



Express law fast track information for clients

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Responding to applications to extend limitation periods

All government agencies may find themselves as respondents to an application to extend time. The judgment in *Blunden* illustrates a number of the key principles any agency opposing such an application should consider.

Blunden v the Commonwealth

[2006] ACTSC 58 (9 June 2006)

The plaintiff, a former sailor on HMAS *Melbourne*, had sought an order under s 36 of the *Limitation Act 1985* (ACT) extending the period within which he could bring an action against the Department of Defence for post traumatic stress disorder and other injuries he claimed to have suffered as a result of witnessing the collision between HMAS *Melbourne* and HMAS *Voyager* in February 1964. Crispin J dismissed the application on the grounds that he was not satisfied that it would be 'just and reasonable' to extend the limitation period as sought. The plaintiff has lodged an appeal to the ACT Court of Appeal.

Applications to extend limitation periods

Each Australian jurisdiction has legislation limiting the time period in which an action can be brought. These limits reflect the view that, as the High Court observed in *Brisbane South Regional Health Authority v Taylor* (1986) 186 CLR 541, the quality of justice deteriorates with the passage of time, and people should be free to arrange their affairs on the assumption that they are not going to be sued after the relevant period has elapsed.

Courts in all jurisdictions have a statutory discretion to extend the limitation period. The legislative provisions governing the exercise of the Court's discretion vary from one jurisdiction to another, but typically require the plaintiff to demonstrate it would be 'just and reasonable' to extend the period, having regard to the factors set out in the particular legislative regime. As Crispin J pointed out in *Blunden*, it is not sufficient for a plaintiff to show he or she has an apparently good claim, and a good explanation for not pursuing it earlier.

Key principles for opposing applications

The Legal Services Directions require all government agencies subject to the *Financial Management and Accountability Act 1997* to plead the expiry of an applicable limitation period, and to oppose any application to extend time, unless the Attorney-General (or his or her delegate) gives approval to do otherwise. Approval to consent to an application for an extension of time will only be given in exceptional circumstances or where it is expected that the application will succeed.

Although any agency opposing an application to extend time will need to have close regard to the provisions of the particular legislative regime, the decision in *Blunden* illustrates some key general principles for opposing applications.

A defendant should be able to demonstrate the prejudice it would suffer if the plaintiff obtains an extension of time

Courts readily accept that long delays have the potential to cause defendants to suffer prejudice. But to rely on prejudice to defeat an application for an extension of time, a defendant should be able to demonstrate the *actual* prejudice it would suffer at trial. In *Blunden*, the defendant submitted it would suffer prejudice in disputing two key issues, namely the plaintiff's claim that his psychological conditions were caused by witnessing the sinking of HMAS *Voyager*, and the extent of the plaintiff's disabilities. In support of this submission the defendant filed affidavits carefully describing its solicitors' extensive efforts to gather evidence. These efforts included attempting to locate the plaintiff's fellow sailors, colleagues, doctors and friends, and issuing notices for non-party production to organisations that may have held relevant documents, such as former employers and treating doctors.

A defendant's prejudice is exacerbated by a plaintiff who is shown to be an unreliable witness

Crispin J held that in circumstances where the plaintiff is shown to be an unreliable witness it becomes even more important that the defendant have access to material to test the plaintiff's claim (see also *Commonwealth v Diston* (unreported) 2003 NSWCA 51 at [51]). In *Blunden*, the defendant pointed to numerous inconsistencies within the plaintiff's own testimony, as well as to inconsistencies between that testimony and those documents that could be found. This type of submission can be made without having to demonstrate that the plaintiff is dishonest; in *Blunden*, Crispin J found that plaintiff's unreliability may have been the result of his long term alcohol dependency, psychological illness or perhaps a subconscious attempt to reconstruct his life history.

The evidential burden of proof favours the plaintiff where there is missing evidence

It has been suggested that given that the plaintiff bears the ultimate legal burden in any trial, it is in fact the plaintiff – not the defendant – who is disadvantaged by an absence of records (e.g. *Shaw v Commonwealth of Australia* [2005] NSWSC 1027 at [53]). However, Crispin J's judgment recognises that in practice a plaintiff's oral evidence in support of his or her claim is likely to be accepted unless the defendant can point to contradictory evidence. In these circumstances, it is clearly the defendant who is prejudiced by the absence of documents (see also *Chappel v Hart* (1998) 195 CLR 232 at [93] and *Cavenett v Commonwealth of Australia* [2005] VSC 333).

A defendant should consider all factors in preparing its case

In many cases, a defendant's opposition to an extension of time will turn on the question of prejudice. However, it is also important to consider the other factors identified by the relevant limitation period legislation – in the ACT, these included whether the plaintiff acted promptly once he or she knew the defendant's act or omission might give rise to an action, and the duration of the plaintiff's disability. Consideration of these factors may generate new lines of investigation and submission, but even when it does not, it may be necessary – depending on the wording of the legislation – to ensure that the court explicitly considers each factor in deciding whether it is just and reasonable to extend the limitation period.

For the full text of the decision, go to:

<http://www.courts.act.gov.au/supreme/judgments/blunden.htm>

For further information please contact:

Declan Roche
Senior Lawyer
T 02 6253 7450 F 02 6253 7384
declan.roche@ags.gov.au

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