an unreasonable period as to the legal validity of their decisions’ (Law Council)

Limitation periods in Administrative Review Applications – Why so short?

- Generally, 28 days:
 - see s 11 AD(JR) Act; s 29 AAT Act.
- From when?
 - date of reasons for decision; and
 - if no reasons provided, date of terms of decision.

Limitation periods in Administrative Review Applications – Why so short?

- But not always:
 - s 39B of *Judiciary Act 1903* – no limit (one exception):
 - S 477A(1) of *Migration Act 1958* - An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.
 - s 500(6B) of the *Migration Act 1958* – 9 days;
 - s 11(4) AD(JR) Act; s 29(4) AAT Act - If no time period specified, period is when Court/Tribunal determines is 'reasonable'; and
 - s 477A(1) of *Migration Act 1958* – date of decision not reasons.

Limitation periods in Administrative Review Applications – Can they be extended?

- Generally, yes:
 - see s 11 AD(JR) Act; s 29 AAT Act; and
 - Note difference between merits and judicial review proceedings in dealing with EOT applications;

- But, not always:
 - s 500(6B) of the *Migration Act 1958* – no discretion:
 - paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act 1975* do not apply to the application; and
 - See Jagot J in *Virapornsawun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1699.

Limitation periods in Administrative Review – What's considered in an EOT application?

- Six principles by Wilcox J in *Hunter Valley Development Pty Ltd v Cohen, Minister for Home Affairs and Environment* (1984) 3 FCR 344:
 - **Principle 1: Acceptable explanation of the delay;**
 - **Principle 2: Action taken by the applicant to make the respondent aware of dissatisfaction with the decision;**
 - **Principle 3: Prejudice to the Respondent;**
 - **Principle 4: 'Mere absence of prejudice is not enough to justify the grant of an extension of time';**
 - **Principle 5: 'The merits of the substantial application'; and**
 - **Principle 6: 'Considerations of fairness as between the applicants and other persons in a like position'.**

Determining cause of action

- The term “cause of action” is not defined in legislation but has been judicially interpreted to mean:
 - “every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to a judgment of the court”
 - Read v Brown* (1888) 22 QND 128 at 131 per Lord Esher MR
- The relevant determinant for the purposes of any claim is when the cause of action accrued

Determining cause of action

- In contract, the cause of action accrues on breach of contract, and not the actual suffering of damage (*Bagot v Stevens, Scanlan & Co* [1966] 1 QB 197; *Scarcella v Lettice* (2000) 51 NSWLR 302)
- The plaintiff would be entitled to nominal damages if no actual loss or damage could be established (*HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 540)
- In tort, proof of damage is necessary

Determining cause of action

- Negligence is only actionable on proof of damage. Damage which is merely “prospective or contingent” does not qualify (*Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 530 per Mason CJ, Dawson, Gaudron and McHugh JJ)
- the “general principle”, as outlined in *Scarcella v Lettice*, is that time runs from when the cause of action is complete, whether or not this is discovered or discoverable (at 308 [24] per Handley JA)

Determining cause of action

Interesting examples

- Latent defects - cause of action is characterised as arising when the defect becomes apparent or when it ought reasonably have been detected
- Continuous cause of action - the cause of action arises from the repetition of acts or omissions of the same kind as that for which the action was brought (per Lindley LJ in *Hole v Chad Union* [1888 H.2819])
- Fraud or deception - the limitation date begins to run from the date when the plaintiff first discovered the cause of action, or may, with reasonable diligence, discover the fraud, deceit or concealed by the defendant

Extensions of time

Interesting examples

- Defamation
- Intentional torts – historical
- Standstill agreements and deeds

Extensions of time

Defamation

- Section 56A - *Limitation Act (NSW)* provides the Court with a discretion to extend the limitation period.
- A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period to a period of up to 3 years running from the date of the publication.
- The principles relevant to an application under s 56A were summarised by Hislop J in *Cassar v Network Ten Pty Ltd* [2012] NSWSC 680 at [16]

Extensions of time

Defamation

- The burden which must be discharged is to establish that it was “not reasonable” to commence proceedings within the limitation period: *Houda v State of NSW* [2012] NSWSC 1036 at [4]
- The test is an objective one, requiring the Court to evaluate “*the circumstances as they appear objectively to the court and not ‘the circumstances which the plaintiff believed, however unreasonably, to exist’*”

Extensions of time

Intentional torts – historical

- Material facts of decisive character
- Unsound mind and PTSD
- *AG Legal Service Direction* (expired)
- Legislative reform

Extensions of time

Standstill agreements and deeds

- Common commercial practice
- Does not suspend the limitation period
- Relied upon to seek extension of time

QUESTIONS ???

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