

# Former state ward obtains an extension of time

**Aurisch v State of NSW**

**Jamie Stephenson, Barrister, Sydney**

On 12 May 1997, Master Greenwood granted a plaintiff an extension of time in which to commence proceedings against the State for damages in relation to alleged abuse which he suffered while a ward of the State.

The plaintiff turned 18 on 23 September 1984 and by virtue of section 52(1) of the *Limitation Act 1969* (NSW) ("the Act"), the time within which the proceedings could be brought against the defendant, without leave, expired on 23 December 1987, three years after the plaintiff's 18th birthday.

The plaintiff sought leave to commence proceeding under section 60G of the Act. Section 60G(2) provides that:

*If an application for an order under this section is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines.*

By virtue of sub-clauses 4(3) and 4(4) of Schedule 5 of the Act, the plaintiff could seek the leave of the court to proceed out of time pursuant to section 60G of the Act if he satisfied the requirements of section 60I(1). Section 60I(1) of the Act provides that:

A court may not make an order under Section 60G or 60H unless it is satisfied that:

(a) the plaintiff:

(i) did not know that personal injury had been suffered; or

(ii) was unaware of the nature or extent of personal injury suffered; or

(iii) was unaware of the connection between the personal injury and the defendant's act or omission,

at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted; and

(b) the application is made within three years after the plaintiff became aware (or ought to have become aware) of all three matters listed in paragraph (a) (i)-(iii).

The plaintiff's evidence was that it was not until matters were drawn to his attention in July 1996 by a social worker that he became aware that his condition was caused by what he suffered as a ward of State. The plaintiff contacted the social worker after the media reporting of the Royal Commission into the police and the revelations regarding the abuse of children. Master Greenwood held that the plaintiff satisfied the requirements of section 60I and in particular section 60I(1)(a)(iii).

The next requirement for the plaintiff was to establish that it was "just and reasonable" for the limitation period to be extended pursuant to section 60G(2) of the Act. Master Greenwood found that on the evidence before him it could not be said that the plaintiff's cause of action was fanciful or futile. Master Greenwood went on to consider whether the prejudice to the plaintiff in refusing the application outweighed any prejudice to the defendant because of the passage of time. Master Greenwood noted that from the point of view of the plaintiff, he would lose a cause of action which, if he could prove, would entitle him to damages. From the point of view of the defendant, it would lose the protection of the statutory bar and be forced to defend a case which went back many years.

The next requirement for the plaintiff was to establish that it was "just and reasonable" for the limitation period to be extended pursuant to section 60G(2) of the Act. Master Greenwood found that on the evidence before him it could not be said that the plaintiff's cause of action was fanciful or futile. Master Greenwood went on to consider whether the prejudice to the plaintiff in refusing the application outweighed any prejudice to the defendant because of the passage of time. Master Greenwood noted that from the point of view of the plaintiff, he would lose a cause of action which, if he could prove, would entitle him to damages. From the point of view of the defendant, it would lose the protection of the statutory bar and be forced to defend a case which went back many years.

In weighing up the respective prejudices, Master Greenwood came to the conclusion that it was appropriate to extend the time within which the plaintiff could bring proceedings and that the plaintiff

had discharged the onus of establishing that it was just and reasonable to do so.

Whether it is "just and reasonable" that the limitation period be extended will depend in the circumstances of the particular case and in this regard it is also worthwhile considering the principles expressed in other judgements such as *Brisbane South Regional Health Authority v Taylor* (1996) 70 ALJR 866, *Harris (as Administratrix of the Estate of Hollins) v Commercial Minerals Ltd and Others* (1996) 186 CLR 1 and *Williams v Minister Aboriginal Rights Act 1983* (1994) 35 NSWLR 497. ■

**Jamie Stephenson** is a Barrister at Selborne Chambers in Sydney. Jamie can be contacted on **phone** 02 9232 1514.

## NOTICE OF ANNUAL GENERAL MEETING

Notice is hereby given that the Annual General Meeting of the Australian Plaintiff Lawyers Association (APLA) will be held at the Hyatt Regency Resort, Coolumb, Queensland on Sunday 2 November, 1997 at 10.50am

### Business:

1. Confirmation of the minutes of the Annual General Meeting of members of the association held on Sunday 20 October, 1996
2. To receive and consider from the council reports upon the activities of the association for the year
3. To transact any other business that may properly be brought before the meeting in accordance with the Rules of Association, including consideration of a proposed Code of Conduct for members of the association

Roland Everingham – National Secretary