QSLAW

quarterly

Q&S QUINN & SCATTINI Lawyers

Issue 9

Are You a Driver Charged With a Traffic Offence? Are You Facing a Period of Licence Disqualification or Suspension?

Criminal Law Team

The traffic laws recognise that loss of licence can impact on a person's ability to earn an income. The law tries to balance the need for road safety with the needs of a driver convicted to provide financially for themselves and their family.

Individuals charged with traffic offences such as drink and drug driving can apply to the Magistrates Court (if they satisfy the relevant eligibility criteria) to retain their licence.

Drink/Drug Driving Offences

Any person convicted of driving with a Blood Alcohol Content (**BAC**) over .05 or with an illicit drug in their system, will face a mandatory period of disqualification. The minimum disqualification that can be imposed in Queensland is a period of not less than one month.

The disqualification imposed by a court will depend on a number of factors including;

- the reading;
- whether the individual has previous convictions of a like nature;
- the impact the disqualification will have on them;
- the defendant's otherwise good character which is often attested to in character references from friends and family; and
- any steps they have taken to ensure the behaviour will not be repeated in the future such as attending and completing an attitudinal driving workshop.

Eligibility to Apply for a Work Licence:

To be eligible to apply to a magistrate for a work licence, you must:

- be the holder of a valid open Queensland licence; and
- be charged with driving with a BAC under 0.15% or driving with an illicit drug present in your blood or saliva.

You must not:

- have had your licence disqualified, suspended or cancelled in the last five years;
- been driving for purposes directly connected with your employment at the time you were apprehended; or
- have been driving classes of vehicle including a truck, bus or limousine.

Having met these eligibility requirements, a driver can advise the magistrate that you

wish to apply for a hearing date for a work licence application.

To obtain a work licence a driver must satisfy a magistrate that:

- that you are a fit and proper person to hold a work licence; and
- that you would suffer extreme financial hardship if your application was refused.

The above needs to be confirmed in a sworn affidavit from you and your employer. This is filed with the court and served on the police prior to your hearing.

If a magistrate is satisfied with regard to the above, then you will be granted a licence allowing you to drive for work purposes for the period of the disqualification (usually twice the period of suspension where no work licence is sought). There are usually strict conditions imposed on the work license order. These can include times and days during which you are permitted to drive, the class of motor vehicle you are allowed to drive, the necessity to wear a work uniform, carry a log book or refrain from carrying passengers.

If you, a friend or family member have been charged with an offence of drink or drug driving, it is highly recommended that you obtain legal advice, especially if your livelihood is dependent on you holding a license.

A member of our Criminal and Traffic Law Team would be more than happy to assist you throughout this process to ensure that you obtain a result that is most favourable to your circumstances.

Wanting a Lifestyle Change and Thinking of Buying into a Retirement Village – The Hidden Costs

Business & Property Team

Retirement villages are a popular choice for many Australians looking to downsize however buying a retirement village is a major financial decision which needs careful consideration and is more complicated then buying other types of residential properties.

There are different forms of legal title and occupancy rights available, there is the ongoing cost of services and maintenance of facilities in the village, and then what fees, charges or capital gain sharing may apply when the unit is sold again later on. Different transaction costs may or may not apply to a purchase, such as lease registration fees and a village operator's legal costs. Whilst they can be a viable option, you need to read the fine print and make sure you understand exactly what you are signing.

What is a Retirement Village?

Retirement Villages in Queensland are controlled by the *Retirement Villages Act 1999* ("**the Act**"). In order to operate the retirement village must be registered under the Act. The Act provides important protections to

residents including being provided with a public information document prior to entering into a contract and a 14 day cooling off period from the date the residence agreement is signed.

A retirement village is premises where older members of the community or retired persons reside, or are to reside, in independent living units or serviced units, under a retirement village scheme. Generally to be eligible to reside you need to be over 55 and able to live independently.

It is important to note that retirement villages do not include manufactured homes, nursing homes or mobile home or caravan parks which operate under a different legislation.

Will I Own the Unit?

There are three main types of tenure which include freehold, leasehold and licence. With most retirement villages, you don't own the title like you would with your home, but instead you have a right to occupy the dwelling, and as such leasehold is the most common form of tenure with retirement villages. A lease terminates automatically on the death of the surviving resident or when the unit is on-sold to a new resident.

However there are some schemes that offer freehold title but you have to remember that although you own the property you are still restricted in dealing with the property. Generally the operator will lodge a caveat over the property and you will require consent of the operator to deal with the property. For example you are not able to take out a mortgage or sell the property without the operator's consent.

Entry Costs

The main reason people choose to move into a retirement village is for a lifestyle change with the benefits of living in a village community and having the security of 24 hour emergency medical assistance. The care free lifestyle is appealing especially with the variety of recreational facilities offered, however the relaxed lifestyle comes at a price.

Not only do you pay an ingoing contribution entry fee but you are charged exit fees, monthly general service charges and resale fees when you no longer wish to reside in the village.

The ingoing contribution is what you need to pay to reside in the village which is essentially the purchase price of the property. General service fees are monthly fees that you will pay for your right to use the facilities which may be increased annually. You are expected to contribute to the costs associated with the day-to-day and ongoing management and maintenance of the village. General service fees will differ with each village but an estimated general amount would be $500-600 per month.

Generally you will also be responsible for payment of the operator's legal costs of around $1,500 plus GST, and the costs to register the lease. Personal service fees are optional and are additional to the general service fees and may include such services such as laundry, meals and cleaning services. You will be required to maintain and repair your unit and you will be responsible for payment of utilities and insurance for your unit. The operator is only required to maintain the village and grounds.

Terminating a Residence Agreement

The Act sets out the ways that you and the operator can terminate the agreement. You are able to terminate your agreement by giving the operator one month's written notice.

The operator may terminate for a number of reasons including if it is determined that you are no longer able to live independently due to illness. The operator may assess your health and if may arrange to remove you from the village to accommodation more suitable to your health needs. A right to reside in an independent living unit does not automatically confer a right to move to an assisted living unit

or a nursing home in the same village. You need to consider when buying into a retirement village unit that the village offers assisted living as well and the costs involved when having to terminate your existing lease.

You are required to continue to pay the general services charge for at least 90 days from when you vacate your unit unless you are able to sell your unit earlier. The obligation to continue to pay the general services charge can continue for up to nine months.

Exit Fees

When an agreement is terminated and you stop living in the village you will need to pay the operator an exit fee which differ with each village and are calculated in reference to a percentage of your ingoing contribution and the length of time you have lived in the village.

The exit fee may start at a percentage of 5% and increase each year you remain in the village. Generally the exit fee is capped at a maximum of 35% for your ingoing contribution. There is always a minimum and maximum exit fee payable which is set out in the public information document. Most people would be aware of having to pay an exit fee but there are other costs that you should be aware of.

Resale and Reinstatement

When you wish to leave the village and sell your unit the operator will be in control of the selling process. You and the operator need to agree on a resale price for your unit. If there is no mutual agreement, the operator must obtain an independent valuation from a suitably qualified valuer which you will be liable to pay half the cost. You must also agree on any reinstatement work that may be required to return your accommodation unit to the condition it was in when you moved in.

This may include work such as cleaning, painting, repairing, replacing floor coverings, fittings, equipment, appliances and furnishings provided by the operator. The reinstatement costs are unknown at the time of entering into the resident agreement and the cost will depend on the age and condition of the unit.

You should always ask the operator prior to entering into the agreement of the likely costs for reinstatement of existing units. The reinstatement costs can be as little as a $4,000 but can be $50,000 or higher in some cases.

Generally the operator will have the right for a period of six months to sell your unit and you will not be able to engage an independent selling agent until after this time. If the unit is not sold after six months then you may engage an agent but will liable to pay the agent's commission in addition to any resale costs of the village.

Once your accommodation unit is resold, you must receive your exit entitlement which is calculated by you're the resale price less the exit fee and capital gain or loss, your share of costs of reselling the unit, any alterations or addition costs, any outstanding service charges, reinstatement costs and operator legal and other fees.

What you need to understand is that your exit entitlement reduces over the course of time and in essence, you are paying for a right to reside and this is not an investment in property for capital gain.

Capital Gain or Loss

It is important that you ascertain at the outset your entitlement to any capital gain when you leave the village, or your liability to bear any capital loss. This is not regulated and it comes down to whatever the village contract states.

The village may receive 50% of any capital gain. In some cases there is no provision for capital gain or loss. You have to check the contract for this.

In a recent sale of an accommodation unit on a resale price of $600,000 the outgoing resident received total funds of around $356,000 after deduction of the exit fee based upon 33% of

original ingoing contribution $148,000, capital gain $76,000, reinstatement costs $4,000, costs of sale $11,000, levy adjustment $4,000 and legal and registration fees of $1000.

Conclusion

It is essential to obtain legal advice before you buy a retirement village unit in order to be fully informed of all the costs and issues which may arise and ensure there are no surprises later on.

When you have been armed with all of the information you can then make an informed practical decision if buying into a retirement village is the right lifestyle choice for you.

The main point is that entering into a retirement village is a lifestyle decision and not a property investment decision.

Ending an Opponent's Claim Early

Commercial Litigation Team

When assisting clients who are being sued, we consider and advise on a range of options and strategies and we work with our clients to achieve the best possible result for them in the most cost-effective manner.

In the case of an opponent's poorly considered claim, there may be an opportunity to force an early end to the proceeding by applying to the court for summary judgment or to have the claim struck out.

One of our corporate clients and its director were being sued in relation to a solar power system installed by our clients at the plaintiff's property.

The plaintiff had claimed that our clients' sales representative told him back in early 2012 that if he connected a particular solar power system prior to 30 June 2013, he would be entitled to a $0.44 rebate on his power bill. It was not disputed that, at the time, this information was correct.

But it was not until April 2013 (more than a year later) that the plaintiff finally decided to ask our clients to install a solar power system. This they did on 24 May 2013. Following completion of the installation, the plaintiff paid our clients and was satisfied with the product and the installation.

However, the plaintiff claimed that about a year later in April 2014, his electrical supplier informed him that he was not entitled to receive the $0.44 rebate because documentation was not submitted by a cut-off date.

The plaintiff engaged solicitors and proceeded to sue our clients primarily on two grounds: firstly, that back in early 2012, our client's representative had misrepresented the plaintiff's entitlement to the $0.44 rebate; and secondly, that our client had been negligent in not submitting documentation on behalf of the plaintiff by the 30 June 2013 cut-off date.

In preparing our client's defence, we reviewed the relevant legislation. We identified an amendment that commenced on 6 July 2012, which stipulated that only customers who lodged a completed application to connect a qualifying

generator prior to 10 July 2012 would be entitled to the $0.44 rebate.

Now, by the plaintiff's own pleading, he acknowledged that he had not engaged our clients to carry out any work until April 2013. We argued that, because the plaintiff had failed to lodge a completed application prior to 10 July 2012, he became legally disentitled to the $0.44 rebate long before he asked our clients to install the solar power system. Effectively, he was claiming damages against our clients for the loss of an entitlement that, by his own conduct, he had no legal entitlement to receive.

The defence we prepared for our clients denied liability primarily on this ground. On instructions from our client, we wrote to the plaintiff's solicitors offering to settle the case on the basis that it be discontinued in order to minimise further legal costs to our respective clients. The plaintiff rejected this offer and aggressively sought to continue the proceeding and to have it set down for trial.

So What Happened?

We advised our clients of their options and the associated risks, and we recommended applying to the court to have the matter dismissed or struck out. We were instructed to bring the application.

The result was that the court awarded our client judgment against the plaintiff in respect of the misrepresentation claim, and having found that the plaintiff's negligence claim was completely deficient, the plaintiff was ordered to re-plead it. The court's reasons for decision stated:

"The plaintiff needs to re-plead his negligence claim identifying the nature and scope of the defendants' alleged duty of care by reference to the law governing recovery for pure economic loss in negligence and exactly how the defendants breached that duty. The basis for claiming loss at the rate of 44 cents per kilowatt up to 2028 also needs to be justified given that, as has been seen already, the government can, and has in the past changed the rate for policy reasons at will."

In our view, the opposition's claim is as good as dead. The result was a win for our clients and a significant and expensive blow to the plaintiff, who currently does not have any viable cause of action filed against our clients, and we would expect that to remain the case.

Litigation can be tricky as our opponent just found out. Failure to properly prepare a claim can lead to an expensive and brutal end to a party's claim.

If you find yourself or your business being sued, please call Quinn & Scattini Lawyers to book a consultation to discuss how we may be able to assist you.

Enforcing Spousal Maintenance Orders

Family & De Facto Law Team

Quinn & Scattini Lawyers had the opportunity to assist a client with the enforcement of her spousal maintenance obligations against her non-compliant former husband.

In discussing the case with colleagues, it became apparent that many clients are often unaware that the Child Support Agency (**CSA**) is able to assist a party to collect the maintenance, at no cost to that party.

In this case, our client had the benefit of a spousal maintenance order (**Order**) from the Federal Circuit Court. That Order required the former husband to pay to our client spousal maintenance of $1,200 a week in addition to his child support obligations.

The sum payable by way of child support varied each year in accordance with the child support assessment formula provided for in the *Child Support (Assessment) Act 1989*.

The arrears owing by the husband, at the time our client sought our assistance, was some $59,000 (made up of both child support and spousal maintenance arrears).

The *Child Support (Registration & Collection) Act 1988* (**the Act**) empowers the CSA to collect any maintenance. 'Maintenance' in the Act is not limited to child support, but also includes spousal or (since March 2009) de facto maintenance, paid by one spouse (or de facto spouse) to the other, pursuant to either a court order or a court registered maintenance agreement[1].

Procedurally, once you have an order or maintenance agreement (such as a Binding Financial Agreement (**BFA**)) you need to notify the CSA within 14 days of the order being made or the BFA being signed[2].

If you do not want to have the CSA register the agreement in order to assist you to collect your payments, you do not have to do so[3].

However, if you have gone to the trouble of formalising the orders or BFA which provide for payment of spousal (or de facto maintenance) it makes little sense not to take this step.

If you do not register the Order or maintenance agreement within 14 days, you are still able to apply to the CSA to register outside the required timeframe. However your ability, or more importantly the CSA's ability, to enforce the payments required will be limited to the date that registration occurred as opposed to the date of the orders or maintenance agreement.

Once the Order or maintenance agreement is registered, it changes the liability from one owed by the payer (in this case, the husband) to the payee (in this case, the wife), into a liability from the payer to the Commonwealth[4]. This variation to who the debt is owed serves

to empower the registrar of the CSA to purse the payment of the liability.

However, by providing the CSA with the power to enforce the debt, the payee does not lose her capacity, or right, to sue her ex-husband for any arrears that accrue. Sections 113 and 113A of the Act clearly provide that, on condition that the payee gives the registrar 14 days notice of her intention to do so, she can sue for payment of arrears.

From a practical point of view, unless a person enforcing a liability has capacity to pay the costs of legal representation or is willing to self-represent, the issue of enforcing the liability can be conveniently (and cost effectively) left to the Registrar of the CSA.

The Act gives a great deal of power to the CSA to enforce the maintenance liability.

This includes:

- Garnishing the wages of the Payer[5]. This is where the CSA compel the employer of the payer to pay the maintenance obligation/s to the registrar of the CSA who in turn passes the funds onto the payee. Generally speaking most employers comply with this obligation as it is an offence for an employer to refuse to comply. Since 2007 it doesn't matter if the payer is a sub-contractor and not an employee as Section 65AA of the Act enlarges the scope of the CSA's power to cover these arrangements as though they are no different from an ordinary employee/employer relationship.
- Issuing a notice to a third party who holds money on behalf of the payer. A common example is where a law firm holds funds in trust on account of legal fees or following the sale of a real property.
- Applying to a reciprocating jurisdiction to have the maintenance agreement enforced.

The CSA also have power to make an order called a departure prohibition order. This order prohibits the payer from departing Australia.

Unfortunately section 72D of the Act provides that this is only applicable to child support liabilities.

However, notwithstanding this, in cases where there is both a child support obligation and a maintenance liability, the CSA can purse both liabilities via a departure prohibition order.

Fortunately this was particularly helpful to my client as she had become aware that the husband was about to embark on a month long holiday to Europe.

Armed with that information, the registrar was able to issue a departure prohibition order and prevent the husband from leaving for his holiday until such time as he made a substantial payment towards his child support and maintenance arrears.

Unfortunately for our client, notwithstanding the significant payment made by the husband, the arrears have since continued to accrue and my client has made the difficult decision to return to

court to pursue for enforcement of the outstanding obligations.

As with all areas of family law, it is important to obtain tailored legal advice about the options available to you regarding enforcement of spousal maintenance and child support at an early stage.

Such advice can save you a significant amount of worry and money, arming you with an understanding about what steps you can take and when.

If you have any queries about spousal maintenance or child support, please do not hesitate to contact us.

Laws mentioned in this post:

[1] Section 18 of the Child Support (Registration & Collection Act) 1988
[2] Section 23 of the Child Support (Registration & Collection Act) 1988
[3] Section 23(3) of the Child Support (Registration & Collection Act) 1988
[4] Section 30 & 64 of the Child Support (Registration & Collection Act) 1988
[5] Section 44 of the Child Support (Registration & Collection Act) 1988

The Granny Flat Revolution

Business & Property Team

The Australian Federal Government has been telling us for a long while now that we should save for our retirement. Various inter-generational reports and future economic forecasting by government suggest that in the near future extraordinary amounts of money will need to be saved for individuals to plan for their own retirement and to avoid the looming Australian Housing Crisis.

The Current Situation

Government is withdrawing from social welfare spending across the board. This means that a large number of people who would have expected that they could access government funded special or supported accommodation as they age now need to be able to look after themselves.

As matters stand there are simply not enough age care facilities funded by the Australian Government to adequately house the aging population that exists at the present.

Many of our elder citizens will need to change their living arrangements after they retire owing to changes to their health, mobility and relationships.

Traveller Trends

There are also a number of Australian self-funded retirees who no longer wish to have the burden of maintaining a large family home while they travel either in Australia or abroad. It is all well and good to be a grey nomad and to see the world and to have an exhilarating lifestyle while you are doing it.

It is also good to have a home base to return to and a granny flat can be an excellent arrangement for the grey nomads to touch base back in their state of origin on the occasions that they need

to relax and wind down from their trips and holidays. It also gives you a domicile for the purposes of voting and citizenship.

A small granny flat can also provide an address from which you can record your company directorships, maintain a library membership or register and insure your boat, car and caravan.

Future action

In anticipation of the future aged care housing shortage, the Federal Government has been putting pressure on state and local governments to streamline the way that they regulate the construction of small structures and extra dwellings on existing blocks of land with houses.

In the past, no two councils could be relied upon to have the same regulatory framework and there was a great deal of difficulty in building an extra dwelling on the property without formally subdividing or strata titling that property. Enter the granny flat revolution. They call them granny flats, plugins, modular housing, mobile or relocatable homes, and Fonzie apartments.

Building a Granny Flat

In many states of Australia granny flats are being erected as separate dwellings on a property and can be used as a secondary source of income. This is not the case in Queensland. Unlike building a home from scratch, granny flats can have a fast-tracked government approval process which can reduce the bureaucracy and paperwork required for a new dwelling from six – eight months to ten or so weeks.

Owing to new building materials, architectural standards and designs, granny flats can be built along the most basic lines or can be constructed to accommodate the most lavish or luxurious tastes. It is all up to the builder's depth of pocket and lifestyle priorities.

Granny Flats – An Affordable Alternative

The number and complexity of the various nursing home, retirement and supported care facilities can be considerable. Retirees intending to buy into supported accommodation may be required to move many miles from where they are accustomed to living and set up new homes with new people who they do not know, at a time in their life when they are least able to accommodate change and are not welcoming of new environments.

The eventual cost of these arrangements can also be difficult to initially forecast. Residents moving into residential care generally only obtain a mere licence to reside, they are compelled to tie up many thousands of dollars in bonds and arrangements with the care providers and there is often very little left of these bonds when the occupant eventually leaves the supported accommodation or passes away.

On exit there can be extensive administration costs, fees and levies that are applied to reduce the funds retained by the nursing home.

Granny flats can represent an excellent alternative for the elderly who wish to downsize but retain some control of their funds and living arrangements.

Granny flats meet the needs of those individuals when they can make arrangements with their family members to either build on a family member's block or to use their own land to erect a granny flat and allow their original home to be used by family members or rented out.

Why Do You Need a Lawyer?

Lawyers can be very useful at the beginning of the transitioning from a larger dwelling to downsizing to a granny flat stage. Special care agreements and support arrangements can be entered into by deed or other binding arrangements that spell out who is to own the property, how it is to be maintained, how any profits are to be apportioned and how it is to pass on at the time when the property can no longer be used.

With respect to the elderly making arrangements with their younger relatives, these agreements can also incorporate carer arrangements and formal documentation can be entered into to allow the cost and support services of an individual for their elderly relatives to be reduced to writing and to be made enforceable and to also ensure that going forward once the granny flat is built that the occupants of both dwellings know what obligations they owe to one another (rather than simply leave things to chance and hope that all will go well).

Granny flat living construction and care agreements need to be put together at the start of the arrangements in a way that everyone who is a stakeholder knows their rights and obligations.

How We Can Help

Quinn & Scattini Lawyers can assist you with:

- any construction contract with a builder;
- loan arrangements;
- buy/sell agreements;
- options to purchase or exit strategies;
- valuation arrangements;
- approval process;
- compliance with requirements of council and regulators;
- negotiations between the parties;
- security arrangements; and
- preparing all documentation between care providers or ancillary arrangements.

Your specific granny flat establishment arrangements can also be backed up with enduring powers of attorney, wills and any other instruments or arrangements that can ensure that the agreements stand the test of time and reflect the true arrangements entered into between the parties.

Failure to undertake the necessary documentation or to get the right advice can lead to catastrophic results and often results in elder abuse and very difficult living arrangements.

Unlike some other firms - who focus on only one area of law - Q&S can offer expert solutions for all legal areas.

Access our expert lawyers for your next legal issue.

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