THE CONDUIT

20 WINTER

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Solicitors & Conveyancers

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CALENDAR DATES

June

Monday 8th	Queens Birthday Public Holiday
Monday 15th	FB Live Night
Wednesday 17th	Cuppa with Coutts Webinar – Episode 1
Wednesday 24th	Cuppa with Coutts Webinar – Episode 2
Monday 29th	FB Live Night

July

Wednesday 1st	Cuppa with Coutts Webinar – Episode 3
Monday 6th	Wills Express Night
Wednesday 8th	Cuppa with Coutts – Episode 4
Monday 13th	FB Live Night
Monday 27th	FB Live Night

August

Monday 3rd	Wills Express Night
Monday 3rd	Bank Holiday
Monday 10th	FB Live Night
Monday 24th	FB Live Night

A MESSAGE FROM Adriana

Since our last quarterly newsletter so much has changed in the world and so much is still affecting the way we live due to COVID-19. In my case, I am still trying to juggle my role of managing partner and ensure my team are okay and being a wife and mother together with my many board commitments as well as concern about what is happening in the world and the Australian world of politics and how that will affect my clients, my staff at Coutts and my family.

So, I thought as we have just had our get out of home and socialise pass from the long weekend, I would look at what the last 3 months has taught me:

- The people I work with are great people whose passion has come through at such a prevalent time, the new world has made us a united team forging even stronger bonds as we work through this difficult time.

- I also want to say I have an amazing set of clients and referral network that are incredibly loyal and supportive of me and my team. In fact, I would call many of them friends; people I love to catch up with and argue the most trivial issues and make some really important decision with or who continually inspire me to be better.

- We can be flexible and change and stay connected if we really need to. Like most companies, the Coutts team is working under a hybrid model of working from home and keeping our offices open. For a law firm, we were actually very well prepared for remote working, with a policy implemented promoting flexible working arrangements well before this. We had much of the technology in place, leading to a smooth transition.

- Whilst Australians probably don't love to be told what to do, we have had faith in the direction of our leaders, and I am not just referring to our political leaders. It doesn't mean we cannot challenge change and leadership nor ask questions or add valuable feedback for change, but we need to think about how we do this whilst respecting our current environment.

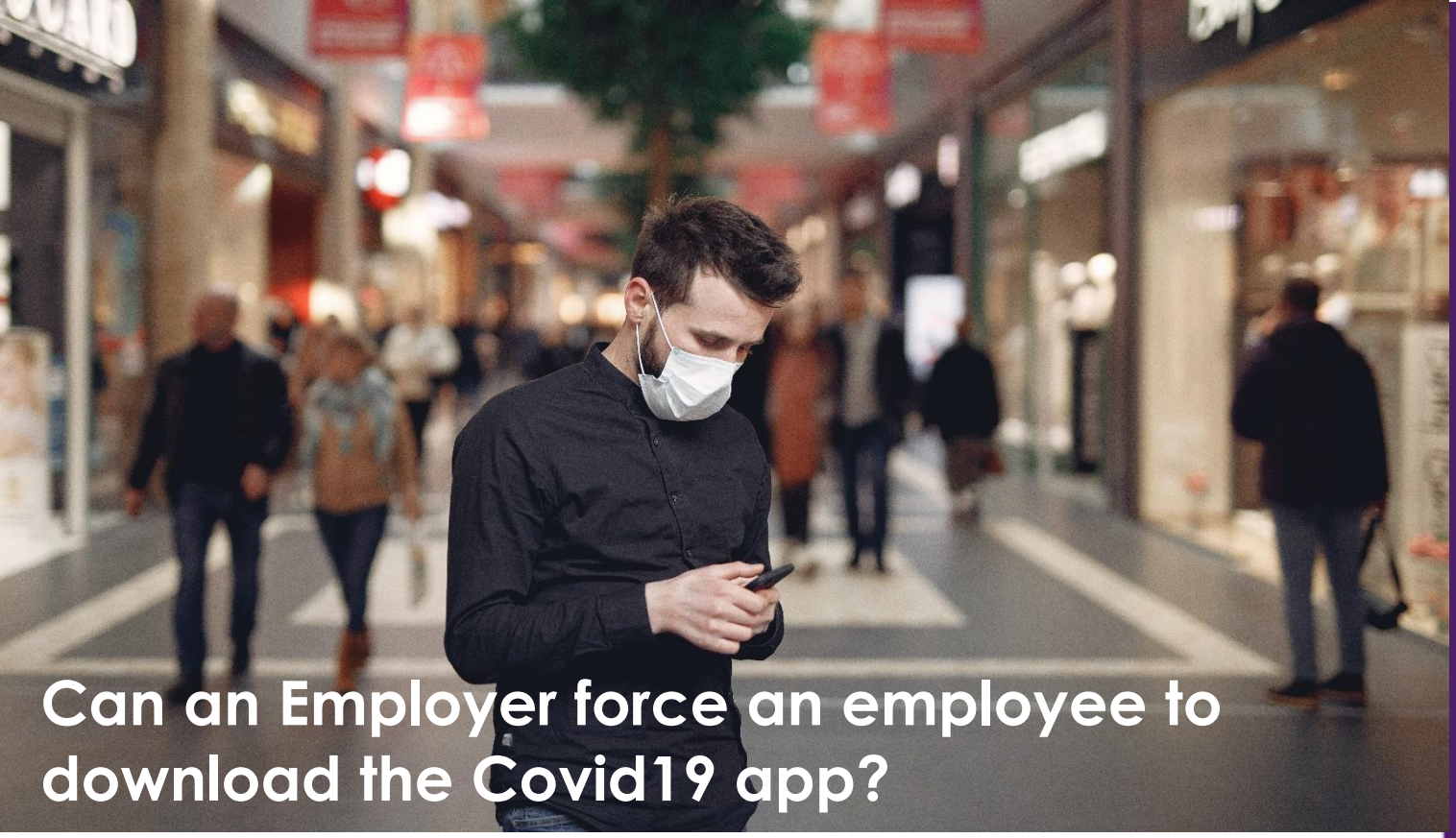
As time moves on and we are now in winter, we see the next phase which hopefully sees the opening of more borders, the increase economic activity including the last stage of opening of all businesses and weekend sport for everyone to participate, the start of local tourism and the full effect of how people have assessed their lives based on the last three months.

However, what I do know is that when you finally have the moment to take a breath and analyse what has happened in the last three months and what still might happen, still try and focus on today. Continue to reach out to friends and colleagues, asking people how they're coping, seeing and hearing what they have done and changed due to COVID. Whilst you may have survived the parts of the economic crisis, remember there are others who haven't come out at all without damage.

Coutts's role is and was to keep you updated and informed and be there for you when we are needed, and this hasn't changed.

So, I just wanted to leave you with this advice, stay focussed, stay determined. As I say, time is everything but sometimes time isn't that long at all.

Thank you



Can an Employer force an employee to download the Covid19 app?

On 26 April 2020, the Australian Government released the COVIDSafe application ("COVIDSafe") which operates by collecting personal data of the user and storing these on the Federal Government's private servers hosted by Amazon. By utilising Bluetooth, COVIDSafe creates an encrypted record of all other users which an individual comes in close proximity with.

In the event a user of COVIDSafe is tested positive of the virus and informs the National COVIDSafe Data Store, COVIDSafe anonymously notifies all other users that have come in contact with the positive-tested user within the last 14 days.

Both Scott Morrison PM and the Department of Health have released public announcements to clarify that COVIDSafe is not mandatory but is highly recommended to slow the spread of COVID-19.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020* ("Biosecurity Determination") was introduced to Parliament on 25 April 2020 and introduces, among other things, restrictions relating to requiring the use of COVIDSafe.

Pursuant to s9(1) of the *Biosecurity Determination*, a person must not require that another person download COVIDSafe nor can a person refuse to enter into, or continue, an employment or contract arrangement with another person on the grounds that they have not downloaded COVIDSafe.

Furthermore, s9(2) prevents employers from refusing an employee entry onto workplace premises on the grounds that they have not downloaded COVIDSafe.

The *Biosecurity Determination* has the force of law and a person who contravenes its requirements is guilty of an offence of up to 5 years imprisonment or 300 penalty units, or both.

The *Privacy Amendment (Public Health Contact Information) Bill 2020* was introduced to Parliament on 11 May 2020 to support this determination, echoing the same restrictions and penalties as outlined in the *Biosecurity* Determination.

The Bill was passed on 14 May and applies in all Australian states and territories.

An employer can recommend that employees download COVIDSafe, but they cannot make an employee compulsorily download it and use it. Following the introduction of the *Biosecurity Determination*, employers who do so will be guilty of an offence.

To see the full *Biosecurity Determination*, please click here.

To see the full *Privacy Amendment (Public Health Contact Information) Bill 2020*, please click here.

Amanda Olic
Senior Associate

Karena Nicholls on Employment Issues

Can you be forced to take leave during Covid19?

The employee had 22 years of service. She had accrued 9.3 weeks' annual leave and 8.6 weeks' long service leave. Due to the Covid-19 pandemic, the employer stood down the employee on 23 March 2020 and requested her to take a day of annual leave per week until September 2020, or until the leave balance reached 2 weeks or 4 days, respectively.

The employee objected the request on grounds that it was unfair to her as a long-standing employee for her leave balance to be reduced to 2 weeks. The employer had considered that the amount of leave left would be the same amount as those employees with a significantly less amount of service and leave accrual.

The test is whether an employee has refused such a request unreasonably, not whether the employer's request is reasonable.

The FWC ruled that it was unreasonable for the employee to refuse the request. The FWC noted the employee had little to no regard to the employer's policy.

It is important to note that the employer had a company policy on applying for leave.

The size of the employer is not relevant when exercising its right to request employees to take a paid annual leave.

A timely reminder for employers and an appropriate option in which they may exercise if they require their employees to take a leave.

Employers Beware: Long term casuals may be able to claim leave entitlements

Mr Rossato was an employee of WorkPac from 28 July 2014 until 9 April 2018. Over that period, six consecutive contracts of employment were made between Mr Rossato and WorkPac. WorkPac treated each employment as a casual employment and Mr Rossato as a casual employee.

Mr Rossato was a qualified and experienced production employee in the open cut black coal mining industry. WorkPac is a labour hire company. WorkPac engages workers and provides their services to its clients who require labour. WorkPac specialises in the provision of labour in particular industries including in the black coal mining industry.

WorkPac submitted that Mr Rossato's remuneration included severable components that were attributable to his status as a "casual FTM", as distinct from a "permanent FTM". WorkPac submitted that these amounts comprised a "casual loading" and totalled 25% of the base rate of pay for a permanent FTM.

WorkPac submitted that upon the Court finding that Mr Rossato was not a casual employee, or a casual FTM, the basis for the payment of a casual loading, which was separate and discrete, failed. WorkPac submitted that the consideration in question was not the service given by Mr Rossato for which he was paid the flat hourly rate, but that a casual loading was accepted by Mr Rossato in discharge of any obligations in relation to annual or personal leave, or any of the other entitlements of permanent employees in issue in the proceedings, and that the basis for this component of the remuneration had failed.

In his employment under each of the contracts, Mr Rossato was other than a casual employee for the purposes of the Fair Work Act and was a "Permanent FTM" and not a "Casual FTM" for the purposes of the Enterprise Agreement and entitled to the applicable entitlements during the period.

Employers: This does not mean that all casual employees are now entitled to accrue and be paid entitlements, but it does create a challenge for employers with long term casual staff.

In order to minimise your risk as an employer, you should:

- ensure that casual contracts are carefully drafted and ensure that they do not make any guarantee of a number of hours or days;
- that the loading is set out clearly;
- that you do not make any representations to employees which could be taken to be guaranteed hours or work or certain days; and
- ensure roster periods are only as long as required.

What is a Certificate of Title and what is the importance of it?

Christine Johnsen
Conveyancer

A Certificate of Title is a person's official land ownership record and notes interests and rights affecting their land. The Certificate of Title is issued by the Registrar of Titles to the person who is entitled to it, either being:

The owner of the land, or otherwise known as the 'registered proprietor', if the property is unencumbered, which means there is no mortgage over the property; or

The registered proprietor's mortgagee if there is a mortgage over the property.

The Certificate of Title is particularly important when one is looking at selling their property and does not have a mortgage over their property. Without this document, your conveyancer is unable to settle the matter for you.

Why? At settlement of your matter, the Certificate of Title is required to be handed over to the purchaser's conveyancer to enable them to provide the same to the Land Titles office to lodge with the Transfer document. The Transfer document is a document that replaces the current owners' names over to the person who has purchased the property. Without the Certificate of Title, the Land Titles office is unable to lodge the Transfer and change their records of the new ownership.

As settlements are affected electronically via the PEXA platform as of 1 July 2019, this is not to mean that Certificate of Titles are any less important. Your conveyancer is required to hold the original Certificate of Title pending settlement, to enable them to enter the details from such document into the PEXA platform to be lodged to the Land Titles office electronically and is then legally required to hold your original Certificate of Title for a minimum of seven (7) years.

If you are looking to sell and you do not have a mortgage over your property, we recommend that you are aware of the whereabouts of your original Certificate of Title before proceeding with your sale. If you have misplaced your Certificate of Title, it is important to make your conveyancer aware of this straight away so they can arrange to apply for a replacement on your behalf, with sufficient time as we note this process can be lengthy.

NEW HOME BUILDER PACKAGE ANNOUNCED!

If you are looking to build a new home or renovate your existing home, then the New Home Builder Package just announced by the Federal Government could assist you!

A $25,000.00 grant will be available to singles or families building a new home up to the value of $750,000.00 (including the land value) or renovations worth between $150,000.00 - $750,000.00 (that will result in the property being worth under $1.5m).

The money for renovations cannot be used for renovations not connected to your main house (such as swimming pools or tennis courts).

The grants will be means tested, meaning that it will be only open to singles earning up to $150,000.00 or $200,000.00 for couples.

These grants will also be available to first home owners on top of the concessions that are already available to them, including exemptions/concessions in relation to stamp duty, the first home/new home grant ($10,000.00) and the First Home Loan Deposit Scheme. If you are a first

Carina Novek
Conveyancing Manager

Coutts' Case Update: Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie [2019] NSWCCA 174

The NSW Court of Appeal handed down its judgement on 2 August 2019, setting out its findings in relation to the definition of "waste" and its "application to land. The judgment has potentially significant consequences for local councils and any other person or organisation that seeks to reuse such as building and demolition waste as part of its activities.

In the initial proceedings, Grafil Pty Ltd (Grafil) and its Director Mr Mackenzie were prosecuted by the Environment Protection Authority (EPA) in respect of the alleged breaches of the *Protection of the Environment Operations Act 1997* (**POEOA**).

The proceedings pertained to land, known as "Lot 8", which was alleged to have been utilised by the Defendants as a waste facility, operating without approved authority and inconsistently with the development consent obtained for sand extraction. Further, asbestos was detected in materials received from recycling facilities that were held on Lot 8. Importantly, the specific quantity of asbestos was not determined, and the Defendants entered pleas of not guilty to the charges. The Defendant's position was that their activities were consistent with lawful authority.

At first instance, the trial judge delivered reasons finding that Grafil and Mackenzie were not guilty but made no orders. On appeal, the Court determined that the trial judge erred in law by misconstruing the definition of "waste" in the Dictionary to the POEOA, which is defined to include:

any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or

any discarded, rejected, unwanted, surplus or abandoned substance, or

any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, processing, recovery or purification by a separate operation from that which produced the substance, or

any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in the circumstances prescribed by the regulations, or

any substance prescribed by the regulations to be waste.

A substance is not precluded from being waste for the purposes of this Act merely because it is or may be processed, recycled, re-used or recovered.

The Court held that the trial judge erred in the process of statutory interpretation, instead finding that the above paragraphs of the definition of "waste" are not mutually exclusive, noting in particular that a substance that is processed, recycled, re-used or recovered can be waste not only by meeting the criteria in paragraph (d) but also because it meets the criteria in any one or more of the other paragraphs.

In the Court of Appeal's view, it did not matter whether the storage was temporary or that the purpose was not to apply the stockpiled material to land as waste.

Th Court held that depositing (and to an extent, spreading) stockpiles of materials on the land prior to use as road base was consistent with the statutory definition of "waste" in both the POEOA and in the *Protection of the Environment Operations (Waste) Regulation 2005* (Now repealed) *[1]*.

The Court also held the trial judge erred in finding that the determination of whether a material was asbestos waste was a **matter of fact and degree**, and confirmed the wider construction adopted in *Environment Protection Authority v Foxman Environmental Development Services Pty Ltd [2]* and *Pullen v Smedley [3]* that "asbestos waste" means any waste that contains asbestos, regardless of how much asbestos, and that the classification was not dependent on the proportion of the amount of asbestos to the volume of waste.*[4]*

The Land and Environment Court is now handed the task of redetermining the matter, having regard to the answers provided by the Court of Criminal Appeal.

Implications

The ubiquitous use of asbestos in residential housing up until the late 1970s and the ability for asbestos fibres to travel long distances by wind means that this judgment has considerable consequences for any person found to have received any building or construction waste on their land, as well as for the local authority responsible for providing facilities to dispose of asbestos waste. Of particular concern is the Court's finding that any waste that is found to have any amount of asbestos, however small, is to be classified as asbestos waste. This leaves open the potential that a significant proportion of other waste material produced in the building and construction industry that may have otherwise had minuscule traces of asbestos detected should now be reclassified as asbestos waste and be disposed of accordingly.

If this were the case, this could have a major impact on the capacity for local authorities to adequately dispose of material that, prior to the Court of Appeal's decision in EPA v Grafil, would have met the classification for another type of waste material.

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[1] Ibid, [170-172].

[2] [2015] NSWLEC 105

[3] [2017] NSWSC 1721

[4] Ibid, [325].

Adele Veness
Senior Associate

Police Powers to Arrest

KEY TAKE OUTS:

High Court reaffirms long standing principle that police only have powers to arrest when there is an intention to charge.

An arrest for the purposes of questioning is unlawful.

In order for an arrest without warrant to be lawful, a police officer must suspect on reasonable grounds that a person has committed or is committing an offence; that it is reasonably necessary for one of the prescribed reasons; that, at the time of arrest, the police officer must have an intention to bring the arrested person before an authorised officer to answer a charge for that offence, and therefore must have an intention to charge the person with an offence.

A recent decision of the High Court in *New South Wales v Robinson* [2019] HCA 46 has found, on a narrow majority that the arrest of a person without the intention to charge them with a criminal offence is unlawful. The Police powers to arrest are found in Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) ("LEPRA"), with section 99 providing that a police officer may arrest a person, without a warrant, if the police officer suspects on reasonable grounds that the person is committing or has committed an offence and that the police officer is satisfied that the arrest is reasonably necessary for one or more of the following reasons:-

(i) to stop the person committing or repeating the offence or committing another offence,

(ii) to stop the person fleeing from a police officer or from the location of the offence,

(iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,

(iv) to ensure that the person appears before a court in relation to the offence,

(v) to obtain property in the possession of the person that is connected with the offence,

(vi) to preserve evidence of the offence or prevent the fabrication of evidence,

(vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

The High Court took the opportunity to reiterate that the position of the law surrounding arrest in New South Wales is as follows:

"an arrest can only be for the purpose of taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for an offence. An arrest merely for the purpose of asking questions or making investigations in order to see whether it would be proper or prudent to charge the arrested person with a crime is an arrest for an improper purpose and is unlawful." per Justices Bell, Gageler, Gordon and Edelman.

Police officers therefore have, in New South Wales, a power to arrest and detain a person where they suspect on reasonable grounds that an offence has been committed or is being committed, and that the person has committed or is committing the offence and the arrest is reasonably necessary. But that power is exercisable only for the purpose of taking the person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. Arrest cannot be justified where it is merely for the purpose of questioning.

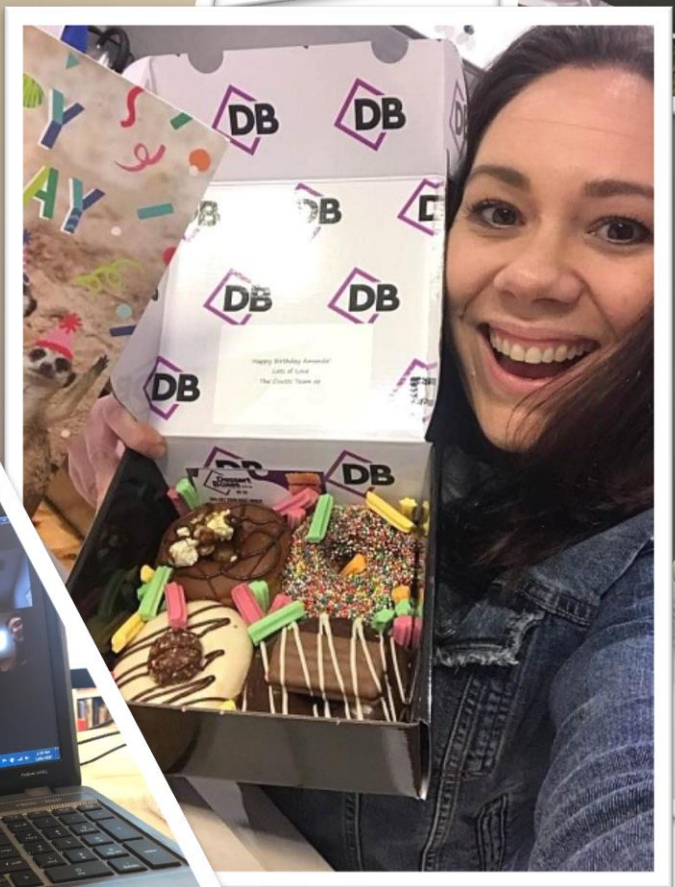
Importantly, a police officer must have an intention to bring the arrested person before an authorised officer to be dealt with according to law to answer a charge for that offence. The police officer must therefore hold the intention to charge the arrested person with an offence. If there is no intention to comply with this requirement, the arrest is unlawful.

Luisa Gaetani
Senior Associate

Lara Menon
Law Graduate

OUT AND ABOUT WITH COUTTS

SOCIAL DISTANCING EDITION



A Wine with Kaisha Gambell

Profile

Position: Head of Estate Planning

Location: NARELLAN, NSW

Areas of Practice: Wills and Estate Planning

Q: How would you describe yourself in two words?

A: *Compassionate and creative – typical Pisces!*

Q: What would your best friend say is your best quality?

A*: My willingness to help everyone else!*

Q: Share your favourite quote

A*: The one thing that doesn't abide by majority rule is a person's conscience.*

Q: On the weekends you can find me:

A: On a walk to the dog park and café with my partner and pooch!

Q: The last book I read was:

A: The Strangers We Know – Pip Drysdale

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Your Questions Answered

I had an injury many years ago, can I still make a claim?

Karena's response:
There are time frames so seeing a lawyer will help you navigate if you can still make a claim. Exceptions can be granted if you have a reasonable explanation as to the delay so just check before you decide to forget about it

I am buying my first home – Woohoo! I was wondering, what inspections need to be done?

Carinas Response:
Before the cooling-off period comes to an end, pest & building inspections should be organised to ensure the property is structurally sound and free of pests' infestation. If buying strata property, you should order strata inspection.

My aunty asked me to be executor of their will – What does this mean for me?

Kaisha's response:

An executor is the person appointed in a will responsible for carrying out your wishes and administering your estate when you are deceased. The executor locates the will, pays all debts and liabilities, identifies and collects all assets of the estate and distributes your assets in accordance with your will.

I want to make a claim for an injury I had at work, but I am in a bit of financial hardship now. Is there anything I can do?

Karena's response:

If liability is accepted, we can ask the Insurer for a hardship payment upfront. You can also go to Centrelink to ascertain what benefits may be available to you.

I am signing a retail lease for my new business, what should I consider as a tenant?

Carina's response:

Among other things, you should consider:

- The initial rent and method of increasing the rent.
  Your ability to transfer or assign the lease, and the expense of doing so.
- The possibility of subletting the premises.
- Your rights to end the lease if the premises are damaged or destroyed.
- Duration of the lease and your right to renew it.
- Who pays for outgoing and other charges?
- The types of insurance required and who contains it.
- The consequences of failing to pay rent and ways of resolving disputes.

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