

THE CONDUIT

19
SPRING

QUARTERLY
PUBLICATION ON
RELEVANT BUSINESS
ISSUES FOR YOU

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COUTTS
Solicitors & Conveyancers

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CALENDAR DATES

SEPTEMBER

- Sunday 1st Father's Day
- Monday 2nd Wills Express Night
- Monday 9th FB Live: Conveyancing Q&A
- Monday 23rd FB Live: Conveyancing Q&A
- Monday 30th NSW School Holidays Commence

OCTOBER

- Monday 7th Wills Express Night
- Monday 7th FB Live: Conveyancing Q&A
- Sunday 12th Cessnock Relay for Life
- Friday 18th Lifelines Men's Mental Health Lunch (Campbelltown)
- Monday 14th School Zones back into effect
- Monday 21st FB Live: Conveyancing Q&A
- Saturday 26th Camden South Public-School Fete
- Thursday 31st Halloween

NOVEMBER

- Monday 4th Wills Express Night
- Monday 4th FB Live: Conveyancing Q&A
- Tuesday 5th Melbourne Cup
- Saturday 16th Christmas in Narellan
- Monday 18th FB Live: Conveyancing Q&A

A MESSAGE FROM ADRIANA



Firstly, welcome to Spring and as semi-finals/ finals are upon us for all our winter sports and for those avid skiers, there is one more month left to enjoy the winter sport. For the rest of us, welcome to one of my favourite times of the year, Spring.

On the business front, we have had an exciting few months. In August, Coutts attended the Australian Law Awards held at Star City Casino, where Coutts was a finalist for the Regional / Suburban Law Firm of the year award, we were top 5 in the national awards for our category. As Coutts continues to grow, we continue to welcome new staff to our team. Since June, we have welcomed Justin Conomy acting as Special Counsel and Head of Coutts' Commercial Litigation team, Adele Veness, our Senior Associate in Government, Environment and Planning Law, Angela Lizzi, property lawyer for our Wollondilly office, Christine Guirguis, commercial lawyer at our Campbelltown and Picton office and lastly, Jacob Elliot our newest paralegal.

As managing partner of Coutts, my greatest joy is watching members of my team grow both professional and personally. We would also like to wish our lawyer Allyce Silm and partner Mitch all the best of luck with the pending birth of their son, we can't wait to meet the newest little man to be part of the Coutts family.

Finally, the business activity has been humming along and a lot of new projects we are currently working with our clients, be it from purchasing their first home to resolving a dispute in business. Whatever your legal need we are more than happy to help.

Yours Sincerely,

Adriana.





PURCHASING UNREGISTERED LAND AS A FIRST HOME BUYER

The purchase of unregistered land by First Home Buyers is still one of the most common transactions I see come across my desk. Despite this, there is so much First Home Buyers don't know about buying unregistered land.

Transfer Duty (formerly called Stamp Duty)

Purchase price \$350,000 or below? Zero to pay – full exemption.

Purchase price between \$350,000 and \$450,000? Discounts apply – the discounts work on a sliding scale depending on the purchase price. The closer the purchase price is to \$350,000, the less you pay.

There is a [calculator tool on the Revenue NSW website](#) which allows you to calculate how much duty would be payable, depending on the purchase price of your block of land.

If the purchase price is over \$350,000 then an element of transfer duty will be payable. This amount must be paid on the earlier of 3 months after the Contract date or settlement. Remember – settlement doesn't occur until the land is registered. As such, in the majority of cases, you will be required to pay the transfer duty within 3 months of the Contract date. The Contract date is the date the Contracts are exchanged/entered into. I often find this is a common misconception among First Home Buyers. If I had a dollar for every time someone told me they thought that "apart from the deposit, nothing is payable until the land is registered", I'd be hundreds of dollars richer.

Purchase price over \$450,000? Full transfer duty is payable – no discounts apply. Again, this becomes payable on the earlier of 3 months after the Contract date or settlement.

The above information only sets out the thresholds. It is important to note that there is criteria you must meet in order to be eligible.

First Home Owner Grant

In addition to the transfer duty exemptions or concessions above, as a First Home Buyer you may also be entitled to a \$10,000 grant. The grant does not apply to the purchase of land but applies to the construction of a new home on the land. In order to be eligible, the total property value (including house and land) must be less than \$750,000.

You may be able to apply through your bank when they're arranging finance for the building contract or you can apply for it yourself when construction of the new home is completed.

Time frames for registration

Whilst you are provided with an anticipated date for registration, this date is approximate only and subject to change.

The Vendor doesn't have control over registration of the land because there are a number of processes that need to be followed involving third parties. Before the land is registered, council must approve the plan of subdivision, construction works must be completed, and the plan of subdivision must be lodged to Land Registry Services.

It is because of this and a number of other external factors like weather, that an exact time frame of when the land will register cannot be given.

Sunset Date

Generally, in a Contract for Sale of unregistered land, there is a 'sunset date'. This is the latest date that the Vendor has to have the land registered by and is usually longer than the anticipated time frame for registration provided by the sales office.

This is important to consider because as a worst-case scenario you could be waiting until the sunset date. It's only until the sunset date has passed, that you have any options under the Contract terms.

In most cases, if the sunset date has passed, you have the option to get out of the Contract, get your deposit back and apply for a refund of any transfer duty paid.

Melina Constantino
Licensed Conveyancer



NSW Court of Appeal revisits compulsory acquisition law

On 6 September 2018, the NSW Court of Appeal (Bathurst CJ, Ward JA and Payne JA) delivered judgment in the case of *Roads and Maritime Services v Desane Properties Pty Ltd* [2018] NSWCA 196.

The case concerned the validity of a Proposed Acquisition Notice (**PAN**) that had been issued by the RMS for the compulsory acquisition of a property owned by Desane at Rozelle. The property was required as part of the proposed Rozelle Interchange associated with the Westconnex road project in Sydney.

The Court of Appeal (in a unanimous judgment) overturned the decision of the primary judge and found that the PAN was valid. Accordingly, the RMS was able to proceed with the acquisition of the property.

In its judgment, the Court of Appeal gave useful guidance as to the circumstances in which a PAN will be legally defective. The Court held that:

- PANs are not required to strictly comply with the Approved Form under the *Land Acquisition (Just Terms Compensation) Act 1991* (**the Act**) and that "substantial compliance" is sufficient;
- similarly, PANs do not need to precisely adopt the language of the Act at the time of issue;
- there is no requirement for a PAN to state the public purpose for the acquisition;
- there was no improper purpose on the part of the RMS in relation to the acquisition of the property. The Court found that the critical time for assessing purpose is not when the PAN is issued, but at the time of acquisition. The Court overruled the finding of the trial judge that the RMS intended to acquire the property as open space and parkland - as this would only arise once construction of the underground interchange was complete. The Court adopted a liberal approach to the necessary "purpose" and found that there was no need to identify the specific purpose with precision at the time the PAN was issued.



Lessons from the Case

The case provides important appellant guidance as to the circumstances in which a PAN may be legally invalid.

The overriding theme of the case is that Courts should adopt a measure of flexibility when the validity of a PAN is challenged. That said, Councils and government agencies still need to exercise great care in the preparation of PANs and the surrounding process to avoid subsequent legal challenges to a compulsory acquisition.

Justin Conomy
Special Counsel





Relationship Breakdown: De facto Decoded

The aftermath of a relationship breakdown is always difficult, when couples are required to divide their property and deal with the emotions mourning a relationship. Most people are aware that married couples have rights under law upon the breakdown of their marriage, however it is also important to note that de facto relationships are also governed by Australian legislation and can also apply for property settlement to determine their financial relationship on a final basis.

What is a de facto relationship?

De Facto relationships are defined under section 4AA of the Family Law Act 1975 (Cth). A relationship is deemed a de facto relationship if two persons (not married or related by family) live together on a "genuine domestic basis". Whilst this definition is quite broad, it allows a Court to determine whether a couple relationship exists with reference to circumstances such as but not limited to the duration of the relationship, financial dependence or lack thereof, whether there is a sexual relationship, if the couple live together and their mutual commitment to a shared life.

This concept is inclusive of same-sex couples.

How do I know if our relationship is eligible for a property settlement?

A de facto relationship is eligible for a property settlement in the following instances:

1. Where the relationship period was at least two (2) years;
2. Where there is a child or children of the relationship;

3. If a party made substantial contributions (financial or non-financial) throughout the relationship and failure to make orders dividing property would be unjust for a party; or
4. If the relationship was a registered relationship in accordance with state or territory requirements.

Do we need to formally divide our property?

There is no legal obligation for de facto or married couples to commence formal property settlement, however undertaking this settlement will ensure finality of the financial relationship between two parties and can assist in resolving property issues whilst a couple are still amicable. This finally determines ownership of property including motor vehicles, household contents, real estate, superannuation and shares. A written binding financial agreement or a legally-binding Consent Orders will document the way property is to be split between the parties.

Additionally, a time limit exists to make an application for financial orders, being two (2) years from the date of separation. If a person wishes to obtain orders outside this period, permission is then required to be sought from the Court to make orders.

Riley Earle
Lawyer



“Lemon” motor vehicles – consumer rights clarified



On 8 September 2018 the Australian Consumer and Competition Authority (ACCC) published an updated guide in relation to the application of the Australian Consumer Law (ACL) to motor vehicle sales and repairs. Although this publication does not constitute legal advice or a definitive guide as to when the ACL applies, it does provide some useful legal guidance for consumers in respect of defects and failures in new and used motor vehicles.

Overview

On 1 January 2011 the ACL was introduced as a uniform consumer protection law across Australia. As the law is relatively new, there is a measure of uncertainty in relation to parts of its practical operation - hence the publication by the ACCC of the above guide. The ACL prescribed a set of “supplier” and “manufacturer” guarantees which apply to all consumer transactions across Australia.

Major and non-major failures

Under the ACL, where there has been a breach of one of the prescribed guarantees, the remedy to which a consumer is entitled, depends on there has been a “major” or “minor” failure to comply with the consumer guarantee. These are concepts new to the law in Australia.

If a vehicle suffers from a “major” failure, then the consumer is generally entitled to elect to:

- reject the vehicle and obtain either a full refund or replacement vehicle of the same type; or
- retain the vehicle and ask for compensation from the dealer or manufacturer.

If a vehicle suffers from a “non-major” failure, then the supplier has the option of repairing the vehicle or providing a replacement or refund to the consumer. A “non-major” failure can become a “major” failure if the vehicle cannot be repaired within a reasonable time. In addition, the consumer may be entitled to compensation for any foreseeable loss suffered by the consumer as a result of any breach of the ACL guarantees.

What are “major” and “non-major” failures

The ACL prescribes a “major” failure as occurring where:

- a person would not have purchased the product had they been aware of the failure;
- the failure results in the product being significantly different from a sample or description;
- the product is substantially unfit for its purpose and cannot be effectively repaired within a reasonable time; or
- the product is unsafe.

A “non-major” failure is a failure which does not amount to a “major failure” as defined above.

Examples of “major” vehicle failures

- A manufacturing defect in a new vehicle causing excessive noisiness in the vehicle resulting in multiple repairs (exceeding 5 weeks) which did not see the issue resolved;
- a 2-year-old vehicle suffering from a manufacturing defect causing the engine and vehicle to seize with the vehicle not be able to be repaired within 5 weeks.

Examples of “non-major” vehicle failures

- a new vehicle which had developed a rattling noise and which did not interfere with its normal operation and which was repaired within 2 days.
- an 18-month-old vehicle with an intermittent electrical fault causing a warning light to activate from time to time. The cause of the problem could not initially be diagnosed and resolved until the third attempted repair.

Alexandra Johnstone
Partner



How marriage, separation or divorce affect your will.

Getting Married

In New South Wales, the act of becoming legally married to someone automatically revokes any previous will that you have made. If you pass away without making a new will after the date of your marriage, you will pass away "intestate", which means that you do not have a valid will at the time of your death and your estate will be given to your relatives in accordance with the law.

Under the current intestacy laws of New South Wales, your spouse is the first person entitled to your estate and in most circumstances, your spouse will receive all or the vast majority of your estate.

Whilst this operation of the law may not be an issue for many first-time marriages, it may cause problems for people who have children from a previous relationship or other people who they are responsible to provide for.

There is an exception to this rule. Where your will is expressed to be made in contemplation of a marriage to someone, then your will is not automatically revoked upon your marriage to that person.

Recently Separated

Separation from your husband or wife does not have any impact on your will. If you have recently separated from your partner and you are currently in the one year waiting period to be able to get divorced, it is incredibly important that you update your will as soon as possible to reflect your new wishes!

If you pass away without updating your will after you've separated, your former husband or wife will inherit any property that was gifted to them in your previous will. If your previous will nominated your former husband or wife as your executor, they will be in control of the administration of your estate.

Formally (or finally...) Divorced

In New South Wales, the act of becoming formally divorced will also automatically revoke your will, but not in the same way that marriage does.

Divorce from your former husband or wife will only revoke those parts of your will that have appointed your former husband or wife as the executor or trustee of your will or gifted them any of your assets.

However, becoming divorced does not revoke any appointment of your former spouse as the trustee of any property that has been left on trust for the beneficiaries in your will, such as your minor children. This means that, even though your former spouse will not receive any benefit from your estate, they may end up as the person responsible for managing the inheritance for your minor children until they become adults.

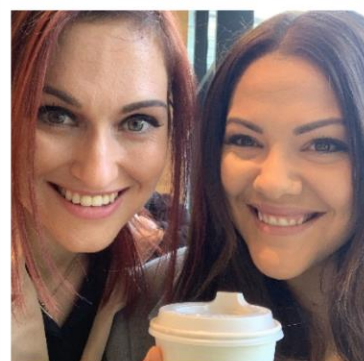
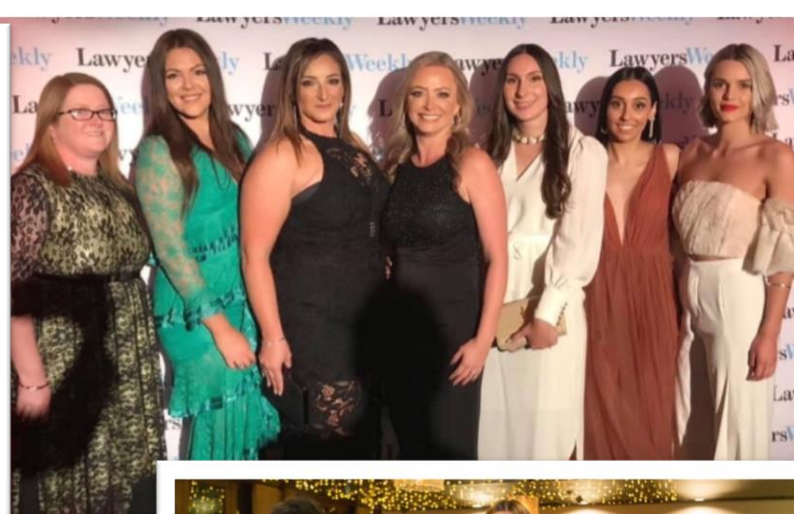
A similar exception exists for this rule, and where your will is expressed to be made in contemplation of your divorce then it will not be automatically revoked when your divorce becomes formal.

Life-changing events like getting married, separated or divorced can have just as much impact on your will and eventual distribution of your estate as they can have on your life. If you would like to know how your marriage, separation or divorce has affected your previous will, or if you would like to prepare a new will because you've experienced one of these events, you should contact our Wills & Estates team for further advice specific to your circumstances.

Kaisha Gambell
Senior Lawyer



OUT AND ABOUT WITH COUTTS



A coffee with Adele Veness

Profile



Position: SENIOR ASSOCIATE

Location: HUNTER VALLEY, NSW

Areas of Practice:

- ADMINISTRATIVE LAW;
- ENVIRONMENT LAW;
- GOVERNMENT LAW; AND
- PLANNING LAW

Q: What was your first job?

A: *A paper run at 13. All I remember is my mum and dad helping me roll up the newspapers and what was probably only an hour or two felt like an eternity.*

Q: What are three things in life you could not go without?

A: *The two most important people in my life, my daughter and partner, I know I can overcome any obstacle as long as I have them. The third thing would be our imagination.*

Q: Do you have a career highlight so far?

A: *My greatest highlight is the opportunity I have had to work with outstanding and inspirational practitioners in each of my workplaces and this trend continues.*

Q: If I wasn't a lawyer, I would be . . .

A: *A music teacher.*

Q: Outside of the office, what are you involved with?

A: *I have a strong interest in both community and international development and public policy, so I tend to support local community development projects and social services – in particular, those that unexpectedly lose funding due to the vacillating policies of our current political climate.*

Q: Lastly, if you could offer words of wisdom to your younger self, what would they be?

A: *Trust your instincts and be patient – plan for the future but focus on the present.*

Your Questions Answered



Is it really against the law using paypass on your mobile phone in a takeaway drive through?



Luisa's response:

Yes, this is correct. A road is defined as a public area where people drive motor vehicles, therefore, although a drive-through is on a privately-owned property, it is still deemed a public area due to the nature of the business.

The law states that you are deemed to be using a mobile device whilst driving if; the car ignition is on and you are; holding the phone or the phone is in contact with your body or if you are operating any of the phone's functions.

If you do intend to use paypass whilst in a motor vehicle and as to avoid a penalty, switch the motor vehicle engine off first.



There have been several professionals on Television saying wills are only a piece of paper and that anyone can contest it thus causing a legal battle which a person spends big money on defending.



Kaisha's response:

We always advise people to have their will drafted by a professional who can include the relevant clauses needed to ensure that your objective of your estate plan is met on your passing. It is important to note that only a select group of eligible persons can contest your will. A will prepared by a lawyer can carefully consider those who have a financial dependency on you and ensure that the risk of your will being contested is reduced or eliminated.

Not having a will may end up costing your estate a lot more, as the process for the court to determine who your estate should be distributed to is generally a much longer and a more costly process, as well as, it causes significant emotional and financial stress for your loved ones.



Can a conveyancer act for both the seller and a buyer?



Christine's response:

Yes, we can. However, authority must be obtained from both sides before we start acting for them.



My husband and I separated in July and still live in the same home for the benefit of our young children. Do we still count as a separated couple?



Riley's response:

It is possible to live together but still be considered as separated. In family law, this is called being 'separated under the one roof'. This is a perfectly acceptable arrangement and does not stop you from being able to enter into family law processes. All that needs to be proven is that it has been communicated that the relationship has ended on a final basis.



My neighbour's dog is constantly barking. What can I do?



Adele's response:

We recommend that you try to address this with your neighbour before notifying council, generally the animal's owner is unaware of the severity of the problem and are more than happy to make preventative measures. However, if this is not the case, you may contact your local council. Council may require a complaint from more than one resident before taking actions. If the council officer is satisfied with the nature of the complaint, the officer will issue the animal's owner with a notice of intention to issue a nuisance order. The notice of intention will specify to the animal's owner the actions they are required to take to prevent the issue from occurring.

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