

Know your limits

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Introduction

With the proliferation of time limits in legislation today missing limitation dates is a mistake that occurs in many areas of the law.

The reasons for missing time limits are varied as are the potential repercussions. Sometimes it is a lack of knowledge by the lawyer that the time limit exists, or failing to check the legislation carefully enough to find the right time limit, as well as failing to diarise the dates effectively and a variety of other slip ups or errors.

In the last five years five per cent of our claims and notifications involved missed limitation periods with the most prevalent areas of practice being personal injury litigation and commercial litigation. Wills and estates, commercial law and family law also feature. In the few claims we have in defamation and libel, missing the time limit is the usual mistake. The cost of claims in this period accounted for 7.6 per cent of our total claims which averages out at approximately \$2.445 million per year.

This practice risk guide lists the limitation periods that have caught practitioners out in recent years. It also gives some claims examples of how the mistakes have occurred and the lessons we can learn from those mistakes. It is not a comprehensive guide to limitation periods but knowing the limitation periods in this guide should assist practitioners in a variety of practice areas. Best practice is to go directly to the relevant legislation and read the limitation provisions carefully each time and never rely on your memory of a provision.

This guide covers some personal injury limitation periods. As this is a specialist area of law please refer to our separate practice risk guide [Pitfalls in personal injury litigation](#) for further information.

Figure 1 >
Percentage of number of limitations related claims in different area of practice from 2010/11 to 2014/15

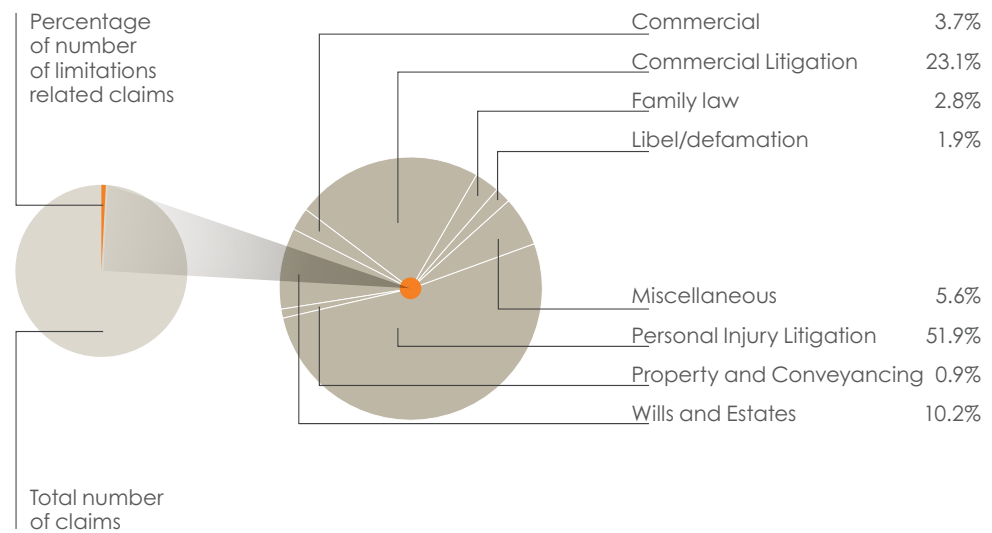
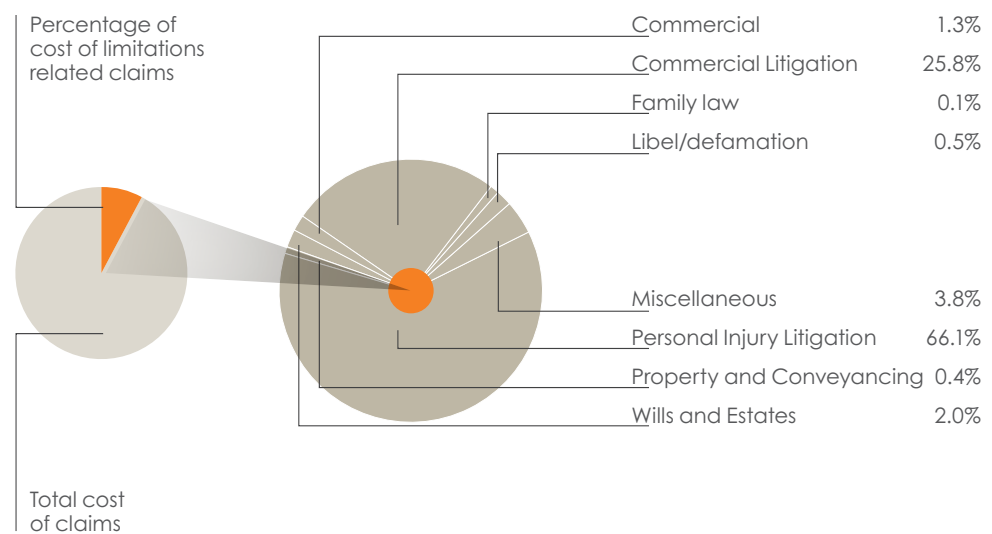


Figure 2 >
Percentage of cost of limitations related claims in different area of practice from 2010/11 to 2014/15



Lessons from the claims

- > Identify and diarise applicable limitation dates at the start of each matter and advise the client of the dates and importance of acting before then.
- > Always double-check the relevant legislation to ascertain the applicable time limit. This is especially important when acting in matters outside your expertise.
- > Different time limits often apply in other jurisdictions – always check the legislation.
- > Employed lawyers should be properly trained and supervised when providing advice especially about limitation dates.
- > Where there are multiple possible causes of action, ensure each is properly considered.
- > If taking advice from counsel ensure they have expertise in the relevant area.
- > Be careful not to let matters drag on. If the client will not respond to requests for instructions or follow your advice, terminate the retainer.
- > Don't assume a time limit will be waived or an extension of time will be granted by a court.
- > When negotiating with another party, be aware of a pending time limit expiry date and don't assume the matter will settle.
- > Don't get delayed waiting for counsel or experts.
- > Beware the short time frames for registering interests on the Personal Property Securities Register.
- > Act promptly when documents require amendment in order for them to be registered or to secure registration.
- > Have processes to ensure files are not overlooked when there are personal issues that may cause practitioners to be distracted.
- > Allow a margin for error – don't leave things until the last moment.
- > When staff leave or the conduct of a file is transferred, ensure critical dates are identified.
- > When there is disruption in the office such as implementing a new practice management system or moving, put processes in place to ensure all necessary steps on matters are completed, especially when close to limitation deadlines.
- > Implement a firm procedure to ensure notices served by the Registrar of Titles are promptly brought to the right person's attention and prompt instructions are obtained from the client.
- > When ceasing to act for a client or even moving office, where your firm has lodged caveats recording its address for service ensure the address for service is changed.

Time limits most commonly missed

| Action | Time limit | Legislation | Extension availability |
|--|--|--|--|
| APPEALS | | | |
| Leave to appeal or application for appeal to the Supreme Court of Victoria, Court of Appeal | 28 days after the decision to which the appeal relates | r.64.05(1)(a) Supreme Court (General Civil Procedure) Rules 2015 (Vic) | The Court of Appeal or Judicial Registrar can extend time – r.64.08 Supreme Court (General Civil Procedure) Rules 2015 (Vic) |
| Appeals from decision of Supreme Court associate judge | 14 days after the day the judgment/order was made | r.77.06.2(1)(a) Supreme Court (General Civil Procedure) Rules 2015 (Vic) | A judge of the court or an associate justice may extend time – r.77.06.2(6) Supreme Court (General Civil Procedure) Rules 2015 (Vic) |
| Appeal from a final order in the Magistrates Court | 30 days after the day on which the order was made | s.109(2)(a) <i>Magistrates Court Act 1989</i> (Vic) | An appeal instituted after 30 days is deemed to be an application for leave to appeal – s.109(4) <i>Magistrates Court Act 1989</i> (Vic) |
| Appeal from an order of VCAT | 28 days after the day of the order | s.148(2)(a) <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) | The court can extend time – r.148(5) <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|--|---|--|---|
| Appeal to the Federal Court | 21 days after the date of judgment or order (unless a different date is fixed by the court appealed from) | r.36.03 Federal Court Rules 2011 | The court can extend time by application – r.36.05 Federal Court Rules 2011 |
| Appeal to the High Court | 28 days after the judgment below was pronounced | r.41.02.1 High Court Rules 2004 | A person can seek an order that compliance with the time limit be dispensed with and file and serve an affidavit explaining the failure to comply with rule 41.02.1 – r. 41.02.2 High Court Rules 2004 |
| Application to Appeal Costs Board | 12 months from the final determination | s.35D <i>Appeal Costs Act 1998</i> (Vic) | The Appeal Cost Board can determine an application for payment as if the indemnity certificate had not expired if it considers that it is in the interest of justice to do so – s.35E(2) <i>Appeal Costs Act 1998</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|--|---|---|--|
| Validity of writ or originating process for service | 12 months from the day it is filed | r.5.12(1) Supreme Court (General Civil Procedure) Rules 2015 (Vic) r.5.12(1) County Court Civil Procedure Rules 2008 (Vic) | The court may extend the period of validity for no more than one year from the day of the order before or after expiry. r.5.12(2)-(3) Supreme Court (General Civil Procedure) Rules 2015 (Vic) r.5.12(2)-(3) County Court Civil Procedure Rules 2008 (Vic) |
| AVIATION | | | |
| Aviation claims for: > Death, physical injury, lost baggage etc in connection with the carriage of a passenger on an aircraft > Related embarking and disembarking operations > Separate notification requirements for baggage complaints in s.30 (although court can waive these if satisfied it is just and equitable to do so) | 2 years from: > the date of arrival or > in the event that there was no arrival, the later of the scheduled arrival or the date on which carriage stopped | s.34 <i>Civil Aviation (Carriers' Liability) Act 1959</i> (Cwlth) | No extension available If the cause of action is not brought in this period it is extinguished |

| Action | Time limit | Legislation | Extension availability |
|------------------------------------|---|--|--|
| BANKRUPTCY | | | |
| Serving bankruptcy notice | 6 months from the date of issue | r.4.02A(a) <i>Bankruptcy Regulations 1996</i> (Cwlth) | The Official Receiver may allow any further period – r.4.02A(b) <i>Bankruptcy Regulations 1996</i> (Cwlth) |
| Serving creditor's petition | 12 months from the date petition presented to court | s.52(4) <i>Bankruptcy Act 1966</i> (Cwlth) | The court can extend time for up to 12 months if it considers that it is just and equitable to do so (only if such extension is granted before the original 12 month period expires) – r.52(5) <i>Bankruptcy Act 1966</i> (Cwlth) |

| Action | Time limit | Legislation | Extension availability |
|--|--|---|-------------------------------|
| BUILDING ACTIONS | | | |
| <p>'A building action in respect of the building works'</p> <p>An action for damages for loss or damage arising out of defective building work</p> | <p>No more than 10 years after the date of issue of the occupancy permit or if no occupancy permit is issued, the date of issue of the certificate of final inspection of building works</p> <p>See <i>Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd</i> [2014] VSCA 165 – the Court of Appeal found that s.134 Building Act 1993 (Vic) replaces the usual 6 year limitation of actions period for all building actions, whether arising in contract or negligence. This means that it operates as an end date to bar actions in negligence after 10 years, regardless of when the defect becomes known.</p> | <p>s.134 <i>Building Act</i> 1993 (Vic)</p> | <p>No extension available</p> |

| Action | Time limit | Legislation | Extension availability |
|--|---|--|--|
| Security of Payments Act claims | <p>The process is technical and has a host of time limits but the time limit of most immediate importance is:</p> <ul style="list-style-type: none"> > a principal has 10 business days to issue a payment schedule in response to a contractor's payment claim (unless a shorter period is required by the construction contract) > care needs to be taken in correctly calculating the due date > failure to respond within time means that the amount claimed in the payment claim is automatically deemed to be due and payable | <p>s.15 <i>Building and Construction Industry Security of Payment Act 2002</i> (Vic)</p> | <p>No extension available unless contract stipulates otherwise</p> |

| Action | Time limit | Legislation | Extension availability |
|---|--|--|---|
| CAVEATS | | | |
| Lapse of a caveat to prevent creation of folio or removal of warning | <p>30 days after the caveat is lodged unless the caveator within time:</p> <ul style="list-style-type: none"> > gives notice to the Registrar of Titles that proceedings are on foot to substantiate its claim in relation to the land or > obtains or serves on the Registrar of Titles an injunction or order of a court restraining the Registrar of Titles from creating the folio or removing the warning | s.26R <i>Transfer of Land Act 1958</i> (Vic) | A caveat cannot be renewed by the same person in respect of the same estate or interest – s.26R(7) <i>Transfer of Land Act 1958</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|---|--|---|---|
| Lapse on notice of transfer of land or other dealing | 30 days after a notice is given by the Registrar of Titles that a transfer or other dealing has been lodged for registration | s.90 <i>Transfer of Land Act 1958</i> (Vic) | No extension available Court may direct the Registrar of Titles to delay registration if, within the 30 days after notice, the caveator gives an undertaking to the court or security or lodges such sum as the court considers sufficient to indemnify every person against any damage that may be sustained by reason of the delay – s. 90(2) <i>Transfer of Land Act 1958</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|---|--|--|------------------------|
| Lapse on application by interested party | 30 days or more, depending on the date specified in the notice served or posted by the Registrar of Titles at the request of a person with an interest in land unless the caveator: > gives notice that proceedings are on foot to substantiate its claim in relation to the land | s.89A <i>Transfer of Land Act 1958</i> (Vic) | No extension available |

| Action | Time limit | Legislation | Extension availability |
|---|---|---|---|
| CONFISCATION | | | |
| Application to exclude assets from a restraining order | 30 days from service of notice of making of the restraining order (where notice is required under s. 19(1)) or in any other case within 30 days after the making of the restraining order | s.20 <i>Confiscation Act 1997 (Vic)</i> | <p>The court can extend time if it is in the interests of justice to do so – s.20(1B) <i>Confiscation Act 1997 (Vic)</i></p> <p>The court may not extend the period within which an application may be made in respect of property that has been forfeited by or under the Act s.20(1C) <i>Confiscation Act 1997 (Vic)</i></p> <p>The extension of time cannot be beyond 60 days after the later of the conviction or the making of the restraining order s.35(2A) <i>Confiscation Act 1997 (Vic)</i></p> |

| Action | Time limit | Legislation | Extension availability |
|--|--|--|--|
| CONTRIBUTION | | | |
| Contribution claims | <p>The longer of:</p> <ul style="list-style-type: none"> > the limitations period applicable to the claim against the defendant or > 12 months from the service of the writ on the defendant | s.24 <i>Wrongs Act 1958</i> (Vic) | No extension available |
| DE FACTO | | | |
| De facto partner property claim | 2 years after the end of the relationship | s.44(5) <i>Family Law Act 1975</i> (Cwlth) | The court may grant leave to a person to apply after the 2 year limit has passed if it is satisfied that hardship would be caused to that person or a child if leave were not granted – s.44(6) (a) <i>Family Law Act 1975</i> (Cwlth) |

| Action | Time limit | Legislation | Extension availability |
|-----------------------------|---|---|--|
| DEFAMATION | | | |
| Defamation claim | 12 months from the date of publication | s.5(1AAA) <i>Limitations of Actions Act 1958</i> (Vic) | Can be extended up to 3 years from publication – but only if the plaintiff satisfies the court it was not reasonable for the plaintiff to have commenced within 12 months – s.23B <i>Limitations of Actions Act 1958</i> (Vic) |
| Offer to make amends | Within 28 days from receipt of a concerns notice (provided a defence has not been served) | s.14(l) <i>Defamation Act 2005</i> (Vic) | |

| Action | Time limit | Legislation | Extension availability |
|--|--|---|---|
| INSTRUMENTS | | | |
| Leave to defend a claim brought on a dishonoured cheque | 16 or 21 days from the service of writ | s.5 <i>Instruments Act 1958</i> (Vic) | The court can set aside any judgment and grant leave to defend if it appears to be reasonable to do so – s.6 <i>Instruments Act 1958</i> (Vic) |
| INTERNATIONAL CONTRACTS FOR THE SALE OF GOODS | | | |
| Action under international contract for sale of goods | 2 years from the date of delivery (unless this is inconsistent with any contractual period of guarantee) | Schedule 1, Article 39 of UN Convention on Contracts for International Sale of Goods, <i>Goods Act 1958</i> (Vic) | No extension available |
| LAND ACQUISITION | | | |
| Land acquisition claims | 2 years from the date of acquisition | s.37 <i>Land Acquisition and Compensation Act 1986</i> (Vic) | Time may be extended by the Minister, the Governor in Council, the Court or Tribunal, or by agreement with the relevant authority – s.106 <i>Land Acquisition and Compensation Act 1986</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|---|---|--|--|
| LIQUIDATOR | | | |
| Application by liquidator to void transaction | The later of: <ul style="list-style-type: none"> > 3 years from the relation-back day or > 12 months from appointment of a liquidator | s.588FF(3) <i>Corporations Act 2001</i> (Cwth) | The court can set a longer period on application made by the liquidator during the 3 years after the relation-back day |
| MARITIME LAW | | | |
| Claim for loss or damage of goods carried by sea | 1 year from the date of delivery or the scheduled delivery date | Schedule 1, Article 3, Para 6, <i>Carriage of Goods by Sea Act 1991</i> (Cwth) | Can be extended by agreement between the parties |
| Compensation for oil pollution damage | 3 years from the date of damage or 6 years from the date of the incident which causes the damage (where the incident consists of a series of occurrences, the six year period runs from date of first occurrence) | Schedule 1, Article VIII of International Convention on Civil Liability for Oil Pollution Damage, <i>Protection of the Sea (Civil Liability) Act 1981</i> (Cwth) | No extension available |

| Action | Time limit | Legislation | Extension availability |
|--|--|---|------------------------|
| MIGRATION | | | |
| Application for review to the Administrative Appeal Tribunal of 'Part 5 reviewable decisions' | 2 working days to 70 days after the notification of decision, depending on the circumstances | s.347 Migration Act 1958 (Cwlth) in conjunction with r.4.10 Migration Regulations 1994 (Cwlth), s. 412 Migration Act 1958 (Cwlth) in conjunction with r.4.31 Migration Regulations 1994 (Cwlth) (protection visas). Other sections and regulations may apply depending on the type of review and visa/ citizenship refusal or cancellation. | No extension available |

| Action | Time limit | Legislation | Extension availability |
|---|--|--|--|
| PERSONAL INJURY | | | |
| <p>Damages for death or personal injury to a person (subject to exclusions contained in other statutory schemes)</p> <p>(refer to practice risk guide: Pitfalls in Personal injury litigation)</p> | <p>The earlier of:</p> <ul style="list-style-type: none"> > 3 years from the date the cause of action is discoverable or > 12 years from the date of the act or omission that resulted in the personal injury or death | <p>s.27D <i>Limitation of Actions Act 1958</i> (Vic)</p> | <p>On application the court can extend time if it is just and reasonable to do so – s.27K(2) <i>Limitation of Actions Act 1958</i> (Vic)</p> |
| <p>Damages for death or personal injury to person where the person was under a disability (subject to exclusions contained in other statutory schemes)</p> <p>(refer to practice risk guide: Pitfalls in Personal injury litigation)</p> | <p>The earlier of:</p> <ul style="list-style-type: none"> > 6 years from the date the cause of action is discoverable or > 12 years from the date of the act or omission that resulted in the personal injury or death | <p>s.27E <i>Limitation of Actions Act 1958</i> (Vic)</p> | <p>On application the court can extend time if it is just and reasonable to do so – s.27K(2) <i>Limitation of Actions Act 1958</i> (Vic)</p> |

| Action | Time limit | Legislation | Extension availability |
|---|--|---|--|
| PERSONAL PROPERTY SECURITIES | | | |
| Registering security interest granted by a corporation | 20 business days from the commencement of the security agreement | s.588FL <i>Corporations Act 2001 (Cwlth)</i> | <p>A company or any person interested can apply to the court for an order fixing a later time – s.588FM <i>Corporations Act 2001 (Cwlth)</i></p> <p>Where registration is outside the 20 business day period but is more than 6 months before the grantor is placed into voluntary administration or liquidation, the security interest will be enforceable in an external administration - s.588FL <i>Corporations Act 2001 (Cwlth)</i></p> |

| Action | Time limit | Legislation | Extension availability |
|---|---|--|---|
| Registering purchase money security interest in inventory | <p>On or before</p> <ul style="list-style-type: none"> > the grantor obtains possession of the inventory (where the inventory is goods) or > the time the purchase money security interest attaches to the inventory (where the inventory is other than goods). | s.62(2) <i>Personal Property Securities Act 2009</i> (Cwlth) | No extension available |
| Registering purchase money security interests in non-inventory | <ul style="list-style-type: none"> > 15 days after the grantor has obtained possession (where the personal property is goods) or > the day the interest attaches to the property (for personal property other than goods). | s.62(3) <i>Personal Property Securities Act 2009</i> (Cwlth) | The court can make an order extending time if it is satisfied that it is just and equitable to do so – s.293 <i>Personal Property Securities Act 2009</i> (Cwlth) |
| STATUTORY DEMAND | | | |
| Setting aside a statutory demand served on a company | 21 days from the date the demand is served | s.459G <i>Corporations Act 2001</i> (Cwlth) | If time limit is missed the company is presumed to be insolvent – s.459C(2) <i>Corporations Act 2001</i> (Cwlth) |
| SUBDIVISIONS | | | |
| Registration of a plan of subdivision | 5 years from the date of certification by the relevant Council | s.7 <i>Subdivision Act 1988</i> (Vic) | Re-certification of a plan does not extend time – s.11 <i>Subdivision Act 1988</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|--|---|--|---|
| TAX | | | |
| Objection to Commissioner of State Revenue's assessment or valuation of tax liability | 60 days after the date of service of the notice of the assessment or decision | s.99 <i>Taxation Administration Act 1997 (Vic)</i> | The Commissioner of Taxation can permit a person to lodge an objection after the 60 day period – s.100 <i>Taxation Administration Act 1997 (Vic)</i> (This section does not apply to an objection referred to in section 96(1)(ca)) |

| Action | Time limit | Legislation | Extension availability |
|---|--|---|--|
| TRADE MARK | | | |
| Opposition to trade mark application | 2 months from the date of the advertisement in the <i>Official Journal</i> that the trade mark has been accepted | s.52 <i>Trade Marks Act 1995</i> (Cwlth) r.5.6 <i>Trade Marks Regulations 1995</i> (Cwlth) | <ul style="list-style-type: none"> > A request for an extension of time may be made within the 2 month period, or at any time before the trade mark is entered into the Register – 5.9(2) <i>Trade Marks Regulations 1995</i> (Cwlth) > The Registrar of Trade Marks can grant a request for an extension of time if the Registrar is satisfied that the grounds set out in the request justify the extension. Where the request is made outside the 2 month period the registrar must be satisfied that there is sufficient reason for the delay before granting the extension –5.10(1) <i>Trade Marks Regulations 1995</i> (Cwlth) |

| Action | Time limit | Legislation | Extension availability |
|--|--|--|---|
| TRANSPORT ACCIDENT | | | |
| <p>Claim for injury or death resulting from transport accident occurring after 1 January 1987</p> | <p>One year after:</p> <ul style="list-style-type: none"> > the accident or death or > if no injury manifested itself at the time of the transport accident, after any injury first manifests itself | <p>s.68 <i>Transport Accident Act 1986 (Vic)</i></p> | <p>Where there are reasonable grounds for delay in making a claim the Commission may accept a claim for compensation at such later time before the expiration of 3 years after the transport accident or death or after the injury first manifested itself – s.68(2) <i>Transport Accident Act 1986 (Vic)</i></p> |

| Action | Time limit | Legislation | Extension availability |
|--|---|--|--|
| UNFAIR DISMISSAL | | | |
| Unfair dismissal application | 21 days from the effective dismissal | s.394 <i>Fair Work Act 2009</i> (Cwlth) | Fair Work Australia may allow a further period if it is satisfied that there are exceptional circumstances – s.394(3) <i>Fair Work Act 2009</i> (Cwlth) |
| VICTIMS OF CRIME | | | |
| Victims of crime application for financial assistance | 2 years from the violent act or in the case of an application by a related victim or person who has incurred funeral expenses, within 2 years after the death of the primary victim | s.29 <i>Victims of Crime Assistance Act 1996</i> (Vic) | Application made out of time will be struck out unless the Victims of Crime Assistance Tribunal considers that, in the particular circumstances, the application ought not to be struck out – s. 29(2) <i>Victims of Crime Assistance Act 1996</i> (Vic) |

| Action | Time limit | Legislation | Extension availability |
|---|---|--|---|
| WILLS | | | |
| Rectification of will | 6 months from the date of grant of probate | s.31 <i>Wills Act 1997</i> (Vic) | The court can extend time if it thinks fit, provided the final distribution of the estate has not been made – s.31(3) <i>Wills Act 1997</i> (Vic) |
| Probate caveat | <ul style="list-style-type: none"> > Expires 6 months from the date the caveat is lodged or > 30 days from the date the Registrar gives notice of an application for the grant unless the caveator serves an objection within the 30 days | r.8.03 <i>Supreme Court (Administration and Probate) Rules 2014</i> (Vic) s.58 <i>Administration and Probate Act 1958</i> (Vic) | No extension available |
| Family provision claims (Part 4) | 6 months from the date of grant of probate or letters of administration | s.99 <i>Administration and Probate Act 1958</i> (Vic) | The court can extend time if it thinks necessary provided the final distribution of the estate has not been made – s.99(2)-(3) <i>Administration and Probate Act 1958</i> (Vic) |
| Grant of probate | 14 days after publication of notice of intention to administer estate | s.79 <i>Administration and Probate Act 1958</i> (Vic) | |

| Action | Time limit | Legislation | Extension availability |
|---|---|--|--|
| WORKERS' COMPENSATION | | | |
| <p>Claim for medical like expenses from a workplace injury</p> <p>(refer to practice risk guide: Pitfalls in Personal injury litigation)</p> | 6 months from the date treatment was received | s.20(8)(c) <i>Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)</i> | Extension available where VWA, self-insurer or the Court (by convention) is satisfied that there is a special excuse for not making the claim within the relevant applicable time limit- s.20(9) <i>Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)</i> |
| <p>Claim for weekly payments</p> <p>(refer to practice risk guide: Pitfalls in Personal injury litigation)</p> | As soon as practicable after the incapacity arising from the injury becomes known | s.20(8)(a) <i>Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)</i> | Extension available where VWA, self-insurer or the Court is satisfied that there is a special excuse for not making the claim within the relevant applicable time limit- s.20(9) <i>Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)</i> |

| Action | Time limit | Legislation | Extension availability |
|--|---|--|---|
| <p>Claim for compensation for death of a worker</p> <p>(refer to practice risk guide: Pitfalls in Personal injury litigation)</p> | 2 years from the death of the worker | s. 20(8)(b) <i>Workplace Injury Rehabilitation and Compensation Act 2013</i> (Vic) | Extension available where VWA or self-insurer is satisfied that there is a special excuse for not making the claim within the relevant applicable time limit- s. 20(9) <i>Workplace Injury Rehabilitation and Compensation Act 2013</i> (Vic) |
| <p>Damages (pain and suffering and/ or pecuniary loss) for personal injury or death to person in relation to a workplace injury</p> <p>(Note: a claim for damages in relation to a workplace injury is commenced by a Serious Injury Application)</p> <p>(refer to practice risk guide: Pitfalls in Personal injury litigation)</p> | <ul style="list-style-type: none"> > Injuries on or after 20 October 1999 – within 6 years of the date of the injury or > Where the cause of action arose before 12 November 1997 – within 3 years of the date of the incapacity becoming known | <p>s. 2 and s. 40 <i>Limitation of Actions Act 1958</i> (Vic)</p> <p>s. 134AB and s.135AC(b) <i>Accident Compensation Act 1985</i> (Vic)</p> | <p>The Court may extend the period, if it decides that it is just and reasonable to do so – s.23A (2) <i>Limitation of Actions act 1958</i> (Vic)</p> <p>The period between the date of lodgement of a claim for Impairment Benefits to 30 days after the claim has been finalised is not counted in the 6 year period</p> |

Claims examples

Appeals

A practitioner acted for a plaintiff in a Magistrates Court claim, which was dismissed.

The client instructed the practitioner to appeal and the practitioner liaised with Counsel about the prospects of success and the time for filing the appeal. Counsel wrote to the practitioner advising there was a 30 day period under section 109(2)(a) of the *Magistrates Court Act 1989 (Vic)*.

In a telephone conversation with Counsel one week later, a lawyer employed by the practitioner was told the limitation period expired between 25 December and 1 January and there would be a period in which 'time would stop running'. Counsel advised the lawyer to check the statutory provision or confirm the expiry date with the court registry.

The lawyer then called the Court of Appeal registry and was told by a clerk that time would not run between 24 December and a certain date in January. This advice was incorrect as the Supreme Court Rules did not affect the operation of section 109 of the *Magistrates Court Act*.

As a consequence the client, in order to obtain leave to appeal, would have needed to show the failure to institute an appeal within time was due to exceptional circumstances. However, the authorities indicated the practitioner's error regarding the applicable time limit for filing the appeal would not be regarded as exceptional circumstances.

The client then changed lawyers and decided not to proceed with the leave application. However the client sued the practitioner claiming damages for lost opportunity to appeal and legal costs incurred by the client.

Lessons

- > Do not rely on information provided by the court registry and always double-check the relevant legislation to ascertain the applicable time limit.

Aviation

An employee of a labour hire company, who was seconded to an airline, was injured when struck on the elbow by a runaway trolley while deadheading on an international flight. Deadheading is the term for airline staff travelling free of charge on a normal passenger flight to their next point of duty.

A practitioner, who was an expert in workers' compensation law, was retained by the employee to advise generally on the employee's compensation rights regarding the injury. The practitioner engaged an interstate firm as agent. In a letter to the practitioner four months after the incident, the interstate firm confirmed its instructions to assist with the workers' compensation claim. It also noted almost as a throwaway line that the employee could have a claim under the *Civil Aviation (Carriers Liability) Act 1959* (Cwlth) (CACL Act) and it would be prudent to investigate the claim as the Act had a strict two-year time limit.

The practitioner sought advice from a barrister that he regularly used on workers compensation matters. The barrister had limited experience in the CACL Act area. The initial advice from the barrister was that further investigations needed to be made to determine if the client was a passenger for the purposes of the CACL Act. The barrister did point out the claim had to be brought within two years of the time the flight was due to land. He later concluded after seeing the airline's manual that the client was probably considered crew and not a passenger. As a result a claim was not pursued within time.

In the meantime a worker's compensation claim was made and resolved. Then more than four years after the injury common law proceedings were issued against the airline as employer.

The proceeding was dismissed with costs awarded to the airline. The judge looked at international decisions and concluded the plaintiff was properly a passenger for the purposes of the relevant conventions and the CACL Act even though he was deadheading. His only remedy was to bring proceedings under the CACL Act which was statute-barred. The Act provided an airline's liability to a passenger for personal injury was limited to the provisions of the CACL Act and the relevant conventions referred to in the Act.

The practitioner failed to appreciate the impact of the CACL Act, its exclusive jurisdiction and the finality of the limitation date and consequently the necessity of researching the definition of 'passenger' thoroughly.

Lessons

- > Investigate all causes of action promptly, especially if the matter involves an area of law that is unfamiliar. Where there are multiple possible causes of action, ensure each is properly considered.
- > Identify and diarise applicable limitation dates at the start of each matter and advise the client of the dates and importance of acting before then.
- > If taking advice from counsel ensure they have expertise in the relevant area.

Building actions

A firm took instructions from a client in February 2010 about a possible claim concerning defective building works. The certificate of occupancy for the house had been issued in November 2000 and the house was showing signs of severe corrosion to the structural steelwork.

The firm obtained an expert report in April 2010 which confirmed there were defects and what remedial work was required. Counsel was then briefed in October, after giving preliminary advice on liability, to draw points of claim for a VCAT proceeding. Counsel was busy with another large matter and did not finalise the points of claim until early in 2011 when proceedings were finally issued. Unfortunately the proceeding was statute barred. Neither the firm nor counsel had any expertise in building and construction law and so neither realised that section 134 of the *Building Act 1993* (Vic) provided a final ten year limitation period for any building works claims even when latent defects are found more than four years after the certificate of occupancy.

The firm had an opportunity to issue proceedings within the ten year limitation period and missed it. The claim against the firm and counsel was settled with a significant amount paid to the client.

Lessons

- > Always double-check the relevant legislation to ascertain the applicable time limit. This is especially important when acting in matters outside your expertise.
- > If taking advice from counsel ensure they have expertise in the relevant area.
- > Don't get delayed waiting for counsel or experts.

Caveats

A firm acted for the wife in a de facto property settlement. The parties had worked out their own arrangements but it involved the wife still being guarantor for some of the husband's business loans. The firm lodged a caveat on one of the properties owned by the husband and listed the firm's address as the address for service.

Several months later the firm terminated the retainer with the client for non-payment of fees. Four years later the firm received a notification from the titles office that a section 89A application under the *Transfer of Land Act 1958* (Vic) had been received for the wife's caveat. Unfortunately the administration staff at the time did not appreciate the importance of the notice and did not do anything with the notice as the file had been long closed.

The 30-day time limit to act on the notice expired and the caveat lapsed. The de facto ex-husband sold the property and the ex-wife alleged she would have been in a better negotiating position to receive money from the sale if the caveats had been in place.

Lessons

- > When ceasing to act for a client or even moving office, where your firm has lodged caveats recording its address for service, ensure the address for service is changed.
- > Have procedures in place to deal with correspondence that comes into the office on a file that has been closed and ensure those procedures are followed.
- > Educate administrative staff on the importance of acting on a section 89A notice promptly.

Confiscation

A practitioner acted for a client regarding a criminal charge. Following the client's arrest, a restraining order pursuant to section 15 of the *Confiscation Act 1997* (Vic) was made over two of the client's properties and a bank account. The practitioner advised that the client could apply to have property that was untainted by proceeds of crime excluded from the restraining order and a potential forfeiture order. However, the practitioner did not tell the client that under section 20(1A) of the Act the application needed to be made within 30 days of the restraining order.

The client was convicted three months later. After another three months the client received an order made under section 35 of the Act forfeiting the properties and the bank account to the Minister. The client provided a copy of the order to the practitioner one week later.

The practitioner was then instructed to apply to have one of the properties and the bank account excluded from the order on the basis they were lawfully acquired and not tainted by proceeds of crime. However, the property was forfeited because the application was not made within 30 days of the restraining order. An application for leave to extend the time was also out of time because it needed to be made before forfeiture pursuant to section 20(1C). Under section 35(1), property is automatically forfeited 60 days after the making of a restraining order or 60 days after conviction, whichever is later.

The practitioner had not made an application to exclude property from forfeiture within time. He wrongly believed he would have time to apply for the exclusion order after receiving an application for the forfeiture order. In fact no application for a forfeiture order was required and the practitioner was wrong about when the application for exclusion could be made. He later acknowledged this was the first time he had to make such an application and had failed to check the legislation about timing.

Lessons

- > Always double-check the relevant legislation to ascertain the steps required to be taken and the applicable time limit. This is especially important when acting in an area of law that is unfamiliar.

De facto

A practitioner represented a client making a property claim against his long-term de facto partner from whom he had separated two months earlier.

The practitioner lodged caveats over two properties owned by the client's ex-partner within two months of initial instructions. The practitioner then wrote to the client seeking instructions to send a letter of demand and commence negotiations.

He received no response for almost 18 months. The client then contacted the practitioner wanting to know what was happening. The practitioner responded confirming the caveats had been lodged and that the practitioner was waiting on instructions about sending the proposed letter to the ex-partner. A few days later instructions were received to send the letter. The ex-partner did not respond to the letter.

Over the next two months the practitioner had meetings with the client where they disagreed over the practitioner's payment arrangements. By the time the practitioner was instructed to issue proceedings, the two year limitation period then under section 43(1) of the *Relationships Act 2008* (Vic) (section 44(5) of the *Family Law Act 1975* (Cwlth) now applies: see section 90RC) had expired and the client lost the opportunity to issue proceedings. The client subsequently terminated the retainer and brought proceedings against the practitioner claiming damages.

At no point did the practitioner advise the client of the limitation period. The practitioner said that in the 18-month period in which the matter was dormant the practitioner was distracted by his spouse's serious illness and did not turn his mind to the limitation issue. Even after contact with the client resumed, the practitioner was preoccupied with the cost issues and failed to consider the limitation period.

Lessons

- > Identify and diarise applicable limitation dates at the start of each matter and advise the client of the dates and importance of acting before then.
- > Be careful not to let matters drag on. If the client will not respond to requests for instructions, terminate the retainer.
- > Have processes to ensure files are not overlooked when there are personal issues that may cause practitioners to be distracted.

Defamation

A practitioner was asked to advise a client about a potential defamation claim. The practitioner took instructions eight months after the first of a series of allegedly defamatory statements were said to have been made.

He promptly briefed Counsel for advice and wrote to the client highlighting the limitation period under section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic) would start to expire in three months. He asked the client for details of the allegedly defamatory publications and witnesses.

One month later the client provided a list of names of potential witnesses but not details of the defamatory statements.

A further two months later the client provided the practitioner with additional instructions about the statements and witnesses. Counsel reviewed this material and wrote to the practitioner, noting the limitation periods regarding the alleged publications were progressively expiring, and advised the claim otherwise had weak prospects and should not be pursued.

The client did not accept Counsel's recommendation. The practitioner prepared and sent a statutory notice of concerns to the relevant party complaining about the allegedly defamatory statements.

When proceedings were eventually issued, more than 12 months had elapsed since most of the statements were made. Consequently the action relied only on some of the statements, which occurred later in time and for which the allegations of defamation were especially weak. The client subsequently changed lawyers and shortly after agreed to discontinue the action.

The client then sought from the practitioner reimbursement of costs paid, the second lawyers' costs and damages on account of the lost opportunity to pursue a successful defamation action.

Although the practitioner advised the client at the outset of the 12 month limitation period he then allowed the time limits for each statement to expire. The practitioner said later that he thought the claims had little chance of success and he was hopeful of convincing the client to drop the matter. He failed to properly document the advice and failed to stop acting when the client refused to take his advice. This left him exposed to allegations of failing to issue proceedings within time.

Lessons

- > Identify and diarise applicable limitation dates at the start of each matter and advise the client of the dates and importance of acting before then.
- > Be careful not to let matters drag on. If the client will not respond to requests for instructions or accept your advice terminate the retainer.

Instruments

A practitioner acted for the defendant in Magistrates Court proceedings brought under the *Instruments Act 1958 (Vic)*, where the plaintiff sued on a dishonoured cheque drawn by the defendant.

According to the defendant, the plaintiff had agreed to lend a sum of money to a relative of the defendant. The plaintiff wanted to hold a cheque from the defendant as security for repayment. The defendant drew a post-dated cheque and gave it to the plaintiff but the monies were never advanced and the defendant stopped the cheque.

The plaintiff alleged that the loan was always intended for the defendant not the relative and that the money was duly given to the defendant.

Four days after consulting the defendant, the practitioner wrote to the plaintiff's lawyers to advise the defendant intended to apply for leave to defend the claim. However, the practitioner failed to apply for leave and judgment was subsequently entered for the plaintiff.

The practitioner did not realise that section 5 of the Act required an application for leave to defend a claim on a dishonoured cheque to be made within 16 days of service or 21 days of service depending on the defendant's place of residence. The practitioner incorrectly thought the limitation period was 30 days.

Lessons

- > Always double-check the relevant legislation to ascertain the applicable time limit. This is especially important when acting in matters outside your expertise.

Liquidator

A practitioner advised the liquidator of a company on a claim against the Australian Taxation Office (ATO) regarding transactions identified by the liquidator as voidable pursuant to section 588FA of the *Corporations Act 2001* (Cwlth).

Section 588FF(3) required that the relevant application by the liquidator under subsection (1) be made:

- > within three years after the relation-back day or
- > 12 months after the first appointment of a liquidator for the winding up of the company, whichever was the later

unless a longer period was ordered by a court.

In this case the proceeding against the ATO needed to be instituted within three years of the relation-back day. No proceeding was issued and no extension of time was sought.

While the practitioner gave advice to the liquidator about the claim and other matters regarding the liquidation, it did not mention the limitation period. The practitioner sent a draft proceeding to the liquidator for finalisation seven months before the limitation period was to expire and followed it up for four months.

It then 'fell off the radar' until the practitioner received an insolvency report from the liquidator several months after the limitation period had expired. When the practitioner again turned their mind to finalising the proceeding, they realised it was out of time.

Although it could be thought a registered liquidator would be aware of the time limitation, the liquidator did not instruct the practitioner to issue proceedings or seek an extension of time before the limitation period expired.

Lessons

- > Do not make assumptions about the knowledge of sophisticated clients regarding issues of law.
- > Identify and diarise applicable limitation dates at the start of each matter and advise the client of the dates and importance of acting before then.
- > Be careful not to let matters drag on. If the client will not respond to requests for instructions, terminate the retainer.

Migration

A practitioner acted for a client in challenging the refusal of a skilled graduate visa.

The visa was initially refused as the client failed the English language test.

The client re-sat the test and obtained results proving competency. On the basis of those new results the client sought a review of the initial refusal. When the migration agent's request to the Department of Immigration and Citizenship for an internal review was rejected, the client retained the practitioner to lodge a formal application for review with the Migration Review Tribunal.

The practitioner informed the client of the final date for lodgement and prepared the relevant documentation. The practitioner signed the documentation the day before it was due and arranged for a colleague to deliver it by hand the next day.

On the day the application was due, the client spoke to the practitioner's colleague to ask whether the application could be made the following day as there were insufficient funds on the client's credit card to cover the lodgement fee. The client was incorrectly advised the application could wait another day. The application was subsequently lodged the day after it was due without the practitioner's knowledge or approval.

The Tribunal refused to consider the application on the basis it was time-barred.

Lessons

- > Never assume a time limit will be waived or an extension granted.
- > Employed lawyers should be properly trained and supervised when providing advice especially about limitation dates.

Personal Property Securities

A firm prepared a security deed on behalf of a manufacturer client for the purpose of registering a security interest on the Personal Property Securities Register for good supplied to a retailer.

The firm sent the executed deed and request for registration of a financing statement to a PPS registration agent. The agent found that the parties names were misstated on the front page in that the grantor and grantee descriptions were transposed. The deed was returned to the firm. At some point the front page was corrected but the deed was not returned to the registration agent for several months and not until the retailer was placed into administration. The time limit of 20 days was clearly missed!

There was no clear explanation for why the deed was not amended and returned promptly to the registration agent. This is a common scenario where the final step in the matter is overlooked because of an unexpected requirement to amend documents. The practitioner handling the matter has often mentally *moved on* and does not follow through with what seems to be an administrative last step.

Lessons

- > Beware the short time frames for registering security interests on the Personal Property Securities Register.
- > Act promptly when documents require amendment in order for them to be registered or to secure registration.

Statutory demand

A practitioner acted for a franchisee in a dispute with the franchisor.

Following the franchisee's failure to pay franchise fees due under the franchise agreement, the franchisor issued a creditor's statutory demand. Under section 459G(2) of the *Corporations Act 2001*(Cwlth), the franchisee had 21 days in which to file and serve an application seeking to set aside the demand.

The practitioner wrote to the client advising of the limitation date. The date was in fact wrong as it was one day earlier than the actual limitation date that applied due to operation of the postal rule. The practitioner also advised that while the client could delay service of the application until the last day to allow for negotiations, the client should instruct the practitioner to prepare the documents a few days before the limitation period was to expire. The client was asked to pay the filing fees upfront and an outstanding account.

On the second last day of the limitation period, the outstanding account and the filing fees were unpaid and the practitioner did not hold instructions to issue the application. An employed lawyer emailed the client for instructions and payment of the filing fees and correctly advised the statutory demand expired one day later than first thought.

Shortly after, the practitioner telephoned the client and said the client had another seven days in which to apply to have the demand set aside. The lawyer had become confused after reviewing the rules for service and mistakenly formed the view that the Federal Court (Corporations) Rules 2000 applied to service of statutory demands by post. In fact section 29 of the *Acts Interpretation Act 1901* (Cwlth) applied and service was effected at the time the letter would have been delivered in the ordinary course of post.

The practitioner did not realise the error until after the limitation period had expired, when the franchisor applied to wind up the franchisee and succeeded in having provisional liquidators appointed.

Lessons

- > Ensure that limitation dates are accurately identified and diarised at the start of the matter.
- > Limitation dates should never be calculated hastily.
- > Employed lawyers should be properly trained and supervised when providing advice especially about limitation dates.

Victims of crime

A client suffered injury in an unprovoked attack. Two years after the attack the perpetrator was prosecuted, pleaded guilty to a charge of intentionally causing serious injury and was sentenced.

The practitioner was retained by the client five months after sentencing. The client was not told that she had less than six months remaining in which to bring common law proceedings or that she had a right to apply to the Victims of Crime Tribunal. Section 29 of the *Victims of Crime Assistance Act 1996* (Vic) provided an application must be made within two years of the occurrence of the act of violence. This period ended before the practitioner was retained. However, section 29 provided discretion for the Tribunal to extend the time within which an application could be brought.

The matter lay dormant for some time while the practitioner waited for full and proper instructions from the client. Almost two years passed before the client returned to the practitioner following the death of the perpetrator.

The practitioner briefed Counsel who advised that the practitioner, who was not aware of the time limit, should have sought an extension of time to apply to the Tribunal. It now seemed unlikely that the Tribunal would exercise its discretion to extend time.

Lessons

- > Identify and diarise applicable limitation dates at the start of each matter and advise the client of the dates and importance of acting before then.
- > Be careful not to let matters drag on. If the client will not respond to requests for instructions, terminate the retainer.

Wills

A practitioner acted for a beneficiary who was disappointed that, pursuant to the terms of her father's will, she received a relatively small monetary amount while her wealthy sibling received the balance of the estate worth several hundred thousand dollars.

The practitioner consulted Counsel who drafted an originating motion and affidavit in support which was sent to the practitioner for issue and service one month before the six month limitation period under section 99(1) of the *Administration and Probate Act 1958* (Vic) expired.

Three days later the practitioner's assistant attempted to file the documents electronically with the court. For unknown reasons the filing was unsuccessful. The system did not send an automated confirmation of filing or rejection and the filing could only be confirmed by logging on to the system's website and checking.

At the same time, the practitioner's practice management system was not operating as the office was in the process of transition to a new system. A reminder to review the filing would normally have been created on the office's system when the documents were submitted for filing. Because the system was not functioning, the assistant did not receive the reminder.

The practitioner and the assistant were both distracted by trying to resolve the problems with the practice management system. The assistant then did not review the matter for several weeks because she was being trained on the new computer system and when she came back to the matter, she did not think to review the filing. The practitioner discovered the failed lodgement almost 12 months later and in the meantime, the estate had been distributed.

Lessons

- > When there is disruption in the office such as implementing a new practice management system or moving, put processes in place to ensure all necessary steps on matters are completed, especially when close to limitation deadlines.



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