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Q&S QUINN & SCATTINI Lawyers

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Mandatory Community Service for Obstructing Police Whilst Intoxicated In Public Place

Criminal Law Team

Changes made by the Safe Night Out Legislation Amendment Bill 2014 (Qld) now provide for mandatory community service orders to be made by courts in certain instances.

The most common of these instances is when a person is charged with obstructing or assaulting police whilst adversely affected (e.g. intoxicated) in a public place.

Assaulting or obstructing a police officer is an incredibly common offence that is regularly before the courts, as the definition of 'obstruct' is quite wide. To obstruct police is defined as 'hinder, resist and attempt to obstruct' a police officer in performance of their duties[1].

This includes conduct such as:

- resisting arrest or making an arrest difficult;
- ignoring the directions of a police officer, including failing to leave a premises or move on when directed; and
- interfering in any way with the police arresting another person, such as a loved one or friend.

In this situation, if the person were to be charged, they would be brought before the court for criminal charges. The court must then make a community service order ordering the offender to perform unpaid community service, unless they are convinced that the person suffers from a physical, intellectual or psychiatric disability which would preclude them from complying with the order[2].

The minimum amount of unpaid community service that must be ordered is 40 hours, and the maximum 240 hours[3].

Ordinarily, the court would have a range of other sentencing options available to them to deal with this behaviour which are far less onerous than community service. Particularly, for first time offenders with a minor charge of obstruct police, community service is a serious and onerous obligation.

Community service requires a person to be under the supervision of corrective services for the period of the order (usually 12 months), or until the required hours of community service are completed. Under the current legislation, the court is unable to impose any other despite this being an appropriate penalty. Community service requires a person to report to and receive visits a corrective services officer when directed, notify a corrective services officer of any change in their address or employment within two days, and most importantly, not leave

Queensland without the permission of a corrective services officer[4].

This is an incredibly serious consequence for hindering or ignoring a police officer's directions when intoxicated, particularly for a first time offender.

If you have been charged with assaulting or obstructing police, do not hesitate to contact our Criminal Law Team today for expert assistance.

[1] Police Powers and Responsibilities Act (Qld), section 790
[2] Penalties and Sentences Act 1992 (Qld), section 108B
[3] Penalties and Sentences Act 1992 (Qld), section 103(2)
[4] Penalties and Sentences Act 1992 (Qld), section 103(1)

Removing and Replacing an Executor

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We often see clients who are frustrated by the way an executor is dealing with the estate of a deceased person. (To keep things simple, this article will use the word 'executor' but the same principles apply to administrators and trustees.)

It is rare, but it does happen, that an executor may deal fraudulently with an estate, such as by taking estate funds for their own benefit.

More common is mere incompetence, which usually results in delay in administering an estate. This can also have the effect of causing the estate to be wasted in unnecessary expenses.

If you are a beneficiary of an estate, what can you do to make an executor hurry up and finalise the estate?

The first step is usually to have a formal demand sent to the executor, telling them to promptly administer the estate. If that does not achieve the desired result, then you can apply to the Supreme Court to ask a judge to make orders directing the executor to do what needs to be done, or for an order removing and replacing the executor.

Unfortunately, the court seems to be very reluctant to remove an executor, giving them lots of latitude to get their act together. For example, there was a case where the executor was blatantly using the estate for her own benefit and delaying the sale of the estate's house while she used it to create an income for herself by renting rooms to students. On behalf of beneficiaries, an application was made to the Supreme Court for an order removing and replacing the executor.

By the time the case came before the judge, the executor had approached a real estate agent to have the house listed for sale. The judge was satisfied that that was enough, and declined to remove the executor.

Even so, if an executor is clearly incompetent, or is persistently causing unreasonable delays in administering the estate, or is acting in their own interests in using the estate, the court will remove and replace the executor.

The question the court will ask is whether it is in the interests of the beneficiaries to replace the executor.

Overseas Travel for Children of Separated Parents

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I am often faced with questions from parents about the issue of overseas travel for their children. Some parents have reservations about allowing their child to travel overseas. These reservations can stem from concern about the safety of the particular country. The 'other' parent may have concerns that the child/children will be kept in that country and not returned.

What happens if a Parent Refuses to Sign the Passport Application?

Ordinarily parents can make a joint application to the minister for a passport for their child. If a parent refuses to jointly apply for the passport then the parent seeking to obtain a passport for the child can make an application to court.

In most cases before an application to court can be made the applicant must first invite the other parent to a Family Dispute Resolution Conference (**FDRC**) to attempt to resolve the issue by mediation. If the FDRC is unsuccessful the applicant will be issued with a Section 60I certificate. This certificate is required to be provided to the court at the time the initiating application is made.

The court needs to be satisfied that genuine attempts have been made to deal with the issue in a cooperative fashion. There are certain circumstances in which the FDRC process can be circumvented such as when the application to court is being made in circumstances of urgency.

The court considers many factors when determining whether to allow a child to travel overseas. The leading case of Kuebler and Kuebler (1978) 4 FamLN N4 tells us that the court will consider a number of factors including but not limited to:

- the length of the proposed stay;
- the genuine nature of the application;
- the effect on the child of any deprivation of access;
- any threats to the welfare of the child by the circumstances of the proposed environment; and
- the credibility of a parties' promise to return to Australia.

The court must always consider whether it is in the best interests of the child to be taken overseas.

It is a criminal offence to remove (or have someone else remove) a child from Australia when a Parenting Order (**Order**) is in force unless the written consent of all parties to the Order has been obtained or removal of the child from Australia has occurred in accordance with the Order itself.

What if the Country the Children are to Travel to Is Unsafe?

Each case will be decided on the basis of its own particular facts. The court will consider the evidence being put forward by both parents about the safety of the intended destination.

In the case of V and V [2004] FamCA 1074 the father applied to take his six-year-old child to the United Arab Emirates (**UAE**"). The mother objected to the travel on the basis that the Australian Government Advisory website suggested it was a potentially dangerous area for westerners to stay. Department of Foreign Affairs and Trade stated with respect to the UAE that 'general warning concerning the threat of terrorism against western people and the need for care' and the department warned Australians saying they should 'exercise a high degree of caution'.

In this case the judge found that it was not in the child's best interests to travel overseas. The judge noted that the travel advice was current, having been updated in the same month that the matter went before the court.

A different outcome was achieved in the case of Dart & Graham [2008] Fam CA 824 where a father applied to court to take his three children to Bali to attend at his wedding. Prior to separation, between December 1993 and December 2004 the family had lived in Indonesia. The children had all lived in Indonesia until the youngest child was six years old. The mother did not object to the children attending at the father's wedding but she did object to them going to Indonesia since in June 2008 the Department of Foreign Affairs and Trade issued a travel warning stating that those who travelled to Indonesia should exercise caution. The warning drew attention to certain provinces within Indonesia. The court made Orders allowing the children to travel to Indonesia to attend the father's wedding and this conclusion was reached because:

The father and children would not be visiting the places nominated as being in civil unrest.

The father managed the family's security for the eleven years whilst they lived in Indonesia. When the family lived in Indonesia they faced many similar potential security threats and despite this they remained living there.

The father was an Indonesian resident and had lived in Indonesia for 12 ½ years.

Indonesia was not a strange land to the children. They had lived there for most of their lives.

Many different factors will be taken into account when determining whether it is appropriate for children to travel to a particular country. When preparing an application or a response to an application all pertinent features of your case should be canvassed within an affidavit so that you have the best chance of persuading the court to make the Orders sought by you.

Quinn & Scattini Lawyers can assist you with making or defending an application for overseas travel. If you require such assistance please do not hesitate to contact our offices and speak to one of our family law experts.

Protecting Against Unlawful Termination of a Building Contract

Commercial Litigation Team

Our client was a frail, 67 year old lady for whom English was her second language. She had entered into a standard form of contract with a builder for the construction of a house.

Our client contacted us after the builder had issued her with a notice to remedy alleged 'substantial breaches' of the contract for the most petty of complaints. The notice asserted that the builder was suspending works and could exercise his right to end the contract. The builder was refusing to communicate with our client and had already begun removing materials from the work site.

Upon reviewing the contract, it became apparent to us that the builder had unlawfully amended the prescribed payment schedule in the contract causing our client to continually overpay progress payment amounts well above what was legal for each stage of construction, and had also been charging more than the legal 10% for GST for each payment.

The contract entitled the builder to terminate the contract if the alleged 'substantial breaches' were not rectified within ten days. It appeared to us that it was the builder's intention to terminate the contract and walk away with the overpayment windfall, leaving our client out of pocket with an incomplete house. Our client's primary concerns were to have the work completed, and to not get ripped off.

So What Happened?

To defeat the builder's attempt to terminate the contract, we advised our client to immediately apply to the Queensland Civil and Administrative Tribunal (**QCAT**) to dispute the builder's right to terminate, because the contract stated that the builder had no right to terminate the contract if the application was made to QCAT within five days of our client receiving the notice to remedy the breach. Our client had approached us with only one day left to apply!

We prepared and lodged the application with QCAT, disputing the alleged breaches and highlighting the unlawful amendments to the schedule, the overpayments and the GST issue. The builder was forced to engage his own lawyer, and then the dispute was quickly and cheaply settled between the parties on terms advantageous to our client, which included the completion of the works.

For practical advice regarding the termination of a building contract, or if you are on the receiving end of a wrongful termination of a building contract, call Quinn & Scattini Lawyers. We are ready to step in to assist you.

Commercial Leases and the Obligation to Insure

Business & Property Team

A commercial lease is typically entered into by a person or company (the tenant) with the owner of the building or premises (the landlord) for the purpose of receiving exclusive possession of said premises from which the tenant may conduct or manage his, her or its business.

A lease will usually grant the tenant a right to exclusive possession of the premises for a fixed period, in exchange for consideration being paid by the tenant to the landlord in the form of rent, outgoings (which may include insurance premiums) and compliance with a host of other terms and conditions of the lease.

The interesting feature of the legal relationship between a landlord and tenant is that, in circumstances where a lease agreement is entered, the rights and obligations of the parties is governed by both the terms of the lease agreement itself and the principles of general and statutory law relating to estates and interests in land.

In short, the landlord and tenant relationship is recognised as giving the tenant not just the contractual right to occupy the premises, but an actual grant of a proprietary interest or estate in the land for the term agreed between the parties. This is an interesting point because holders of estates or interests in land will usually enjoy additional rights (known as a 'bundle of rights') in respect of the premises.

But this duality of rights and obligations also raises an important question about the parties liability for risk, damage and injury, that may be sustained in respect of, or in connection with, the lease and premises, including the building, the employees, invitees and customers that may have cause to enter or come in contact with the leased premises.

This is where a tenant will be smart to turn its careful attention to the terms of the lease to ascertain which party is responsible for what liabilities, and which party is required to obtain, and keep current, the various insurance policies that exist these days to indemnify the parties against the various types of loss and damage that may be sustained in the course conducting a business from a leased premises.

Insurance Explained

Insurance plays a vital role in a commercial lease as a mechanism of risk transfer and loss spreading arrangement between the party giving insurance (the insurer) and the party obtaining insurance (the insured). In the event where the risk eventuates, the insurer may pay the insured a sum of money equalling the financial loss suffered by the insured (given the insurance policy covers the type of loss in question).

The types of risks inherent in commercial real property lease include the risk of loss due to fire, damage to the building and to other property, personal injury, cancellation of the lease, disruptions in a landlord's rental income or tenant's business, the loss of use of the premises and the continuing obligation to pay rent in the absence of a rent abatement clause.

There are different forms of insurance policies available to protect a tenant and landlord from the consequences of an occurrence of an event, which may include public liability insurance, building and contents insurance, business insurance and the like, and the level of insurance required will usually be expressed within the terms of the lease. The level of protection available to either party is dependent on the insurance policy itself.

Obligation to insure

The standard obligations for a tenant commonly found in commercial leases are to insure items such as plate glass, windows, doors and any other glass forming part of the demised premises, fixtures, improvements, plant and equipment and to maintain public liability policy that covers personal injury, bodily injury, product liability, contractual and contingent liability.

A lease may also expressly state that such cover must not be less than a certain percentage of damage or loss, the policy to note the interests of the landlord, the insurer and insurance policy must be satisfactory to the landlord, and the tenant must provide a copy of the certificate of currency of the insurance policy to the landlord upon demand.

In a standard commercial lease where the premises contain multiple tenancies (such as offices or stores), the risk of loss or damage to the external structure of the building may remain with the landlord, on the basis that it would be more practical for the landlord to obtain insurance over the whole building rather than each tenant insuring the building. The lease may also contain an express covenant requiring the landlord to insure the building and common facilities or areas and recoup a proportion of the insurance premiums from each tenant.

In circumstances where the building is in single occupation by the tenant, the landlord may still insure the building and recoup a premium from the tenant. However, in such cases the tenant may also insure the building for such cover as fire damage and usually the landlord will be listed on the tenant's insurance policy, to minimise risk in cases where the tenant may have caused damage to the building by their negligence.

In certain circumstances the tenant may have the obligation to insure against a particular risk, the tenant may be required to obtain insurance with a reputable insurer to the landlord's satisfaction. The landlord may have the right to withhold their approval in respect to a particular insurer, despite the fact that the landlord's preference of insurer may have a higher premium will not have a bearing on the matter.

In absence of an express obligation on the landlord or the tenant to insure the whole or part of the premises under a covenant of the lease, potential issues may arise in

respect to which party has the obligation to insure and any legal consequences resulting from failure to renew a policy of insurance.

Obligation to Repair and Reinstate

In determining who has the obligations to insure under a commercial lease it is important to interpret the lease as a whole and to review other covenants including the covenant to repair, reinstate and damage covenants.

Usually, a tenant will be excluded for their obligations under such covenants should the damages be caused by fire, flood, storm, tempest, explosion, riot, civil commotion, war or otherwise an inevitable accident or act of god without any negligence or default on part of the tenant.

The landlord will often insure the above risks and in the event of the building being wholly damaged without negligence or default of the tenant, and may choose to repair the premises from the proceeds of the insurance.

In the event that damage or destruction to the premises is caused by default or negligence on the part of the tenant, notwithstanding the fact that the landlord may have insured such risks, it may not relieve the tenant from the tenant's liability to repair or reinstate the premises under the lease.

Obligation to Indemnify

It may be expressly stated in the commercial lease for the tenant to indemnify and hold indemnified the landlord against all actions, claims, demands, losses, damages and costs and expenses which the landlord may sustain, incur or for which the landlord may become liable arising from the following: breach of covenant, misuse, escape of harmful agent, failure to notify the landlord of any defect, use of demised premises or personal injury.

The tenant may be held to indemnify the landlord for any loss, damage or injury caused to the property or person caused by the neglect or default of the tenant.

Obligations in Respect of Rent

The standard covenants will usually state that in the event that the building is totally or partially damaged by fire, flood, storm, tempest, explosion, riot, civil commotion, war or otherwise by inevitable accident or act of God, and without any neglect or default on part of the tenant, and the premises is wholly or partially unfit for occupation or use, then rent may be reserved until the premises is restored, or if the building is wholly unfit for occupation the tenant or landlord may give written notice of its intention to cancel the lease.

Summary

The level of protection afforded to either the tenant or landlord under a commercial lease will depend upon a number of factors, but will usually, and largely, depend upon a construction of the express terms of the lease, the terms and conditions of any insurance policies obtained, and the law governing the area.

A prudent tenant should always make its own enquiries of the landlord to ensure

that the landlord has obtained insurance (in circumstance where the landlord is required to obtain insurance) and that the tenant is covered against all loss, including loss caused by negligence (if applicable) or as otherwise required by the lease.

If in doubt, a tenant would be wise to consider obtaining a separate insurance policy for itself.

But ultimately, to ensure an adequate level of protection under the lease, the tenant should carefully analyse the terms of the lease, followed by a careful review of the insurance policies to ensure adequate insurance cover exists for the tenant to match the terms of the lease.

The tenant should always provide a copy of the lease and insurance clause to the insurer or broker to ascertain that insurance can be obtained for the insurance being requested pursuant to the insurance clause. It may not always be the case that insurance can be provided for what is requested in the insurance clause.

This publication provides general information only and must not be relied upon as legal advice.

We recommend you seek specific advice tailored to your circumstances by contacting our office directly on 1800 999 529.

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