

Limitation periods: Simple? Not always



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Calculating the correct time for the commencement of proceedings for damages for various causes of action, is essential to ensuring that proceedings are not statute-barred. Sounds obvious - simple even, but that's not always the case. Lawcover's Schedule of Limitation Periods, published annually on the Lawcover website, is one resource designed to assist practitioners. It covers a range of civil causes of action in New South Wales, and identifies the relevant legislative sources for each.

For the purposes of this article, it is also worth taking a closer look at some of the particular difficulties solicitors tend to come up against, such as: the need to be aware of short limitation periods, the applicability of limitation periods to claims in equity, and the importance of identifying the point from which time runs.

Short limitation periods

While three, six, or 12 years are the limitation periods for many claims, a number of statutes provide for shorter limitation periods. Take for example the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) under which the right to damages is extinguished if an action is not brought within two years after the date of arrival of the aircraft at the destination, or, where the aircraft did not arrive at the destination, the date on which the aircraft ought to have arrived at the destination; or the date on which the carriage stopped, whichever is the later.

Claims in equity

Claims in equity are particularly tricky, as s 23 of the *Limitations Act 1969* (NSW) does not apply limitation periods to a cause of action for specific performance of a contract or for an injunction or for other equitable relief, except in so far as they may be applied by analogy.

In *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181, a claim for breach of fiduciary duty was considered, where there was an analogous breach of the duties provided by ss 180-183 of the *Corporations Act 2001* (Cth), which attract a six-year limitation period (s 1317K).

The Court of Appeal held that there was no discretion to not apply the analogous s 1317K limitation period, in the absence

Snapshot

- Be aware of causes of action with short limitation periods.
- Take care to understand whether a limitation period may apply to claims in equity.
- Understand the point in time from which the limitation period runs.
- Refer to Lawcover's Schedule of Limitation Periods.

of a ground which justifies not doing so because reliance by the defendant on the statute would, in the circumstances, be unconscionable.

The extent of the analogy will, however, be relevant. In *Lewis Securities Ltd (in liq) v Carter* [2018] NSWCA 118, a claim was made under the second limb of *Barnes v Addy* where the defendant argued that by analogy the limitation period in s 1317K of the *Corporations Act* should apply. The Court of Appeal held that where the breach amounted to a fraudulent and dishonest design, the analogy could not be

made out and no limitation period applied.

Identifying the point from which time runs

Understanding when a cause of action accrues is critical for calculating the limitation period. The recent Victorian Court of Appeal decision in *Orwin v Rickards* [2020] VSCA 225 has provided clarification in the context of a financial agreement made under the *Family Law Act 1975* (Cth). The appeal arose from a professional negligence claim brought by the claimant against her solicitor, consequent upon her former partner's successful application in the Family Court to set aside a financial agreement on various grounds rendering it invalid.

The judge at first instance dismissed the claim against the solicitor, holding that the proceedings were statute barred as they were commenced more than six years from the date upon which she had first suffered loss. The claimant appealed, asserting that loss was contingent upon and did not occur until the relationship ended and the former partner commenced proceedings under the *Family Law Act*. Therefore, the High Court decision in *Wardley Australia Ltd v Western Australia* [1992] HCA 55 applied and time did not run until the two contingencies occurred. While the Court conceded the force of the claimant's submission on *Wardley*, it was ultimately rejected in favour of the New Zealand Supreme Court's decision in *Burton* [2009] 1 NZLR 437 which held the proper characterisation of loss was not one of exposure to a contingent liability but a defective asset, being an invalid pre-nuptial agreement. Therefore, loss was suffered on the date the parties entered into the pre-nuptial agreement and time started to run from then. **LSJ**