

the Conduit

20
SUMMER



COUTTS
LAWYERS & CONVEYANCERS



02 Coutts Summer Diary

03 A Message from Adriana Care

04 BOTCHED! What can I do? Who can I sue?

05 New Reforms to NSW Laws Offer Greater Protections to Victims of Domestic Violence

07 Protecting man's best friend: NSW reforms to domestic violence laws will now extend protections to pets of domestic violence victims

09 Keep your eyes peeled for "unfair terms"

11 Cheap Stunt is a Costly Act for Former Acquaintance

13 Keeping Up With Modern Awards: Upcoming Changes to the Children's Services Award, to come into effect 1 November 2020

16 The Abolishment of Stamp Duty and the Introduction of Land Tax for NSW

17 Out and about with Coutts

18 A wine with Kaisha Gambell

19 Your Questions Answered

CALENDAR DATES

December

Monday 7th	Wills Night
Wednesday 9th	Webinar – Commercial Litigation
Saturday 12th	Wills Weekend
Wednesday 23rd	Our office will close at 12pm
Friday 25th	Christmas
Saturday 26th	Boxing Day
Thursday 31st	New Years Eve

January

Friday 1st	New Years Day
Monday 4th	Office ReOpens

February

Monday 1st	Wills Night
Sunday 14th	Valentines Day



A MESSAGE FROM

Adriana

The silly season is well upon us, and I would like to take this opportunity to thank you, our clients and also our community in what has been an extremely challenging year for us all. Reflecting on 2020, it's hard to believe what we've been through in the last 12 months: Bushfires, Floods, COVID and the affects on families and on businesses; and then the businesses who lost it all in two separate fires in the main street of Camden. It certainly has been a year – but as Peter McWilliams once said “comfort zones are most often expanded through discomfort. Discomfort is a catalyst for growth. It makes you yearn for something more. It forces you to change, stretch and adapt”. 2020 has certainly forced us all to change, stretch and adapt.

Here at Coutts, this Christmas we have chosen to support a number of charities – after all, Christmas is a time for giving. The personal support shown by my staff in particular is something I am extremely proud of. You may have seen the donations made for “It’s in the bag” campaign (over 15 handbags, FULL of essential and luxury items for women in crisis); or the Christmas items donated to Turning Point, the local pantry for those in crisis. We are proud to be part of such worthy causes and look forward to supporting these and others, in 2021.

Our last day in the office this year will be Wednesday, 23 December 2020 where our office will close at midday. We will reopen 9am on Monday, 4 January 2021.

I wish you all a wonderful Christmas and a happy and safe holiday season!

I look forward to seeing you all in 2021.

thank you

check out our new website 



BOTCHED!

What can I do? Who can I sue?

Plastic and cosmetic surgery is becoming more and more popular. There are many reasons why people undergo these surgeries, some are, because of the result of an injury or to alter their appearances for cosmetic purposes. This is the reason why it can be a significant shock when cosmetic surgery goes wrong. Patients can experience severe pain and permanent damage. This damage can take a toll both physically and/or mentally.

A patient who has suffered an injury, loss or damage as a result of negligent plastic or cosmetic surgery may be entitled to claim for damages. We understand this can be difficult because it is hard to quantify how much a botched nose, or a loss of feeling in a limb is worth.

In order to make a claim, you must prove that the medical treatment you received was negligent and that the surgeon has breached their duty of care. A medical negligence claim can be against the surgeon, doctor, hospital or other health care practitioners who have been negligent in their procedures with their patients. A critical element, especially in plastic and cosmetic surgery cases is whether your doctor has adequately informed you of the risks of the operation.

What can you claim?

You may be able to claim:

- ✓ Medical costs
- ✓ Loss of income
- ✓ Pain and Suffering incurred
- ✓ Family compensation for wrongful death

Examples of unsuccessful plastic or cosmetic procedures include:

- ✓ Mental health effects from your treatment
- ✓ Rashes and skin pigmentation
- ✓ Excessive scar and Disfiguration as a result of the treatment
- ✓ Infection leading to other health problems
- ✓ Ongoing pain

Botched cosmetic or plastic surgery can leave a lasting effect on your self-esteem and health and we understand the position you have been put in. Coutts has an experienced team in medical negligence and will assist you through the process of a claim.



Karena Nicholls
Partner



Mai O'Regan
Paralegal



New Reforms to NSW Laws Offer Greater Protections to Victims of Domestic Violence

KEY TAKE OUTS

- ✓ The NSW government has introduced several reforms which will offer greater protections to victims of domestic violence.
- ✓ The reforms will enable victims of domestic violence to give evidence in closed court, remotely, or via audio-visual link. Victims of domestic violence will also be allowed to have a support person with them when giving evidence.
- ✓ Further, the reforms introduce new jury directions regarding delayed complaints, and extend the length of ADVOs in circumstances where the perpetrator receives a term of imprisonment for the offending behaviour.

The NSW government has introduced a bill to offer greater protections to victims of **domestic violence** giving evidence in court proceedings. The reforms will enable victims of domestic violence to give evidence remotely or in closed court. Previously, this option was only available to sexual assault complainants, children, or people with cognitive impairments. Further, victims of domestic violence will also be entitled to have a support person with them whilst giving evidence and new directions will be given to juries in relation to delayed reporting. There are also proposed changes to extend the terms of AVOs in circumstances where the offender is sentenced to a term of imprisonment as a means of providing greater protections to victims.

Attorney-General and Minister for the Prevention of Domestic Violence, Mark Speakman, has tabled a bill in parliament which would reform the means by which victims of domestic violence are able to give evidence in court proceedings, change the directions given to juries in relation to delayed reporting, and offer greater protections to victims in AVO proceedings.

The reforms to state legislation under the Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020 give victims of domestic violence the choice to give evidence in closed court, remotely, or via audio visual link. Previously, such options were only available to sexual assault complainants, children, or people with cognitive impairments. Domestic violence victims were able to make an application to the court to give evidence in closed court or by other means, however, these applications were subject to a grant of leave from the court. However, the reforms remove the requirement for an application to be made, and domestic violence victims are allowed the ability to choose how they would like to give evidence in their matter. Under the reforms, victims of domestic violence will also be allowed to have a support person with them whilst giving evidence in proceedings.

The reforms recognise the complexity of domestic violence relationships and the long-lasting psychological impacts domestic violence can have on victims. A Parliamentary Inquiry into Domestic Violence published on the 24 November 2015 identified that the most common reasons for victims not reporting incidents of domestic violence include fear of the perpetrator, feelings of shame and embarrassment, fear of not being believed, and fear of psychologically re-living the incident.

Under the reforms, an amendment to the **Criminal Procedure Act** will create a new jury warning in circumstances where a victim in domestic violence proceedings delays making a complainant about the alleged offence or fails to make a complaint altogether. The direction means that the court will have to warn the jury that absence of complaint or delay in making a complaint does not necessarily mean the allegation is false, rather, that there are a variety of reasons why victims of domestic violence fail to come forward. However, it will still remain open to the jury to make a finding that the delay in complainant is relevant to the credibility of the victim if there is sufficient evidence to support this proposition.

Further, the bill introduces a provision to the **Crimes (Domestic and Personal Violence Act)** whereby if an offender is sentenced to a term of imprisonment, the ADVO ordered by the court is to remain in place for the entirety of the prison sentence and an additional two years after the end of the term of imprisonment. This means that victims will be protected by the conditions of the ADVO even after the perpetrator is released from gaol.

For many victims, the prospect of having to give evidence in the presence of their perpetrator or in an open courtroom can be incredibly distressing and discourage them from reporting the matter to police or from giving evidence in court. As expressed by Mr. Speakman, “Attending court can be overwhelming for victim-survivors who’ve suffered terrible abuse. Our reforms sought to ease that burden to ensure they are supported during criminal proceedings, particularly while giving evidence,”. It is hoped that the reforms will provide greater protections to victims of domestic violence and increase victim attendance rates and the finalisation of matters in court.



Luisa Gaetani
Senior Associate



Georgia Walker
Law Graduate



Protecting man's best friend: NSW reforms to domestic violence laws will now extend protections to pets of domestic violence victims

KEY TAKE OUTS

- ✓ The NSW Government has introduced legislative reforms which will provide protections to family pets as a standard condition of Apprehended Domestic Violence Orders (ADVOs).
- ✓ The Animal Abuse and Domestic and Family Violence report found that 94% of instances of animal abuse occurred as a result of domestic abuse.
- ✓ The proposed amendments will also extend the legal definition of intimidation to include harm caused to animals or threats to harm animals.

The NSW government has announced proposed legislative reforms to the Crimes (Domestic and Personal Violence) Act 2007 and the Criminal Procedure Act 1986. The “Stronger Communities Legislation Amendment (Domestic Violence) Bill” introduced by MP Mark Speakman will provide stronger protections for victims of domestic violence and will extend Apprehended Domestic Violence Orders to protect family pets.

The Animal Abuse and Domestic and Family Violence report was released on the 27 August 2020 following a review by the NSW Government into the issue of domestic abuse inflicted against pets and livestock. The report found that harm caused to animals by perpetrators of domestic violence was reported by 94% of specialists as the most common form of abuse to animals. Of those who were surveyed, 87.5% were of the view that ADVO laws should be amended so that people could seek ADVOs on the basis of harm to pets, whilst 94% of respondents agreed that there should be mandatory protections afforded to pets under ADVOs.

Following the release of the report, the proposed bill provides legislative recognition of the harm that is often caused to pets in situations of domestic violence, whereby perpetrators of domestic abuse use their victim's pets as a means of coercive control to intimidate and manipulate. This sort of behaviour occurs mainly after the victim has expressed a desire to leave the relationship and the abusive partner is trying to prevent them from doing so. Sadly, there are also many reported instances where pets are harmed or killed after the victim has left the relationship and the abusive partner is “punishing” them for doing so. Indeed, studies in Australia have shown that many victims of domestic violence delay leaving the relationship due to concerns for the safety of their pets.

With the proposed reforms, pets will no longer be classified as personal property belonging to the person in need of protection under the ADVO, and will instead be afforded protections as a separate entity under the standard conditions in all Apprehended Domestic Violence Orders. Further, amendments to the Criminal Procedure Act 1986 (NSW) mean that the definition of intimidation will be expanded to include harm to pets or threats to harm pets.

As expressed by Mr. Speakman in his second reading speech, “pets and animals are cherished and become quasi members of the family”, therefore, the proposed legislation recognises that pets should also be protected under ADVOs as they are very much a part of the victim’s family.

Along with the reforms, the Government is also allocating \$500,000 in funding to programs which facilitate animal shelters housing pets of domestic violence victims. This is a means of providing further support to domestic violence victims and will give their family pets a safe place to be held when fleeing a violent relationship. This will enable victims of domestic violence to leave violent homes without worrying about whether their former partner will harm their beloved pet.



Lara Menon
Lawyer



Georgia Walker
Law Graduate

Keep your eyes peeled for “unfair terms”

KEY TAKE OUTS:

- ✓ It has been ten years since provisions of the Australian Consumer Law came into effect, declaring unfair terms in standard form consumer contracts void.
- ✓ Restraint of trade clauses found within franchise agreements of Back in Motion Physiotherapy Pty Ltd have been deemed ‘unfair’ under Australian Consumer Law.
- ✓ Unfair terms in contracts can be expensive, not only because they could be declared void but also because of the litigation costs and risk to a business’ reputation.

Last month, terms of a franchise agreement between Back in Motion Physiotherapy Pty Ltd (BiM) and its franchisees have been found unfair and the franchisor has submitted an undertaking to the ACCC.

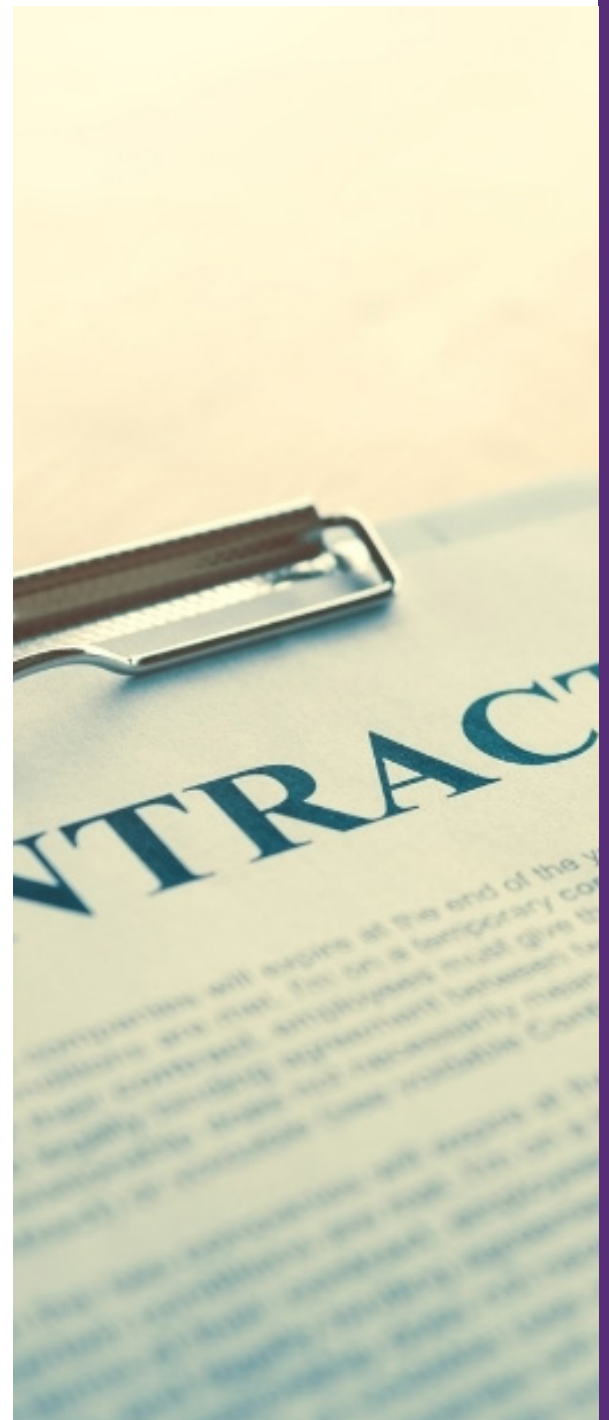
In this matter, individuals whose BiM agreement had concluded and sought to establish their own physiotherapy practice were prohibited from doing so within a 3km radius for three months or a 10km radius for a 12-month period of BiM outlets. The effect of the unfair clause effectively “meant that most former franchisees could not operate in many parts of metropolitan areas of Australia because of the existence of other Back in Motion Physiotherapy franchise outlets in those locations”, ACCC Deputy Chair Keogh stated.

The franchise agreements also included a clause which allowed the franchisor to charge the franchisee a ‘buy out fee’ equal to four times their annual royalty fees, if they opted to be released from the unfair restraint of trade.

The Law

Under s 24 of the ACL, ‘unfair’ is defined as a term that would;

- ✓ Cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- ✓ not reasonably necessary to protect the legitimate interests (such as assets or securities) of the party advantaged; and
- ✓ causes detriment (either financial or otherwise) to the party to which the term applies.



In relation to the matter of BiM, it can be construed that whilst they may have been seeking to protect their interests, it was done in a way that was detrimental to former, current and future signors of a franchise agreement with BiM.

Further, BiM agreed to stop enforcing or relying upon these unfair terms with current and future franchise agreements and will remove them from existing agreements.

Currently, there are no prohibitions or penalties under ACL and the Franchising Code of Conduct on businesses including or relying on unfair contract terms in agreements. Courts however can declare terms to be unfair, resulting in them being void and unenforceable so that they are no longer bound to the parties affected.

If you are concerned with the terms of an existing contract and would like clarification, contact Coutts on either 1300 268 887 or info@couttslegal.com.au and our team is here to assist.



Amanda Olic
Senior Associate

Cheap Stunt is a Costly Act for Former Acquaintance

KEY TAKE OUTS

- ✓ The ACT Magistrates Court has found in favour of a woman who was a victim of a leaked nude image and accompanying disparaging comments by a former acquaintance.
- ✓ The Plaintiff claimed that the posted nude image of her and the disparaging comments made against her were defamatory in nature as they injured her reputation.
- ✓ The Chief Magistrate awarded the plaintiff \$54,000 in damages.



Recently, in the matter of *Edwards v Gill* [2020] ACTMC 21, the ACT Magistrates Court ordered the Defendant to pay \$54,000 in damages after posting a nude image of the Plaintiff and making defamatory comments against her in a group chat.

The Plaintiff sued in the tort of defamation for compensatory and aggravated damages after the Defendant posted a nude image of the Plaintiff. The image was widely circulated within the community through a group on Facebook Messenger where the Defendant also made defamatory comments against the Plaintiff.

The Plaintiff only became aware of the posted image of herself when a school friend sent her a screen shot of the image. The Plaintiff recognised the image as one she had exchanged with a former intimate partner for personal use only.

The Plaintiff also received screen shots of messages posted in the Facebook group. The Plaintiff knew at least six of the members in the group chat. She even received a message from her butcher who asked her “do you know there’s a nude pic of you doing the rounds?” The Plaintiff was shocked, embarrassed, and humiliated when she found out how many people the image was published to in the group chat.

The Defendant denied that the posts were defamatory in nature and argued that they were “honest opinion” and were unlikely to cause the plaintiff any harm.


Findings

The Chief Magistrate held that it did not matter how the Defendant intended the images and comments to be received, the test used is how they are perceived by an ordinary reasonable person. The Chief Magistrate found that the defamatory comments and the nude image harmed the Plaintiff’s reputation and awarded the Plaintiff \$45,000 in compensatory damages and an additional \$9,000.00 for aggravated damages.

If you are concerned about the distribution of an intimate image without your consent, please contact Coutts today.



Christine Guirguis
Senior Lawyer



Keeping Up With Modern Awards: Upcoming Changes to the Children's Services Award, to come into effect 1 November 2020

The Fair Work Commission is currently undertaking their four-yearly review of the modern awards, under section 156 of the Fair Work Act 2009.

Most recently, on 19 October 2020, the Fair Work Commission made a determination in relation to the Children Services Award 2010. This determination added to the decisions made on 10 June 2020 and 29 September 2020.

The 29 September decision left the commission with four outstanding issues to resolve, which included the following:

1. Part time employment – the means of communicating ad hoc agreed changes;
2. Educational Leaders – additional 2 hours non-contact time per week;
3. Minimum engagement (no substantial changes, just re-wording); and
4. Coverage (no substantial changes).

The most recent decision of the Fair Work Commission, on 19 October 2020, dealt with the above outstanding issues, with the amendments to be effective from 1 November 2020.

Outstanding Issue One: Communication of ad hoc agreed changes

The first outstanding issue relates to the ability of an employer and employee to change agreed regular patterns of work, the process of doing so, and the notice required when doing so. The previous requirements, and amendments that are effective as of 1 November 2020, are set out below.

Previous requirement	Current requirements (as at 1 November 2020)
<ul style="list-style-type: none"> ✓ Changes in the agreed regular pattern of work can only be made by agreement in writing ✓ Changes in the days to be worked or starting and finishing times may also be made in writing 	<ul style="list-style-type: none"> ✓ Changes can only be made in writing, however an agreement in writing can be made by any electronic means of communication
<ul style="list-style-type: none"> ✓ Employers are not required to provide 7 days' notice of a change of roster, if the change is due to an emergency outside of the employers control 	<ul style="list-style-type: none"> ✓ No change to the employer being excused from providing 7 days' notice if the change is due to an emergency, however the employers must now pay the employee at overtime rates for the additional time the employee remains in the workplace.
<ul style="list-style-type: none"> ✓ Employers are required to provide 7 days written notice of a change to rostered hours 	<ul style="list-style-type: none"> ✓ Employers are still required to provide 7 days written notice of a change, however this can be done by electronic means of communication

Outstanding Issue Two: Educational Leaders – additional two hours non-contact time

The second outstanding issue is in relation to the amount of non-contact hours afforded to staff and education leaders for planning purposes, per week. The purpose of non-contact hours is to allow the education leader to plan, prepare, evaluate and program activities. The Fair Work Commission has now allowed an additional two hour of non-contact time for educational leaders, in addition to those responsible for planning.

Previous requirement	Current requirements (as at 1 November 2020)
<ul style="list-style-type: none"> ✓ An employee responsible for the preparation, implementation, and/or evaluation of a developmental program will be entitled to 2 hours of non-contact per week. ✓ Wherever possible the non-contact time should be rostered in advance. 	<ul style="list-style-type: none"> ✓ An employee responsible for the preparation, implementation and/or evaluation of a developmental program will be entitled to 2 hours non-contract per week. ✓ An employee appointed as the Education Leader will be entitled to a minimum of 2 hours non-contact per week. ✓ The entitlements above are cumulative, meaning an educational leader who also has programming responsibilities is entitled to a minimum of 4 hours non-contact per week.

Other Changes and Information

Reimbursement for reasonable costs

Clause 15.2(c) was amended so that the requirement for an employer to reimburse an employee for the costs of protective clothes or equipment (such as hats and sunscreen lotion), will be limited to reasonable costs incurred only.

Minimum wage

The Fair Work Commission undertook their annual wage review in June 2020. The minimum rates and allowances were increased by 1.75% and were raised in a staged structure: so that the industries effected by coronavirus received the raise first. The Children Services Award 2010 raised was modified from 1 July 2020.

For Employers

To ensure you are compliant with the changes to the award, it is important to:

- ✓ Allow for online rostering and electronic communications as acceptable when changing hours;
- ✓ Review communication procedures and notice periods with staff in relation to rostering changes to ensure they are compliant with the award;
- ✓ Ensure payroll is informed of the overtime rates that apply where an employee's hours are changed due to an emergency, and further, the 1.75% increase effective from 1 July 2020;
- ✓ Familiarise yourself with the definition of 'emergency' under the award to ensure you are compliant with the award;
- ✓ Facilitate or provide employees with hats and sunscreen where available or be prepared for reasonable reimbursement requirements; and
- ✓ Consider where non-contact time is required (per week) and roster your staff accordingly.

For Employees

It is important to know your employment law rights and to understand new laws that affect you. It is necessary to:

- ✓ Understand that your employer can alter rostered hours with adequate notice through electronic means;
- ✓ Familiarise yourself with the definition of emergency under the award;
- ✓ Ensure you are being paid accurately for emergency changes to rostered hours and with respect to changes to minimum rates;
- ✓ Request access to hats or sunscreen or alternatively retain receipts for reasonable sun protection products and provide them to your employer for reimbursement; and
- ✓ If an Educational Leader or are working on developmental programs, ensure you are rostered the minimum weekly required non-contact time.



Allyce Silm
Senior Lawyer



Brianna Ellul
Paralegal



The Abolishment of Stamp Duty and the Introduction of Land Tax for NSW

KEY TAKE OUTS

Stamp duty is the tax paid to the Government every time someone purchases a property. On Tuesday our Treasurer, during the State budget planning, announced the possible abolishment of stamp duty due to it being “one of the biggest financial barriers to home ownership”.

What does this mean for NSW? It means another tax will need to take its place...

Currently, if you purchase a home, you are liable to pay stamp duty. This tax is based upon the purchase price of your home, the higher the purchase price, the more you pay. First Home Buyers (subject to meeting certain eligibility criteria) are currently exempt from stamp duty, so the State Government is looking offer First Home Buyers a grant of up to \$25,000.00 in place of the exemption that every buyer would then have the benefit of.

Mr Perrotet believes that “This is a vision for every person and family in NSW – from first home buyers trying to get a foot on the property ladder, to frontline workers moving to service our regional communities, and retirees who are ready to downsize.”

While this may seem appealing to Australians, with the abolishment of any tax comes another. Mr Perrotet is suggesting the gradual introduction of a land tax. This would be an annual tax based on the value of the land.

Currently in NSW you are exempt from land tax on your own home (principal place of residence) and you are only liable for land tax in the event that you own property whose collective value exceeds the threshold (which for 2020 is currently \$734,000).

With the average median price of housing in NSW being \$870,000 (which would cost you approx. \$34,000 in stamp duty) the thought of not paying stamp duty is certainly appealing, but at what cost?

Land tax is currently approx. 1.6% of the property value (above the threshold), however if there were no thresholds and this became an annual tax would we be looking at paying \$13,920 every year?

Definitely food for thought...



Carina Novek
Property Law Manager



Out and About with COUTTS



A Wine with...

Amy



Profile

Position: Licensed Conveyancer

Location: Camden, NSW

Area of Practice: Conveyancing

Q: How would you describe yourself in two words?

A: Honest , Generous

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

A: Loyal

Q: My favourite motto / mantra is:

A: If it doesn't add to your life, it doesn't belong in your life.

Q: My pet peeve is:

A: Oh I have a few; sneakiness, lying and people that cant park between the lines

Q: On the weekends you can find me:

A: Hanging out with my loved ones

Q: The last book I read was:

A: I can't remember the last time I read a book

Q: The top 3 most used emoji's on my phone are:

A: Girl doing a face palm, laughing face, kiss face

Q: My favourite movie of all time is:

A: Be a hard pick between Grease and Dirty Dancing

Your Questions Answered



WE SEPARATED 15 MONTHS AGO, BUT THERE WERE A FEW WEEKS WHEN WE GOT BACK TOGETHER TO TRY AND SORT THINGS OUT. CAN WE STILL GET DIVORCED?



It is very common for people to get back together for short periods of time after a separation. If this has happened to you, the separation is 'paused', but continues again if you separate once more.

For example, Sarah and John have been separated for two months. They decide to try and work things out. They get back together for six weeks. At the end of the six weeks, they decide to separate once more. At the end of that six weeks, John and Sarah have only been separated for two months. The period of separation continues from there.



WHAT IS THE DIFFERENCE BETWEEN A POWER OF ATTORNEY AND ENDURING GUARDIANSHIP?



A power of attorney is a legal document which allows an individual (known as the principal) to appoint another person (known as the attorney) to make decisions about your financial property and manage your financial affairs. An enduring guardianship is a legal document that allows you to appoint another person to make decisions on your behalf regarding your medical, health and lifestyle decisions when you lose mental capacity.



THERE IS A DEVELOPMENT POPPING UP NEXT TO ME WHAT CAN I DO?"



We have prepared submissions to Council on behalf of a client in relation to a proposed development on the neighbouring property which was an overdevelopment of the site and also not a lawful use of the site. The development proposed to turn a small block of units into a multi-dwelling site that was not in keeping with the heritage and landscaping and tourist attractions for the picturesque location.

We await an outcome but hope that the development will be rejected by Council.



WHAT SHOULD I DO WHEN SIGNING A CONTRACT?



Be sure you have read and understood the entire contract. If you do not understand it, don't sign it until you do understand it.

Be sure everyone signs & dates the final page.

Be sure everyone initials & dates each page of contract.

Contract pages should have numbering "1 of xx pages".

Be sure all warranties etc that are incorporated by reference are attached to basic contract.

If the contract is a form contract, *all* entries must be filled out (if the space does not apply use "NA" etc).



WHAT CAN I DO IF SOMEONE BREACHES A CONTRACT?



Most contracts are enforced in court. If the other party breaches the contract, you can go to court to try to collect damages or obtain 'specific performance'. However, some contracts have an arbitration clause which requires any disputes to be arbitrated by a neutral party.



WHAT INSURANCE WILL I NEED IF I AM BUYING A HOUSE?



If you are buying a home unit, a certificate of currency should be obtained from the body corporate's insurer to make sure the property is adequately insured. Your lender requires details and proof of this on or before settlement. If you are moving into the property before settlement, the seller would probably want to make a special arrangement whereby you are responsible for insurance from the time you take possession.

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by appointment only

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Adriana Care
Managing Partner



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