

the Conduit

22
SPRING



COUTTS

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CALENDAR DATES

September

Thursday 1st	Spring starts
Sunday 4th	Father's Day
Monday 5th	Narellan Wills Express Night
Wednesday 7th	Wollongong Wills Express Night
Monday 12th	Facebook Live (Pre-Recorded)
Friday 16th	Turning Point BBQ
Monday 26th	Facebook Live

October

Sunday 2nd	Daylight savings commences
Monday 3rd	Labour Day
Wednesday 5th	Wollongong Wills Express Night
Monday 10th	Narellan Wills Express Night
Monday 10th	Facebook Live (Pre-Recorded)
Friday 21st	Turning Point BBQ
Monday 24th	Facebook Live
Monday 31st	Halloween

November

Wednesday 2nd	Wollongong Wills Express Night
Monday 7th	Narellan Wills Express Night
Monday 7th	Facebook Live (Pre-Recorded)
Friday 18th	Turning Point BBQ
Monday 21st	Facebook Live



A MESSAGE FROM

Adriana

Welcome to the Spring edition of our newsletter where the days are starting to get longer, and the weather is finally warming up.

We have been working hard behind the scenes and are excited to announce our Campbelltown office's beautiful renovation is officially complete. Our refurbished office is multi-levelled, with spacious meeting rooms, lush interior decor, and comfortable new furniture. Keep a look out for our full-service law firm's new signage in Campbelltown, it will be sure to catch your eye.

We pride ourselves on offering a personal approach to the law and aim to thoroughly understand each client's situation on an individual basis. Recently, our enduring commitment to client satisfaction was recognised through multiple award accolades; Partner Karena Nicholls won the Lawyers Weekly: Mentor of the Year Award, and Coutts was a finalist in the Australian Law Awards for Regional/Suburban Law Firm of the Year.

To celebrate a successful year, Coutts recently held an End of Financial Year dinner with a Wild West themed Murder Mystery Night. It was a delightful event filled with lots of laughter.



Coutts is committed to philanthropy, and we recently sponsored Youth Solutions' Annual Charity Ball. The charity develops and implements initiatives aimed at reducing and preventing alcohol and drug abuse in young people across the Macarthur and Wingecarribee regions of NSW. The dress code was "dress as your favourite star, icon, decade", so the Coutts team swapped out purple for pink and went as the Pink Ladies from Grease. The event raised over \$50,000!

Finally, remember, Coutts is always here to help you, your family, and friends with any legal matter. With experienced lawyers in Property, Conveyancing, Family, Wills & Estates, Injury Compensation, Employment, Commercial, Local Government & Criminal law, our team can assist you through all of life's transitions. Call us on 1300 268 887, we're always happy to help.

thank you



Dangers of using a Post Office or Online Will Kit

Are will kits legal?

It is becoming increasingly common for people to opt for cost-saving methods of estate planning such as utilising “Post Office Will kits” or online wills or estate planning services. Whilst wills kits are legal in Australia, there is a substantial range of issues that arise with these services that should not be overlooked and that can result in the will, or part of the will, being invalid.

Main Considerations of Estate Planning being Overlooked

One of the most common problems when utilising post office and online will kits is that many important principles of estate planning are overlooked or simply not considered by the testator writing their will. This is the case because the element of legal advice that is necessary for the valid creation of a will is not being provided to the testator when using these services.

Can you gift someone real property in a Will?

One major example is the gifting of real property within a will. An individual may provide a gift of real estate to someone else within their will that they are unable to gift in the first place. This is easily done without realising as if it is owned as joint tenants with someone else then it will automatically pass to the surviving joint tenant upon their death. It is therefore unable to be gifted to a separate third party unless the joint tenancy is severed. A large majority of clients that we speak to on a daily basis are not aware of the ownership structure of their property or assets so would not think to consider this or whether they are able to gift their real estate or the proceeds of the same.

This can have many implications upon the beneficiaries if this is the only gift that they have provided to them and if the family situation is complex. This may result in the main beneficiaries not receiving any benefit from the estate and having to make a Family Provision claim or contest the will to receive their entitlement from the estate.

Mistakes: Witness to a Will requirements

Another common issue with this service is the execution of the document being done incorrectly. Although it may be easy to simply state in the instructions “You need two eligible witnesses to sign”, it is important that the witnesses are suitable and that they are not persons who cannot act as witnesses to wills.

The issue that we commonly see when these are made without legal assistance is that the witnesses are “an interested witness” who benefit from a disposition under the will. It is not commonly known that beneficiaries are unable to sign as witnesses to the will and that if they do, it voids the will to the extent

of their interest as per s10 of the Succession Act 2006 (NSW). This results in many of these wills being created with the main beneficiaries under the will receiving potentially no entitlement or benefit from the estate as they have wrongfully acted as witnesses.

No advice regarding how to avoid potential Family Provision claims or issues.

The other crucial part of advice that is given by a solicitor upon drafting estate planning documents are likely issues or claims that could be made based on someone's instructions. Although there is no explicit way to prevent a Family Provision Claim from being made in the future, there are ways in which we can lessen the chances of this occurring and for consideration to be made as to who is likely or can potentially make a claim against the estate in future. If someone simply writes down their wishes without making such considerations, it is much more likely that there will be an estate dispute following their passing and that extensive fees will need to be paid from the estate as a result.

Location of the signed Will

When completion of an at home or online will occurs, the location of the wills are often not communicated or they are kept somewhere that isn't secure. This is a huge issue, especially for anyone who may live alone or in a different location to the executors of the estate. When a will is completed by a lawyer, it will be kept in their safe custody in a location that is secure and easily accessible for the executors of the estate so that when it is time for the estate to be administered there is never a question of finding or locating the documents that have been created.

Is it cheaper to use a DIY Will kit?

When you consider the fact that such a large majority of these wills result in extensive litigation or contested estate matters, the simple answer is no. A poorly drafted or an invalid will created without legal advice can result in many issues occurring following the passing of the testator, only some of which we have been outlined within this blog. The main issue is it resulting in lengthy litigation and family disputes that no one wishes to occur. A family member passing away is already an extremely sensitive and difficult time and no one wants to deal with the added stress of uncertainty of a will that someone has created from a kit or service that lacks the crucial legal advice required for it to be done properly.



Rebecca Mostyn

Senior Associate



What you need to know before buying or building property in Mine Subsidence Districts

KEY TAKE OUTS

- ✓ What is a Mine Subsidence area?
- ✓ How do I know if my land is in a Mine Subsidence District?
- ✓ What does it mean for my purchase?
- ✓ What does it mean for my build?

What is a Mine Subsidence District?

A Mine Subsidence District in New South Wales is an area that has been proclaimed by the [Subsidence Advisory New South Wales \(SANSW\)](#) to have a potential subsidence (gradual caving in or sinking of land) risk from active or inactive underground coal mining.

What is the Subsidence Advisory NSW responsible for?

The duties of the Subsidence Advisory of New South Wales include:

- supporting the property owners living in areas when subsidence from underground coal mining may occur;
- providing advocacy support to owners affected by coal mines subsidence in NSW;
- management of compensation claims when damage occurs due to subsidence and supporting owners through the claims process; and
- regulating development within such Districts to help protect homes and structures from subsidence damage.

How to tell if your land is in a Mine Subsidence District

When you are considering purchasing land that may or may not be located in a Mine Subsidence District, your solicitor/conveyancer will review the Contract for Sale which will include a certificate from the local council which will disclose whether or not the land is in a Mine Subsidence District.

You can also search a property to see if it is in a Mine Subsidence District [here](#).

Buying property in a Mine Subsidence District

Under Section 23(a) the Coal Mine Subsidence Compensation Act 2017, buyers have the right to withdraw from a contract of sale for a structure that does not comply with SANSW's development requirements. SANSW also has discretion to determine to pay a claim for subsidence damage to a contravening development in circumstances where the failure to obtain the relevant approvals was not the fault of the property owner or where exceptional circumstances exist.

If a property owner can demonstrate they exercised due diligence (for example, sought proof of approval from vendor or council at the time of purchase but either due to an error, omission or malfeasance) were not alerted that the structure was a contravening development, SANSW may determine to consider the claim.

Prior to 30 September 2019 the Subsidence Advisory New South Wales provided a Section 15B or 15C certificate.

The Section 15B certificate confirmed that a property in a Mine Subsidence District had been constructed in accordance with development requirements and was eligible for compensation should the property be impacted by subsidence damage.

The Section 15C certificate identified if a claim for mine subsidence damage to a property had previously been paid or was pending. If a compensation claim for the damage has already been paid, no further claims can be paid for the same damage irrespective of whether repairs were completed.

A new online register of certificates issued under the Mine Subsidence Compensation Act 1961 is available [here](#). The register allows users to search for a property to ascertain whether a Section 15B certificate has previously been issued and if so the date of issue.

All structures on the property at the date of issue of the last certificate are eligible for compensation should subsidence damage occur. Improvements constructed since the issue of the last certificate must have been built in accordance with SANSW's requirements to be eligible for compensation.

In some cases, a certificate may have been issued recently for a property or no improvements have recently been constructed or altered and the prospective purchaser may be satisfied to proceed with the purchase based on this information given the age of structures on the property.

Requirements: Building in a Mine Subsidence Area

Land within a subsidence district must be built to an appropriate standard to ensure any subsidence risk and damage is reduced.

All development within a subsidence district must submit and have a building application approved by SANSW.

The SANSW can impose conditions and requirements such as:

- Use of certain building materials and construction methods;
- The size, height, and location of new structures; etc

The requirements and conditions may increase building costs and guidelines should be looked at prior to any land purchase in a Mine Subsidence District.


There is a list of Mine Subsidence guidelines on the SANSW website which sets out requirements for building in a specific subsidence district.

There is also a list of exemptions in relation to minor construction work that does not require approval from the SANSW.



Christine Bassett

Licensed Conveyancer & JP



My ex and I have final Family Law property orders, but he is not complying. What can be done?

KEY TAKE OUTS

- ✓ Section 106A of the Family Law Act authorizes the Federal Circuit and Family Court of Australia (FCFCOA) to appoint an officer of the court to execute a deed or document in the name of the person who is refusing to sign such a document.
- ✓ An Application for Enforcement can be filed with the Federal Circuit and Family Court of Australia requiring further orders for a non-complying party to do all things necessary to give effect to the Family Law property orders
- ✓ The parties may be permitted to make an application to set aside or vary the final Family Law property orders if they satisfy certain requirements pursuant to Section 79A (or Section 90SN for de facto matters) of the Family Law Act.

You have received final property court orders made by the Federal Circuit and Family Court of Australia, however your ex-partner is failing to comply with the Orders which is causing difficulties in giving effect to the orders. What can you do?

There are a number of options you can take if your partner is breaching Family Law property orders.

Enforcing Family Law property orders

Option 1 – Section 106A

If your Family Law property orders contain reference to orders allowing the Court to appoint an officer of the court or other person to execute a particular document that your ex-partner is failing to sign to give effect to the Orders, then you can write to the Court with a number of documents to ask them to enforce the order pursuant to Section 106A and sign any documents that your ex-partner is failing to sign to give effect to the order. An example of this is where you have orders allowing for the sale of the former matrimonial home, and the property has been sold but your ex-partner refuses to sign a discharge of mortgage document. If you have a Section 106A order in your final orders, and your ex-partner continues to refuse to sign the discharge of mortgage, then you can write to the Court and ask them to appoint an officer of the Court to sign the discharge of mortgage on behalf of your ex-partner. This will allow the settlement to proceed.

The documents you require if you are seeking to move forward with this option are:

- The original document that is required to be signed by a Registrar of the Court.
- An Affidavit addressing the attempts made to obtain your ex-partners signature on the required

documents, and the facts relied upon to show their refusal to sign the required documents.

- A covering letter indicating the basis for your request and the urgency.

If you do not have a Section 106A order within your Family Law property orders but now seek to incorporate an order, you can do so by filing an Application in a Proceeding as well as the above documents, requesting that the order be made.

Option 2 – Enforcement proceedings

If there is a provision made in your Family Law property orders for your ex-partner to pay you a sum of money, but they have not paid, you can file an Enforcement Application requiring the Payer to:

- Identify the total amount owing
- Order the total amount owing be paid in full or by instalments
- Order enforcement of the obligation
- Prevent the disposal of property or wasting of assets by the payer and/or
- Make an order for costs.

Section 79A (or Section 90SN for de factos) Application to vary or set aside final Family Law property orders

The Federal Circuit and Family Court of Australia has the power to vary or set aside final property orders following an Application to do so, provided that they can be satisfied that one of the following has occurred:

- There has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including a failure to disclose relevant information), the giving of false evidence or any other circumstance;
- In the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out;
- A person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is fair to vary the order or to set the order aside and make another order in substitution;
- Circumstances of an exception nature have arisen relating to the care, welfare and development of a child of the marriage, where the child or the person who has caring responsibility for the child will suffer hardship if the court does not vary or set aside the order;
- A proceeds of crime order has been made.

If one of the above can be proven, the Court has the discretion to vary or set aside the existing Family Law property orders.

The Applicant in the Application to vary or set aside final Family Law property orders bears the onus of satisfying the Court that the orders should be varied or set aside.



Luisa Gaetani

Partner



Amendments to the NSW Bail Act and How This May Affect the Criminal Justice System

KEY TAKE OUTS

- ✓ Additional amendments to the Bail Act 2013 were assented to on 27 June 2022.
- ✓ These amendments make it significantly harder to be granted bail and has negative implications regarding the increased pressure on the Court and criminal justice system through its anticipated effect on guilty pleas.
- ✓ The amendments were made with little consultation from the community or legal professionals which raises issues in relation to its practical application and compatibility regarding already existing programs.

What were the recent changes to the Bail Act 2013?

The NSW government has made amendments to the Bail Act 2013, that was assented to on 27 June 2022. These amendments make it harder to be granted bail which has potential negative implications regarding the pressure on the Court and criminal justice system.

The insertion of section 22B and 30A was seemingly rushed through Parliament and passed with little community consultation and will have significant influence on the way in which Bail is applied and granted by the Court.

Section 22B reads:

“(1) During the period following conviction and before sentencing for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention, a court—

(a) on a release application made by the accused person—must not grant bail or dispense with bail, unless it is established that special or exceptional circumstances exist that justify the decision, or

(b) on a detention application made in relation to the accused person—must refuse bail, unless it is established that special or exceptional circumstances exist that justify the decision.

(2) If the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why the accused person's detention is not justified.

(3) Subject to subsection (1), Division 2 applies to a bail decision made by a court under this section.

(4) This section applies despite anything to the contrary in this Act. (5) In this section— conviction also includes a plea of guilty.

Note— Conviction is defined in section 4(1) to include a finding of guilt."

Consequences of the 2022 Amendments to the NSW Bail Act

In summation, the application of section 22B of the Bail Act 2013 means that people who plead guilty or are eventually found to be guilty and are likely to be imprisoned for the offence, are **required** to establish a special or exceptional circumstance in order to be granted bail pending their sentencing.

This high standard contradicts the Early Appropriate Guilty Plea program which was introduced in NSW in early 2018. The program aims to encourage defendants to enter guilty pleas at an early stage, which would relieve pressure off the Court and criminal justice system, and in return, the defendant would receive a discounted sentence.

Section 22B of the NSW Bail Act dissuades a person from entering a guilty plea as the 'special or exceptional circumstance' is an especially high threshold to meet. In practice, Section 22B could lead to a reduction in guilty pleas, leading to significant delays in cases which will add more pressure onto the justice system in terms of lengthy hearings and the time/costs incurred by the Court. In addition, this will lead to strain on the already fraught resources of NSW Police who will be required to prepare briefs of evidence for matters which would not ordinarily proceed to hearing.

Changes to the NSW Bail Act May Increase Remand

Furthermore, this amendment will undoubtedly lead to a higher number of people being detained in our already-overcrowded prison system. This places additional pressure on public resources and increases the cost of incarceration.

Section 30A reads:

If bail conditions impose a requirement for the accused person to be subject to electronic monitoring—

(a) the bail authority must be satisfied the electronic monitoring is of a standard that at least meets any minimum standards prescribed in the regulations, and

(b) the bail condition must require the electronic monitoring to be of a standard that at least meets any minimum standards prescribed in the regulations.

Controversy surrounding the 2022 amendments to the NSW Bail Act

The amendments to the NSW Bail Act 2013 are highly criticised by legal professionals for its lack of consultation and potential negative implications. The President of the NSW Law Society, Ms Joanne van der Plaats, has expressed how the amendments would affect the criminal justice system by adding additional pressure whilst the system is attempting to recover from the backlog of cases experienced

during the COVID-19 pandemic.

She further noted that a balance must be struck between reducing the risk of re-offending and the principle of innocent until proven guilty, and that these amendments fail to strike that balance.

The insufficient time that was allowed for consultation with experts of the field has effectively led to the President of the NSW Law Society saying that “ *rushed reform can lead to flawed laws*” in relation to Section 22B and 30A.

The Aboriginal Legal Service has also exclaimed their disdain relating to the lack of consultation. The ALS had said that the proposed amendments could see more Aboriginal adults and children imprisoned which could derail the progress of closing the gap.

The amendments to the NSW Bail Act 2013, not only makes it more difficult to be granted bail but has significant negative implications regarding its influence on the justice system and its application.



Lara Menon
Senior Associate



Isabel Strahan
Paralegal

Silent Directors: Do they exist?

KEY TAKE OUTS

- ✓ Silent directors are still liable directors.
- ✓ Directors must keep themselves informed of the day-to-day activities of the company and must comply with their directorial duties.
- ✓ Breaches of director duties can have serious consequences for individual directors.

What is a Director?

When it comes to corporate structures the term “silent director” has been heard many times. It is the notion of a director that does not work in close proximity with the company, does not actively participate or have a holistic knowledge of the day-to-day activities and is often used by directors to void liability. In reality, the law does not distinguish between silent directors and directors who have a more active role in the Company.

Section 9 of the [Corporations Act 2001](#) defines a Director as a person who has been elected or acts in a manner that exercises directors’ powers and control over a company’s business.

- **De facto director:** a person who has not formally been appointed but has the authority to act within that role.
- **Shadow director** is a person that instructs an appointed director.
- **Executive director** is an employee of a company that manages day-to-day tasks.
- **Nonexecutive** is a person who is not involved in the day-to-day management of the company but operates in a supervisory capacity.

Directors’ duties in Australia

Directors are subjected to a range of statutory obligations that are found in sections 180 – 183 of the Corporations Act, and common law duties including;

- Exercising power with reasonable care;
- Act in good faith in the best interest of the company and for a proper purpose;
- Avoiding conflicts of interest;
- Acting honestly and transparently;

- Being up to date with the Company's affairs;
- Avoid insolvent trading.

Remaining 'silent' and distancing yourself from the running of a company does not negate your responsibility. Irrespective of the level of involvement that a director has, directors are obligated to action matters pertaining to the Company and may be held liable for falling short of their obligations.

What happens if a director breaches their duty?

It is important for Directors to make themselves aware of their obligations to their shareholders as generally breaching director duties can result in criminal and civil sanctions, disqualifications, or commercial consequences.

Directors can also be personally liable for debts and may have to compensate the company for any losses they were suffered from a breach of their duties. Directors may also be liable as a guarantor and may need to use personal assets as security for the companies' liabilities.

Directors must be careful to avoid assuming that they are a 'silent director' and turning a blind eye on business operations as they are still held legally responsible and liable for any gains and loss that occur.

CASE STUDY: Deputy Commissioner of Taxation v Clark [2003] NSWCA 91

The debunking of silent directors has been shown by the courts in the case of *Deputy Commissioner of Taxation v Clark*. The Court considered the position of a wife as a 'sleeping', or silent, director. She had attempted to rely on non-participation in the management of the company, to avoid liability under the insolvent trading provisions of the Corporations Act.

The case highlighted that the failure to participate in the management of a company, regardless of the reason, is inconsistent with the director's duty to share in the management of a company and cannot be relied upon in defence of liability for insolvent trading.

The Court stated that 'there is no justification for a doctrine, which would hold sleeping directors to be 'de facto non-directors', who should be relieved of their liabilities'.

If you have any concerns about your obligations and rights as a company's director or if you suspect that you may potentially be liable for breaching your duty as a director, get in contact with our commercial team at Coutts. Our commercial team has a breadth of experience in matters of this nature and can provide practical legal advice for the resolution of issues surrounding breach of the director's duties.



Elyse Strahan
Senior Lawyer



Out and About with
COUTTS



A Wine with... Melina

PROFILE

Position: Senior Licensed Conveyancer

Location: Campbelltown

Area of Practice:
Property & Conveyancing



Q: How would you describe yourself in two words?

A: Outgoing and caring

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

A: I asked her and she said 'Your best quality is that you're always there for anyone and everyone to provide support and guidance no matter what'

Q: My favourite motto / mantra is:

A: Live life to the fullest and focus on the positive

Q: My pet peeve is:

A: The cold! Can't stand it – if I could move to a country with warmer weather during Australia's 3 winter months, I would!

Q: On the weekends you can find me:

A: Going on walks, shopping and eating out

Q: The last book I read was:

A: Does a Contract for Sale count? They are novel size. Other than this, it's been a long time since I've read a book

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

A: 😂 🙋 😊

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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