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Mandatory vs Directory: Time Limits for Statutory Claims

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Introduction

This paper considers the nature and implications of the time limits that apply to statutory claims lodged under the *Workers' Compensation and Rehabilitation Act 2003* (the Act). The relevant time limits to be considered are the following:

- i) The time limit for lodgement of a claim for compensation;
- ii) The time limit for lodgement of an application for review;
- iii) The time limit for lodgement of an appeal against a review decision;
- iv) The time limit for lodgement of an appeal under the Act to the Industrial Court of Queensland.

The time limit for lodgement of a claim for compensation

The time for applying for compensation is dealt with in s.131 of the Act, which states:

131 Time for applying

- 1) An application for compensation is valid and enforceable only if the application is lodged by the claimant within 6 months after the entitlement to compensation arises.
- 2) If an application is lodged more than 20 business days after the entitlement to compensation arises, the extent of the insurer's liability to pay compensation is limited to a period starting no earlier than 20 business days before the day on which the valid application is lodged.
- 3) Subsection (2) does not apply if death is, or results from, the injury.
- 4) An insurer must waive subsection (1) for a particular application if it is satisfied that special circumstances of a medical nature, decided by a medical assessment tribunal, exist.
- 5) An insurer may waive subsection (1) or (2) for a particular application if the insurer is satisfied that a claimant's failure to lodge the application was due to--
 - a) mistake; or
 - b) the claimant's absence from the State; or
 - c) a reasonable cause.

Time runs from when "*the entitlement to compensation arises*". When the entitlement to compensation arises is provided in s.141, which states:

141 Time from which compensation payable

- 1) The entitlement to compensation for an injury arises on the day the worker is assessed by--
 - a) a doctor; or
 - b) if the injury is an oral injury and the worker attends a dentist--the dentist.
- 2) However, any entitlement to weekly payment of compensation starts on--
 - a) (a) if a doctor or dentist assesses the injury as resulting in total or partial incapacity for work on the day the worker stops work because of the injury--the day after the worker stops work because of the injury; or
 - b) (b) if a doctor or dentist assesses the injury as resulting in total or partial incapacity for work on a day later than the day the worker stops work because of the injury--the day the doctor or dentist assesses the injury.

In *WorkCover Queensland v Mary Patricia Downey* (2001) 168 QGIG 381 Hall P considered the interpretation of s.158 of the *WorkCover Queensland Act 1999* (s.141 of the current Act). The injury had developed in 1997. A diagnosis of unfit for work

was given on 10 November, with the claim being lodged the next day.

His Honour stated, relevantly:

Given that the expression “after the entitlement to compensation arises” is not to be given its natural meaning, one would (prima facie) expect that a statutory meaning would be provided. It seems to me that at least one meaning is provided by s. 168(1)(2).

Because subs. (2) operates as an exception to or a limitation upon the operation of subs. (1), it seems to me that the expression “assessed by a doctor” (or for that matter “assessed by a dentist”) must be taken to mean “assessed by a doctor as resulting in total or partial incapacity for work”. I.E., where the commencement of the limitation period is said to be triggered by the activity of a doctor; it is necessary to show that a doctor has assessed the alleged injury as involving partial or total incapacity. The exception or limitation at s. 168(2) both protects the worker against a doctor retrospectively unleashing the limitation period by an assessment that the total or partial incapacity was present many months ago, and protects insurers against an assessment that total or partial incapacity has been present for a few months. The legislature must have intended that s. 168 will be used in the interpretation of s. 158. The legislature had both sections present to the mind at the same time. Section 168(4) expressly refers back to s. 158(2).

Accordingly, the entitlement to compensation arises when the worker is assessed by a doctor as having an injury that results in total or partial incapacity for work.

By the express terms of s.131(1) of the Act a claim is valid and enforceable only if the time limit is met. Accordingly, as was observed by Hall P in *ANZ Banking Group v Q-COMP (2004) 175 QGIG 1125*, “non-compliance with the six-month time limit ... is a matter of some gravity”.

The sub-section means what it says (see *Thompson v WorkCover Queensland [2001] 1 Qd R 461-462 per Helman J*) in that there is no claim unless WorkCover waives compliance.

Section 131 (1) is thus subject to the power to “waive” contained in sub-section (5).

Accordingly, an insurer may “waive” sub-section (1) or (2) if satisfied that the failure to lodge the application was due to:

- a) mistake; or
- b) the claimant’s absence from the State; or
- c) a reasonable cause.

Mistake

In *ANZ Banking Group v Q-COMP (supra)* the questions of what constitutes a “mistake” or a “reasonable cause” were considered by the Industrial Court of Queensland.

The Industrial Magistrate below had waived time on the basis that the failure to lodge within the six-month time limit was a mistake within s.131(5)(a), and on the basis that the failure to apply for two months after the worker became aware of the mistake, was due to a reasonable cause for the purposes of s.131(5)(c).

The reasons why the Industrial Magistrate waived time were as follows:

- The claimant was in fact suffering a psychological disorder;
- She was handling the matter herself;
- She had raised the issue sought to be the subject of the claim in an earlier claim;
- It was quite possible, in the claimant’s mind, that the events of the entire afternoon (being accused of theft at work and then having a “near miss” accident on the way home) would be considered be the first application;
- In all of the circumstances the claimant could be considered to have made a “mistake” for the purposes of s.(5)(a).

On appeal, the Industrial Court accepted there was “some basis for a mistaken belief that all incidents were covered by the first

application”.

Reasonable excuse

In ANZ (supra) the worker’s “mistake” was revealed after discussion with an officer of Q-COMP. Notwithstanding this information, the application was not lodged for a further two months. This delay was held at first instance to be “reasonable” as a result of the worker’s psychological disorder.

In respect to the finding of reasonable cause, the Industrial Court stated:

“...It seems to me that too much should not be made of the reasonable mind. The limitation period and the power to waive the limitation period under operate in circumstances in which workers suffering, physical, psychiatric, and psychological injuries are seeking to claim a benefit. It will frustrate the purpose of the Act if a failure to meet the time limit attributable to the very “injury” complained of is to be denied pardon because a reasonable person who (with cause) would not be suffering from the “injury”, would have met the time limit. The way in which the Industrial Magistrate dealt with section 159 was in my view entirely unexceptional.”

Accordingly, in considering reasonableness his Honour considered the explanation in the circumstances and took into account the effect of the claimant’s psychological disorder.

In *Mayne Group Limited v Q-COMP* (No. 122389 of 2003, unreported, Industrial Magistrates Court), the claimant lodged outside of the six-month period. The claimant was not a novice in the area of the workers’ compensation claims, had a work-related incapacity that did not resolve within the time frame he had expected, had taken advice from someone outside of the scheme and had previously been fired following lodgement of a worker’s compensation claim. The reason that the claimant lodged outside of the six-month period was because the incapacity did not resolve within the time frame he had expected and because of previously being fired because of a worker’s compensation claim.

Industrial Magistrate Gordon found that none of the claimant’s reasons amounted to a reasonable excuse, primarily because it appears that the claimant knew of the time limit and for his own reasons, chose to ignore it. In the circumstances there was no reasonable excuse.

Time limit when applying for review

The time limit that applies to an application for review is set out in s.542 of the Act which states:

542 Applying for review

- 1) An application for review must be made within 3 months after the person applying for review (the applicant) receives written notice of the decision or the failure to make a decision and the reasons for the decision or failure, unless subsection (4) applies.
- 2) For subsection (1), the applicant may, within the 3 months mentioned in the subsection, ask the Authority to allow further time to apply for review.
- 3) The Authority may grant the extension if it is satisfied that special circumstances exist.
- 4) If the notice did not state the reasons for the decision or the failure to make a decision--
 - a) the applicant must ask the decision-maker for the reasons within 20 business days after receiving the notice; and
 - b) the decision-maker must give written reasons within 5 business days after the applicant asks for the reasons; and
 - c) the application for review must be made within 3 months after the applicant receives the reasons, regardless of whether the reasons addressed the matters prescribed under a regulation.
- 5) The application for review--
 - a) must be made in the approved form and given to the Authority; and
 - b) must state the grounds on which the applicant seeks review; and
 - c) may be accompanied by any relevant document the applicant wants considered in the review.
- 6) The Authority must, within 10 business days after receiving the application, give the applicant and the decision-maker written notice that the application has been received.

At first sight, the requirement contained in s.542 (1) that “an application for review must be made within three months” after the person applying for review receives the relevant material set out in s.542(1) presents a significant, arguably insurmountable, barrier

for a claimant who fails to bring himself or herself within s.542 (4).
Until recently the point was one of some controversy.

In *Q-COMP v Baulch* (2004) 175 QGIG 978 the President of the Industrial Court held that the equivalent provision to s.542 in the *WorkCover Queensland Act 1996* (repealed) was directory and not mandatory. His Honour's reasoning was as follows:

The WorkCover Queensland Act 1996 in the form which it took at the time relevant to this appeal did not provide that an application for review which was not made within the 3 month time limit at s. 491(1) was invalid. A comparison may be made with the explicit provision at s. 158(1) dealing with an application for compensation. Of course, if s. 491(1) was mandatory that consequence could follow, compare Maxwell on Interpretation of Statutes, at 364 to 367. However, it would be passing strange if compliance with s. 491 was intended to be mandatory in circumstances in which there is no power to waive non-compliance. The WorkCover Queensland Act 1996 was beneficial legislation. The limitation period on applying for compensation might be varied, s. 158. The limitation period for appeals to the Industrial Magistrates Court might be varied, compare McQuade and Hayes v. WorkCover Queensland 165 QGIG 126 and WorkCover Queensland v. Morgan 169 QGIG 193. The time limit on the appeal for this Court might be varied, s. 346 Industrial Relations Act 1999. Every consideration of context and justice suggests that just as the limitation at s. 499(1) is read as directory so also should the limitation period at s. 491 be read as directory. It does not follow course that the limitation period has no work to do. There must be compliance in substance, compare Scurr v. Brisbane City Council (1973) 133 CLR 242 at 255. The power at s. 491(2) (unusually) vested in WorkCover's board deals with enlargement of the period: not compliance with it.

It follows in my view that the application for review was not invalid. It was the responsibility of the Statutory Review Unit to determine whether there had been compliance in substance. When the Statutory Review Unit failed to do so s. 495(4) attached and Mrs Baulch had an appeal to the Industrial Magistrates Court. With respect to the Industrial Magistrate it was not a matter of extending time but the Industrial Magistrate was correct to determine that the now appellant erred in finding that it had no jurisdiction to deal with a review lodged outside the limitation period, in setting aside that determination and remitting the matter to the Statutory Review Unit to be heard and determined according to law. That will involve (and may only involve) dealing with the matter of substantial compliance. I confirm the orders of the Industrial Magistrate.

The argument in support of the proposition that Q-COMP has the power to deal with an application for review that is lodged out of time is based upon reading s. 542 (1) as directory and not mandatory.

The conclusion that the time limit contained in section 491(1) of the former act (which was similar to s.542) is merely directory and the failure to comply strictly will not invalidate the application for review if there has been substantial compliance has been criticised by Dutney J in *Emerson v Coles Myer* [2004] QSC 161 at paragraph 26. His Honour stated, relevantly, as follows:

“Since the only right to review a rejection decision on the merits which an applicant has is the right granted to the applicant by the statute itself, it follows that if that right is limited by the imposition of a time constraint, the failure of an applicant to bring herself within that time constraint must be fatal. That is because she could not bring herself within the scope of a statutory right ... Nonetheless, I have great difficulty in accepting that a statutory provision authorising a review of a decision within a specified limited time, without a power to extend time being conferred, authorises an application outside the prescribed time.” [My underlining]

The matter has now been settled by the decision of Lyons J of the Supreme Court of Queensland in *Cloncurry Shire Council v Workers' Compensation Regulatory Authority and anor* [2006] QSC 362.

Her Honour declined to grant a declaration that upon a proper construction of chapter 12 part 2 of the Act:

- a) There is no power to extend the period of three months after the person applying for review receives notice of a decision by a self-insurer under s.540(1)(b)(ii) of the Act within which an application for a review of the decision must be made; and
- b) A review by Q-COMP of the decision by a self-insurer under s.540 (1)(b)(ii) of the Act in respect of an application for review made later than three months after the person applying for the review receives notice of the decision is invalid.

Her Honour held that she was not satisfied that a decision taken by Q-COMP to review a decision of the self-insurer outside of the time period allowed for in the legislation was invalid.

Her Honour accepted that the primary question to be considered is whether the legislature intended that a failure to comply with the time limit prescribed by s.542(1) would invalidate an application for review, as opposed to an analysis as to whether the

provision was mandatory or directory.

Nothing turns on the fact that *Cloncurry Shire Council* (supra) concerned a self insurer, as opposed to WorkCover Queensland.

Thus the issue of whether s.542 is mandatory or directory has been answered by both the Industrial Court of Queensland and Supreme Court of Queensland. It is directory.

The consequence of her Honour's finding in *Cloncurry Shire Council* (supra) is that an application for review that is filed outside of the three-month time limit prescribed by s.542 will not, of itself, be invalid. It will be a matter of discretion for the Review Unit to accept the matter out of time or decline to accept it. The question then becomes one of what criteria should be considered in exercising this discretion.

The discretion is at large. Notwithstanding this, it would be inconsistent with the remainder of s.542 if the need to show "special circumstances" (the test applied by s. 542(3)) was not regarded as a guide. What might constitute a "special circumstance"?

In the absence of a definition, the answer is probably that "special circumstances" will exist where, in all of the circumstances, it would be unfair to shut the claimant out from a compensation claim. One example (accepted by Lyons J) would be where the claimant was in a coma and the time period had been missed. Another would be mistake.

Time limit for appeal against a review decision

The relevant time limits are contained in s.550, which states:

550 Procedure for appeal

- 1) The appeal must be made--
 - a) if the appeal is about a review decision--within 20 business days after the appellant receives the review decision; or
 - b) if the appeal is about a non-reviewable decision--within 20 business days after the appellant receives the notice of the decision stating the reasons for the decision.
- 2) For subsection (1)(b), if the notice of the decision did not state the reasons for the decision, the appellant must ask the respondent for the reasons for the decision within 20 business days after receiving the notice.
- 3) For subsections (1) and (2), the appellant may, within the periods mentioned in the subsections, ask the respondent to allow further time to appeal.
- 3A) An appeal may be started only with 1 appeal body.
- 4) The appeal may be started only by filing a written notice of appeal with the appeal body.
- 4A) If the appeal body is the industrial commission, the notice of appeal must be filed in the industrial registry.
- 5) If the appeal body is an industrial magistrate, the notice of appeal must be filed at--
 - a) the Magistrates Court nearest to the place where the appellant resides or, if the appellant is an employer, carries on business; or
 - b) a Magistrates Court agreed to between the respondent and the appellant.
- 6) The appellant must, within 10 business days after filing the notice of appeal, serve a copy of the notice on--
 - a) if the appeal is about a review decision--the Authority; or
 - b) if the appeal is about a non-reviewable decision--the insurer.
- 7) If the appellant is an employer, the appellant must also serve a copy of the notice on the claimant or worker.
- 8) If a notice of appeal required to be filed in a Magistrates Court mentioned in subsection (5)(a) is filed in another Magistrates Court, the registrar of the other Magistrates Court may send any relevant documents to the registrar of the appropriate Magistrates Court.
- 9) If a notice of appeal required to be filed in a Magistrates Court is filed in the industrial registry, the industrial registrar may send any relevant documents to the registrar of the appropriate Magistrates Court.
- 10) If a notice of appeal required to be filed in the industrial registry is filed in a Magistrates Court, the registrar of the Magistrates Court may send any relevant documents to the industrial registrar.

Accordingly, the time limits are as follows:

- If the appeal is about a review decision — within 20 business days after receipt of the review decision;
- If the appeal is about a non-reviewable decision — within 20 business days after the appellant receives notice of the decision stating the reasons for the decision (If the decision received does not state the reasons, the appellant must ask the respondent for the reasons within 20 business days after receiving the notice (s.550(2)));

- Again, s.550(3) provides for a capacity to seek an extension of time within the periods mentioned in sub-sections (i) and (ii).

The Industrial Court has, in recent times, rejected the proposition that an Industrial Magistrate does not have the power pursuant to the materially similar s.550 of the Act to extend time (see *McQuade v WorkCover Queensland* (2000) 165 QGIG 126 and *WorkCover Queensland v Morgan* (2002) 169 QGIG 193).

In *McQuade v WorkCover Queensland* (supra) the Industrial Court held that the equivalent (and for present purposes identical) provision to s.550 contained in the now-repealed *WorkCover Queensland Act 1996* was directory and not mandatory. His Honour followed the same reasoning in *WorkCover Queensland v Morgan* (supra) to hold that the predecessor provision to s.550 was directory and not mandatory and (it would appear) an Industrial Magistrate had a power to extend time. His Honour held that it was s.498 (the predecessor to s.549) which vests the right of appeal. His Honour went on to state that:

“Section 498 does not make jurisdiction conditional upon compliance with an imperative stipulation as to time or any other matter. Section 499 does not derogate from the right vested by s.498. Section 499 provides procedural steps to be followed in the exercise of the right.”

Given the similarity of the statutory provisions there is some force in the argument that the judgment of Lyons J in *Cloncurry Shire Council* (supra) in respect of s.542 would also apply to s.550.

It follows that applications can be made outside of time. Where they are, the question to be considered is whether the circumstances warrant the exercise of the Court or Commission’s discretion. In *Phelan v Q-COMP*, T/M 7971 of 2003, a decision of Mr Glasgow IM given 14 October 2003, the Court applied the general principles that are universally applied by Courts in whom an unfettered discretion to extend time is vested. These principles are discussed below.

Time limit for appeal to the Industrial Court

The time limit for an appeal to the Industrial Court is set out in s.346 of the *Industrial Relations Act* which states:

346 Time limited for appeal

- 1) An appeal against a decision must be commenced, as required under the rules, within 21 days after--
 - a) if the decision is given at a hearing--the announcement of the decision at the hearing; or
 - b) if the decision is given through the registrar--the release of the decision.
- 2) However, on an application made during or after the 21 days, the industrial tribunal may allow an appeal to be commenced within a longer period.

That time limit has historically been considered to apply to appeals to the Court under the Act (see, for example, *Mayo v Q-COMP* (2004) 176 QGIG 687). However significant doubt was cast upon this proposition in *Hetmanska v Q-COMP* (2006) 183 QGIG 917.

Even if s.346(2) does not apply the Industrial Court accepted in *Hetmanska* (supra) that 21 days is the time limit and that power exists to extend time.

Accordingly, there is no controversy as to the power of the Industrial Court to extend time. The important consideration, however, remains one of in what circumstances would an extension be given?

In *WorkCover Queensland v Zanoletti* (2001) 167 QGIG 669 the President stated:

The limitation period of 21 days at s. 346(1) should not be seen as an arbitrary cut-off point unrelated to the demands of justice. It should be treated as representing the Legislature’s judgement that the community will best be served by appeals being commenced within that brief limitation period, notwithstanding that on occasion the limitation period may defeat a perfectly good case: compare *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 540 at 553 per McHugh J (with whom Dawson J agreed). The discretion to allow an extension of time at s. 346(2) should not be treated as having equal standing with s. 346(1). It is not the case that once an application for extension of time is made, the Court is to exercise a broad discretion about whether to refuse or to grant the extension. The task confronting the Court is to exercise a power to grant an extension upon the footing that the interests of the Queensland community are best served by the 21 day limitation period at s. 346(1). An applicant for an extension of time has the positive burden of demonstrating that the justice of the case requires the indulgence of a further period, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 540 at 547 per Toohey and Gummow JJ and at 554 per McHugh J (with whom Dawson J

agreed).

Section 346(2) gives no direct guidance as to the basis upon which the power is to be exercised. It should be treated as a “full and unlimited” discretionary power. It is useful to marshal up the cases, e.g. *Canaway v Workers’ Compensation Board* (1996) 152 QGIG 1186 and *Carmody v Workers’ Compensation Board* (1998) 157 QGIG 119, in which the power has been exercised (or not exercised) and distil “principles” or “guidelines” for the disposition of other cases in which the power at s. 346(2) is invoked. However, any such set of “principles” or “guidelines” may not be treated as exhaustive. Neither may testing the circumstances of a particular case against the “principles” or “guidelines” become a substitute for the exercise of the power itself.

In *Schostakowski v Australian Meat Holdings Pty Ltd* (2002) 169 QGIG 284 the President in rejecting an application for extension of time lodged by an industrial inspector 68 days out of time stated that:

- a) the 21 day period should be seen as an assessment by the legislature that in the ordinary category of case justice will best be served by adhering to a 21-day limitation period;
- b) an applicant for an extension of time within which to appeal has a positive burden of demonstrating that the justice of the case requires the indulgence of a further period;
- c) it is not the position that once an application for extension of time is made the court is to exercise a broad discretion on the basis that all parties are equally placed.

In *Abu-Dabat v Jason Clifford Gibbons* (2004) 176 QGIG 542 this Court, in rejecting an application to extend time to allow an appeal to be filed out of time stated:

“The period set by s. 346 has been set by the legislature. It is not a provision contained in a rule of court. Legislature has made a judgment and, in the ordinary case, justice will be served if the 21 day time limit is observed.

It is for the applicant to demonstrate why the 21 day time limit should be departed from. To do that, an applicant must at least show reasonable prospects of success.”

In *Chapman v State of Queensland* [2003] QCA 172 the Court of Appeal stated, at paragraph 3, that:

“The principles to be applied in determining whether or not to extend time to appeal are well settled: See *Hunter Valley Developments Pty Ltd v Cohen* [1994] 3 FCR 344 at 348-349.”

In *Hunter Valley Developments Pty Ltd v Cohen* (supra) Wilcox J suggested the following principles to guide, not in any exhaustive manner, the exercise of the Court’s discretion to extend time:

Section 11 of the Administrative Decisions (Judicial Review) Act does not set out any criteria by reference to which the Court’s decision to extend time for an application for review under s. 5 is to be exercised. Already there have been a number of decisions of judges of this Court, all sitting at first instance, dealing with the approach proper to be taken. They differ a little, both in language and in emphasis, but I venture to suggest that from them may be distilled the following principles to guide, not in any exhaustive manner, the exercise of the Court’s discretion:—

(1) Although the section does not, in terms, place any onus of proof upon an applicant for extension, an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied that it is proper so to do. The “prescribed period” of 28 days is not to be ignored (*Ralkon v Aboriginal Development Commission* (1982) 43 ALR 535 at 550). Indeed it is the prima facie rule that proceedings commenced outside that period will not be entertained (*Lucic v Nolan* (1982) 45 ALR 411 at 416). It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an “acceptable explanation of the delay” and that it is “fair and equitable in the circumstances” to extend time (*Duff v Freijah* (1982) 43 ALR 479 at 485; *Chapman v Reilly*, Neaves J, 9 December 1983, not reported, at p 7).

(2) Action taken by the applicant, other than by making an application for review under the Act, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished. A distinction is to be made between the case of a person who, by non-curial means, has continued to make the decision-maker aware that he contests the finality of the decision (who has not “rested on his rights”: per Fisher J in *Doyle v Chief of General Staff* (1982) 42 ALR 283 at 287) and a case where the decision-maker was allowed to believe that the matter was finally concluded.

Compare *Doyle, Chapman, Ralkon and Douglas v Allen* (Morling J, 3 April 1984, not reported, at p 18 of the transcript) with *Lucic* at pp 414–5 and *Hickey v Australian Telecommunications Commission* (1983) 47 ALR 517 at 519. The reasons for this distinction are not only the “need for finality in disputes” (see *Lucic* at p 410) but also the “fading from memory” problem referred to in *Wedesweiller v Cole* (1983) 47 ALR 528.

(3) Any prejudice to the respondent, including any prejudice in defending the proceedings occasioned by the delay, is a material factor militating against the grant of an extension: see *Doyle* at p 287; *Duff* at pp 484–5; *Hickey* at pp 525–7 and *Wedesweiller* at pp 533–4.

(4) However, the mere absence of prejudice is not enough to justify the grant of an extension: *Douglas* at p 18; *Lucic* at p 416; *Hickey* at p 523. In this context, public considerations often intrude (*Lucic, Hickey*). A delay which may result, if the application is successful, in the unsettling of other people (*Ralkon* p 550; *Becerra v Fowell* (unreported, Morling J, 18 February 1983) at pp 12–13 of the transcript) or of established practices (*Douglas* p 19) is likely to prove fatal to the application.

(5) The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted: *Lucic* p 417; *Chapman* p 6.

(6) Considerations of fairness as between the applicants and other persons otherwise in a like position are relevant to the manner of exercise of the court’s discretion: *Wedesweiller* at pp 534–5. In considering the authorities it is, I believe, important to bear in mind the point made by Sheppard J in *Wedesweiller* (at p 531) relating to the diversity of decisions as to which review may be sought under the Act:

“... there will be some cases which may be decided upon considerations which affect only the immediate parties. It will be appropriate to consider whether the delay which has taken place has been satisfactorily explained, the prejudice which may be caused to an applicant by the refusal of an application, the prejudice which may be suffered by the Government or a particular department if the application is granted and, generally, what the justice of the case requires. In other cases wider considerations will be involved.”

He went on to mention the reference to public interest made by Fitzgerald J in *Lucic* at p 416.

It is in relation to the former category of cases, ie those “which affect only the immediate parties” that the approach adopted by Bray CJ in *Lovett v LeGall* (1975) 10 SASR 479 at 485, in respect of private litigation but adopted in this context in both *Doyle* at p 287 and *Duff* at p 485, is apposite namely:

“If the defendant has suffered no prejudice, as when he was well within the limitation period of the plaintiff’s claim, or where the excess period of time is small, or where he cannot show that he has lost anything by reason of the delay, it may well be that the court will not find it difficult to come to the conclusion that it is fair and equitable in the circumstances to grant extension.”

By contrast, in cases involving public administration, especially day-to-day matters such as personnel management, the public interest may well dictate refusal of an extension, even after only a short delay.

These principles are consistent with the approach taken by the Industrial Court in previous decisions.

Importantly, in *QPSU v Department of Corrective Services* (2006); 182 QGIG 503 the Industrial Court confirmed that, often the question of extension of time is not clear cut, and went on to extend time taking particular note of the consequences to the applicant of refusal.

The decisions of the Industrial Court dealing with extension of time to appeal decisions under the workers’ compensation legislation demonstrate that these general principles will apply.

(See, for example, *WorkCover Queensland v Zanoletti* (2001) 167 QGIG 669; *Mayo v Q-COMP* (supra); *Pritchard v Q-COMP* (2006) 181 QGIG 643; and *Hetmanska v Q-COMP* (supra))

In *Zanoletti* (supra) the Industrial Court extended time to an appeal by the requisite 6 days. There was a reasonable excuse (the town agent who appeared when the decision was given in open court failed to inform WorkCover Queensland of an aspect of the

order which was now sought to be the subject of appeal). There was no prejudice to the respondent caused by the delay and the appellant appeared to have a strong case.

In *Mayo* (supra) the delay was comparatively brief, but 13 days. The Industrial Court considered that there was “*an entirely satisfactory explanation*”. The putative appellant had been misinformed of the limitation period’s length by his then legal practitioner. The Court noted that the appeal being by way of rehearing on the record there was no prospect of prejudice to the respondent. The matter was advanced with “*commendable alacrity*” from the point at which the putative appellant’s legal advisers became aware that he was out of time.

In *Pritchard* (supra) the Court formed the view that the proposed appeal could not succeed, and thus dismissed the application for extension of time.

Conclusion

The time limits imposed under the Act and that apply to appeals differ in many respects. One point of commonality is an ability to be extended in an appropriate case. Any extension of time is an indulgence, not a right, and thus as with all litigation the focus should be on compliance with the timeframe rather than having to argue why (and in some cases how) it might be extended.