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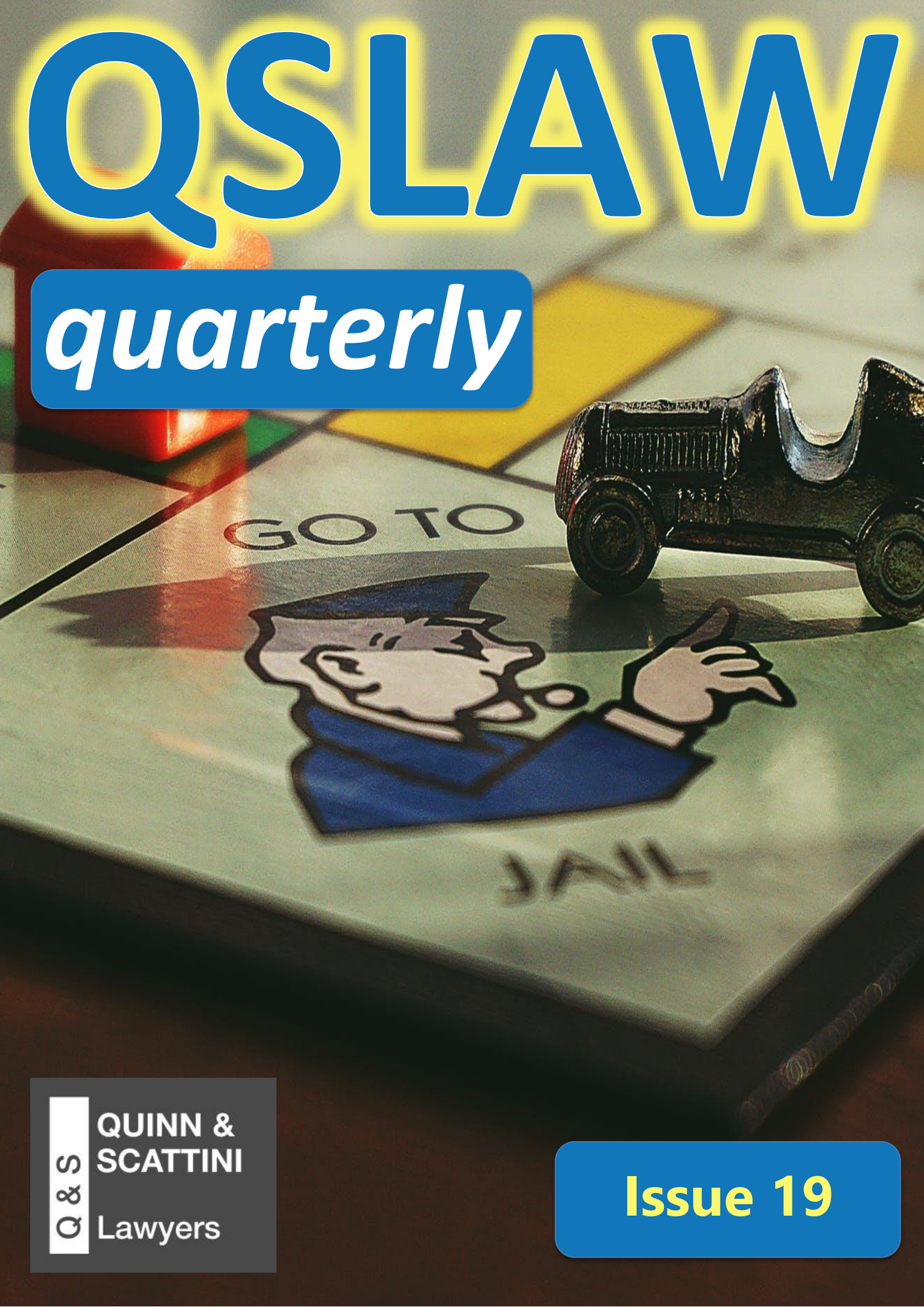

Q&S QUINN & SCATTINI Lawyers

Issue 19

Recording of Criminal Convictions

Criminal & Traffic Law Team

If you have been charged with an offence, you may be fearful of having a criminal conviction recorded against your name. It is a common concern when clients are proceeding through the criminal justice system, particularly for reasons such as employment and travel. However, in some cases it is possible to avoid having a criminal conviction recorded.

Does a Conviction Always Have to be Recorded?

In Queensland, a court has the discretionary power to make an order under section 12 of the *Penalties and Sentences Act 1992* (**PSA**) to not record a criminal conviction against an offender. There are exceptions to the power and circumstances which mandatorily attract a conviction, which are determined by their legislative maximum penalties. For example, if you have pleaded guilty to an offence and you have been sentenced to a term of imprisonment, a judge cannot apply his/her discretion and they must record a conviction. The court's discretionary power to not record a criminal conviction is not generally exercised for indictable offences rather minor offences, for example, a wilful damage charge.

In deciding whether or not to record a conviction, the court will be required to take into account a variety of factors and features in all the offending and personal circumstances of the individual.

The following factors are to be taking into account as per the PSA:

1. The Nature of the Offending

The court must weigh up whether it is appropriate to record a conviction, taking into account what kind of offence has been committed and relevant circumstances. The circumstances of the incident can potentially have an impact on the severity of the offending or present an aggravated feature. All of these factors must be considered before determining whether or not to record a conviction.

2. Character and Age of Offender

The next relevant consideration under the PSA is an offender's character and age. In order to attest to an offender's good character, it is beneficial to provide the court with supporting material. This can be done in various ways such as a character reference from an employer or a letter of support from a community or volunteer group that you have been a part of. The goal is to demonstrate your contribution to society in a positive manner.

The court will also take into account an offender's age. This can be weighed on more heavily for younger offenders, where immaturity can provide context to certain offending. However, this is not an excuse for any wrong doing.

3. Economic, Social Wellbeing and Employment

The last consideration for the court to take into account is the detriment any criminal conviction would have on your present or future economic, social wellbeing and employment. This can be evidenced to the court by providing material supporting the proposition that you will lose your job or will be unable to obtain employment due to a criminal conviction.

For example, if you were before the court for your first common assault charge. You can provide the court with an explanation or supporting material as to how a criminal conviction would prevent you from applying for work in the military. Alternatively, you can provide evidence of how a criminal conviction would restrict your ability to travel for employment purposes.

Ultimately, a penalty will need to be imposed even if a court decides to not record a conviction. The court has a range of penalty options that could be appropriate depending on the type of offending and circumstances surrounding it. In Queensland, sentencing principles are based on the premise that punishment should be proportionate in all the circumstances.

If you are concerned about the recording of a conviction, it is recommended you speak with a criminal lawyer from Quinn and Scattini Lawyers before your court date.

Leases – To Register or Not to Register?

Business & Property Team

In dealing with leases I am regularly asked the question '*Why do I need to register my lease*?'

Whether or not you should register a lease depends on a number of factors and is dependent on the term of the lease and whether there is a mortgage over the property subject to the lease.

From a landlord's perspective, having a lease registered is not that important (except in the case of selling a property with registered leases may add value to the property for investor buyers as such buyers may look for the leases to be registered on title). The person most likely to gain from having a lease registered is the tenant.

The *Land Titles Act 1994* (**The Act**) provides that '*an unregistered lease of a lot or part of a lot is not invalid merely because it is unregistered*.'

If the term of the lease is for more than three years then the *Property Law Act 1974* requires that the lease should be registered.

This is because registration provides the tenant with '*indefeasible title*'. Indefeasibility means that once a land title appears on the titles register it cannot be defeated by other proprietary claims

contrary to the register. This simply means that if your lease is registered your right as tenant is recorded on the title and is protected in the event of a sale or transfer of the property.

The issue of registration of a lease was considered in the case of Friedman v Barrett. In that case a landlord sold the freehold to a buyer which was subject to an unregistered lease. The tenant subsequently sought to exercise his option to renew the lease on the buyer but the buyer claimed that he was not bound by the option to renew by virtue of the lease being unregistered. The court found in favour of the buyer.

A short term lease (which is defined in the Act as a lease for a term of three years or less including any options to renew) need not be registered but may be registered. This is due to the statutory protection he Act provides to tenants for short term leases. It is important to note that a tenant will only receive statutory protection if the lease is for a term of no more than three years including options to renew. Quite often commercial leases are for a term of three years with an option to renew for a further three years. In this case, the initial three years will receive statutory protection but the option period will not. In this example the lease should be registered.

Exceptions to the indefeasibility of title give adequate protection to short term leases where the tenant is in actual possession or entitled to immediate possession, so that a registered proprietor (the landlord) holds title subject to the unregistered tenancy.

As a tenant you want your lease to be validly recognised by third parties and by the landlord's mortgagee.

Often the landlord will have a mortgage registered on the title that a tenant is leasing. Should the landlord default under its mortgage then the bank has the right to take possession of the property and may exercise its power of sale. If the bank has not consented to the lease it does not have to recognise the tenant's right to occupy the property. However this does not apply to short term leases due to the statutory protection of the Act.

The cost to register a lease for the whole of a lot is minimal which as at the time of writing (15 February 2019) is $187.00. However in cases where a lease is for part of a building there must be a lease survey plan attached to the lease correctly identifying the leased area.

The Titles Office has strict requirements on how the lease survey plan is to be prepared and often a tenant will be responsible for the landlord's costs in preparation of the survey plan. These costs can be expensive and should be negotiated at the time the lease is entered into. Furthermore, there will be costs for obtaining mortgagee consent which also needs to be factored into negotiations.

In summary, if you are a tenant then it is strongly recommended that you register your lease regardless of the term in order to obtain the best protection possible.

Electronic Conveyancing Now Available

Expert Conveyancing Team

What is Conveyancing?

Conveyancing is the legal process of buying and selling land (with or without a building on the land).

What Is Electronic Conveyancing (e-Conveyancing)?

Electronic conveyancing offers conveyancers, lawyers and financial institutions an alternative way of settling conveyancing transactions by settling electronically through a central, electronic/online platform.

The online platform is called PEXA. PEXA stands for Property Exchange Australia and was established in 2010 with the objective of assisting the Australian property industry transition to a 100% electronic conveyancing process in the future.

There are a range of benefits for buyers and sellers which include:

Buyer

- On-time settlement (as documents are prepared and checked for errors prior to lodgement);
- Peace of mind (instant lodgement of documents with relevant authorities including the Titles Office); and
- No need for cheques (replaced with electronic transfer of funds).

Seller

- On time settlement (as documents are prepared and checked for errors prior to lodgement);
- Fast access to funds (funds are transferred as cleared funds on the day of settlement and so no waiting for cheques to clear); and
- Easy to use (signing of transfer documents by seller no longer required).

PEXA currently charges a fee of $56.32 per transaction.

Ready to Assist

Quinn & Scattini understand how important it is to be at the forefront of this technological development in order to deliver best outcomes for our clients. After receiving detailed training from PEXA staff at our local offices, our Conveyancing Team can now provide electronic conveyancing via the PEXA platform.

The Quinn & Scattini Advantage

We will take care of your conveyance from the signing the contract to successful settlement.

Conveyancing services include:

- checking the contract;
- property searches;
- providing copies of survey plans for checking;
- advise on special conditions;
- preparation of transfer;
- preparing stamp duty declarations and attending to the payment of duties;

- adjust rates and any other outgoings;
- preparation of settlement statement; and
- attending to settlement.

We can also ensure that clauses covering your rights and the responsibilities of other parties are inserted into your contract. This will streamline your conveyancing process and protect you if items such as soil tests, pest control, finance approvals, surveys and searches are not completed in the anticipated manner.

Still Need Answers?

Contact our expert Conveyancing Team on 1800 999 529 or email mail@qslaw.com.au. To request an obligation-free quote visit qslaw.com.au.

Get an Instant Mobile Quote

Text BUYING to 0408 738 668

Text SELLING to 0427 501 601

Excluding a Beneficiary from a Will - Some Points to Consider

Clark Saint
Senior Associate
Wills & Estates

A person making a will in Queensland can give instructions to their lawyer about who they want to leave their estate to and also who they do not want to leave their estate to.

If you look at our free Will Information Pack (available by request here: Request a Will Info Pack), you will see that it contains a section where the will-maker can expressly name a person who they are not leaving any part of their estate to, and can give an explanation why that person is not to be included as a beneficiary of their will. The will-maker can also name a person who they are making a reduced gift to, and the reasons why they are doing that.

A common example of a reduced gift is when a parent is leaving one child (say) $100,000 from their estate but is only leaving the second child $50,000 with the explanation that they have previously given $50,000 to the second child to assist that child perhaps to buy a house. So the will makes a balancing of what the will-maker's children receive. A will including a reduced gift clause might also include a clause stating that the will-maker forgives a debt owed by the second child to the will-maker. This amounts to an instruction

to the executor not to recover money owed from the second child because a financial adjustment has been made in the will.

A more drastic scenario arises when the will-maker gives instructions that they are leaving nothing to a child; and the reasons for this can be widely varied. A common example is that the will-maker and the adult child have not had contact with each other for many years.

A lawyer receiving instructions to exclude a child as a beneficiary, or to leave a significantly reduced gift to a child, will inform the will-maker of the risk that the child might contest the will. However, if the will-maker is clear in their instruction to exclude or reduce a benefit to a child, then the lawyer must act on those instructions. While the will-maker has the right in their will to exclude or reduce a benefit to a child, that might not be the end of the matter. An excluded child, or a child receiving a reduced benefit from the will-maker's estate, could decide to file a claim for further provision from the will-maker's estate, or to claim that the will-maker lacked capacity at the time they gave their will instructions, or that someone unduly influenced the will-maker.

It will be the role of the executor to uphold the will-maker's instructions and to present to a court any available evidence showing why the will-maker's instructions to exclude or reduce a benefit to a child should be upheld, but there is no guarantee that the will-maker's wishes will be upheld by the court. This type of litigation is expensive and a will-maker should carefully consider the potential financial losses to their estate if they provide a reduced benefit to, or completely exclude a child as, a beneficiary of their estate.

Quinn & Scattini Lawyers have considerable experience in drafting wills and acting in estate litigation matters and have a team of estate lawyers ready to assist you.

Is it Lawful to Record and Publish a Private Conversation?

Commercial Litigation Team

Recording Conversations

We often see in movies and televisions shows a plot device involving a recorded conversation. Perhaps it's used as a means of blackmail or to prove the innocence of the good guys. We only condone the latter.

We live in an age where people carry around recording devices in their pockets and handbags. Many phones are continually listening to everything we say. Isn't that right Siri?

At times our clients will inform us that they are in possession of a recorded

conversation they think will help their case. As a general rule, we recommend that our clients maintain written communication where possible. It's always easier to produce a document in court than to have multiple parties give their account of what was said.

But what if you have recorded a conversation relating to an issue with another party? What does the law say about the recording and publishing of conversations, particularly private conversations? When can they be used, if at all?

Invasion of Privacy Act

The *Invasion of Privacy Act 1971* (Qld) ("**the Act**") is the relevant legislation in Queensland on matters concerning the recording and publishing of conversations.

A Private Conversation

The issue that needs to be looked at first is whether the conversation in question is a "private conversation."

Under the Act, whether a conversation is private will be determined by the circumstances surrounding it. The question is whether the conversation should only be heard or listened to by the parties to that conversation. To make this assessment, the courts will consider:

- the parties to the conversation;
- the location of the parties having the conversation; and
- the content of the conversation.

For clarity, the Act states that you are a party to a private conversation if you are the recipient or the speaker of words in a private conversation.

An appropriate example would be where two company directors are having a conversation in a closed office regarding the failings of their company and the likely redundancies of employees. Because of the parties involved, the location, and the content of the conversation (including its effects if made public), this would be a "private conversation." By contrast, two employees discussing their mutual dislike for a television show in the office lunch room would not be considered a private conversation. No one is forcing you to watch that show Sharon!

Recording a Private Conversation

For the purposes of the Act, recording a private conversation includes the use of a listening device.

The Act has a broad interpretation of a listening device. Essentially, a listening device is anything capable of recording, monitoring or listening to a private conversation -- excluding hearing aids (in case you were wondering). Such devices are rampant in our day-to-day living and it is not hard to imagine that someone could record your conversation without you knowing.

Recording a private conversation is an offence under the Act. Where a person is guilty of using a listening device to record a private conversation, they may be required to pay a fine or be sentenced to a maximum of two years in prison. However, there are exceptions that allow you to record a private conversation. The

most notable being that you are party to that private conversation.

Further exceptions excuse government entities who record and listen to private conversations in the performance of their duties. Also, you will not be liable for unintentionally overhearing a private conversation over the telephone. Perhaps save such conversations for when you get off the bus next time.

Publishing a Recorded Private Conversation

Further offences may apply where a person, who has unlawfully recorded a private conversation, then communicates or publishes that conversation to someone else -- unless the publication or communication is made to a person who was a party to the private conversation or with the consent of a party to the conversation.

Telecommunications (Interception and Access) Act

The *Telecommunications (Interception and Access) Act 1979* (Cth) ("**the Telecommunications Act**") expands the liability of individuals who record conversations, with specific application to telecommunication devices and networks.

Under the Telecommunications Act, unless you are the intended recipient, you are prohibited from recording a telephone conversation. However the Telecommunications Act goes beyond just telephone conversations and includes speech, data, text images or signals.

Although the Telecommunications Act imposes strict prohibitions on the recording of telephone conversations and messages, there are parties who are exempt from liability for obvious reasons. They include:

- emergency services, such as fire, police and medical;
- government bodies involved with monitoring and preventing criminal activities; and
- employees working for network carriers who need to record conversations in the course of performing their job.

Where a person is guilty of an offence under the Telecommunications Act, the aggrieved party can apply to the courts for civil remedies, including general damages and injunctions.

Conclusion

In short, if you are not a party to a conversation, or you do not have the consent of a party to that conversation, you cannot record or publish that conversation. This includes the recording of phone conversations and communications over telecommunication networks.

How We Can Help

Quinn & Scattini Lawyers expertly assist parties to litigation and disputes. We can advise you on the correct procedures for obtaining and using recorded conversations and other evidence.

Why Choose Us?

You will be talking to a real expert, local to you. You will not be treated like another file number, but as a real person, and a person going through a difficult and

stressful experience. Get expert advice, not just what you want to hear, in a language you can understand, not legal jargon.

Office Locations

Q&S's expert lawyers are available at any of Q&S's five office locations.

Brisbane CBD | Beenleigh | Cleveland | Gold Coast | Jimboomba

Still Need Answers?

Submit an online enquiry below or call 1800 999 529.

Q&A With Expert Family Lawyer, Shelley Johnson

Shelley Johnson
Lawyer
Family & De Facto Law Team

Shelley is a lawyer in Quinn & Scattini Lawyers' Family and De Facto Law Team. Shelley has over 15 years' experience assisting clients with a range of family law matters, including divorce, property settlements and disputes, children's issues, consent orders and other parenting matters.

Shelley has taken the time to answer some frequently-asked questions and provides a concise summary of what is required to resolve the issue at hand.

Question: What Do I Do If My Marriage Certificate Is Not Recognised In Australia?

My husband and I were married in Vanuatu 15 years ago. At a time when there was no Google. When I got back, I used our marriage certificate to change my name on everything to my married name. A few years later, when I went to change my passport I wasn't able to as they would only accept a change of name form and didn't recognise our Vanuatu marriage certificate.

I am not able to complete an official change of name as I now don't have enough ID in my maiden name. We thought one way around this as I need less ID is to get married in Australia however all of the marriage celebrants say we are unable to do this as we have already been married. We looked into it further and we are unsure whether or not our marriage was official in Vanuatu or how we go about finding out. My question is if we do get married in Australia and our Vanuatu wedding was legal what would be the repercussions?

How else am I possibly able to change my name officially and on my passport?

Answer: In order to answer your query you need to consider firstly whether your marriage which took place in Vanuatu 15 years ago is valid in Australia. The *Marriage Act 1961* (Qld) provides that if a marriage is valid under the rules of the country where it took place, then it is usually recognised as valid in Australia. There are exceptions to this general rule i.e. both parties must be at least eighteen

at the date of the marriage and not married to another person at the time.

If your marriage in Vanuatu is valid, and it would seem likely that it is, you cannot marry in Australia as you are already legally married. If you did so you would be guilty of an offence (bigamy) that carries a maximum penalty of five years imprisonment.

While you are unable to register your marriage in Australia your Marriage Certificate should be acceptable legal proof of your marriage. Given that the passport office appears to be refusing to recognise your Marriage Certificate, you may need to seek legal assistance.

Question: What Do I Need To Re-establish Contact With My Child?

Parties were in a relationship for approximately 10 years and have one child together. The mother stole a large sum of money from the father whilst he was in prison for a few months after being charged with something that he shouldn't have been charged with (basically a case of wrong place wrong time and being too trusting of a former tenant to a property he owned and rented out, but won't go into details as not really relevant). So basically the mother was meant to pay a large sum of money to his lawyers to help defend his charges and imprisonment. He had given the mother access to this money for his legal fees. She pretended she was doing this but instead just absconded with their daughter. Child was about 8 years old at the time and had always had a very close relationship with her father. He had cared for her whilst the mother worked as he was semi-retired and had several investment properties which he managed.

The mother then immediately placed a domestic violence order on him (even though he had never threatened her, and had no idea where she was even or how to contact her. Most likely a tactic just to thwart any attempted contact between their child and her father). He has had no contact with the mother or child since the mother just up and left. The DVO has since expired and has not been renewed.

The father misses his daughter immensely and would love nothing more than to have some form of contact with her. Obviously it's going to be extremely hard to mediate the matter as he has no idea where she is. It's been about 3-4 years now since he's had any contact with either the child or mother. He's hoping to be able to file for a location order but has no clue how to go about this. From what I've read, it seems to me that a location order is only for when there are current parenting orders.

There's no orders in place so am I correct in thinking it would be a commonwealth information order he needs to apply for? I've found it difficult to find information on this as it seems to tie in a lot with a recovery order? As it's been quite some time since he's seen his daughter he's not wanting a recovery order as they are no doubt settled wherever they are. He's just wanting the courts to be provided with her address details for service or an application for contact with his daughter.

So my questions are as follows:

1. Am I correct in thinking it's a commonwealth information order as opposed to a location order that he needs to apply for?

2. Can this be done without a recovery order or should he in fact be doing a recovery order as well (I would have thought the time frame for a recovery order would be well and truly past)?

3. What is the appropriate form to use when filing for an application of said order?

4. Will the parties still need to attempt mediation prior to him applying for any parenting orders? And if no, does he file for parenting orders simultaneously or would that have to wait until he's been successful in locating the child?

Answer: It is a great shame for a child to grow up without a parent, particularly in a situation where that parent dearly wants to see the child. The Family Law Act clearly states that it is in the best interests of children to have both of their parents involved in their lives in a meaningful way. This is a general proposition of law and can be rebutted if there are compelling reasons why it should not apply.

In terms of finding the child, you are correct in saying that a location order would be appropriate. You mention that there are currently no Court Orders in place. The only way you can obtain a location order is by filing an Initiating Application with the Court and seeking such an order on an interim basis. What this means in English is that you would have to file proceedings in which you ask the Court to make a location order. This is an Order under s67N of the Family Law Act which directs Centrelink (or a named Commonwealth Agency) to provide the address of the child to the Court. Once this has been achieved, and the mother served with the Father's application, he could seek further Orders aimed at rebuilding his relationship with his child.

You are correct when you say that a recovery order is not appropriate in this situation and it is unlikely that an application for such an Order would be granted.

This is a difficult area and for such an application to succeed, the Father would need to comply strictly with the provisions of the Act. I would recommend that he gets legal assistance with such an Application as it may be the only way that he is able to achieve his goal of rebuilding his relationship with his child.

Do You Have A Family Law Problem?

Get the answers you need today!

Shelley can be contacted on 3821 2766, email sjohnson@qslaw.com.au or alternatively, visit www.qlsaw.com.au and submit an online enquiry.

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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