

EXAMPLE SUBMISSIONS

ISSUE: *Relevant offence-free period, whether a 4 year or 2 year period should apply*

INTRODUCTION

These submissions are intended for an application for the removal of current licence disqualifications where an issue for initial determination is whether the “relevant offence-free period” applying to the applicant is 4 years or 2 years.

Currently, the approach of the Roads and Maritime Services (RMS) is that a conviction for any *major offence* (or other 4 year category offence) in the past 4 years imposes a 4 year offence-free requirement upon the applicant – regardless of whether the disqualification for that offence has been served in its entirety and therefore, not one of the disqualifications sought to be removed.

The following are example submissions provided for your assistance. They are de-identified and an adapted version of actual written submissions that were prepared by the Driver Reform Implementation Team.¹

It is acknowledged that other arguments exist and that other interpretations of the legislation are open. Obviously you must satisfy yourself as to the appropriateness of the material before considering including them in any submissions that you may make.

¹ This matter is still before the Local Court and has been adjourned for the applicant to complete a *driver education course*. In this matter, the court has accepted that the applicant is subject to a *2 year offence-free period*. At present, there have been no higher court decisions on this aspect of the legislative scheme.

The submissions

ISSUES

1. Is an applicant eligible to apply for removal of current licence disqualifications where they have a conviction for a major traffic offence in the last 4 years, the disqualification for which has now expired?
2. Does the definition of “licence disqualification” in s. 221A of the Act which refers to consecutive or concurrent disqualifications, mean that the expired disqualification for the major offence in the last 4 years is considered part of current disqualifications, and hence caught by the 4 year offence-free period?

ROAD TRANSPORT ACT 2013

The current scheme for the removal of any current period(s) of disqualification is contained within Division 3A of Part 7.4 of the Act. The scheme commenced on 28/10/2017 when amendments were introduced to the Act by the *Road Transport Amendment (Driver Licence Disqualification) Act, 2017*. Section 221B(1) of the Act empowers the Local Court to remove licence disqualification periods.

Essentially there are three criteria on which the court must be satisfied before making an order for the removal of licence disqualifications under section 221B(1) of the Act. These criteria are;

1. That the applicant has never been convicted of any of the serious offences listed in section 221D(1) of the Act,
2. That the applicant has not been convicted of any driving offences during the *relevant offence-free period* – section 221B(1)(a), and
3. That the court considers it is appropriate to do so – section 221B(1)(b).

This submission relates only to point 2.

Particular aspects of the scheme, and a person’s eligibility to apply, is dependent upon the individual’s driving record. The definition section of the Division, (s. 221A) refers to a series of offences and mandates whether a person is required to demonstrate a 4 year offence-free period or a 2 year offence-free period before an application for disqualification removal can be made. Current disqualifications for serious offences require a 4 year offence-free period before removal of those disqualifications will be considered, whilst those disqualifications from offences considered to be less serious, and habitual offender declarations, attract a 2 year offence-free period.

THE APPLICANT’S CONTENTION

It is the Applicant’s submission that as a matter of statutory construction, the relevant offence-free period in this case is 2 years. It is submitted that this is the natural consequence upon a reading of the relevant provisions, and affording the words used their natural and ordinary meaning.

The key to the Applicant’s submission is that the exercise in determining whether a 2 or 4 year offence-free period will apply, is to be determined with reference to the current disqualification periods that the Applicant is seeking to have removed, and not those periods which have been served and are no longer existing. This interpretation of the Act emerges from the definition of *relevant offence-free period* found in section 221A of the Act.

At the outset, the requirement to be free of convictions for any driving offences throughout the *relevant offence-free period* stems from section 221B(1) of the Act. The court is not empowered to make an order removing disqualifications unless this requirement has been satisfied.

Section 221B(1)

(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

(b) the Local Court considers that it is appropriate to do so.

Note.

See section 221D for persons who are not eligible to apply for the removal of licence

Each of the phrases in bold have been defined in section 221A of the Act.

Disqualified person is simply a person subject to licence disqualification.

Relevant offence-free period, in relation to a disqualified person who has applied under this Division **for the removal of his or her licence disqualifications**, means:

(a) 4 years, if any **of those licence disqualifications** was imposed because the person was convicted of:

(i) a major offence, or

(ii) an offence of exceeding a speed limit prescribed under this Act by more than 30 kilometres per hour, or

(iii) an offence against section 115 (1), 116 (2) or 117 (2), or

(iv) any other offence prescribed by the statutory rules, or

(b) 2 years, if all **those licence disqualifications** were imposed by this Act because the person was declared (or taken to have been declared) an habitual traffic offender under Division 3 (as in force immediately before its repeal), or

(c) 2 years, in any other case

(Emphasis added)

The application for removal of any licence disqualification(s) can only refer to current disqualifications. The court is not empowered to reach back into the past and remove disqualification periods that have been served in their entirety. There would be no utility in applying to remove prior concurrent disqualification periods if they have expired.

Affording the words in the provision above their natural and ordinary meaning, it is submitted that the process the definition of *relevant offence-free period* calls for, is an examination of the applicants driving record to determine **those** offences from which the disqualifications arise, being those disqualifications sought to be removed by the application. With this list of offences having been determined, if any of them fall within the 4 year category, a 4 year offence free period should apply. If they all fall into the 2 year category or 'other' category, then a 2 year period is appropriate. It thus

links the offences in each of the relevant offence-free periods to the offences which resulted in the disqualifications which are to be removed.

The legislation does not say that there must be a 4 year offence-free period if the applicant is convicted of any major offence in this period. Whilst this might be a simplistic way of looking at the legislative scheme, it is not consistent with the wording of the Act.

The words used make it clear that the disqualifications which determine the relevant offence free period are **those** disqualifications which are current and which the applicant is seeking to have removed.

Those words of the Act must be given their ordinary meaning. They must be looked at in the context of a scheme allowing people to seek relief from lengthy disqualification periods. The public safety considerations referred to above mean that a person's traffic record will determine how quickly they can seek to have existing disqualification periods removed.

In cases of statutory interpretation where there is some ambiguity in the words used, the Courts might refer to the Second Reading Speech and the Explanatory Note to the legislation to find guidance as to the intention behind the words used. The initial submission of the Applicant is that there is no ambiguity in the words used in ss 221A and 221B.

However, in the event the Court is not convinced of the Applicant's interpretation of these two sections, we turn to the Second Reading Speech and the Explanatory Note to see what guidance is given. The Attorney General, The Hon Mark Speakman SC, when introducing these amendments to the Legislative Assembly on the 12th September 2017, said in the Second Reading Speech;

"...the bill will allow drivers who do the right thing and remained compliant with their disqualification period to apply to the Local Court to have their remaining disqualification period lifted. Applicants will need to remain compliant with their disqualification period for two years or four years depending on the seriousness of the offence."

The Second Reading Speech goes on to give some more detail about the scheme. In explaining the relevant offence-free periods, the Attorney General says:

"The court will only lift an order or reduce a driver disqualification period if the person has not been convicted of any driving offence for the duration of the relevant offence-free period. This will be four years for any disqualification arising from serious offences and two years in other cases—for example, where the applicant has been convicted of driving while disqualified, unlicensed driving or low level speeding offences." (*emphasis added*)

The underlined portion would seem to align with the applicant's contention. The underlined words are similar to the words used in the legislative provisions already discussed. The use of the word 'for' suggests, 'belonging to' or 'in connection with'. Past disqualifications, even those which were once concurrent to existing periods, are not to be removed and therefore cannot be a subject of the application. The natural consequence is that the *relevant offence-free period* definition is not setting a regime for those disqualifications which have expired.

Licence disqualification removal relates only to current periods of disqualification. The offences resulting in current periods of disqualification are the ones to be considered when determining whether the relevant offence-free period is 2 or 4 years. There is no ambiguity about this. It is what the Act says. A general description of the scheme in the Second Reading Speech seems to give support for this. If it is thought that other interpretations are available from the Second Reading Speech, it cannot read down the logical interpretation of the scheme based on the clear meaning of the words used in the legislation.

The Explanatory Note to the legislation also gives a very general outline of the scheme in terms similar to that in the Second Reading Speech. Under the heading **Removal of outstanding driver licence disqualification periods**, it describes the scheme as follows:

“to enable a person who is disqualified from holding or obtaining a driver licence as a consequence of committing motor vehicle offences or being declared as an habitual traffic offender to apply to the Local Court for an order removing his or her driver licence disqualifications. An order may be made if the person has not been convicted of any driving offence for the relevant offence-free period (being 4 years for disqualifications arising from certain serious offences and 2 years in other cases) and the Local Court considers that it is appropriate taking into account relevant circumstances such as the safety of the public, the person’s complete driving record and the person’s family and employment obligations.” (emphasis added)

The same observations apply here as they do to the Second Reading Speech. This is a general description of a scheme which delays disqualification removal based on the offences which led to the disqualifications that the applicant is seeking to have removed. In the definition of *relevant offence-free* period, the Act does not refer to any and all convictions and neither does the Second Reading Speech or Explanatory Note.

The applicant highlights the use of the term **complete driving record** in the Explanatory Note. This term is adopted when describing the considerations for determining the appropriateness of an order. The use of this term gives some support to the contention that in the calculation of the relevant offence-free period, the record is to be considered in a limited way. As contended by the applicant, limited to those offences for which disqualification periods are sought to be removed.

LICENCE DISQUALIFICATION DEFINITION

The second issue to be considered is whether the definition of *licence disqualification* means that an expired disqualification for a *major offence* is considered part of the current disqualifications and hence caught by the 4 year “offence-free period”.

The definition of “licence disqualification” in s. 221A of the Act is as follows:

licence disqualification means a disqualification (imposed before or after the commencement of this Division) from holding or obtaining a driver licence that is imposed by a court or by the operation of this Act, and includes any consecutive or concurrent licence disqualification and any period of disqualification which does not commence until other disqualifications or other periods of licence cancellations or suspensions are completed.

As already noted, this scheme is aimed at the removal of current licence disqualifications. There is no utility in seeking the removal of licence disqualifications that represent a continuous chain of disqualifications in the past which have now expired. The definition of “licence disqualification” does not seek to do this. It simply seeks to clarify that a person who is disqualified from holding a driver licence may have multiple consecutive disqualifications. It is forward looking in describing licence disqualification as either single or multiple disqualification periods.

If an approach were to be adopted that the *licence disqualification* definition did require a reaching back and taking into account expired disqualifications, merely because they were concurrent or consecutive disqualifications in a chain leading to current periods of disqualification, the problem arises as to how far this may reach back. This interpretation would have an unintended backward reach. Given the accumulating nature of disqualifications for Driving Whilst Disqualified offences (prior

to 28/10/2017 at least) and the addition of 5 year habitual offender disqualifications, again operating cumulatively, the court will encounter many applicants who have a 'chain of disqualifications' which extend for many years back into the past. It would not be unusual to see applicants who have an unbroken chain with expired disqualifications stretching 20 years back.

I would suggest that such an effect is not what parliament intended when introducing the scheme. There is certainly nothing in the Second Reading Speech or Explanatory note to suggest that the issue of whether a 2 or 4 year offence-free period applies would be dependent upon historical matters. Yet this would seem to be the outcome if the *licence disqualification* definition was afforded an interpretation that permitted a looking back at consecutive periods.

Not only would this circumstance appear to be contrary to the purpose behind the Act, it could also lead to perverse outcomes. Consider two persons who each have a major offence on their record 20 years ago and both have long since served the period of disqualification for this major offence. If person 'A' has remained disqualified since that time on account of accumulating periods of disqualification for Drive Whilst Disqualified offences and Habitual Offender Declarations, then person 'A' would be in the 4 year offence-free category by virtue of the major offence 20 years ago. Whereas person 'B' may have had a small gap in their disqualifications, be it a day, a week or a month anywhere in the past 20 years and the break in the chain would mean for person 'B' the 20 year old major offence would not place them in the 4 year category.

This uncertain reach back into the past would arise partly from the wording of the *licence disqualification* definition. The definition is absent a link, or a limiting term for the concurrent or consecutive disqualifications. To what must a disqualification be consecutive or concurrent for it to fall within the definition? The definition does not require it to link directly to an existing or current period of disqualification, hence, it seems once at large to reach backwards, and it can extend for many years, even years beyond the example referred to above.

It appears that the RMS view is that they do not currently consider that major offences 'in the chain of disqualifications' will trigger a 4 year offence-free category requirement if that major offence was more than 4 years ago. The problem with this approach is that if it is accepted that *licence disqualification* does require a looking back in the chain, there is nothing in its terms to limit it to looking back only 4 years.

For the reasons given above, if it were accepted that the literal approach to the *licence disqualification* definition provided for a 'link in the chain' type approach, (of which the applicant argues to the contrary) this interpretation would not be in accordance with a purposive approach to interpreting the legislation. Given the perverse outcomes that could flow in the example provided, and what would seem an unfair outcome for Person 'A' when he or she is in substantially the same position as Person 'B', the purposive approach should prevail.

A comparatively recent High Court of Australia discussion of statutory interpretation principles 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;

"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]

The applicant contends that on balance, any suggestion that a literal approach to the *licence disqualification* definition provides for a 'link in the chain' interpretation ought to be subordinate to the more purposive approach described and approved of by the High Court in the excerpt above.

Further, *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]

To prefer the interpretation of *licence disqualification* that does not provide for the reaching back into the past, along a supposed 'chain of disqualifications' and allowing somewhat historical matters to impact, is the approach that will “produce the fairer and more convenient operation”. The applicant contends that this is also the appropriate approach on a literal interpretation of the provisions, but for sake of completeness suggests that even if the contrary is found, the purposive approach should prevail.

As previously discussed, with reference to Second Reading Speech and Explanatory Notes, there is nothing in the approach contended by the applicant that is inconsistent with the demonstrated intention of the legislature. The comments found in both the speech and the notes support the contention that the relevant offence-free period should be determined with reference to the particular disqualification periods to be removed, and the offences from which they arose.

CONCLUSIONS

Section 221B gives the Court the power to remove all licence disqualifications to which a disqualified person is **then subject**. The section then goes on to refer to that power being dependent upon the applicant not having been convicted of any driving offences during the relevant offence-free period. The definition of *relevant offence-free period* is clear in its terms. It links the calculation of the offence-free period to those disqualifications which are sought to be removed. Whilst the definition of “licence disqualification” in s. 221A is wide enough to include consecutive periods of disqualification, for the purpose of disqualification removal under the Act, it is clear that it is only referring to disqualifications to which the applicant is then subject.

The Local Court has the power under s.221B to remove all licence disqualifications to which a disqualified person is then subject, depending on the applicant having been offence free for the relevant period and satisfying the Court that disqualification removal is appropriate. The Local Court has no power to remove licence disqualifications to which an applicant is not subject. The definition of licence disqualification, insofar as it relates to consecutive periods of disqualification, is forward looking. It cannot refer to expired disqualification periods, even those which happen to be in a chain of consecutive disqualifications.