

# *the Conduit*

21  
AUTUMN



COUTTS  
LAWYERS & CONVEYANCERS





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## CALENDAR DATES

### March

Monday 8th  
Friday 19th

International Women's Day  
Turning Point BBQ

### April

Friday 2nd  
Monday 5th  
Monday 5th-Friday 16th  
Friday 16th  
Sunday 25th

Good Friday  
Easter Monday  
School Holidays  
Turning Point BBQ  
Anzac Day

### May

Sunday 9th  
Thursday 27th

Mother's Day  
Biggest Morning Tea



## A MESSAGE FROM

# Adriana

Welcome to the Autumn edition of our newsletter and as we start to experience some cooler days, we are all also very excited to get back to a somewhat normal season of Winter Sport! A timely reminder to continue following the COVID-19 Safety Guidelines to ensure no interruptions to our sporting season! Good luck to all of our teams!

It has been an exciting few months here at Coutts, including the launch of our Wollongong office. A Wollongong office has always been on the cards for Coutts, and with the help of Karena Nicholls, this has become a reality. We are very proud to now offer our clients the opportunity to come & see us in our Wollongong office (by appointment only) and look forward to expanding our office in the 'gong' in the future!

Many of our clients will know Kaisha from our Wills & Estates team, who has had a couple of big months both personally and professionally. In January – Kaisha welcomed her baby boy Harrison; who is simply adorable and a welcomed edition to the Coutts Fam! January was Kaisha's month, also being promoted to Senior Associate of Coutts. Kaisha is a natural leader and mentor in Coutts and is well respected by her colleagues and clients. For now, Kaisha is enjoying her time with little Harrison, and we look forward to having our new Senior Associate back in the office later this year.

Aside from this, Coutts is as exciting and as crazy as ever. We are excited to be out and about networking with our colleagues, referral partners and local communities; seeing our wonderful sponsorships and partnerships play out with our many local winter sports starting up. Celebrations for International Women's Day last week, and the start of many charitable functions; which we are excited for more than ever to be a part of. Look out for us and come and say hi to myself and the team.

Wishing everyone a safe & happy Easter and I hope you all enjoy time spent with family & friends.

# thank you

check out our new website 



# Adverse Possession – Squatters Rights in 2021

## 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.

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## What is adverse possession?

Also known as ‘Squatter’s Rights’, adverse possession is the process of legally asserting physical ownership of land after a period of time.

## Limitation Period: How Long Does Possession Need to Occur?

In NSW, an adverse possessor must have exclusive occupation of the land for 12 years before claiming adverse possession. In very extreme circumstances, there may be reasons for the limitation period to be extended.

## What criteria must be met to establish adverse possession? (Mulcahy v Curamore Pty Ltd [1974])

There are three main elements from the above case which guide successful adverse possession.

1. The possession must be ‘open, not secret.’ This means the possession is able to be noticed by the documentary owner who is reasonably careful of their own interests.
2. The possession must be ‘peaceful, not by force.’ Force may be used to begin adverse



possession, however, but not to maintain it.

3. It must be adverse so that it is not by consent of the owner. If permission is given but later revoked, 'adverse' begins from the date of revocation. Similarly, if there is an absence of consent initially, but is given at a later stage, any time accrued towards the limitation period for adverse possession is void at the date of consent. Family relationships exclude the possibility of permission.

## How is adverse possession proven?

The possessor must prove that they had actual or intended possession. This involves an intention to exclude land to all others, but only by possession and not ownership.

### Evidence

Consideration is given to the 'character and value of the property, suitable and natural mode of using it' and conduct of the owner in protecting his own interests. For example, the construction of a fence is usually the 'strongest possible evidence' of adverse possession. Evidence that the possessor 'could have done more' to the land is not considered. Mistaken belief of ownership or willingness to pay if requested is also irrelevant as evidence of possession.

### Payment of rates and taxes

The paying of rates and taxes is important as a contributing factor of proof, but not conclusive. However, a refusal to pay rates becomes contrary to the intention to possess.

## Can the owner retake possession?

In reclaiming possession, it is important to note that the time period of repossession is irrelevant. For example, 45 minutes of repossession can nullify 19 years of adverse possession.

## The documentary owner can reclaim possession in two ways:

1. By physical entry

Rights to the land must be reasserted before limitation period. This includes acts such as removing the possessor, or lesser acts such as removing fences or other structures. The owner must resume possession 'with the intention of repossessing', however must not undertake this by way of violence or force. Oral or written protests, and paper dealings such as a mortgage or lease, do not qualify as repossession.

2. By court proceedings

The time of adverse possession stops when court proceedings are commenced, so it is commonly advised to 'litigate first, negotiate later.' This is commenced by the issue and service of a summons for possession with the intention of obtaining an order for possession. Once proceedings commence within limitation period, adverse possessor's rights are terminated. If this summons is dismissed, time starts over again from this date.

# Hardy v Sidoti (2020)

## Facts

In Hardy v Sidoti, Mr Hardy bought his property in Redfern in 1998 which backed onto a 'dunny lane', a small area developed to collect waste from outdoor dunnies in the 19th Century. In 2002, he removed a paling fence separating the lane from his backyard and made improvements to the land over 3 years. Sidoti then purchased a property in 2018 which backed onto the opposing side of dunny lane. Despite a corrugated iron fence separating the land, the lane was included as part of their property. Sidoti attempted to undertake renovations to the area to extend their backyard when Hardy claimed adverse possession.

## Decision

Kunc J found that Hardy had been in possession prior to the limited folio created over the Sidoti property in 2005, evident by removing the paling fence in 2002. This in conjunction with the landscaping over the 3 year period demonstrated a public display of ownership such that any reasonable person could recognise him as the owner. Kunc J concluded that 'He is entitled to orders to recognise that ownership, including that the defendants cease to trespass... and by removing structures they have erected on it and relocating the fence they have built.'

While adverse possession laws continue to be in contention, there is not likely to be any reform in the coming years.



**Kylie Fuentes**  
Licensed Conveyancer





# Lime Scooters, are they Going to Become a Thing of the Past?

The US based e-scooter company Lime Network has come under scrutiny by the Australian Competition and Consumer Commission (ACCC) after discovering that the company did not inform its rental users of a dangerous and ongoing safety issue that injured over 50 Australian users.

## KEY TAKE OUTS

- ✓ Companies must disclose any known safety issues, as to allow consumers to take extra precautions if they still choose to use the product.
- ✓ Under Australian Consumer Law, a company must issue and file a report if a user has sustained an injury because of using their product.

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The ACCC has issued the Lime Network with a court undertaking after finding that the companies second generation scooters are prone to excessive brake force, which has led to the front wheel often locking and causing broken bones, damaged teeth, cuts, and abrasions.

The ACCC has found that Lime did not make the necessary injury reports on at least 50 occasions relating to consumer injuries sustained while riding the second-generation scooters.

Lime ceased its rental scooter operation in March 2020 due to COVID-19 government restrictions. However, Lime has stated that they will be using generation-three or later models if they recommence operations in Australia, as they are confident that the “upgrades are successful, and they are confident that they have resolved the sudden stopping issue.”

According to the ACCC’s statement, Lime has admitted to most likely having broken Australian consumer protection laws, and they are endeavouring to regain Australian consumer trust.

## What’s Next For Lime Scooters?

While scooter companies such as Lime are finding a gap in the transport market, there are questions as to how safe these new vehicles are.

After the undertaking by the ACCC, there has been growing community concern over the safety of e-scooters. The chairman Harold Scruby, of the Pedestrian Council of Australia is pushing for reforms and has stated that the government needs to “stop pretending e-scooters are safe.”

This has brought up the issue of whether riders of e-scooters should have a license and whether the scooters should be registered vehicles. Mr Scruby has also pointed out the issue of mandatory insurance policies implemented for riders, to protect both riders and other pedestrians.



**Amanda Olic**  
Senior Associate



**Elyse Strahan**  
Law Graduate





# Burial or Cremation? How to Decide the Funeral Wishes of a Deceased Person

## KEY TAKE OUTS

- ✓ No one legally owns the body of a deceased person.
- ✓ When there is a Last Will and Testament of the deceased person, the named Executor(s) have the temporary control of the deceased's body for the purpose of arranging their burial or cremation.
- ✓ Where the deceased did not leave a Last Will and Testament, the Next of Kin is the most appropriate person to hold this temporary control.
- ✓ If the deceased person left written intentions as to their funeral wishes, the Executor or Next of Kin is legally bound to carry out those wishes.

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The issue of deciding on the funeral arrangements for a deceased person is becoming prevalent within Australia. The major questions being asked by the deceased persons loved ones are: Who needs to organise the funeral? Who decides how the deceased is disposed of by means of burial or cremation? How do we resolve disputes between family members regarding the ownership of the deceased's body? This article will explore these questions and provide guidance as to who legally has the right to arrange the funeral wishes of a deceased person.

## Who has a right to bury the deceased when the deceased left a Will?

An eligible person will have control over the deceased's body for the purposes of burial or cremation however, no person can legally own whole or part of a deceased's body.

An eligible person in this context is the Executor appointed pursuant to the Last Will and Testament of the Deceased. In this instance, the familial requests are not legally required to be followed by the Executor, however the Executor may wish to follow the families intentions provided that they are not contrary to the deceased's wishes.

Regulation 77 of the Public Health Regulation 2012 (NSW) provides that if there are written intentions from the deceased relating to their funeral wishes, then the Executor is bound to adhere to such request. A failure to follow the deceased's funeral wishes could result in a maximum penalty of 10 penalty units.

## What happens when the deceased does not leave a Will?

If the deceased did not leave a Last Will and Testament, then there is no appointed Executor for the Estate. The question then arises as to who the eligible person or persons is would be to temporarily have control over the deceased's body for the purposes of carrying out the burial or cremation of the deceased.

In this situation, the Next of Kin (legally referred to in Australia as the deceased person's closest blood relative or somebody who has a close relationship to the deceased person for example a husband or wife) would have the temporary control over the deceased's body for the purposes of carrying out the funeral of the deceased. In turn, this person or persons would also be considered to have the right to apply to be the Administrator of the deceased persons Estate through the process of applying for Letters of Administration.

It is important to note that the common law has considered the issue of there being no Next of Kin that has survived the deceased person. The case of *Smith v Tamworth City Council* (1997) held that if there was no surviving Next of Kin, then the person whom the deceased last lived with has the temporary control of the deceased's bod for the purposes of burial or cremation.



**Kaisha Gambell**  
Senior Associate



**Vivian Hondrogianis**  
Paralegal





# Police Powers on Drug Dogs and Strip Searches under Fire

## KEY TAKE OUTS:

- ✓ The Law Enforcement (Powers and Responsibilities) Amendment (Drug Detection Dogs and Strip Searches) Bill 2020 introduced by the NSW Greens Party is currently in its Second Reading.
- ✓ The amendment puts strict limitations upon the circumstances under which a strip search, or other personal search, can occur.
- ✓ It also prohibits the use of drug detection dogs in carrying out drug detection in a public place without a warrant.
- ✓ The Police are also prohibited from enforcing target limits or quotas on the number of persons strip searched.

## Strip searches and Drug Detection Dogs

Primarily, the amendment limits the circumstances in which strip searches may be carried out.

By definition, a strip search must not involve an examination of the person's body by touch, or require the person to squat, cough or bend over. The officer conducting the search is also not permitted to remove a person's clothes, including moving or otherwise adjusting them.

This amendment explains that a strip search must only be undertaken if the officer believes on reasonable grounds that the strip search is necessary, or there is immediate risk of significant harm to a person's life or safety. Possession of a small quantity of a prohibited drug or plant does not in itself constitute an immediate risk of significant harm to a person's life or safety.

If a strip search is necessary for the reasons mentioned, under the Bill, the police officer will need to tell the person that they may have a support person to be present while it is conducted. Furthermore, as a strip search is such an invasive procedure, it is not possible to consent to a strip search. Further, for personal searches other than a strip search, consent must be sought, and an unfavourable inference must not be drawn from non-consent.

The amendment also seeks to protect children following reported instances of officers strip-searching children as young as 10 based on their suspicion alone. The Bill seeks to prohibit strip searches of children younger than 16 and allows strip searches of 16-17-year olds only in exceptional circumstances.

Interestingly, target numbers or quotas of persons searched will also be prohibited. This is in response to the overwhelming abuse of these powers in the past, with over 2 million searches being conducted since 2013 which exceeded the target of 1.7 million.

The amendment also prohibits the use of drug detection dogs in carrying out drug detection in a public place without a warrant. This targets the efficiency of the practice, which reportedly produces false results in approximately two-thirds to three-quarters of cases.

## Other Notable Changes

It is also important to note that the Commissioner of Police will be required to record information relating to, and report annually to Parliament on, the number of searches, including strip searches undertaken by Police. This also includes searches carried out by police while using dogs to carry out general drug detection under a warrant.



**Lara Menon**  
Lawyer



**Bethany Kickert**  
Reception

# Public Liability Claims: Negligent or Not?

Let's look at two cases *Hubbard v CPB Contractors Pty Ltd (No 2)* [2020] NSW SC 1922 and *Hayley Marks v Skydive Holdings Pty Ltd* [2021] VSC 21 who both look at negligence and come to two different conclusions.

## Facts

### **Hubbard v CPB Contractors Pty Ltd (No 2) [2020] NSW SC 1922**

Mr Hubbard was employed as a security guard performing duties at a premises of the occupier. It was alleged that he had fallen in a ditch and sustained injury on 5 October 2011. He presented with a walking stick that he uses to walk and is in constant pain. The defendant disputed that the accident occurred as it did and states that they were not negligent relying on that Mr Hubbard had failed to take reasonable precautions. They also alleged that he contributed to his own injury claiming contributory negligence.

## Outcome

The Court found in favour of Mr Hubbard awarding judgment in the sum of \$11,212,281 and that the Defendant pay his costs.

The Court looked at the tests of duty of care, breach of duty of care, causation and damages. They were satisfied that the risk of harm was reasonably foreseeable and not insignificant and that the defendant must have been aware that security personnel would be attending the compound at night. The Court identified that there was no illumination where Mr Hubbard had fallen, no webbing to guard and therefore had breached its duty of care.

The Court stated that causation was established and that he was not satisfied that a torch would make Mr Hubbard guilty of contributory negligence.

A success for Mr Hubbard.

Now let's look at the second case of, **Hayley Marks v Skydive Holdings Pty Ltd [2021] VSC 21**.

## Facts

The Plaintiff undertook a tandem skydive jump on 18 August 2018.



The Plaintiff suffered a fracture to her lumbar spine at L2 for which she required a L1-L3 fusion and an L2 corpectomy. She also suffered anxiety and depression.

The cause was a heavy landing and the plaintiff claimed that her injuries were caused by the lack of care and skill. Although she signed a waiver, the Court held that the waiver did not bar the claim.

The Defendant argued that the injuries are a result of a materialisation of inherent risk that could not be avoided by exercise of reasonable care.

## Outcome

The Court found that they could not find that the injuries were caused by the failure of the instructor or the company to exercise reasonable care and avoid a foreseeable risk of injury, or to conduct the tandem jump with due care and skill. The Defendant was not liable in negligence, contract or under the Australian Consumer Laws.

Further the Court stated that the injury was a result of the materialisation of an inherent risk associated with skydiving, that could not be avoided by the exercise of reasonable care and that the turbulence is invisible and cannot be avoided and there was nothing else that could be done to slow the rate of the descent.

## Key Takeaways

Many cases result in different outcomes. It is important to have the right legal team behind you and we at Coutts have the experience and the expertise.



**Karena Nicholls**

Partner





# Can a Company Sue for Defamation?

## KEY TAKE OUTS

- ✓ A Harris Park travel agency commenced defamation proceedings against a Sydney woman that was part of a mother's Facebook group after publishing a post that was extremely critical of the travel agency's services.
- ✓ The Court dismissed the travel agency's claim and ordered that it pay the woman's legal costs.
- ✓ Generally, a company does not have capacity to sue in defamation unless it is a not-for-profit company or a company that employs fewer than 10 employees and is not related to another company.

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A travel agency based in Harris Park has been ordered to pay a woman's legal costs after commencing defamation proceedings against her for publishing negative comments about the company in a mother's Facebook group.

## The Facts

The woman had booked flights through the travel agency for herself and her child who was about 18 months old at the time. The woman had requested that the travel agency ensure that the airline provide her with a bassinet for her child and baby food. The woman said that she had received both verbal and written assurances from the travel agency that the airline would provide these facilities.

On the flight, the airline staff advised the woman that they had no record of any payment and therefore, the airline had no record of any requirement to provide the bassinet and baby food.

On 2 July 2018, the woman published a post on the Facebook group of a community group called 'Desi Mums Connect (Sydney)' that was extremely critical of the quality of the travel agency's services.

The travel agency commenced proceedings against the woman for damages for defamation arising from the Facebook post.

The primary issue in the proceedings was whether the travel agency, as a corporation, had the capacity to sue the woman in defamation. Under the Defamation Act 2005 (NSW) ("the Act"), a company cannot

sue in defamation, unless they are an “excluded corporation” which includes companies that employ fewer than 10 employees.

The travel agency argued that it employed only 5 or 6 employees. However, the Court found that argument was not persuasive due to a partnership the travel agency had with a call centre in India.

## The Findings

As the travel agency could not prove it had fewer than 10 employees, the Judge held that the travel agency did not have the capacity to sue the woman in defamation and ordered that the travel agency pay the woman’s legal costs.

The Judge also noted that in the event that the travel agency had capacity to sue in defamation, he would have awarded the travel agency damages in the sum of \$10,000.00 for loss of reputation.

## When can a company sue for defamation?

As shown in the above case, a company is only entitled to sue for defamation in certain circumstances. Section 9 of the Act provides:

- ✓ A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.

Under the Act, an ‘excluded company’ is defined as a not-for-profit company or a company that employees fewer than 10 employees and is not related to another company.

If a company is not considered to be an ‘excluded company’ under the Act, they cannot sue for defamation. However, an individual associated with a company, such as an employee can sue for defamation where the publication refers to a company but reflects upon an employee within the company.

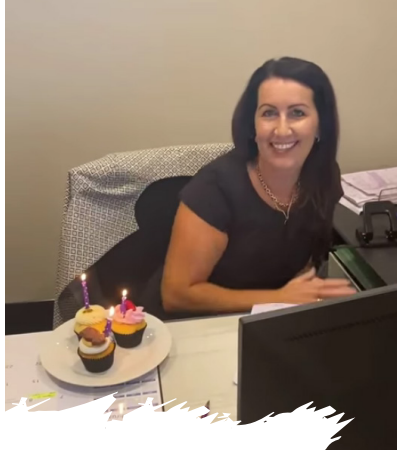


**Christine Guirguis**  
Senior Lawyer



**Elyse Strahan**  
Law Graduate





# Out and About with COUTTS





# A Wine with... *Lara*



## Profile

**Position:** Lawyer

**Location:** Camden, NSW

**Area of Practice:** Family and Criminal Law

Q: How would you describe yourself in two words?

A: Empathetic & Dedicated

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

A: Loyal

Q: My favourite motto / mantra is:

A: What will be will be

Q: My pet peeve is:

A: I have a few, but lying and loud chewing would be top of the list!

Q: On the weekends you can find me:

A: Spending time with family or shopping

Q: The last book I read was:

A: The Book of Two Ways

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

A: face palm, present, laughing

Q: My favourite movie of all time is:

A: This is tough, but I would have to go with 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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**Adriana Care**  
**Managing Partner**



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