

LAWS2244 Final Exam Summary

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ALTERNATIVE DISPUTE RESOLUTION (ADR)

PROFESSIONAL RESPONSIBILITY

- Part of a lawyer's professional conduct rules:
 - Legal Profession (solicitors) Conduct Rules 2015 r 7.2
 - Legal Profession (Barristers) Rules 2021 r 17A

FORMS OF ADR

- Negotiation (parties only)
- Mediation, conciliation (neutral third party involved, facilitative)
- Arbitration, adjudication (neutral third party involved, determinative)
- Negotiation → most control over outcome; arbitration, adjudication → least control over outcome

MANDATORY ADR SOMETIMES REQUIRED

- (**Civil proceedings**) Must advise a client to undertake "genuine steps to resolve dispute" prior to beginning (most) civil proceedings (eg *Civil Dispute Resolution Act 2011* (Cth) ss 4-10)
 - An applicant who institutes civil proceedings must file a genuine steps statement at the time of filing the application (s 6). Must detail the steps that have been taken to try to resolve the issues in dispute.
 - This can include a letter of demand, a without prejudice conference, a mediation
- (**Employee Dismissal**) Must complete FWC conciliation before commencing civil proceedings for a general protections dismissal claim (*Fair Work Act 2009* (Cth) s 570)
- (**Discrimination**) Must complete AHRC complaint resolution process before commencing a civil proceeding for discrimination (*Australian Human Rights Commission Act 1986* (Cth) ss 46P, 46PO)
- (**Family law**) Must make a "genuine effort to resolve a dispute through Family Dispute Resolution before lodging an application for parenting orders", unless an exception applies (*Family Law Act 1975* (Cth) s60I).

MUST BE DONE IN GOOD FAITH

- S 196 *Civil Law (Wrongs) Act 2002* (ACT), states "It is the duty of each party to a proceeding referred for mediation or neutral evaluation under section 195 to take part, genuinely and sincerely, in the mediation or neutral evaluation."
- Mediation
 - R 1180 requires that parties to mediation take part genuinely and constructively
 - If not, may be able to seek an order under r 1181(1)(b) for the party to pay costs for failing to discharge this duty
- Workers Compensation Arbitration
 - (1) The purpose of a dispute resolution conference is to enable parties to an application for arbitration, with the assistance of a conciliator, to—
 - (a) settle any issue in dispute; and
 - (b) settle the amount ...
 - (c) ... narrow the issues in dispute and, as far as practicable, agree on the future progress of the application.
 - (2) Parties attending a dispute resolution conference must, during the conference, make a genuine effort to settle the claim.

LIMITATION PERIODS

1. Identify the limitation period for the cause of action

2. Work out when it started
3. Work out whether the clock was suspended or postponed at all
4. If out of time, work out if an extension is possible

Note: if not sure on the cause of action, then see PRELIMINARY DISCOVERY

IDENTIFY LIMITATION PERIOD

ACT

- The general rule in the ACT is an “action on any cause of action is not maintainable” if brought 6 years from the date when the cause of action first accrues (s 11(1) Limitation Act 1985 (ACT)).
 - (**human rights**) However, these give way to more specific limitation periods specified in other pieces of legislation (e.g. *Human Rights Act 2004* (ACT) s 40C(3))
 - (**personal injury**) S 16B *Limitation Act 1985* (ACT) addresses this. A limitation period of 3 years begins after the day the person injured first knows (a) that they have suffered an injury (including disease or disorder) and (b) that relates to another another’s act or omission.
 - (**child abuse exception**) There are exception to limitation periods for survivors of child abuse (Limitation Act 1985 (ACT) s 21C). Per Civil Law (Wrongs) Act 2002 (ACT) s 114AA(1), “child abuse means physical abuse or sexual abuse of a child”.
- Refer to Schedule of Limitation Periods
 - Deed (contract without consideration): 12 years (s 13)
 - Personal injury that includes disease or disorder: 3 years (s 16B(2)(a); *Stingel v Clarke*; *Doyle v Gillespie*)
 - Defamation: 1 year from the day of publication (s 21B)

ACT equitable claim

- In the ACT, limitations periods apply to equitable claims (*Limitation Act 1985* (ACT) ss 6, 11).
- Breach of fiduciary obligations subject to a 6-year limitation period (*Paramasivam v Flynn*).
- However, the “doctrine of laches” may still be applied
 - For this to apply, the plaintiff must know about the wrong, delay, and there be unconscionable prejudice caused to the opponent by the delay.
 - Where this occurs, the action can be barred despite the limitation period not being reached (*Lallemand v Brown* per Mossop M)

Non-ACT equitable claim

- Where limitation periods do not apply to equitable claims (most of the time outside ACT), equitable claims may be dealt with by:
 - The “doctrine of laches”. This may have the affect of barring a claim where it is “practically unjust to give a remedy”.
 - For this to apply, the plaintiff must know about the wrong, delay, and there be unconscionable prejudice caused to the opponent by the delay.
- Analogy with a common law action with a statutory limitation period.

FCA

- There is no general limitation act at a federal level. However, a State / Territory limitation period may be “picked up” under s 79 *Judiciary Act 1903* (Cth) in a court exercising federal jurisdiction in that State / Territory.
- ASK: is there an applicable limitation period applicable to the cause of action in the state / territory legislation?
- Federal statues also have a couple of specific limitation periods in legislation

- *Competition and Consumer Act 2010* (Cth) – ss 87F–87K, 82(2), 87(1CA), 77(2) and schedule 2 (Australian Consumer Law) s 236(2)
- *Fair Work Act 2009* (Cth) – s 370(a)(ii), 527T(1)(a)(ii), 544, 545(5)
- *Corporations Act 2001* (Cth) – s 1317K [6-year limitation period may apply to certain actions brought under the *Corps Act*]
 - “Proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.”

WHEN DOES THE LIMITATION PERIOD START?

- The clock starts when the cause of action “accrues” (e.g. *Limitation Act 1985* (ACT) s 11(1)). In broad terms, this is when (1) the necessary facts have occurred, (2) there is a competent plaintiff and (3) there is a competent defendant.

Necessary facts

- What the necessary facts are depends on the cause of action:
 - Contract = at the breach of contract (*Guthrie v Spence*)
 - Negligence = when the damage is suffered (*Price v Drysdale*)
 - Deed = when the cause of action accrues (s 13)
- Detectability
 - The clock might start when cause of action is discovered rather than accrued (if necessary facts were not detectable) – E.g. lung cancer from asbestos
 - S 16B *Limitation Act 1985* (ACT) addresses this. A limitation period of 3 years begins after the day the person injured first knows (a) that they have suffered an injury (including disease or disorder) and (b) that relates to another person’s act or omission.
 - Note: this ACT is more generous applying only a subjective test to whether the person knows – not whether they ought to have known.

Time

ACT

- **(5 day or less time period)** If the period is 5 days or less, any day when the registry is closed is excluded (r 6350(2))
- **(Christmas)** Any day in the period beginning on 25 December and ending on 1 January is excluded in working out when the thing must or may be, or is, done (r 6350(3))
- **(non-business day)** If something must be done on or by a particular day, which is a non-working day (public holiday, weekend) then this is to be done on the next working day (s 151A *Legislation Act* (ACT))
- **(change or no time set)**
 - A court may change the time period if an application is made by a party (r 6351)
 - If not time limit is set, the a party may make an application to the court which may, by order, fix the period within which the thing may or must be done (r 6352)
- Refer to table

FCA

- If the time period is one day or more, the particular day or the day of the particular event is not to be counted (r 1.61(2))
- **(business day)** if the time fixed includes a day that is not a business day and the time fixed is 5 days or less, the day is not to be counted.

RESET OR SUSPENSION?

Bad faith

- The clock may reset if the defendant wrongfully conceals a fact or acts fraudulently / deceitfully. The clock starts instead from plaintiff's first discovery of the concealment / fraud / deceit (e.g. acknowledgement or a payment) (S 33 *Limitation Act 1985* (ACT))

Confirmation of cause of action

- The clock may reset if defendant confirms the existence of a cause of action (e.g. acknowledgement or a payment, found in s 32 *Limitation Act 1985* (ACT)).
- The clock will run from the point of this confirmation.
- This is because the defendant is not labouring under uncertainty from this point.

Disability

- Disability may suspend or stop the clock (*Limitation Act 1985* (ACT) s 30) to ensure a cause of action can be properly run. Per the *Limitation Act 1985* (ACT) Dictionary a person is under a disability if
 - (a) under 18 years old [clock starts when you become an adult]
 - (b) for 28+ days a person is unable to run a cause of action during the limitation period due to mental illness or disorder; mental or physical disability; war or warlike operations or circumstances.
- EXAM:
 - when does the disability start?
 - When does the disability end?
 - Then do the calculation

EXTENSION?

- If time has expired before the originating process is issued, the general rule is that the rights subsists but the remedy is barred.
 - If this is the case, the proceedings may commence, but the defendant has a defence.
 - Defendant may waive the right to rely on the limitation period defence.

Extension barred

- However, the right and remedy may both be barred (*Austructures v Makin*, per Almond J) on construction of a particular limitation.
- This was found to be the case in relation to s 1317K of the *Corporations Act 2001* as:
 - The limitation period was in emphatic terms
 - The Explanatory Memorandum was silent on the issue
 - This was the type of provision in which an "affirmative course" to be followed is prescribed (i.e. that the same matter is not to be done according to some other course).
 - Section 1317K sits within Part 9.4B of the *Corporations Act 2001* which contains punitive provisions. In the context of punitive provisions there are "potent" policy arguments that limitation periods should be observed.
 - Thus, P could not add new claims to the existing case through amending the originating process, after the limitation period had expired.
- If the remedy and the right is barred after the limitation period, then the action will be unsustainable.
- Will be a question of statutory interpretation of the of the provision which imposes the limitation period to work out whether it bars the right or just the remedy.

Extensions available

- (**Personal injury claim**) Extension available where "just and reasonable" to do so (s 36(2) *Limitation Act 1985* (ACT)).

- This takes into account length of and reasons for delay (s 36(3)(a)) and prejudice to defendant (s 36(3)(b)).
- However, this has been interpreted to be very limited in application (excludes numerous claims).
- It does not apply in respect of (s 36(5)):
 - (a) section 16AA (Motor accident claims);
 - (b) section 16B (Other claims for damages for personal injury);
- **(Human rights claim)** Extension available if the “court orders otherwise” (*Human Rights Act 2004* (ACT) s 40C(3)).
 - No test is given for the court to use. However Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* gave factors to be considered where discretion of the court is unfettered. Broadly these are:
 - Consider explanation for delay
 - Prejudice to the defendant
 - Merits of claim succeeding

JURISDICTION

- It is necessary to determine whether the court has jurisdiction (authority to decide the matter) (*CGU Insurance Lt v Blakeley*).

PERSONAL JURISDICTION

- The court must have personal jurisdiction for a decision to be binding. The [defendant/respondent] must submit, or be served with a valid originating process of the court.

Submission

- This may be obtained first by submission to the jurisdiction.
- A plaintiff commencing proceedings in a court is automatically submitting to the court’s jurisdiction
- A defendant submits to jurisdiction by entering an unconditional notice of appearance in the proceedings OR by agreeing to jurisdiction in contract
 - Note: *Shergill v Singh*, defendant refused to submit notice of appearance in proceedings

Service

- Just because a defendant does not consent, does not mean there is not jurisdiction (as in *Shergill v Singh*). Personal jurisdiction is established if a party is validly served with originating process of the court.
 - Easy if in the territory (*Laurie v Carroll*)
 - If the person is outside of the territory, they can still be served in Australia with a SEPA notice (*Service and Execution of Process Act 1992* (Cth) (SEPA)).
 - However, note that the matter must have a sufficient nexus to the territory in which it is being brought.
 - For example:
 - Tort committed in territory
 - Damage suffered in territory
 - Parties agreed in contract to court having jurisdiction to hear

SUBJECT MATTER JURISDICTION

High Court

Original jurisdiction