Guidelines for extending or waiving time limits (s119k(2))

**These are guidelines for the exercise of the discretion to extend or waive time limits under Section 119k(2) and issued as an Advisory Practice Note under section 20D of the Act**

1. The following guidelines have been developed to assist with the administration of section 119K(2) of the *Accident Compensation Act* 1985 (the Act). However, they are not intended to and do not, restrict the Authority’s exercise of its discretion in particular cases. Every case must be considered on its merits.

**General**

1. Under section 119K(2) the Authority or self-insurer may extend or waive any time limit specified in Division 3A if it is satisfied that the worker’s failure to meet the time limit was due to special circumstances. However, the relevant time limit may only be extended or waived after a worker submits a written application for an extension or waiver (section 119K(1)). The extension or waiver may be granted before the time limit expires (sub- section(5)(a)) or the time limit may be waived once it has expired (sub-section (5)(b)). If extending or waiving a time limit, the Authority or self-insurer must specify a new time limit within which the relevant act must be done (sub-section(4)).
2. For the purpose of section 119K, the relevant time limits are those referred to in the following sections:
* 119A(1) - An expression of interest for a subdivision 1 settlement must be given within 12 months from the date a section 115D Notice was given to the worker
* 119A(2) – An expression of interest for a subdivision 2 settlement must be given with 3 months from 8 April 2002 (8 July 2002)
* 119D – An application for a settlement must be made before the expiry of 6 months from the date of the response under section 119B(2)
* 119F – a worker has 28 days from the date any offer of settlement was made to accept that offer
* 119K(4) – A time limit specified under section 119K(4)
1. For the purpose of section 119K, the dates and minimum periods mentioned in sections 115(a), 116(1)(a), 115(b), 116(1)(b), 115(d), 116(1)(d), 117(b)(ii) are not time limits for the taking of action by the worker. They are fixed, representing eligibility criteria that are not alterable by administrative action or otherwise.

**Special Circumstances**

1. In exercising the discretion to extend or waive a time limit, it is necessary to consider whether the claimed 'special circumstances' caused the worker to fail to meet a time limit. It is not enough that there are 'special circumstances' in a general sense if those circumstances do not contribute to the failure of the worker to meet the time limit. For example, general hardship or impecuniosity or a particular need for a settlement on the part of a worker, where these things did not contribute to the failure to meet the time limit, will not constitute a case of 'special circumstances' for the purpose of section 119K(2).
2. Circumstances can be said to be 'special' when they are unusual or uncommon. It is not necessary that they be exceptional or extraordinary. This view has been adopted by two recent decisions of the Supreme Court of Victoria, namely the decision of Balmford J in Carra v Hamilton (2001) 3VR 114 and the unreported decision of Pagone J handed down on 21 June 2002 in the case of Connelly V MMI Workers Compensation (Vic) Ltd and Ors. Both these cases dealt with an Order of the Supreme Court Rules which provided that a Court should not extend time for commencing proceedings 'except in special circumstances'. That Order, being a negative stipulation (that is, the extension should not be granted unless there are special circumstances) is probably stricter to apply than section 119K(2).
3. Therefore an explanation by a worker for a failure to comply with a time limit in Division 3A of the Act may constitute a case for 'special circumstances' if it is unusual or uncommon.
4. It is not appropriate to distinguish different time limits in Division 3A of the Act by requiring the circumstances to be more 'special' in one case as opposed to another case.
5. The Authority’s experience and judgment as to what kinds of circumstances are common or usual and what are uncommon or unusual will be relevant in making a decision whether to extend or waive any time limit in Division 3A that has not been met due to 'special circumstances'.
6. Regard must be had to all of the circumstances of the case which may bear upon the reason why the worker failed to meet the time limit. If there are multiple factors or circumstances, it is inappropriate to look at any of them in isolation.

**Relevant time limits**

1. Further, it is important to have regard to the particular time period which has been or may be exceeded in a particular case. The applicable time limits prescribed are 12 months in section 119A(1), 3 months in section 119A(2) , 6 months in section 119D and 28 days in section 119F . The degree of departure from the applicable time limit is relevant.

**Policy underlying time limits**

1. It will be necessary to understand any Parliamentary intention and policy underlying a particular time limit. In regard to WorkCare settlements in accordance with subdivision 2, the applicable time limit to lodge an expression of interest (3 months from 8 April 2002) is significantly shorter than that applying to a settlement for injuries suffered between 12 November 1997 and 20 October 1999 (subdivision 1 settlements) namely, 12 months. The Government intended this to be a one-off, strictly limited offer. The strict 3 month time limit applying to WorkCare settlements was intended to ensure that workers exercised their rights as soon as possible. In contrast, in relation to subdivision 1 settlements, it was decided not to impose this strict 3 month time limit for workers. In further support of the Government’s intention for WorkCare settlements to be a one-off opportunity to enable a particular class of injured workers in receipt of weekly benefits to apply for a settlement, a further criterion was added, namely the requirement for a worker to have been on weekly payments as at 3 September 2001. This was added in order to discourage workers who had returned to work attempting to go off work in order to get back on to benefits so as to become eligible to apply for a lump sum. In contrast, there is no deadline for when workers for a subdivision 1 settlement have to meet all criteria and hence it is possible for additional workers to become eligible at any time in the future. This was another reason why it was decided not to impose a 3 month time limit, namely the fact that no overall time constraint would be placed on the subdivision 1 settlement process as there is no deadline for when workers have to meet all the criteria.
2. Special circumstances in relation to a sub division 2 (WorkCare) settlement will need to be assessed in the light of the stricter time frame imposed by Parliament in comparison to a subdivision 1 settlement. It is likely that there will be more reasons put forward for a failure to comply with this time limit and therefore consideration must be given to these reasons in making a decision under section 119K(2) to waive or extend a time limit.
3. It should also be noted that the Act is beneficial legislation and is to be interpreted and administered substantially in favour of the worker.

**Cases to be judged on their merits – no fixed policy**

1. However, as stated above, every case must be considered on its merits. The Authority or self insurer must pay some regard to the individual circumstances of a particular worker’s case. These guidelines are intended to ensure consistency of administrative decision-making. However, the Authority or self insurer must take care to ensure that they are not followed slavishly so that the particular circumstances of a case are disregarded. To ensure that these guidelines are applied having regard to the particular circumstances of an individual case, it may be appropriate for the decision maker to invite comment on why the guidelines should be applied. Alternatively, the Authority or self insurer may have to be prepared to entertain argument on the merits of these guidelines or to listen to arguments by an affected person who seeks to show that his or her case should be brought within the guidelines.
2. On the other hand, facts which are not relevant to the exercise of the discretion under section 119K(2) to extend or waive time a particular time limit should not be considered in making a decision one way or the other. For example, a view which is formed about the ability of a particular worker to comply with other requirements in applying for a settlement or about the likelihood of a particular worker being offered a settlement, should not influence the exercise of the discretion to extend or waive a time limit.

**Provisional decision to be given**

1. In any event, before a final adverse decision is made by the Authority in a particular case, the Authority should provide a provisional decision with proposed reasons to the worker for comment before making a final adverse decision together with a copy of these guidelines.

**Possible examples of ‘special circumstances’**

1. To assist with the exercise of the discretion the following are circumstances which may contribute to or even constitute, a case of 'special circumstances' for the purpose of section 119K(2):

*(a) Illness*

Illness on the part of the worker which substantially prevented the worker from attending to the worker’s affairs and taking any action to meet a time limit.

*(b) Worker cannot comply with Proof of identity and date of birth requirements*

If a worker cannot comply with the requirements as to proof of identity and date of birth as set out in Directions 5 to 9 of the Ministerial Directions made under section 119L of the Act within time and provides sufficient reasons as to why he or she cannot comply within time. In relation to the time limit for the lodgement of an expression of interest for a subdivision 2 settlement, which expires on 8 July 2002, factors such as the possibility of compliance within a short period of time would be relevant. For example:

1. a person who, not having any original proof of identity and date of birth documents within the terms of Direction 6 (or certified copies of those documents), is required to obtain an original of any others such as an extract of his or her birth certificate from overseas in accordance with Direction 9. There may be a variety of reasons as to why a person does not have any original proof of identity and date or birth documents, including loss of those documents. In any event, a person who has been required to obtain the original of a proof of identity document may not be able to obtain this until after the expiry of the time limit on 8 July 2002. This may constitute special circumstances in regard to an expression of interest for a subdivision 2 settlement but may not constitute a special circumstance in relation to an expression of interest for a subdivision 1 settlement in respect of which the time limit is 12 months. In either case, if an extension or waiver of time is granted because it is considered that there are special circumstances, section 119K(4), requires a new time limit within which the relevant act must be done to be specified in writing. If the person again fails to comply with this extended time limit, then the extended time limit may be further extended or waived in accordance with section 119K(1). In order to obtain a further extension, it would be necessary for the person to show that he or she has taken every reasonable action to obtain the required proof of identity and date of birth document and that he or she has done so as soon as possible in the circumstances after being required to obtain that document.

(ii) a person who, not having correctly certified copies of any of the required proof of identity documents is required to arrange for the originals to be correctly certified or to provide the original proof of identity documents. It may, for whatever reasons including not receipt of notice requiring the action to be taken, not be possible for the person to comply with this requirement until after 8 July 2002. Again, if an extension or waiver is granted and a further time limit is thereby set, it would be necessary for the worker to show that he or she has taken every reasonable action to comply with this requirement as soon as possible in order to obtain any further extension/waiver under section 119K(4).

*(c) Non-receipt of documents*

Non-receipt of documents by the worker for whatever reason resulting in failure to comply with a time limit. This may include any one or more of the following documents:

* The letters sent to workers by the Authority for a subdivision 1 settlement under section 119A(1).
* A section 115D notice issued by an agent for a subdivision 1 settlement under section 119A(1). (However if a worker fails to receive a letter by the Authority in regard to a subdivision 1 settlement under section 115 but subsequently receives a section 115D notice from the Authority’s agent, then it cannot be said the worker has failed to receive relevant notification in regard to potential eligibility to lodge an EOI for a subdivision 1 settlement. The worker must lodge an expression of interest for a subdivision 1 settlement before the expiry of 12 months from the date that the section 115D notice was given to the worker – refer to section 119A(1)).
* The mail out sent by the Authority to potential workers for a subdivision 2 settlement under section 119A(2).
* A response from the Authority under 119B(2) for an application for a settlement under section 119D.

The worker may not receive any of the above documents for a number of reasons including the following:

* Failure of a person signing a registered post item on behalf of the worker to pass it on to the worker. Satisfactory proof of this fact would have to be provided by the worker.
* Failure of the Authority’s database to identify a worker potentially eligible to express an interest in a sub-division 2 settlement under section 116 resulting in non-issue to these workers of the Authority’s standard circular advising of the requirement for the expression of interest to be lodged within 3 months from 8 April 2002. As a result of this, a worker may fail to lodge an expression of interest within time. This may occur, for example, when a worker’s weekly payments are terminated and then, following dispute by the worker, are subsequently reinstated by a court. The interim termination of the worker’s weekly payments may result in the worker not satisfying the relevant criteria in section 116(1) of having been in receipt of weekly payments for at least 104 weeks as at 3 September 2001. Another example may be if the worker’s employer is late in requesting reimbursement for weekly payments made to the worker from the Authority. As the Authority’s system lags behind the actual payments of compensation paid to workers, it is possible that the Authority would not have identified a potential worker in time, resulting in failure to send out the standard circular to that worker.

*(d) Incorrect financial and legal advice*

Incorrect legal or financial advice received by a worker resulting in failure to comply with a time limit. This may include the following situations:

* Although an applicant is not required to obtain legal and financial advice before lodging an expression of interest, an applicant may do so. (The costs of such advice will not be reimbursed by the Authority, although the costs of such advice obtained prior to applying for a settlement will, in accordance with Ministerial Direction 18, be reimbursed to the worker). In the event that a worker obtains advice before applying for an EOI, a solicitor may incorrectly advise a client about matters such as:
	+ the effect of a settlement on social security entitlements: The correct advice is that settlements are not regarded as periodic payments for the purposes of section 1164 of the Social Security Act 1991 but are to be treated as lump sum compensation payments for the purposes of sections 1168 to 1172 of that Act. If the settlement were to be treated by the Department as a periodic payment under section 1164, this could reduce the net social security benefit of a worker receiving a settlement. A worker who has been incorrectly advised that a settlement would be regarded as a periodic payment which will affect his/her social security benefits may decide for that reason not to lodge an expression of interest within the required time.
	+ the taxation of a settlement: The Australian Taxation Office has advised that it is currently treating lump sum payments arising from the settlement of periodic payments under statutory compensation schemes for work related injury as not constituting assessable income. A worker may receive incorrect advice that a lump sum settlement will be taxed as assessable income and for that reason decides not to lodge an expression of interest in time. (note, however that the ATO has undertaken an extensive review of its current interpretation of this aspect of the law. If it changes its position, then the correct advice may be that a settlement does constitute assessable income for taxation purposes.)
	+ If the legal or financial adviser does not provide the advice, together with the certificates required by Direction 16 or 17 (as the case requires) in time.
	+ If the legal or financial adviser providing the required certificate does not satisfy the professional requirements set out in Directions 12 and 13 (for whatever reason) and this fact is not discovered until after the application for the settlement has been received, being on a date after the six month time limit for applying for the settlement has expired. This is on the basis that the worker had reasonable grounds for believing that he or she was so qualified.
	+ If the legal or financial adviser has not provided the worker with all the advice required by Direction 10, notwithstanding that the adviser has completed a certificate in accordance with the Directions, resulting in a decision by a worker not to apply for a settlement within time.

 This may occur given that there is no requirement for the advice provided to a worker to be examined in detail by the Authority or the self insurer. The onus is on the provider of the advice to certify that all relevant advice has been given. However, it is possible that an adviser may omit to advise on one or more of the issues required to be addressed by the adviser. One of the financial issues to be addressed is the rights of the Commonwealth to recover any amounts owed or owing by the worker under the Social Security Act 1991 and the possible consequent reduction by those amounts of the amount otherwise payable to the worker as a settlement under the Accident Compensation Act 1985. One of legal issues to be addressed is a general overview of the compensation provisions of the Social Security Act 1991 and the legal consequences of accepting a settlement. Further, it may be that even if the adviser purports to advise the worker of these matters, the advice given may be incorrect. In either case, the onus would be on the worker to prove that the adviser did not provide the required advice or if he or she had provided that advice, it was incorrect advice and in either case this resulted in the worker deciding not to apply for a settlement within time.

* + If a worker can prove that he or she was ignorant of or did not understand the legal and/or financial advice provided and for that reason failed to comply with the time limit in applying for a settlement. Ignorance or lack of understanding may arise as a result of language difficulties or other peculiar characteristics of the worker such as intellectual capacity and state of health. It may be that a worker could not understand the advice or misunderstood the advice and for that reason decided not to apply for a settlement. Alternatively, it may be that a worker with language difficulties, who notwithstanding the assistance of an interpreter, decided not to apply for a settlement as result of lack of understanding.

*(e) Ignorance and lack of understanding resulting in failure to comply with time limit*

Generally, ignorance and lack of understanding on the part of the worker which results in the failure of the worker to comply with any time limit under Division 3A of the Act should be considered.

**Other Circumstances**

1. It is important to note that the above is not exhaustive of the circumstances which may be considered to be special for the purpose of exercising the discretion under section 119K(2) to extend or waive a time limit under Division 3A of the Act. There may be other circumstances which require consideration if they cause the delay in complying with a time limit. However, the cause of the delay must be unusual or uncommon. It is important that each individual case is assessed and that the discretion in section 119K(2) is exercised in the light of the relevant circumstances of each case.
2. Even if a case falls within in any one or more of the above circumstances, that does not necessarily mean that an extension or waiver of time should be granted. These are only guidelines in relation to the exercise of the discretion and should be applied as an aid to the exercise of that discretion. Each case must be considered on its merits.