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RMO
RYAN
MURDOCH
O'REGAN
Lawyers

Instalment Contracts: What To Look Out For

Property & Business Team

Many property purchases in Queensland are relatively straightforward. The standard process is; a deposit is paid by the buyer, outstanding conditions are progressively satisfied, and settlement occurs by way of the buyer paying the balance purchase price to the seller, to which in exchange, the seller then provides legal title to the property.

However, both buyers and sellers need to be aware of the hidden menace within property sales – **instalment contracts**. These contracts for the sale of land in Queensland can have traps for unwary sellers and buyers alike.

What is an instalment contract?

The Property Law Act 1974 (Qld) (PLA) defines an instalment contract as an executory contract for the sale of land in terms of which the buyer is bound to make a payment or payments (other than a deposit not exceeding 10% of the purchase price) without becoming entitled to receive a conveyance in exchange for the payment or payments.

It is an agreement for the purchase of any Queensland property where the buyer makes incremental payments of the purchase price without obtaining legal title to the property until the final payment is made. While an instalment contract might seem a reasonable proposition, once the agreement is entered into, the rights of the seller and the buyer are significantly altered.

What makes an instalment contract?

Unfortunately, the consequences of instalment contracts can sometimes arise in regular property sales unbeknownst to either party. For example, a contract that obligates the buyer to pay more than 10% of the purchase price, without an immediate conveyance of title, can be deemed to become an instalment contract.

A contract will be an instalment contract where:

- the terms of a contract require the buyer to pay particular amounts of the purchase price (in addition to the standard deposit) prior to settlement, particularly in circumstances where the amount paid under the contract exceeds market value; or
- a rebate of the purchase price is given to the buyer prior to settlement; this may be interpreted as a reduction of the purchase price, potentially causing the deposit paid to exceed 10% of the purchase price.

Any payment made before settlement may result in the contract being an instalment contract. It should be noted that the Supreme Court of Queensland has partially confirmed that a released deposit will not

necessarily by itself constitute an instalment contract (in Watpac Developments Pty Ltd v Latrobe King Commercial Pty Ltd & Anor [2011] QSC 392). However, particular attention must be paid to the wording of special conditions to a contract. Any amounts paid by a buyer that are non-refundable, or described as anything other than a "deposit" may result in the creation of an instalment contract.

Protections for a buyer

After it is determined that a contract is an instalment contract, it can be quite onerous towards the seller. This is primarily due to the special laws governing instalment contracts that can drastically change the relationship between the buyer and seller from those under a normal land sales contract.

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Under the Property Law Act, if a contract is an instalment contract the following will apply:

- should the buyer default on a payment, the seller cannot simply terminate and forfeit the deposit amounts paid by the buyer, but is required to give the buyer a 30 day notice to allow the buyer time to rectify their default before terminating the contract.
- The seller is prohibited from selling or mortgaging the property. If the seller mortgages the property without the buyer's consent, the contract is voidable by the buyer at any time before settlement and the seller is guilty of an office for which fines can be imposed (section 73 PLA)
- The buyer has the right to lodge a caveat over the property, preventing the registration of any instrument affecting the property until completion of the instalment contract. This caveat is deemed to be lodged with the consent of the registered owner and is non-lapsing (section 74 PLA). This may present complications for developers in relation to off the plan contracts where the land is needed as security to fund the development.
- A buyer has the right to demand the seller to convey the property to the buyer once the buyer has paid one-third of the purchase price and they are not otherwise in default under the contract. The seller is entitled to require that the buyer also sign a mortgage in favour to the seller over the property for the remaining

two-thirds of the purchase price. The repayments of the remaining two-thirds will continue to be governed by the contract (section 75 PLA). This can be problematic for sellers where there is an existing mortgage over the land, as the seller's bank will require the existing mortgage to be paid out before the transfer takes place.

- The seller also has the right to demand that the buyer take a conveyance of the property and a mortgage back. However, the seller will be obligated to transfer to the buyer the stamp duty payable under the Duties Act and the buyer's legal costs for the preparation, execution and registration of the conveyance of the property to the buyer. This advance is added to the contract sum and forms part of the secured mortgage debt to be repaid by the buyer (section 75(2) PLA). This often creates various tax and fee issues for the buyer that may not have been accounted for.

Given the unnecessary problems that instalment contracts create for sellers, agents should take care when specifying the deposit in contracts and advise sellers of the implications if a deposit exceeds 10% of the purchase price. In order to prevent the unintended consequences of an instalment contract, legal advice should be sought when drafting special conditions to a contract or when negotiating amendments.

Consequences of default

As previously mentioned, where a buyer fails to make any of the instalment payments or any other payments required under the contract, then the seller must give the buyer 30 days' notice of an intention to terminate the contract in the approved form. The contract will remain on foot as if no breach ever occurred if the buyer rectifies the breach within the cure period. The seller has an unrestricted right of termination only where the breach relates to the payment of the required deposit.

Where the seller is in breach of the contract and fails to transfer title of the property to the buyer, the buyer can make a Court application to force the transfer and the seller will be liable for a fine.

Conclusion

Instalment contracts are complex agreements for the sale of land in Queensland and can often be entered into by parties unknowingly. These contracts significantly alter the rights of the seller and buyer from those in a standard land sales contract. Because of this, parties to a land sale contract need to be aware of the various circumstances that can result in an instalment contract being entered into. It is important that buyers and sellers speak to a lawyer who can ensure that their rights are protected and to help parties avoid inadvertently entering into these contracts. Our Property and Business Team have the experience and knowledge to provide you with valuable advice on the risks associated with instalment contracts, when they should be used and whether they are suitable for your particular transaction.

Contact Us

To speak to one of our experienced lawyers about your contact for sale of land or instalment contract, call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

The Inheritance of Assets When The Existence Of The De Facto Relationship Is In Dispute

Under the Succession Act 1981 ('the Act"), de facto partners have the same rights as married spouses in relation to the inheritance of assets. However, issues can arise where other relatives or family members dispute the existence of that de facto relationship or argue that the relationship had ceased prior to death. This article touches upon some of the potential implications that can arise in relation to a deceased estate when the existence of the de facto relationship is in dispute.

In such cases where the status of the relationship is questioned, the Court conducts a thorough examination into every aspect of the couple's lives in order to determine whether or not a de facto relationship existed for a continuous period of at least two years ending on the date of death.

In determining whether a de facto relationship exists, the Court Will look at the following factors:

- the length of the relationship;
- the nature and extent of common residence;
- whether there is, or has been, a sexual relationship;
- the degree of financial dependence or interdependence, and any arrangements for financial support;
- the ownership, use and acquisition of property (including property owned individually);
- the degree of mutual commitment to a shared life;
- whether they care for and support children; and
- the reputation and public aspects of the relationship.

Consider for example a daughter whose mother died suddenly leaving no Will. The mother and father had divorced many years earlier and the daughter had lived, for the most part, with her father. The mother had not remarried although had established a long-term relationship with a man, who the daughter describes as a boyfriend. The

mother and the boyfriend lived in their own homes as single people, but went out together. They had done this for many years.

The daughter is not advised of her mother's death and not told of the funeral. The boyfriend proceeds to make an application for a Grant of Letters of Administration to be granted to him and claimed to be the de facto spouse of the deceased. If this claim is accepted by the Supreme Court he would be entitled to receive the same share in the deceased's estate as if he was the deceased's spouse. That is, under the rules of intestacy, the de facto spouse would receive the deceased's personal effects, a statutory legacy of $150,000.00 and an equal share of the residue. The balance of the residue would go to the daughter.

However, if the daughter could disprove the boyfriend's claim that he was the deceased's de facto then the daughter would inherit the entire estate and the boyfriend would receive nothing.

The Courts have held that it is possible to have a bona fide domestic relationship as a de facto spouse without living together. Although living together is a usual and expected feature of a de facto relationship it is not determinative of the issue with the Court looking to the whole matrix of facts and circumstances of the particular situation to determine what does and does not constitute a de facto spouse.

Section 15B of the Act provides that when a de facto relationship ends gifts made to the former de facto partner in a Will are revoked. Essentially this means that the effect of the end of a de facto relationship is the same as a divorce or the end of a civil partnership. This revocation applies unless the Will-maker expresses a contrary intention in their Will. However, the issue is that whilst the dissolution of a legal marriage is clear cut the same does not necessarily apply to a de facto relationship because there is no divorce decree to prove the end of the relationship. If other relatives or family members argue that the relationship had ceased and therefore the gift under the Will revoked, then the onus is on the propounder to positively prove that the defining characteristics of a de facto relationship had not come to an end.

These issues were considered most recently by the Queensland Supreme Court in the case of the Estate of HRA Deceased [2021] QSC 29.

In this case, the deceased and the respondent were in a de facto relationship for a number of years. The deceased had no children. The deceased's estate was worth approximately $1.6 million dollars at the time of his death.

Under the Succession Act 1981 ('the Act"), de facto partners have the same rights as married spouses in relation to the inheritance of assets.

Prior to the deceased's death, the respondent moved from their shared residence to a retirement village. The deceased later moved to a nursing home.

The deceased had prepared a handwritten, unwitnessed document dated 12 February 2010 and described as the deceased's "only Will and Testament". This document was found in the deceased's residence. Under the terms of this document, the deceased left his residence to the respondent.

The respondent claimed that she was still in a relationship with the deceased notwithstanding they lived in separate accommodation. She filed an application seeking a declaration that she was the de facto spouse of the deceased and was entitled to his residuary estate on intestacy, that Letters of Administration be granted to her as Administrator or that the original handwritten document dated 12 February 2010 formed the Will of the deceased and that the deceased's residence be given to her.

The applicants, the deceased's niece and nephew, applied for Letters of Administration on intestacy of the estate of HRA deceased, to be granted to them as Administrators arguing that the respondent and the deceased were not in a de facto relationship for a 2 continuous period of at least two years prior to his death.

The Supreme Court was effectively asked to decide:

- whether the de facto relationship between the deceased and the respondent continued after they ceased living in the same residence; and
- whether the deceased's letter amounted to an informal Will.

A decision by the court that a de facto relationship existed between the deceased and the respondent during the whole of the two-year period immediately before the deceased's death would result in the respondent being entitled to the estate. (Either the gift of residence under the informal Will document, (if held valid), or the entire estate, as per the rules of intestacy).

If the court decided that a de facto relationship between the deceased and the respondent did not exist during the whole of the two-year period immediately before the deceased's death then the respondent would not be entitled to any benefit from the estate. The estate would be shared by the applicants, namely the deceased's niece and nephew.

The court took the view that the respondent had the capacity to maintain contact/involvement with the deceased but failed to do so after 2013. The court commented that even if one party in a relationship loses the capacity and ability to communicate meaningfully, the other party can still show commitment to the relationship by actions such as visits, letters, cards, flowers and gifts, arranging to receive updates from nursing staff and involvement in decisions about care.

In this case, the court concluded that the respondent failed to establish that she was in a de facto relationship with the deceased for a continuous period of at least two years ending on his death. With that conclusion, the respondent lost her claim for the deceased's entire estate as his de facto partner.

The court did not deal with the issue regarding the deceased's informal Will because even if the document was held to be a valid Will, any gift to the respondent under the document would have been revoked pursuant to section 15B of the Act.

This case highlights the need to maintain sufficient elements of the de facto relationship until the death of the partner to preserve that entitlement, whether or not the deceased partner had a Will. If you are in a de facto relationship and you live separately from your partner, it is critical that you continue to conduct yourself in a way that preserves your status as a de facto partner.

Grandparents and Grandchildren – The Legal Position

Tim Ryan
Director
Family Law

"Young people need something stable to hang on to – a culture connection, a sense of their own past, a hope for their own future. Most of all they need what Grandparents can give them."

– Jay Kessler

It is thought of as a "right of passage" for parents to evolve into grandparents and get the chance to commune with children without the responsibilities of parenthood. It's an opportunity to play with a child and be their friend and support without consequences.

Sometimes this evolution from parent to grandparent is fractured by a breakdown in relationships with their adult children. The breakdown may be with your own adult child or with their partner. There may be abuse in that relationship which is beyond your ability to repair. Sometimes parents use their children as leverage and to obtain financial gain from their grandparents

What happens to your grandchildren?

It is a sad reality that children are significant casualties of parental separation. It's hard enough when the separation is amicable. A child's feelings of stability are undermined and the concepts of love and nurture no longer provide protection from external forces. Everything changes.

If the separation of parents is not amicable, and possibly violent, the children suffer the most. Even if the separation is concluded the child's relationship with their grandparents can be disrupted. Parents can relocate or form a new relationship. The opportunity for grandparents to see grandchildren can be severely curtailed or be non-existent.

Changes in law

*The Family Law Amendment (Shared Responsibility) Act 2006 introduced significant changes to the Family Law Act 1975 (**"the Act"**).* The amendment

confirmed and emphasised the importance of the relationship of grandparents and grandchildren.

Grandparents are specifically recognised in the Act. The act sets out the objects and principles of Sect 60B to ensure that the best interest of the children are met by (I am paraphrasing relevant sections of the Act):

- protecting children from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence,
- ensuring that children receive adequate and proper parenting to help them achieve their full potential, and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives), and
- children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

A court will determine what is in a child's best interests in a primary sense which deals with essential conditions of health, safety and wellbeing and, assuming separation has occurred, having a meaningful relationship with both of the child's parents.

A grandparent's legal right

The additional considerations are most relevant to grandparents and formally recognise the significant role played by grandparents in children's lives. That is:

- any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views,
- the nature and relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child),
- the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either his or her parents or any other child or other person (including any grandparent or other relative of the child), and
- the capacity of each of the child's parents and any other person (including any grandparent or other relative of the child) to provide for the needs of the child, including emotional and intellectual needs.

The above summary is selected from relevant parts of the Act namely, Sect.60B and Sect. 60CC.

Sect. 60CA provides the overriding (or paramount) principle. That is, in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Each case is different

As in all aspects of family law the particular approach should be measured by the unique (almost always) set of circumstances relevant to the situation. The court will apply the principles as set out above with a view to achieving the summarised objectives. Whilst there is no automatic right as a grandparent to see your grandchildren the children do have a right to see you if it is determined that it is in their best interests (and, of course, the grandparent is agreeable).

Utilising the principles set out above, a court has the jurisdiction to consider a grandparent's role if it must determine what future care and living arrangements would be best for the child.

The best approach

It is trite to say that utilising the court process is not a preferred option to seeking arrangements to maintain a relationship with a grandchild. Apart from the cost (significant if you do not have access to public assistance) the acrimony that can simmer between parents and grandparents may create barriers that are difficult to overcome.

Grandparents should always try to discuss options and seek agreement to arrangements. Mutually agreed arrangements usually work without any lingering resentment that sometimes arises from those that are court ordered.

Parenting plans

Grandparents can instigate mediation and seek assistance from a Family Relationship Centre. All parties are usually invited to mediate a sensible arrangement that can be documented by way of a Parenting Plan. These plans are utilised by parents and deal with issues concerning the child's welfare.

A Parenting Plan can include a grandparent or other relative of the child. The plan must be signed by both parents so if there is no agreement the grandparents cannot be included. A Parenting Plan is not enforceable by a court but can be relied upon as a reflection of the intent of all parties when the plan was agreed.

The courts can consider the content and the intentions of the parties if the matter is litigated.

If all else fails

A grandparent is entitled to apply to the court if negotiation and/or mediation fail. The court will only grant an application if, upon consideration of the goals and principles set out above the application is considered to be in the child's best interests.

The circumstances of care for the child may be such that a grandparent may feel it necessary to apply for custody or access. The court must be satisfied that the parent

is unable to care for the child or the child is in danger.

If the court is satisfied that access or custody (to the grandparent/s) is in the child's best interests a further order would be considered so as to confer upon the grandparent/s parental responsibility which allows the grandparent to make decisions for the child (schooling, health, living arrangements and religion) without the need to consult with the parents.

Alternatively the grandparent may simply be seeking quality time with his or her grandchild. That is an easier decision for the court to make although it must still be satisfied that the decision is in the best interests of the child.

The Act promotes mediation and discussion as a means to resolve disputes regarding children. Litigation should be regarded as a last resort. Sometimes there is no choice and the Family Court is set up and available to make a decision where only a legally binding resolution can succeed. It is important to note that it is compulsory to attempt to reach agreement by mediation before commencing proceedings.

A certificate must issue from the mediator noting your attempts to mediate and be made available to the court before any application will be accommodated.

In summary

It is important to understand the dynamics that the court applies. The court will have regard to and consider arrangements for children on the basis that they have a right to a meaningful relationship with their grandparents. Arrangements that the court may put in place will not be as extensive as that between a parent and his or her child. In certain circumstances the orders for care of a child by a grandparent/s may be extensive and a subjective approach is always applied taking into account the welfare needs of the child.

Obviously, a grandparent must actively engage with the parents in negotiation, mediation and, if necessary, the court process in order to warrant consideration by the court when determining care arrangements.

Grandparents will invariably be successful in obtaining orders or arrangements for some form of communication and time with their grandchildren.

The child's needs and the availability of the grandparent will determine the extent of the arrangements. In normal circumstances it is expected that grandparents will work with the parents rather than replace them. Sometimes it may be appropriate for a grandparent to step back and not add to the conflict.

All these variables are "packaged" so that a determination can be made taking into account the child's interests, the grandparent's availability and the particular circumstances of the case.

Key takeaway

It is important for grandparents to consider the impact that their involvement will have on all parties including the parents and to make sure that their goal is child focussed and conducive to a child's ongoing welfare. An important takeaway from this is that a

child's right to have a meaningful relationship with his or her grandparents is enshrined in the Act and is not dependant on the whims and fancies of the child's parents.

If you have questions seek the assistance of a family lawyer. Obtain advice as to your options and then attempt to negotiate an appropriate outcome. If all else fails our team of family law specialists can provide appropriate and cost effective guidance to assist you in achieving your goal with regard to your relationship with your grandchild.

Sunset Dates

A sunset date in a property contract is the latest date by which a party must fulfil a condition in the contract. Failure to do so will often lead to a right to terminate the contract.

A seller and a buyer are free to negotiate sunset dates but there is legislation in place that governs sunset dates in property contracts.

- Land Sales Act 1984 requires a seller to settle the sale of an off the plan contract for flat land (non-strata title) within 18 months of the contract date.

- Body Corporate and Community Management Act 1997 requires a seller to settle the sale of an off the plan contract for strata title property no later than 5 ½ years from the contract date.

From the seller/developer's perspective, it will want a long sunset date to allow sufficient time to obtain development approvals, funding and to carry out the necessary construction works.

Buyers need to be wary of entering into long term contracts as a buyer's circumstances will be very different and can change over time. Property values can go up and can come down over the course of a long term contract. If values come down then that will affect the buyer's ability to obtain a loan on the property.

A buyer's personal circumstances may change. They may get married, divorced, move interstate or move overseas or become unemployed. Any of these situations may lead to a buyer wishing that he or she was not tied into a long term contract.

So buyers need to think long and hard about the ramifications of entering into long term contracts and to seek legal advice about sunset dates and the contract terms generally before entering into the contract.

Love Thy Neighbour

Sylvia Hoefnagels
Senior Associate
Commercial Litigation

Wherever you live, you will likely have one or more neighbours. Hopefully everyone will get along, but often enough, disputes between neighbours arise.

The most common disputes we see in our litigation and disputes team are regarding the following:

1. Dividing fences
2. Retaining walls
3. Trees
4. Noise
5. Pollution
6. Water run off
7. Bad behaviour
8. Dogs/animals
9. Vermin etc.
10. Encroachment

We can assist you with any of these.

In this edition, we will discuss dividing fencing disputes.

You may need to install a fence or repair a fence on the boundary line with your neighbour/s. You do not have to pay for the cost of this on your own, as your neighbours can be ordered by QCAT to pay up to half of the cost of the fence, depending on the circumstances.

It is always best to talk to your neighbour with what you would like to do with the dividing fence. If you can resolve the issue without it turning into a dispute, this is always preferred. Knowing where you stand will assist you in negotiating a successful outcome.

So, in general, where do you stand?

Firstly, what is a **fence**? It can be any structure higher than 0.5m (including a natural structure), that separates the land of adjoining owners. It includes e.g. a waterway, or a cattle grid, but does not including a retaining wall, or part of a building.

Secondly, you will need to find out what the **common boundary fence** is in your neighbourhood. For example, if most properties in your neighbourhood have 1m chicken wire fencing, then that is your common boundary fence. However, if most properties in your neighbourhood have 1.8m colorbond fencing, or a 1m concrete block fence, then that is your common boundary fence.

Whether the fence is a new fence, or a replacement, the same principle applies. Each neighbour pays half of the cost of the common boundary fence as is between each neighbour. If you have 3 neighbours, then they each pay half of the common boundary fence as between them each and yourself.

What happens if your common boundary fence is e.g. 1m chicken wire fencing and you want to install a 1.8m colorbond fence? You can agree with your neighbour to each pay half, but if your neighbour does not want a colorbond fence, or does not disagree with a colorbond fence but does not want to pay for it, then you can only force your neighbour to pay half of the cost of chicken wire fence. The balance of the cost will have to be borne by you.

If your neighbour does not agree, can you just build it anyway? Unless there is an urgency to the fencing work, then you cannot. Where the fencing work is urgent, for example when the dividing fence is damaged, or destroyed, then you can carry out the fencing work to restore the dividing fence to a reasonable standard (bearing in mind the state of the fence before it was damaged or destroyed).

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[1]We will talk more about this in a later edition

You will need to issue your neighbour/s a Notice to Contribute[2], which includes a notice to fence, allow them one month to respond and then proceed to one of these options:

- Use the free mediation service through a Dispute Resolution Branch;
- Apply to QCAT (this has to be done within 2 months of giving the Notice to Contribute)

This information is general in nature, and the circumstances and facts of your matter may change the outcome. If you require further assistance or advice, we can assist you further during a Consult.

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[2]https://www.publications.qld.gov.au/dataset/notices-to-neighbours/resource/1b83edfc-9a08-4ced-8a56-fdf5647c5bc9

Drinking and not driving? – Being "in charge of a vehicle"

Tanya Dower
Senior Associate
Criminal & Traffic Law

You wouldn't jump behind the wheel of your car and drive home after a few drinks, but did you know that simply sitting or sleeping in your car could lead to you being charged with drink driving?

Queensland law doesn't draw a distinction between driving, attempting to drive or being "in charge of" a motor vehicle. If you are caught doing any of these things while over 0.05 (for open licences) you will be charged with drink driving.

So what does it mean to be "in charge of a motor vehicle"?

The traffic legislation does not require you to be driving a motor vehicle. A person is in charge of a motor vehicle if they appear, act or behave as the driver. Basically it looks at whether you are in a position to exercise control over the vehicle and will turn on the individual matter.

Some examples of where people have been convicted of being "in charge" include:

- Sitting in the driver's seat while the engine is running
- Sitting in the driver's seat while the car is turned off, with the keys

Queensland law doesn't draw a distinction between driving, attempting to drive or being "in charge of" a motor vehicle. If you are caught doing any of these things while over 0.05 (for open licences) you will be charged with drink driving.

- Sleeping in the driver's seat
- Sleeping in the passenger's seat with the car keys
- Being outside the vehicle with the keys where they are in a position to drive it

A defence does exist to the charge. This can apply if:

- you were manifested an intention not to drive the motor vehicle
- you were not so intoxicated that you were incapable of forming an intention not to drive
- the motor vehicle was not parked a way in that was a danger
- and you haven't been convicted of an alcohol or drug- related driving offence in the last year.

Mandatory periods of disqualification mean you **will** lose your licence for drink driving. It is important to speak with an experienced traffic lawyer to keep that disqualification as low as possible or to apply for a restricted work licence.

Have you been charged with being "in charge of a motor vehicle"? Could you have a defence available?

We are available at any of our local offices or by telephone or video-conference.

Get the best representation and book a Criminal & Traffic Law Consultation for $149.

Speak to our expert lawyers on 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

Connect with

Ryan Murdoch O'Regan Lawyers

mail@rmolaw.com.au

www.rmolaw.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
31 Middle Street
(Cnr Doig St)
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