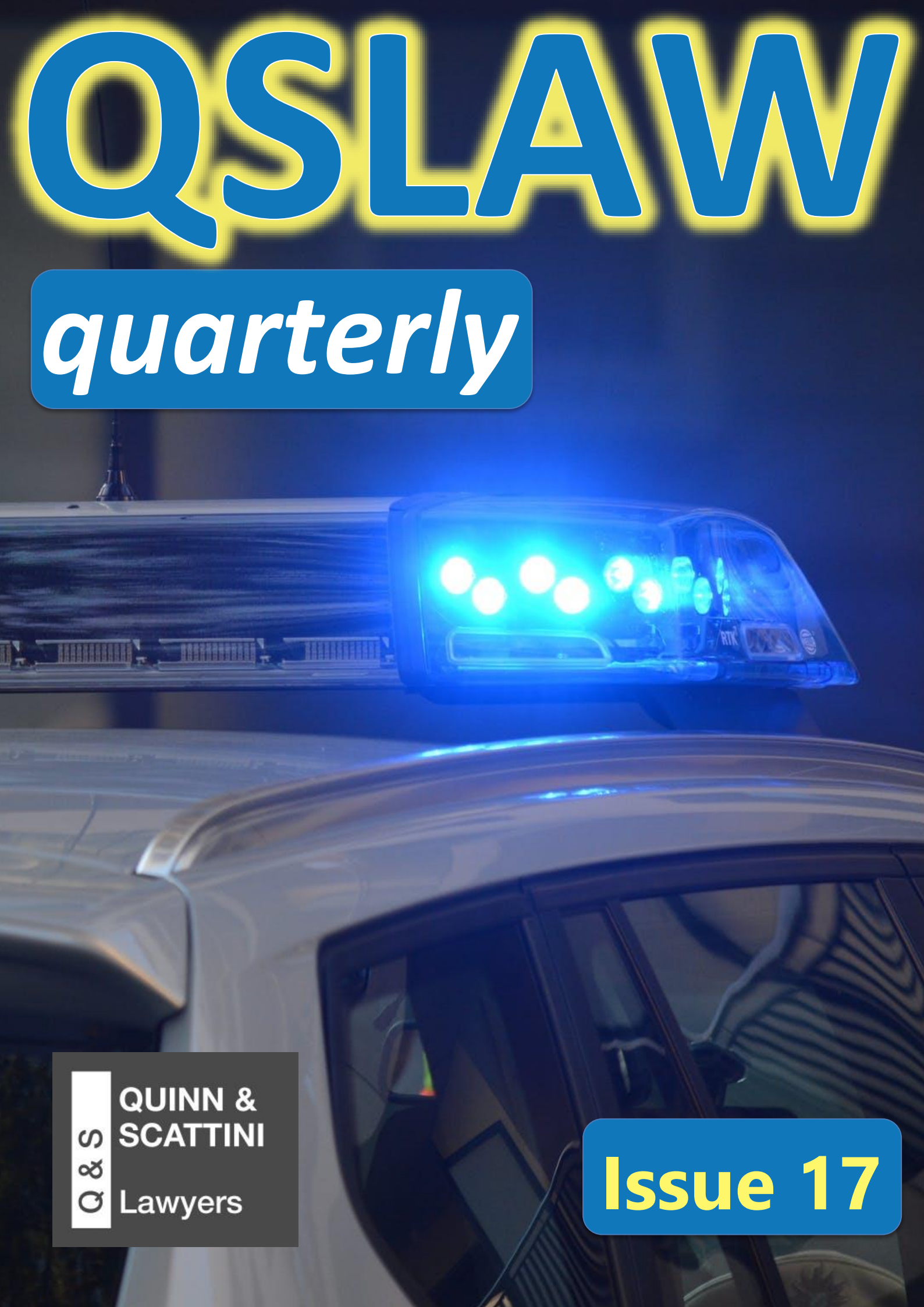
QSLAW

quarterly



Q&S QUINN & SCATTINI Lawyers

Issue 17

Drug Driving and Its Implications

Traffic Law Team

Queensland legislation currently provides for two types of drug driving:

- driving while under the influence of a drug; and
- driving while a relevant drug is present.

The former is the most serious of the two and carries much higher penalties and a higher licence disqualification period.

You can be charged with driving while under the influence of a drug if a police officer reasonably suspects that your driving ability has been impaired by a drug or if you refuse to provide a saliva test.

What Drugs Will Be Tested?

Saliva tests detect active ingredients for the following:

- THC – which is the active ingredient found in cannabis;
- Methylamphetamine – the drug also known as "speed" or "ice"; and
- MDMA – which is the active ingredient found in ecstasy.

Road Side Testing

Similar to a random breath test, you can be pulled over by a police officer and required to submit to a random roadside saliva test. Police can also require you to submit to a roadside saliva test if they suspect you are driving under the influence of a drug.

A saliva test completed roadside takes approximately three to five minutes to return with a result. If the result is negative you will be free to go. Where the result is positive you will be asked to attend a police vehicle for a second saliva test. If a second saliva result is positive a sample will be sent for laboratory analysis. You will also be suspended from driving a motor vehicle for a period of 24 hours.

Once police have a positive laboratory result, they will formally charge you with drug driving.

Failure To Provide Saliva Test

If asked to provide a roadside saliva test, it is important that you comply with the directions of a police officer. If you refuse to provide a saliva test when requested (either roadside or at a police station) you can be charged with an offence of failing to provide a breath or saliva sample. This offence carries a maximum penalty of 40 penalty units or a term of imprisonment not exceeding 6 months.

If you have been charged with a drug driving offence, you should obtain legal advice immediately particularly if you require your drivers licence to get to work or if you have had a previous like conviction in the past five years.

Penalties

Driving while under the influence

If caught driving under the influence of a drug the maximum penalties are as follows:

Charge	Maximum Penalty
No previous convictions of drink or drug driving in the past 5 years	28 penalty units* or a term of imprisonment not exceeding 9 months.
One previous conviction of drink or drug driving in the past 5 years	60 penalty units or a term of imprisonment not exceeding 18 months.
If in the past 5 years the person has been convicted on indictment of any offence concerning driving a motor vehicle	60 penalty units or a term of imprisonment not exceeding 18 months.
If 2 previous convictions of drink or drug driving within 5 years	Magistrate must impose as whole or in part of the punishment, imprisonment.

* 1 Penalty Unit is equivalent to $126.15

If you are charged with driving under the influence of a drug your licence will be suspended immediately until your charge is later dealt with by court or the charge is withdrawn.

Driving while relevant drug is present

The maximum penalty for driving while a relevant drug is present is 14 penalty units or a term of imprisonment not exceeding three months.

Licence Disqualification

Driving under the influence of a drug

If you are charged with driving under the influence of a drug your licence can be disqualified for a period of up to six months. If you have previously been convicted of driving under the influence of liquor or a drug within the last five years, the disqualification period can be up to two years.

Driving while relevant drug present

The minimum period of disqualification for this charge is 1 month with a maximum period of 9 months.

When imposing a disqualification period the court has regard to a number of relevant factors. They are:

- the traffic history of the individual;
- whether the individual has previously been convicted of like offences; and
- the impact a period of disqualification will have on the individual, particularly on their ability to earn a living.

Options

If you have been charged with drug driving you should seek legal advice immediately to have your options explained to you.

If you are dependent on holding a drivers licence to get to and from your place of work, you may need to consider applying for a restricted work licence. You will only be eligible to apply for a restricted licence if you have not in the past 5 years:

- being convicted of drink or drug driving;
- had your licence disqualified, suspended or cancelled;
- were charged with the offence while driving for work purposes;
- were deriving a certain class of vehicle namely a truck, bus or limousine.

If you have been charged with a drug driving offence, you should obtain legal advice immediately particularly if you require your drivers licence to get to work or if you have had a previous like conviction in the past five years.

If faced with a drug driving charge, our Criminal and Traffic Law team would be more than happy to provide you with advice on the likely penalty and period of disqualification that you face.

Our team can also assist you in making an application of a restricted work licence.

Thinking about Assigning Your Retail Shop Lease? Are You Aware Of Your Disclosure Obligations As The Assignor?

Business & Property Team

The *Retail Shop Leases Act 1994* (**RSLA**) imposes strict disclosure processes and obligations that an assignor is required to comply with prior to assigning a retail shop lease.

A common example of when a lease assignment will occur is upon the sale of a retail business wherein the buyer of the business wishes to take over the existing lease.

Often a business sale contract will include a condition that the lease associated with the business premises is to be assigned from the outgoing lessee "assignor" to the incoming lessee "assignee".

Did You Know?

If an assignor does not correctly comply with its assignment disclosure obligations under the RSLA within the required time-frames then the assignor and guarantor (if any) may still be liable under the lease for any defaults of the assignee (yes, even after the lease assignment has occurred!).

As the assignor cannot control the future actions or defaults of the assignee, this poses significant risks to an assignor if not released from such liability.

So, how does an assignor comply with their assignment disclosure obligations under the RSLA?

The assignor must give the assignee a copy of the current lease and a compliant assignor disclosure statement before the earlier of the following:

- at least 7 days before the day that the assignee enters into the agreement to purchase the business (if the assignment is in connection with the sale of a retail business); or
- at least 7 days before the lessor (the owner of the premises) is asked to consent to the assignment.

It is therefore imperative if you are assigning a retail shop lease to ensure that you leave adequate time to comply with your disclosure obligations under the RSLA.

What If An Assignor Does Not Have Time To Comply?

This may occur when the assignment of the lease is urgent.

There is a provision in the RSLA that allows the assignee to provide a waiver notice to the assignor.

The waiver notice must state (amongst other things) that the assignee agrees to waive the assignor's obligation to provide the assignor disclosure statement and a copy of the current lease by the required disclosure dates under the RSLA.

It is important for an assignor to note that regardless of this waiver notice, the assignor is still required to provide the assignee with a copy of the current lease and the assignor disclosure statement before the lessor is asked to consent to the assignment or before the day in which the assignee enters into the agreement to purchase the business (as the context dictates).

It should also be noted that an assignee is not obligated to provide a waiver notice.

Further Disclosure Obligations

The assignor must also receive an assignee disclosure statement from the assignee before the lessor is asked to consent to the assignment.

The assignor must provide a copy of the assignor disclosure statement (as provided to the assignee) to the lessor on the day that the lessor is asked to consent to the assignment.

Other Important Considerations

In addition to the RSLA requirements, the lease itself may contain assignment provisions and processes that will need to be complied with.

The RSLA also contains strict disclosure obligations for an assignee and landlord that will need to be considered when assigning a retail shop lease.

If you are a party to an assignment in any capacity, then we recommend that you obtain legal advice prior to commencing any steps in the assignment process.

Sharing Is Caring – What to Do When You No Longer Care For the Company or Your Fellow Shareholders

Commercial Litigation Team

Equal shareholders face similar difficulties to partners in a failing marriage when the corporate relationship faces an irreconcilable breakdown. This usually occurs where the parties fail to, or refuse to, share the love instilled in an initially entrusted business venture.

Individuals embarking on these business ventures often do so full of confidence and trust, but with a considerable degree of naivety as to the future conduct of the business. Typically, the business relationship is considered more as a "quasi-partnership" rather than a larger corporate arrangement, and the parties are usually unaware of the consequences that will follow if, and when, the initial excitement dissipates and emotions conflict with the future conduct of the business.

When the parties are on the precipice of corporate despair, sections 232 and 233 of the *Corporations Act* (**the Act**) provides a wide range of remedies available to aggrieved shareholders when the love leaves the room and where the shareholders have reached an intractable deadlock in their business affairs.

Under the Act, the most common relief relied upon to break this deadlock is the '*oppression*' remedy which applies to '*oppressive, unfair and discriminatory conduct*' on the part of one shareholder towards the other(s).

Several recent decisions of the courts have clarified the definition of '*oppressive conduct*' and the relief that is available to an oppressed shareholder under the Act in resolving a dispute. In *Munstermann v Rayward*, involving a closely held family business on the Gold Coast, and other recent decisions, some of the oppressive conduct contended between the parties included:

- workplace bullying and harassment, disparaging behaviour and intense personal acrimony;
- unilaterally and unreasonably taking control of business finances and accounts, client information and company billings;
- being unnecessarily intrusive, objectionable and failing to involve the other shareholder(s) in the decision-making processes;
- taking unaccountable and extended leaves of absence;
- failing to attend meetings when convened;
- wilfully withholding reasonable consent to day-to-day business transactions;

- misappropriating or misusing company funds;
- causing the business to trade in a manner not envisaged by the parties and attempting to paralyse the company in the course of its business; and
- generally acting in an '*unfairly prejudicial*' manner.

In *Munstermann* and a recent decision of the Queensland Court of Appeal in *Asia Pacific Joint Mining Pty Limited v Allways Resources Pty Limited*, the courts have confirmed the definition of 'oppressive conduct' and the relief that will be provided to an oppressed shareholder, if the following criteria are met:

- the test of oppression is an objective one based on what the '*objective commercial bystander*' would consider '*unfair or prejudicial*' in all of the circumstances of the individual matter;
- oppressive conduct is '*something which lacks probity and fair dealing, is something which is burdensome, harsh or wrongful. Inequitable or unjust, or exhibits commercial unfairness*';
- oppressive conduct does not have to be unlawful or in breach of a director's fiduciary duties to be considered oppressive;
- conduct that has the effect of paralysing a business in its day-to-day operation will be oppressive particularly where the oppressor is using '*strong arm tactics*'. The courts are very wary and take a dim view;
- a 50% shareholder can seek relief if there is no readily apparent way to control or prevent the oppression;
- the court's discretion under the Act is very wide. A court will consider various options including a forced share buy-out (being the most common remedy) to allow the shareholders to make a clean break; and
- a court will only look to wind up an otherwise solvent company as a last resort and such relief will not be granted if a less drastic form of relief is available and appropriate.

In both *Munstermann* and *Asia Pacific Joint Mining*, the court ordered that the oppressor shareholder buy out the oppressed shareholder's shares at a value decided by the court or by an independent forensic valuer. The respective companies were viable, trading well and with significant accountable assets, and therefore did not warrant a winding up order.

The courts will equally look at the unfortunate consequence of equal shareholder disputes as far as it concerns the prevention of business paralysis or the stagnation of corporate prosperity, the diminution of business profits, a down-valuing of stock, assets and good-will and the avoidance of a continued erosion of trust and respect between the parties, which further impairs the ongoing viability of the company.

Protracted litigation can be avoided by the parties entering into a carefully drafted shareholders' agreement. This is always the most preferable course

notwithstanding the parties' initial trusting and enthusiasm in embarking on a new and life-changing venture.

This agreement should contain provisions to enable the timely resolution of seemingly inescapable shareholder deadlock disputes. Such provisions should include the ability of one shareholder to acquire the shares of the other in accordance with an accepted independent valuation. The agreement should also include referral to an independent arbitrator or other avenues of dispute resolution.

Quinn & Scattini Lawyers' Commercial Litigation Team has what it takes to move quickly and protect your commercial interests and have the expertise required to effectively identify, address and resolve shareholder disputes across all types of industries.

If you have a business dispute, of any type, make the first move and call one of our expert litigation lawyers on 1800 999 529.

When the parties are on the precipice of corporate despair, sections 232 and 233 of the Corporations Act provides a wide range of remedies available to aggrieved shareholders when the love leaves the room, and where the shareholders have reached an intractable deadlock in their business affairs.

Stay At Home or In the Office with Skype

Wills & Estates Team

When you hear about making a will you might be guilty of leaving it to the last of your to-do list.

Despite the many distractions in day-to-day life, establishing how you would like your estate to be distributed should be something you consider, particularly when a significant life event occurs. If you get married, have children, or divorce, finalising your will needs to be at the top of your list so you can secure your future wishes. How can Quinn & Scattini Lawyers help you cross it off your list once and for all?

One convenient way to get this done is through Skype.

Skype with expert will lawyers at Quinn & Scattini Lawyers at a time and place convenient to you. You can be in your lounge room or at the office. Location is irrelevant.

Our expert will lawyers have the expertise and experience required to guide you through the complexities so you don't have to worry about any costly mistakes being made.

The convenience of Skype means that at a scheduled time you can be face-to-face with your dedicated will lawyer with no travel time. If you are time-poor or have a young family, you may find Skype to be best suited to your needs.

If you enjoy visiting the office, don't let Skype hinder your enthusiasm. Quinn & Scattini will always be open to office visits from our clients and we look forward to meeting you and assisting with any legal issues you may have if you are in the area.

Would you like to schedule a Skype call? Call Quinn & Scattini on 1800 999 529, email mail@qslaw.com.au or visit www.qslaw.com.au and submit an online enquiry form.

Connect with

Quinn & Scattini Lawyers

mail@qslaw.com.au

www.qslaw.com.au

1800 999 LAW

(1800 999 529)

Brisbane CBD
Level 2, 102 Adelaide Street
(Next to King George Square)
Brisbane City
GPO Box 2612
Brisbane QLD 4001
Phone: (07) 3222 8222
Fax: (07) 3221 5350

Beenleigh
99 George Street
(Opposite Court
Cnr York Street) Beenleigh
PO Box 688
Beenleigh QLD 4207
Phone: (07) 3807 7688
Fax: (07) 3807 7514

Cleveland
141 Shore Street West
(Opp. Train Station)
Cleveland
PO Box 898
Cleveland QLD 4163
Phone: (07) 3821 2766
Fax: (07) 3821 2083

Gold Coast
1/2406 Gold Coast Hwy
(Cnr Markeri St.)
Mermaid Beach
PO Box 293
Mermaid Beach QLD 4218
Phone: (07) 5554 6700
Fax: (07) 5554 6900

Jimboomba
Shop 1
689 Cusack Lane
Jimboomba
PO Box 705
Jimboomba QLD 4280
Phone: (07) 5540 3940
Fax: (07) 5540 3233