**Administrative Appeals Tribunal**

**ADMINISTRATIVE APPEALS TRIBUNAL )**

 **)** No: 2012/1668

**General Administrative Division )**

 **Re: Indra Thappa**

Applicant

**And: Comcare**

Respondent

**DIRECTION**

**TRIBUNAL:** Professor RM Creyke, Senior Member

**DATE:**  11 January 2013

**PLACE:**  Canberra

The Tribunal directs the Registrar, pursuant to subsection 43AA(1) of the *Administrative Appeals Tribunal Act 1975*, to alter the text of the decision in this application as follows:

1. the second footnote marked as “3” and its contents be deleted;
2. footnote “4” and its contents be deleted;
3. in paragraph 11, footnote “4” to be added after the words “finality in decision-making” with the reference “*Lucic v Nolan and Others* (1982) 45 ALR 411 at 416.”
4. in paragraph 11, footnote “5” to be added after the words “just outcome requires otherwise” with the reference “*Duong v Australian Postal Corporation* (2005) 41 AAR 288 at 293-294.”

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Professor RM Creyke, Senior Member

 [2012] AATA 364

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2012/1668 |
| Re |  |
|  | APPLICANT |
| And | COMCARE  |
|  | RESPONDENT |

# Decision

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| Tribunal | **PROFESSOR RM CREYKE, SENIOR MEMBER** |
| Date |  **15 June 2012** |
| Place | **Canberra** |

The application for extension of time is granted under s29(7).

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**PROFESSOR RM CREYKE, SENIOR MEMBER**

# Catchwords

PRACTICE AND PROCEDURE – interlocutory hearing – application for extension of time – whether acceptable explanation of delay – whether applicant rested on rights - merits of the claim and public importance – whether external substantive review has occurred - extension of time granted

# Legislation

Administrative Appeals Tribunal Act 1975 (Cth) ss 29(7)-(10).

Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 5A, 5B, 14.

# Cases

Comcare v A’Hearn (1993) 119 ALR 85

Duong v Australian Postal Corporation (2005) 41 AAR 288

Hunter Valley Developments Pty Ltd v Cohen (1984) 7 ALD 315

# REASONS FOR interlocutory DECISION

**PROFESSOR RM CREYKE, SENIOR MEMBER**

1. Mr Indra Thappa applied on 25 April 2012 for an extension of time to lodge an application to the Tribunal for review of a decision by AusAID. The decisions to be reviewed were made in the period 9 to 20 February 2010.
2. The application was resisted by Comcare on one ground only, namely, that the merits of the matter had been thoroughly canvassed by AusAID in a report prepared by an independent investigator, WISE Workplace Investigations, which had issued a report in September 2010. Comcare submitted that the report was lengthy, was comprehensive and covered all the issues which could be raised before the Tribunal, namely, whether the action undertaken by AusAID was ‘*reasonable administrative action’* and hence prevented any liability arising for any injury claimed by Mr Thappa.[[1]](#footnote-1)

# Background

1. Mr Thappa first sought review of the results of the initial decisions on 22 April 2010 (AAT Application No 2010/1638).
2. A stay of these proceedings was requested by Mr Thappa’s legal representative on 12 November 2010 pending the outcome of a secondary review Mr Thappa was seeking through the Merit Protection Review Commission. On 12 November 2010 the Tribunal rejected that application for a stay on the ground that it was not known how long the secondary review would take.
3. Subsequently Mr Thappa’s applied to the Merit Protection Review Commission on 9 January 2011. Mr Thappa was notified on 30 September 2011 that the Commission would not review his application as it was submitted out of time, a decision affirmed by the Commission on 28 October 2011. A further review by the Merit Protection Review Commissioner was unsuccessful and the case was closed on 4 January 2012.
4. On 10 January 2012, Mr Thappa appealed to the Commonwealth Ombudsman for a review of the decision by the Merit Protection Review Commissioner to close his application. On 2 March 2012, Mr Thappa was advised that the Ombudsman would not investigate the matter.
5. During March 2012, Mr Thappa contacted the Fair Work Ombudsman to explore whether the matter could be reviewed by that body. On 17 April 2012, Mr Thappa was advised that the matter was outside its jurisdiction.
6. Mr Thappa then approached the Tribunal on 25 April 2012 for an extension of time to pursue his claim through the Tribunal. An interlocutory hearing on the matter was held on 6 June 2012.

# Consideration

1. The application to the Tribunal has been made over two years after the initial decision and 20 months after the results of the internal investigation conducted by AusAID. It is out of time.
2. However, the Tribunal has the discretion to grant an extension of time.[[2]](#footnote-2) The principles which have been commonly used to guide the Tribunal in exercising its discretion are encapsulated in certain cases*.*[[3]](#footnote-3)
3. A key public interest factor for the Tribunal in exercising its discretion to extend time is the desirability of achieving finality of decision-making.[[4]](#footnote-4) At the same time, the Tribunal does not take an unduly strict approach to the limitation periods if a just outcome requires otherwise.[[5]](#footnote-5)
4. The Tribunal notes that although the delay in this case is extensive, Mr Thappa did attempt to appeal to the Tribunal in 2010 - an application which was not out of time. He has also been pursuing his claim through alternative and appropriate avenues, namely, the Merit Protection Review Commission, the Commonwealth Ombudsman and the Fair Work Ombudsman in the interim. In other words, he has not rested on his rights.
5. In relation to the merits of the application, the sole ground on which Comcare disputed the application for an extension of time, the Tribunal notes that although the internal investigation prima facie appears to be comprehensive, it was an investigation on behalf of AusAID, there are aspects of the report which are disputed by Mr Thappa, and these substantive issues were not considered by the Merit Protection Review Commissioner, the Commonwealth Ombudsman, nor by the Fair Work Ombudsman.
6. In particular Mr Thappa claims that ‘*the primary review failed to meet standards of evidentiary and investigative neutrality’*. In other words, Mr Thappa’s issues in relation to the substantive application have not been aired before an independent body, external to and with no relationship to, the agency.
7. In those circumstances, as a matter of fairness, the Tribunal is prepared to grant Mr Thappa an extension of time to lodge his application with the Tribunal.

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| I certify that the preceding 15 (fifteen) paragraphs are a true copy of the reasons for the decision herein of  |

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Dated 15 June 2012

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| Date of hearing | **6 June 2012** |
| Date final submissions received | **8 June 2012** |
| Applicant | **In person** |
| Respondent | **In person** |
| Advocate for the Respondent | **Kate Watson**  |

1. Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 5A, 5B, 14. [↑](#footnote-ref-1)
2. Administrative Appeals Tribunal Act 1975 (Cth) s 29(7)-(10). [↑](#footnote-ref-2)
3. Hunter Valley Developments Pty Ltd v Cohen (1984) 7 ALD 315; Duong v Australian Postal Corporation (2005) 41 AAR 288 at 293-294. [↑](#footnote-ref-3)
4. Lucic v Nolan and Others (1982) 45 ALR 411 at 416. [↑](#footnote-ref-4)
5. Duong v Australian Postal Corporation (2005) 41 AAR 288 at 293-294. [↑](#footnote-ref-5)