

TIME LIMITS

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TIME LIMITS

1. The Financial Counselling Perspective

From a financial counselling perspective, the main value of the Limitation Act is providing information to clients about old debts. If a client has a debt which is more than six years old, it is useful to check when the client last made a payment, and whether the client has made a written acknowledgement of the debt. If it is more than six years from the date of the last part-payment, or acknowledgement in writing, the client may have a defence under the Limitation Act. In this situation, it is most important that the financial counsellor does not, on the client's behalf, admit the debt in writing, or countenance the client making a part payment. This may start the six years running again. The counsellor would, in these circumstances, head any letter to a creditor 'Without Prejudice', and start off with the words like 'the client denies any liability whatsoever in this matter'.

2. What Is A Limitation Period?

A limitation period is a time set down by an Act of Parliament within which an action of a particular sort can be brought. If that time has passed, the action is said to be 'statute-barred'. This means that without leave of a Court action cannot be brought in a Court on that particular cause of action.

Limitation periods in Western Australia are governed mainly by the Limitation Act 2005 which came into operation on 15 November 2005. Generally it applies to matters that arise after that date.(s. 4). There are two exceptions, which are mentioned in detail later in this note. The time limits created by other state acts of parliament, such as the Family Provision Act, the Family Court Act, and the Civil Judgments Enforcement Act continue to operate (s. 9). In this note a reference such as (s. 9) is a reference to a section of the Limitation Act 2005.

The previous Act, the Limitation Act 1935 continues in force in Western Australia, and continues to be relevant to matters which arose before 15 November 2005. As noted below, the time limit for a creditor to sue on a mortgage is twelve years. For some time to come an action by a creditor under a mortgage may be brought under the old act.

3. Claims for Personal Injury

The general time limit to sue for damages for personal injury is reduced to three years (s.14). The same time limit applies to actions relating to the death of a person under the Fatal Accidents Act. The right to sue for damages for personal injury arises ('accrues') when the earlier of two events occurs. These are:

- a) when persons become aware that they have sustained a significant personal injury, **or**
- b) the first symptom or clinical sign of a significant personal injury becomes evident (s. 55). A different rule relates to asbestos related diseases. A right to sue in relation to asbestos related diseases accrues when the person has knowledge of the relevant facts (s. 56). A person who has a disease attributable to the inhalation of asbestos should obtain legal advice straight away.

4. General Time Limits

There is a general time limit of six years for all situations for which there is no specific time limit (s. 13). In the past, there were a large number of specific time limits for different situations, and it was necessary to work out into which category any particular claim fitted.

4.1 Motor Vehicle Accident Claims

An example of how these provisions operate in practice is shown by the legal actions that may follow a motor accident. An action for damage to a motor vehicle can be brought within six years of the accident (s.13). An action for damages for personal injury caused by the motor accident can only be brought by an adult within three years of the cause of action accruing (s.14). The cause of action accrues when the person becomes aware of sustaining a 'not insignificant' personal injury, or when the first symptom or clinical sign appears (s. 55). However, if the person sustaining injury is less than eighteen years of age, longer time periods apply, as set out in paragraph 5 of this paper.

If a driver at fault in the accident is not covered by compulsory third party insurance, and the Insurance Commission of Western Australia makes payments for persons killed or injured in the accident, the Commission has six years to bring an action against the driver for reimbursement (s. 13). This cause of action accrues from the date the Commission settled the claim with the representatives of those killed or injured. (1)

5. Time Limits For Minors

If a person is under 15 years of age when their right to sue arises, they have six years in which to sue (s. 30). If a person is 15, 16 or 17 years of age, their time to sue expires when they reach 21 years of age (s. 31). This sounds as if a great deal is asked of very young people. It is moderated by the provision that time running while that person does not have a guardian is not counted (s. 32 (1)), however there is an outer time limit of when the person attains the age of 21 years (s. 32 (2)).

'Guardian' for a person under 18 years of age is someone who has legal responsibility for the long-term care, welfare and development of the person, and

for whom it is practicable to commence an action on behalf of the person under 18 (s. 3). A court can extend the time up to when the person reaches 21 years of age (s. 41). This section allows a person who was under 18 years of age when the cause of action arose to apply to a court for leave to commence an action, up to when the person turns 21. There is also an extension of the time limit concerning a minor if the prospective defendant is a person with whom the minor was in a close personal relationship (s. 33).

6. Persons Under A Mental Disability

'Mental Disability' is defined as including an intellectual disability, a psychiatric condition, an acquired brain injury or dementia which has the effect that the person is unable to make reasonable judgments in relation to matters concerning them or their property (s. 3). If a person is suffering from a mental disability at the time when their right to sue arises, time during which they are suffering the disability and do not have a guardian is not counted in calculating the time limit. However, there is an overall time limit of 12 years (s. 35). If the person suffering the mental disability is in a close personal relationship with the prospective defendant, the time limit is then 3 years after the relationship ends. The time is also lengthened if another provision of the Act creates a longer time (s. 36 (2)). There is an overall time limit of 30 years (s. 36). A court can also extend time up to 12 years (s. 42). A guardian is defined as a guardian or administrator under the provisions of the Guardianship and Administration Act 1990 (s. 3).

7. Other Important Time Limits

There are a number of special cases to which the general six-year time limit does not apply. Some notable ones are:

7.1 Deeds

Any contract describing itself as a deed, an agreement under seal or an indenture, which is signed by the person said to be liable under it, and whose signature is witnessed by an independent witness, is a deed. (Property Law Act 1969 WA s. 9). The time limit for an action on a deed is 12 years (s. 18).

7.2 Mortgage Debts

1. If a mortgage secured on land or personal property is in the form of a deed, the time limit for action on it is 12 years (s. 18).
2. Under a mortgage of land which is not expressed as a deed the lender has 12 years to sue to recover the principal outstanding, (s. 20) and 6 years to sue to recover interest (s. 21).
3. Under a mortgage of personal property such as a car, which is not expressed as a deed, the lender has 6 years to sue to recover the principal (s. 13), and 6 years to recover interest (s. 22).

If a mortgage is of both land and personal property, such as a mortgage covering a house and a car, it is viewed as a mortgage of land (ss 20 and 21). The right of the lender to sue arises (accrues) when the contract is breached. The contract itself normally has detailed provisions relating to breach or default, and usually this includes when the borrower fails to pay an instalment due under the mortgage on time. The lender also has 12 years to recover land subject to a mortgage after the contract is breached (s.23). If a contract does not specify a date when money is to be repaid, but the money is repayable on demand, then the right to sue arises when the lender makes a demand for repayment, and the borrower fails to comply (s. 59).

7.3 Judgments

Section 9 of the new Act provides that if another period of time is provided for by another Act of Parliament, then it prevails over this general six year time limit of the new Act. Section 12 of the Civil Judgments Enforcement Act 2004 provides a twelve year time limit to enforce judgments.

8. Acknowledgement or Part Payment of Debt

The law continues to be that a written and signed acknowledgement of a debt, or a part payment of it, extends a limitation period (s. 47).

The requirements are:

- 8.1 An acknowledgement of the creditor's right or title to be paid (even though there is no promise to pay);
- 8.2 An acknowledgement is effective only if it is in writing and signed by the debtor (s. 48). A verbal acknowledgement, by telephone or personally, is not effective to extend a time limit;
- 8.3 Under the previous Act, an acknowledgement was effective if made by the debtor, or the debtor's agent, in writing and signed by the debtor or the debtor's agent (s 38 and 44 Limitation Act 1935). The new Act does not include a reference to the debtor's agent.
- 8.4 An acknowledgement under the new Act is called a 'confirmation of a cause of action'. It accordingly applies to all sorts of actions, for example for tort. The old Act did not extend the effect of acknowledgement to tort.

- 8.5 A part-payment extends the limitation period if it is made in relation to the creditor's right or title, and in circumstances consistent with an acknowledgement of the creditor's right or title. An example of a payment inconsistent with this is a payment with a denial of liability (s. 46 (1) (b)). For example, if a debtor writes to the creditor in a letter headed 'Without Prejudice' and denies liability, but nonetheless pays a sum of money, the payment does not start the time limit running again.
- 8.6 A time limit which has expired is **not** extended by an acknowledgement or part payment after the time limit has expired (2).

9. Other Acts – Other States

As mentioned earlier, the new Act does not affect the operation of a limitation provision in another Act of Parliament. Accordingly, the time limits in the Family Provision Act, the Family Court Act and the Civil Judgments Enforcement Act continue to operate, unaffected by the new Act (s. 9). The Act is an Act of the Western Australian Parliament, and accordingly does not affect what happens in a court in another state. If a debtor in Western Australia is sued by a creditor in the courts of another state, that proceeding is not affected by Western Australian law. The limitation period in relation to that action is the one applicable under the law of the creditor's state. If a court in another state makes a judgment in a matter, that judgment can be registered in Western Australia for enforcement here, under the provisions of the Service and Execution of Process Act 1992 (Commonwealth). Section 105 of that Act provides that the judgment from the other state then has the same force and effect, and may give rise to the same proceedings by way of enforcement, as if it were a judgment of a Western Australian court. This means that enforcement is then subject to the Civil Judgments Enforcement Act 2004 (WA), and all the provisions of that Act including the twelve year life of a judgment apply to it. However, interest on the

judgment is determined by the law of the court in which the judgment was made:
Service and Execution of Process Act ss. 104 and 108.

10. Deceased Estates

An action by a person under the Family Provision Act 1972 must be made within six months of the appointment of the executor or administrator unless a Court extends that period of time: (s 7 (2)) Family Provision Act 1972. A trustee administering a deceased estate can get protection against creditors wishing to make a claim against the estate by advertising in the Government Gazette, and in a newspaper or newspapers circulating in the relevant localities; Trustees Act 1962 (s. 63).

11. Absence Overseas

The old Limitation Act (s 41) provided that if a person against whom an action could be brought was overseas at the time the cause of action arose ('accrued') the time limit started running from when the defendant returned to Australia. There is no parallel in the new Limitation Act.

12. Power of a Court to Extend Limitation Periods

Courts have a limited power to extend time limits, in some specified circumstances. There is no **general** power for a court to extend time limits. The circumstances in which a court can extend a time limit are:

12.1 Fraud or Improper Conduct

A court can extend time to commence an action if there has been fraud or improper conduct by or on behalf of the defendant (s.38). This does not apply to

a defamation action. In a case of fraud or improper conduct the court can extend the time to sue by up to three years.

12.2 Personal Injury or Fatal Accidents Act:

A court can extend the time to sue for personal injury or wrong in a case in which the defendant did not know the cause of the death or injury, or the identity of the person responsible (s.39).

12.3 Defamation Action:

The time limit for beginning a defamation action is one year from the publication (s. 15). A court can extend this time limit up to three years if it is satisfied that it was not reasonable for the plaintiff to have commenced the action within one year (s. 40).

12.4 Extension for Minors

As mentioned above, a court can extend the time for a minor to sue, up to when the person attains the age of 21, if the court is satisfied that it was not reasonable for the person's guardian not to commence the action in time (s. 41).

12.5 Extensions for Persons with a Mental Disability:

As mentioned above, a court can extend the time for a person who suffers from a mental disability at any time after a cause of action accrues to them up to twelve years, provided that the court is satisfied that it was unreasonable for a guardian of that person not to start the action within time (s. 42). The definition of 'mental disability' and 'guardian' are set out earlier in this note.

13. Time Limits in Family Law

Section 44 (3) of the Family Law Act creates a time limit of twelve months after a divorce takes effect for beginning proceedings relating to spousal maintenance or property, including proceedings of those types involving a bankruptcy trustee of one of the parties. When a person makes an application for divorce, and the court makes a divorce order, that order **takes effect** after one month (s. 55 (1) and 55A). The time limit of twelve months starts running from when the divorce order takes effect.

These principles do not apply to an application under section 78 of the Family Law Act, which is a section that allows parties to a marriage to seek from the Family Court a declaration of title or rights (if any) that they have in respect to the property of the parties. This is important to note because generally when twelve months have elapsed from a divorce taking effect parties will usually believe they cannot bring any sort of property action in the Family Court. If there is some item of property in which they assert they have an interest, be it legal or equitable they can bring an application before the Family Court seeking a declaration in regard to their interest in that property and can also seek orders as to sale or partition of the property and interim or permanent orders as to possession of it. A section 78 application would normally relate only to property that was in the ownership of one or both of the parties at the time they were married to each other. It is unlikely to apply to property acquired by one of the parties after separation, unless the person acquiring the property used money or property accumulated during the marriage.

14. Time Limits In De Facto Matters

The Family Court Act 1997 (WA) provides that the Family Court of Western Australia can made orders concerning the property of de facto partners, or the property of one of them (s.205ZG), or for the maintenance of one de facto partner

by the other de facto partner (s. 205ZD). There is a two-year time limit within which an application can be made, after the end of the de facto relationship (s. 205ZB (1)). Under s. 205ZA the court can declare interests in property in a way similar to the way the Family Court can declare interests in property under section 78 of the Family Law Act. However, unlike a section 78 application, the same two-year time limit applies to a declaration of interests under s. 205ZA as to an application for orders relating to property or spousal maintenance under s. 205ZG or s. 205ZD. The court can grant a de facto partner leave to apply out of time if the court is satisfied that hardship would be caused to a de facto partner if leave were not granted (s. 205ZB (2)).

15. Same Sex De Facto Relationships

By virtue of section 13A of the Interpretation Act 1984 (WA) the term de facto relationship includes a same sex relationship. Accordingly the time limits described above relating to de facto matters apply similarly to same sex and different sex relationships.

16. Tax Debts

There is no particular statute of limitations binding the Australian Taxation Office. It is usual that, in the absence of fraud or evasion, matters are reviewed only about five years back. However, if there is fraud or evasion no time limits are applied.

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1. State Government Insurance Commission v Teal 2 WAR 1990 p.105
2. Stage Club Ltd. V Millers Hotels Pty. Ltd. (1981) 150 CLR 535

CASE STUDY

TIME LIMITS

Lolita Newone has come to see you in an agitated state. Normally you do not see clients on a Friday afternoon, but you have made an exception for her. She hands to you a District Court Writ of Summons. She says it was served on her on Wednesday of last week. It says she has to enter an appearance in ten days from the date of service, and that time is up tomorrow. She asks where she has to appear.

You look at the Writ of Summons. You see that the plaintiff is ABC Bank, and the defendants are Leonard Lumbered and Lolita Lumbered. You ask who they are.

Lolita explains that twelve years ago, when she was seventeen, she and Leonard Lumbered bought a house. They were just married. Leonard had a good income, and some savings. They moved in after they came back from their honeymoon. Things went well for about a year, then Leonard began to drink heavily. When he got on to the rum he became violent. On one occasion he started a chainsaw, and chased her around the house with it. She escaped with their small son Humbert, and went to a refuge. When she took proceedings against him to get possession of the house, Leonard said that if he could not have the house, no one could. He smashed all the doors off their hinges, piled them up in the backyard, and put the furniture on top. He then lit the pile, and danced around the bonfire, shouting threats to neighbours who looked over the fence. Leonard then drove to the airport, and left for Libya. The last Lolita heard of Leonard is that he was working on an oil pipeline in a remote part of Libya. You ask Lolita what happened to the house.

Lolita says that the house was a mess after Leonard finished with it. The bank sold it as is for \$55,000. She says that was ridiculous, because they had bought

the house about a year earlier for \$110,000. The bank asked her for money at the time, but she said she had no money, and they had better chase Leonard in Libya.

You ask Lolita about her present situation.

Lolita says that she is now married to Neville Newone. They bought a house in joint names about eight years ago. It is now worth \$400,000, and they owe \$200,000 on the mortgage. They live there with Humbert, and the two children of their marriage. Lolita is not working. Neville has quite a good job, but there is no money to spare after they pay the mortgage on their house, and meet the other expenses of the household.

You look again at the Writ of Summons. You see that it refers to a home loan which Leonard and Lolita Lumbered entered with ABC Bank about twelve years ago. It refers to the borrowers defaulting on the loan, and a default notice served on the borrowers at their last known address about eleven years ago, which they failed to comply with. It refers to the bank selling the house, and claims \$50,000 as shortfall on the principal of the loan, \$60,000 as interest accrued, plus ongoing interest and legal costs.

Lolita says she cannot imagine where she could get \$110,000 plus the other amounts. She is very afraid that if Neville finds out about the Writ of Summons, he might be very angry and throw her and Humbert out on the street.

It is 2.00 pm on Friday afternoon. Lolita says she is quite desperate, and she will do anything that might help to save the situation.

Lolita asks:

1. Does she have to appear anywhere in particular within ten days of being served with the Writ of Summons?
2. Is there anything you can see in Lolita's situation that might be of benefit to her?
3. Are there any steps you can suggest to Lolita that she takes now?
4. Lolita says that she has not had much sleep since the Writ of Summons was served on her. She has been searching on the internet to see if she could find anything that might be helpful. She has found that ABC Bank is a member of the Financial Ombudsman Service. Is this a situation in which FOS may be of assistance to Lolita?

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