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It's about time

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Set out below are claims and complaints by practice and root cause that have presented at Law Claims in recent times.

Claims that arise from a failure to meet critical dates or respond to client deadlines affect all areas of practice. The number and cost of these claims continue to remain high and are significant.

While many of these matters are capable of rectification, the rectification process is itself expensive, both in terms of the actual cost of legal fees incurred and in terms of the stress and anxiety that such claims cause practitioners. In most incidents these claims are preventable.

If a claim arises out of or is contributed to by the failure to comply with any time before the doing of any act where the time stipulated for compliance;

- Is 30 days or less, the excess is increased by 50%;
- Is greater than 30 days, the excess is increased by 100%.

Personal injuries statute barred claims account for many of the time related claims and complaints against legal practitioners.

Common litigation problems include failure to issue or serve proceedings or respond to self-executing orders. In relation to non-litigation problems we have seen incidences where there has been a failure to register, renew, exercise options, file or pay by a specific deadline.

Corporate (including insolvency)

- Late registration of charges or lodgement of changes to registers
- Failure to apply in time to set aside statutory demand resulting in presumption of insolvency
- Failure to object to liquidators acceptance of proof of debt

Criminal law

- Out of time to pursue claim for criminal injuries compensation. Lost track of time when client/victim charged with making false statement with respect to a non-material element of the crime
- Out of time to object to confiscation of property under 'proceeds of crime' legislation
- Out of time to bring prosecution

- Lawyer failed to turn up at court so client represented self. Lawyer sent bill for full amount so client complained to regulator.

Dispute resolution – civil, employment, family, personal injury

- Failure to advise (potential) client of time limits to bring proceedings
- Out of time to commence proceedings, join all relevant parties, serve process, set aside statutory demand, lodge appeal
- Failure to comply with self-executing order triggers default judgment.
- Delay in filing proceedings before material change in (interstate) law
- Delay such that matter struck out for want of prosecution
- Delay bringing matter to trial by which time a key witness or party has disappeared, deteriorated, died, disposed of assets, become insolvent
- Delay post settlement - other party pulled out before deed signed, and property transfers could not be completed
- Failure to serve superannuation splitting order on trustee of super fund.
- Rejection of notice of appearance due to typographical error results in default judgement

Transactional – revenue, real property, IP, commercial, finance

- Failure to issue Form 1 Statement in time, purchaser able to rescind
- Failure to advise on conditions precedent, cooling off/time of essence
- Failure to lodge documents for stamping or pay duty on time
- Failure to object to revenue assessment in time
- Failure to exercise option to renew lease in time
- Failure to renew trade mark or patent in time
- Errors in documents due to tight time pressures eg wrong lot number inserted results in builder putting concrete pad on property next door
- Failure to issue notices under contracts in time
- Failure to register charge in time
- Out of time problem compounded by falsifying date to avoid penalties
- Failure to lodge bid in time due to technology failure
- Failure to draft effective time provisions in contracts

Wills and estates

- Failure to file and serve a claim within 6 months of grant
- Unreasonable delay, often several years, either in applying for probate, or in administering/distributing the estate.
- Delay in preparing the will and testator died before will was executed
- Failure to serve claim within 3 months of notice of the claim being made
- Failure to renew caveat on grant within time

Legal/factual error – failure to know or find out what needs to be done by when

- Failure to lodge objections to amended tax assessments in 60 days (solicitor wrongly assumed the client had 4 years to do so)
- Failure to nail down precise dates of past employment before expiry of 6 year limitation period on bringing a claim
- Misinterpretation of time zone relevant to calculating close of business
- Unaware of change in law regarding time limit

- Misunderstanding of self-executing' order. Felt safe in ignoring self-executing order further discovery because on the basis of the client's instructions there was nothing further to discover. Did not realise need to communicate this to court in order to prevent judgment being entered
- Didn't investigate, check source, or read documents carefully enough or early enough to identify time sensitive legal issues (e.g. different time limits applying to different parties, errors in oral information)

Lack diligence/Oversight - know what needs to be done by when but it's not done

- Poor handling of known time-sensitive matter- claim about to be statute barred was sent to court for filing by DX instead of by hand which resulted in claim being processed out of time. Out of time problem not immediately discovered because practitioner took no further action on the matter for 8 months.
- Proceedings issued but not served due to difficulty locating defendant. Attempted service on insurer not followed up in time to prevent Court dismissing the proceedings
- Too busy doing other things to register charges or pay stamp duty
- Boggled down in investigation/evidence gathering and forgot to file
- Focused on settlement negotiations and forgot to file
- Long running litigation, overlooked need to renew/extend approvals
- Distracted by business/personal problems and forgot to file/respond (eg moving offices, partnership dispute, short staffing, illness)
- Expected indulgence from other side was not forthcoming
- Dates entered wrongly in diary and other diary/reminder malfunctions
- Miscalculation of relevant dates or times (e.g. of last day to file defence, business day, public holiday, close of business during daylight saving)
- Notices served on some parties but not others

Poor teamwork, delegation and supervision

- Seven missed limitations discovered after employee left the firm
- Failure to check/remind employee of 6 month deadline to file claim
- Files overlooked, not tracked when transferred between junior solicitors who changed teams such as the urgent injunction application delegated to an employed solicitor who went on holidays and transferred job to another employed solicitor who had still not prepared the application 6 months later by which time it was too late
- Urgency of lodgement not communicated to secretary
- Misunderstanding about who in the team was to lodge the document

Over-reliance on counsel

- Solicitor liable because counsel's retainer interpreted narrowly (brief re workers comp does not automatically include retainer on common law; brief to advise on one jurisdiction did no include retainer to advise on relevant time limits in other jurisdiction).
- Solicitor/counsel proportionately liable on basis that solicitor should have picked up counsel's error (e.g. wrong applicable time limit; wrong trade practices advice that no cause of action).
- Solicitor/counsel proportionately liable on basis solicitor should have chased dilatory counsel (e.g. time limit expired waiting for counsel's advice; wasted costs of gross delay)

Failures of engagement, communication, & 'useable trail'

- Uncertainty about existence, scope or commencement of retainer, particularly personal injury and contracts with cooling off periods (e.g. casual enquiries, retainer limited to workers comp/not common law, or documenting deal/not advising, and transferred matters)
- Actual or perceived failure to explain to the client both the nature and impact of the time limit or time constraint
- No record to prove the practitioner did give the client or potential client advice about the limitation period or 'advice to get advice'
- Admin error meant client's new address not in the system and letters seeking urgent instructions continued to go to old address
- Failure to manage unreliable client who failed to give instructions in time
- Failure to communicate to client the time limit on acceptance of settlement offer
- Lack of timely communication to client deprived client of opportunity to arrange security for costs instead of having order made against them

There are many ways of managing critical dates. It is suggested that a critical date system in order to be effective include an effective back up system (so that the system does not fail because the only person responsible for managing it is away, uniformity in approach across a firm (to avoid confusion, when practitioners and support staff move between different sections of the firm) and an early warning system (so that the practitioner has sufficient time to complete the next step in the matter).

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