Offence-free period – when does it commence?

Issue: Should the offence-free period be taken to have commenced from;

- **the date of the last driving offence, or**
- **the date of the last conviction for a driving offence?**

INTRODUCTION

At the time of writing, there have been no reported Local Court decisions on this issue. Neither have there have been any appeals to the Supreme Court to provide certainty on the correct approach in determining when an *offence-free period* should be taken to have commenced.

This document has sought to summarise the case for an interpretation of the legislation that adopts the date of offence as the commencement of an offence-free period. It is acknowledged that other arguments exist and that other interpretations of the legislation are open.

Obviously you must exercise your own forensic judgement before incorporating any of the materials or arguments in any submissions that you might make.

The Driver Reform Implementation Team at Legal Aid NSW would be interested to hear of any matters where this issue has arisen and, to the significant disadvantage of the applicant, the date of conviction was found to be the point at which the *offence-free period* was taken to have commenced.

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23rd July 2018

When does the offence-free period commence?

Firstly a note about the question itself.

In determining whether the appropriate *offence-free period* has been demonstrated, strictly speaking, the question is not one of when the *offence-free* period may have commenced.

Section 221B(1) provides the court with the power to make an order, and 221B(1)(a) is in effect, a disentitling provision. All 221B(1)(a) requires is that the court be satisfied that in the preceding 2 or 4 years, no event of the type described in 221B(1)(a) has occurred. In considering an application, the court is not required to consider or determine when the offence-free period commenced.

Having said that, the issues raised by section 221B(1)(a) may be more conveniently discussed as though it were an exercise in determining the starting point of an offence-free period, and accordingly is discussed in this way here.

Since commencement of the legislation, there have been varying approaches to the question of when the *offence-free period* commences. With reference to the last driving offence for which a conviction was imposed, does the offence-free period commence from;

- the date of the **offence,** or
- the date the **conviction** was imposed?

For the reasons shortly to be expanded upon, it would seem the correct approach should be that the *relevant offence-free period* commences from the date of the last offence, and not from the date of the conviction for that offence.

Currently when a person applies to the Roads and Maritime Service (RMS) for a copy of their driving record, the RMS will provide the driving record along with one of two covering letters. The view of the RMS as to the persons eligibility to apply under the scheme for disqualification removal, will determine which cover letter is provided. When RMS considers the person to be eligible, the cover letter will provide this opinion. In cases where, in the view of the RMS, the person is not eligible, the letter is silent on the issue of eligibility – no opinion is provided. Regardless of which covering letter is provided by the RMS, an application may still be made and the driving record and covering letter must still be attached to that application.

In considering whether the person has completed the *offence-free period,* the RMS regard the offence-free period as commencing from the date of last conviction. It is important to bear this in mind when in receipt of a driving record accompanied by an RMS covering letter which does not indicate a view that the applicant is eligible to apply under the scheme. Consider whether there would be a different outcome if the offence-free period was calculated from the date of offence as opposed to the date of conviction.

As to whether it is advisable to proceed with an application in circumstances where the relevant offence-free period has been served when calculated from date of offence, but not when calculated from date of conviction – see **Cases where the 'offence date or conviction date' argument matters!!**

Date of offence or date of conviction – on what does it turn?

Essentially the question is to be resolved by the interpretation of section 221B(1)(a), which states;

> *1) The Local Court may, by order on application made in accordance with this Division, remove all licence disqualifications to which a disqualified person is then subject if:*
> *a) the disqualified person has not been convicted of any driving offence for conduct during the relevant offence-free period before the removal of the licence disqualifications, and*

There are a number of reasonably settled principles of statutory interpretation to be borne in mind when interpreting any statutory provision. With these principles in mind, I suggest that it is relatively clear that the effect of the provision above, and the intention of parliament, is that the relevant offence-free period should be taken to have commenced from the date of the last driving offence, and not the date of conviction for that offence.

Note: References will be made to the *literal* and *purposive* approaches to statutory interpretation. This is not intended to be, and nor could it possibly be, in any way a comprehensive discussion of these principles. What follows is short reasoning which seeks to demonstrate that an interpretation based purely on the literal approach and one with a more purposive approach are both pulling in the same direction.

Date of offence;

The literal approach to statutory interpretation;

Perhaps the clearest argument in favour of an interpretation that fixes the date of offence as the commencement of an offence-free period is to give the words of the provision their ordinary and natural meaning.

Consider the words used in 221B(1)(a) - "*the disqualified person has not been convicted of any driving offence for conduct during the relevant offence-free period before the removal of the licence disqualifications" (emphasis added).*

The underlined portion seems to make it clear that it is the conduct (commission of the offence) which is the relevant factor so far as the timing of the offence-free period is concerned. *Conviction* appears as a necessary pre-condition only (there must have been a conviction for the offence to be relevant), but it does not have any work to do so far as the calculation of time. This is achieved by the underlined portion.

To adopt an interpretation that it is the time of conviction that is relevant, would leave the words "for conduct" with no work to do. If date of conviction was intended to be the relevant factor, the section would read perfectly well, and achieve that purpose, if the words "for conduct" were deleted.

There is the well-established principle of statutory interpretation that one must strive to give meaning to every word and one cannot assume that the legislature has included words which are unnecessary or superfluous. A comparatively recent High Court of Australia statement of the principle can be found in *Project Blue Sky v ABA* [1998]; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998); Relevantly, at paragraph 69, McHugh, Gummow, Kirby and Hayne JJ said;

> "*Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision[52]. In The Commonwealth v Baume[53] Griffith CJ cited R v*

Berchet[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

To illustrate this point with section 221B(1)(a), consider the two options below;

1. *the disqualified person has not been convicted of any driving offence for conduct during the relevant offence-free period before the removal of the licence disqualifications.*

2. *the disqualified person has not been convicted of any driving offence during the relevant offence-free period before the removal of the licence disqualifications.*

Option 1 reads as though is the date of conduct (offence) that is determinative.
Option 2 reads as though it is the date of conviction that is determinative.

Option 1 is as it appears in the Act, option 2 has had the words "for conduct" deleted.

Note: The Local Court Bench Book does not reproduce section 221B(1)(a) in full – it substantially quotes the section, however the words "for conduct" have actually been omitted. Whilst as a matter of practice one ordinarily would do so, if you are making submissions on 221B(1)(a), ensure the full text of the legislation is available and referred too.

The purposive approach to statutory interpretation;

Often the purpose of the legislation, or the mischief for which it was created, will have a degree of impact upon the interpretation of the words of the statute. It can result in the words of the statute being ascribed a meaning that is not necessarily reflective of a literal interpretation of those words. Regard may be had to extraneous materials, so more than the words of the statute itself, in order to determine the intention of the legislature, and then interpret the legislation within the context of the legislature's intention.

The underlying purpose of Division 3A of Part 7.4 of the Act is surely to provide a pathway for disqualified drivers to return to lawful and regulated driving. This was indeed a phrase used in much of the material at the time of the amendments, and still appears under the heading of 'Rationale' on the "*Driver licence disqualification reforms"* page of the Justice NSW website.

I think it would be universally accepted that the major reasoning behind the inclusion of an *offence-free period* is that it requires a person to demonstrate a change in their behaviour before having the opportunity to apply. They must have been complaint with their disqualifications and have refrained from driving for the required period.

Linking the offence-free period to the date of conviction removes the calculation of time from the conduct of the applicant and instead links it to the process of the court and the timing of the recording of a conviction. To do so, artificially extends the offence-free period by the time intervening between the offence and the conviction.

In most cases the time between the commission of the offence and imposing a conviction will be relatively short, but there will be notable exceptions. For example, many who advise or act for clients in Local Court matters will have seen occasions (usually arising after a motor vehicle collision) where the police officer has filed a Court Attendance Notice in the days before the matter would have become statute barred – in which case the delay is in the order of 6 months before the matter even commences. In 'camera recorded offences' the statute of limitations is

extended to 12 months. In cases where there has been an outstanding warrant for the arrest of an accused, the delay can be much more.

Adopting the date of conviction as the relevant date would see these persons disadvantaged by delay, regardless of the reason for delay. The patent unfairness of this should be seen as reason to conclude that the words "for conduct" found in 221B(1)(a) were included in order to avoid this unfairness. The unfairness illustrated here would be removed if the offence-free period was calculated to commence from the date of the offence.

Adopting the date of conduct as the commencement of the *offence-free period* would more align with the general purpose, policy and context behind the provision. Division 3A was introduced along with other amendments which saw the abolition of the HTO Scheme, a significant reduction in penalties for unauthorised driving offences, the provision for concurrent rather than accumulating disqualification periods, and of course 3A itself provides for the new scheme for the removal of disqualifications. Against this backdrop, it seems the general purpose and policy of the provision is clear. To provide that pathway back to regulated and lawful driving, but only to those who have demonstrated a change in their behaviour by complying with their disqualification periods for 2 or 4 years. It would seem at odds to extend the time before a person can apply under the scheme by some arbitrary linking to the recording of a conviction, rather than to the conduct of the applicant.

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981); 147 CLR 297 is much relied on for the proposition that a literal interpretation may be displaced by another construction where the literal approach will lead to absurd or inconvenient results. At 321 per Mason and Wilson JJ;

> "*Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended."* [emphasis added]

I would question whether there are in fact 'two strongly competing interpretations'. But perhaps if the 'date of conviction' interpretation is advanced, the authority above may provide some support for the 'date of offence' interpretation. Considerations of fairness and convenience are certainly more likely to come to the aid of the 'date of offence' interpretation.

Similarly, *Project Blue Sky v ABA* [1998]; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998) provides at paragraph 70;

> *"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In Commissioner for Railways (NSW) v Agalianos[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].* [emphasis added]

Consistency throughout the Act.

It may be suggested that an interpretation of 221B(1)(a) which fixes the offence-free period as commencing from the date of conviction is more consistent with other provisions within the Act and should therefore be preferred, even if such an interpretation does not accord with the literal meaning of the words used.

It is true that a number of provisions in the Road Transport Act 2013 operate on the basis of the date of conviction as being the trigger. For example, it is the date of conviction, not the offence that will determine whether a major offence is a second or subsequent offence in 5 years, see section 205 of the Act. However, there is no conflict between this particular example or other similar provisions and 221B(1)(a) of the Act. They are not interlocking provisions in any way.

See again *Project Blue Sky v ABA* [1998]; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998) where at paragraph 70 McHugh, Gummow, Kirby and Hayne JJ said ;

> *"A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."* [emphasis added]

Division 3A of Part 7.4 of the Act sets up a 'stand-alone' scheme for the removal of disqualifications. An application under this Division is dealt with entirely with reference to provisions within the Division – there is no interplay between Division 3A and section 205 or any other similar provisions within the Act. No conflict arises which is required to be alleviated by adjusting the meaning of competing provisions.

Whilst its relevance may be entirely questionable given these proceedings are not 'criminal proceedings' and the provisions are not penal provisions as such, it is worth mentioning the House of Lords judgement in *Sweet v Parsley* [1970] AC 132. This case concerns *mens rea* and *strict liability* and construing the intention of Parliament. In delivering judgement, Lord Reid said;

> *"..it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."*

Given this is an application proceeding, it is not strictly on point, however adopting the interpretation that the *offence-free period* commences from the date of conviction is adopting the interpretation that is least favourable to the applicant and the one that can lead to a significant and unfair disadvantage to the applicant.

Cases where the 'offence date or conviction date' argument matters!!

Often the date of conviction is relatively close in time to the date of the offence – perhaps in most cases, by the time they come to you, the client will have served the offence-free period regardless of which date is adopted.

In cases where the offence-free period has been served when calculated from the offence date, but not from the conviction date – should an application be pursued?

Whether to apply now or wait, depends very much upon the period of time before they would become eligible to apply under the 'conviction date' argument. It is important to bear in mind that there is no right of appeal to the District Court if an application is refused. If an application is rejected by the court, a further application cannot be made within 12 months of the dismissal of that application.

Given there is no appeal option – if, on the conviction date argument, your client would become eligible in a relatively short period of time, they may be best advised to wait. Waiting avoids the argument and avoids the risk of an application being refused for want of completion of the offence-free period.

The longer the period a person would be required to wait – the less the utility in waiting. If waiting would require a period of 12 months or more – then there is no risk in applying immediately and running the 'date of offence' argument.

There are a number of circumstances where you may be required (or choose) to proceed with an application and argue that the date of the offence is the appropriate date from which the *offence-free period* should commence, some examples of when this might occur are;

- The timing of an application is obviously a matter determined by your client's instructions. You may be instructed to lodge an application in cases where the offence-free period has been served when calculated from offence date, but not from the date of conviction, or

- Such an application has already been lodged, you have now come into the matter and you are not instructed to withdraw the application and reapply once the later date has passed.

  Note: It may not be necessary to withdraw and reapply. An adjournment might sufficiently cure an application which was lodged prior to the 2 or 4 year period being served when calculated from last conviction. Whether an adjournment will suffice, would likely depend upon the interpretation adopted of the words *"…before the removal of the licence disqualifications…."* found in 221B(1)(a). It would seem that the 2 or 4 year period need only be served by the time the court is to make any order removing disqualifications, not necessarily at the time the application was lodged. In which case, an adjournment could cure the timing issue rather than withdraw and re-file. If the date on which the person would become eligible under the 'conviction date' argument is only weeks way, then perhaps the court may be persuaded to adjourn. In cases where it is months away, clearly withdraw and reapply at the appropriate time is the likely option.

Conclusion

At the time of writing, there have been no reported Local Court decisions on this issue. Neither have there have been any appeals to the Supreme Court to provide more certainty on the correct approach in determining when an *offence-free period* should be taken to have commenced.

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