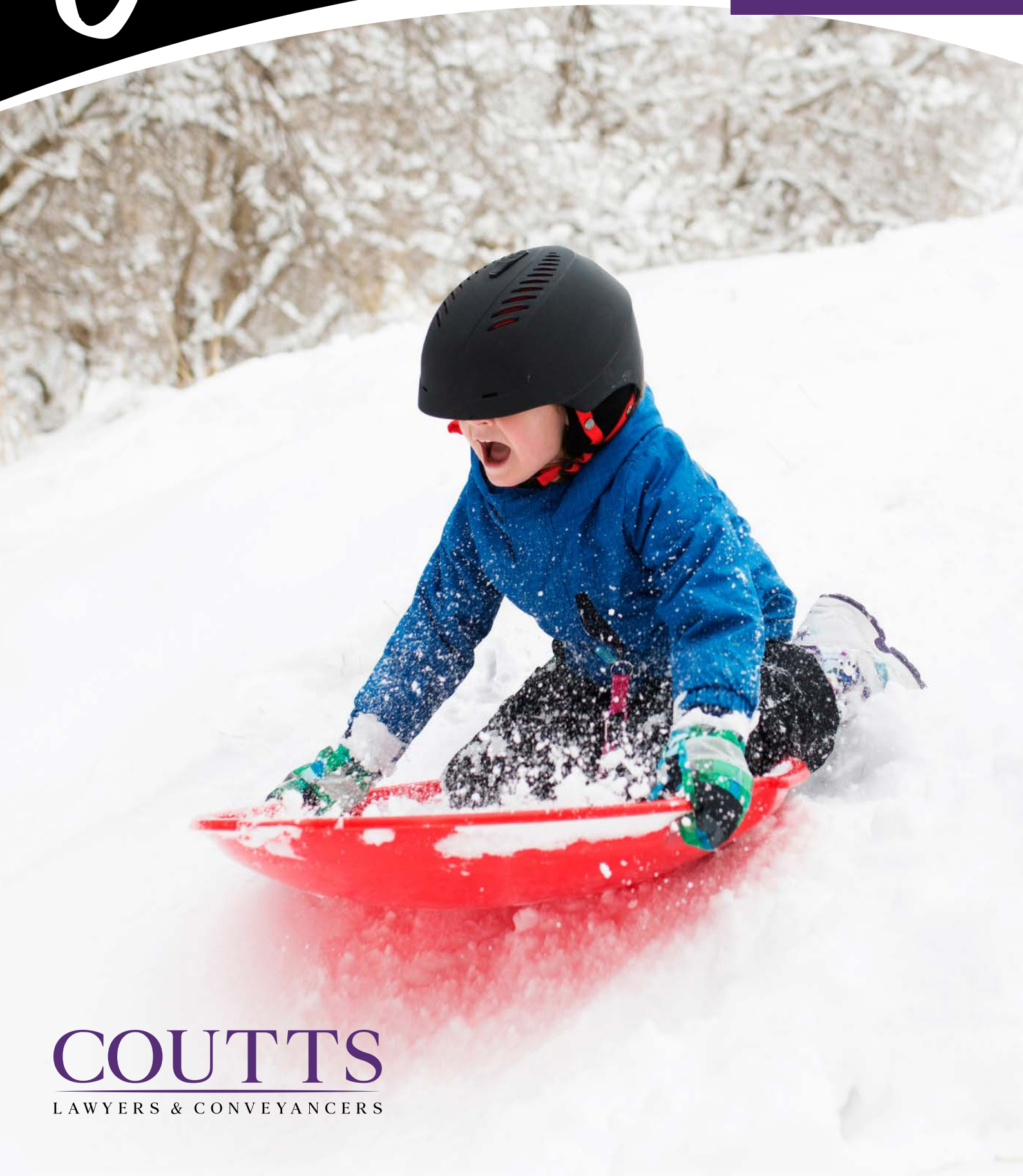
the Conduit

23 WINTER



COUTTS
LAWYERS & CONVEYANCERS

CALENDAR DATES	
JUNE	
Thursday 1st	First Day of Winter
Thursday 1st	Wollongong Wills Express Night
Monday 5th	Narellan Wills Express Night
Monday 12th	King's Birthday
JULY	
Monday 3rd	Narellan Wills Express Night
Thursday 6th	Wollongong Wills Express Night
Friday 7th	Bank Holiday
AUGUST	
Thursday 3rd	Narellan Wills Express Night
Monday 7th	Wollongong Wills Express Night

A MESSAGE FROM Adriana

As the winter season sets in, it's time to cosy up and keep warm. We recommend lighting up your fireplace, snuggling under a warm blanket, and enjoying the comforts of being indoors. We have stayed very busy at Coutts with working on new services for our customers, local awards, discounts and redesigning our offices so there is plenty to touch on this Conduit.

First I would like to highlight Karena, Elly, Nikki and the whole Coutts team who were finalists in the Illawarra Women in Business Awards across various categories. What a great achievement to be finalists two years in a row.

At Coutts, we believe in giving back to the community that has supported us throughout the years. As part of our ongoing commitment, we are proud to continue our support of local sporting teams, including the Camden Rams, Oakdale Workers, Oran Park Netball, and Saint Anthony's Netball Picton. We wish all of our teams the best of luck in their upcoming games and events. We also recently hosted a free workshop focusing on the latest Employment Law & HR changes that will impact local businesses. The workshop was well-received by business owners, with a great turnout and interactive presentation covering several critical updates. We had a productive conversation with attendees and provided insights that can help local businesses stay up-to-date with the latest developments in Employment Law & HR.

We have also begun our Senior Discount promotion, offering exceptional discounts for seniors on our legal services including conveyancing, wills, power of attorney, and enduring guardianship. Due to the great feedback received, we have decided to extend this promotion beyond the initial one-month period.

Coutts is always focused on growing both our team and services. We are always looking for bright talented professionals to join our team, if you or someone you know is interested in Joining Coutts check out our careers page.

At Coutts, we are committed to providing our clients with expert legal assistance in a wide range of areas. Whether you need help with Property, Conveyancing, Family, Wills & Estates, Injury Compensation, Employment, Commercial, Local Government or Criminal Law, our team of professionals are here to help you, your family, and your friends with any legal matter. We pride ourselves on providing excellent client service and being there for our clients every step of the way.

If you require legal advice or have any questions, please don't hesitate to contact us at 1300 268 887. Our team is always happy to assist you and provide the best possible legal solutions.

thank you

What you need to know when buying a property within a Mine Subsidence District

KEY TAKE OUTS

- ✓ What is a Mine Subsidence District?
- ✓ What you need to know about purchasing a property in a Mine Subsidence District

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What is a Mine Subsidence District?

A Mine Subsidence District is declared in areas where there are potential subsidence risks from active or non-active underground coal mining. 'Subsidence' relates to the sinking of the ground under the property which can result in, amongst other things, cracks and movement of the walls and floors to the structures on the land.

Can I build on land within a Mine Subsidence District?

Yes, subject to complying with development guidelines. The development guidelines applicable to properties within a Mine Subsidence District set out the requirements for building a dwelling and other structures on the land based on subsidence risks. Where the development guidelines are adhered to, property owners will be eligible for compensation should mine subsidence damage occur.

How do I know if the property I am purchasing is within a Mine Subsidence District?

This information is available in the Planning Certificate (also known as a 10.7 Certificate) which is available from Council and attached to every Contract for Sale. As such, your Solicitor or Conveyancer will be able to confirm whether the property you are looking to purchase is within a Mine Subsidence District once they have received and reviewed the Contract for Sale.

Alternatively, if you don't have a copy of the Contract, you can find this information out via the NSW Planning Portal. You can also find out what development guidelines have been applied to the property via the Planning Portal.

I'm buying in a Mine Subsidence District – should I be concerned about my safety and/or damage to my property?

Subsidence Advisory records indicate that in the last 10 years, less than 2% of properties have been affected by subsidence. The fact that the property is mined beneath it, doesn't mean it will be impacted by subsidence.

Usually, subsidence happens unnoticeably over a period of time as the ground beneath settles. Structures damaged by subsidence usually remain safe and can continue to be occupied while the claim is resolved and until the property is repaired.

In rare situations, the subsidence can result in small or big holes in the ground. These can be dangerous and must be treated with caution and reported immediately to Subsidence Advisory which runs a 24-hour emergency hotline.

What has changed?

Prior to 1 October 2019, a Purchaser could obtain a Section 15B and a Section 15C Certificate.

The Section 15B certificate confirmed that the property had been constructed in accordance with Subsidence Advisory's development requirements and was eligible for compensation should the property suffer 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 damage had already been paid, no further claims could be paid for the same damage, irrespective of whether repairs were completed.

From 1 October 2019, Subsidence Advisory stopped issuing the 15B and 15C Certificates.

The change came as a result of a comprehensive review of the mine subsidence compensation system which found that the process for assessing whether a property complied with Subsidence Advisory's development requirements and was eligible for compensation was inadequate. The likelihood of a claim being made for a non-compliant property was extremely low and so the significant cost increase to adequately undertake compliance checks prior to issuing the certificates was deemed unjustifiable. For example, Subsidence Advisory's records indicate that in the last 10 years, only 4 claims for homes have been refused due to the structure being non-compliant.

So what can I do as a Purchaser to ensure I would be entitled to make a claim in the event that a structure on the property was affected by Mine Subsidence?

1. Make enquiries with the previous owner. Ask them whether they or any predecessors in title (owners before them) have made a claim and if so, request details of any previous claim including what works were completed or compensation paid.
2. Search the Subsidence Advisory online register to see when the last 15B certificate was issued. Any structures on the property as of the date of issue of the 15B certificate are eligible for compensation should subsidence occur. However, any structures built, or structural alterations made after the issue of the certificate, must have been carried out in accordance with Subsidence Advisory's requirements to be eligible for compensation.
3. Make enquiries with Council to see what approvals they hold for structures erected on the property. Subsidence Advisory approval is required as part of the application process to the Council i.e. plans for any structure that is to be erected on land within a Mine Subsidence District will need to be approved by Subsidence Advisory NSW as well as the Local Council. As

such, structures that have Council approval will be eligible for compensation should subsidence occur. Despite this, it is important to note that Council is not always able to confirm whether certain structures have approval due to factors like the age of the structures or lack of records held by Council.

Are there any protections in place for owners of property in a Mine Subsidence District where structures are non-compliant, but they were unaware of such non-compliance?

Subsidence Advisory has discretion to, under the Coal Mine Subsidence Compensation Act 2017, pay a claim for subsidence damage to an unapproved structure in circumstances where failure to obtain approval was not the fault of the property owner or where there are exceptional circumstances.

Subsidence Advisory may consider the claim if the property owner can establish that they exercised due diligence (see steps 1-3 above) and haven't altered the unapproved structure.

What should I consider when I sell a property that is in a Mine Subsidence District?

It is recommended that you keep a copy of approvals to assist any future prospective purchaser when the property is listed for sale, and they start making enquiries.

What should I do if I have more questions or queries about purchasing in a Mine Subsidence District?

Contact the Subsidence Advisory NSW staff. They are available to address any questions or concerns you have about mine subsidence.

Melina Costantino
Senior Licensed Conveyancer & JP

Divorce 101: Understanding Divorce in Australia

KEY TAKE OUTS

- There are numerous eligibility requirements that must be satisfied in order to be divorced in Australia.
- There are two types of divorce applications: sole and joint applications.
- Whether your attendance is required at the Divorce hearing depends on the circumstances.
- You may be required to submit further documents if you still live under the same roof as your ex-partner or have a child/children under the age of 18.

When two parties to a marriage separate, it can be an emotional and challenging time. The emotions that are associated with the separation of a marriage can be compounded with confusion in relation to the legal processes and procedures that must follow.

This article intends to breakdown the eligibility requirements, what you will need to consider before filing, what a divorce hearing may look like and the finalisation of a divorce.

Eligibility Requirements

In order to be considered eligible for divorce in Australia, the following must be proven:

1. The couple was legally married,
2. The relationship has irretrievably broken down, and
3. The couple has been separated for more than 12 months.

In addition to the above requirements, you or your partner must satisfy one of the below requirements:

1. Be born in Australia,
2. Have a citizenship certificate, or
3. Have the intention of continuing to live in Australia for at least 12 months.

Types of Applications

When applying for a divorce there is a choice of two different applications: sole or joint.

A sole application is individually applied for and then served onto the other party. This application is beneficial in situations where the other side does not agree to a joint application or where one party has a concession that can be used to minimise filing fees.

However, it must be noted that if the other side is not legally represented, your solicitor may need to instruct a process server to serve the documents to your ex-partner which will incur an additional fee.

A joint application is signed by both parties and therefore, there is no process server fee. However, both parties must freely consent to file a joint application for divorce.

Things to Consider Before Filing

a. **Have you been married for less than two years?**

In accordance with Section 44 of the Family Law Act 1975, if you have been married to your partner for less than two years it is classified as a 'short marriage'. This will alternate the process of divorce. A counselling certificate is needed to prove that there is no chance of reconciliation between you and your ex-partner. This will need to be filed with your application as a supporting document.

b. **Have you been living under the same roof for the last 12 months but have been separated?**

As abovementioned, in order to be eligible for divorce the parties to the marriage must be separated for over 12 months. The Court recognises that in certain financial or family situations, it may be difficult to move out of the matrimonial home. However, you must prove to the Court that there is no chance of reconciliation therefore, further evidence is needed.

An affidavit supporting your divorce application would be required to explain how you maintained separation whilst still living in the same house.

The affidavit could include details of the following:

- A change in sleeping arrangements,
- A reduction in shared activities, for example, family outings,
- A decline in performing household duties for each other,
- The division of finances, or
- Any other relevant material for example, if you have notified your family and friends of the separation.

It is important to note the operation of Section 50 of the Family Law Act 1975 when discussing separation under the same roof. This provision notes that the time of separation does not need to start again if your partner moves back into the home for less than a continuous period of 3 months.

In summation, if during the period of your 12-month separation, you choose to reconcile, however after 2 months of living together you agree to file for divorce, you will not need to start the 12-month separation period again.

c. **Is there a child/children of the relationship that are under the age of 18?**

The divorce order will not take effect if the court is not satisfied that there are no children of the marriage that are under 18.

If there are children under the age of 18, the Court must be satisfied that proper arrangements have been made for the children. This may include the formalisation of a parenting plan or Consent Orders.

Attendance in Court Hearings

Divorce hearings are held in the Federal Circuit and Family Court of Australia.

Whether or not your attendance is required is dependent on the circumstances of the case. It is normal practice that if your divorce application requires additional evidence for example, if you have filed a sole application and there is a child under the age of 18, you will be required to attend the hearing.

However, attendance is not required if you have submitted a joint application and indicated that neither of you wishes to be present at the hearing.

Attendance for Divorce Hearings are done remotely by either telephone or video conference if required.

Finalising a Divorce

Once your application has been filed you will receive a listing date when your matter will be heard. Exactly one month and one day after this date, the Court will make your Divorce Order. This Order will be made available to you or to your legal representative.

Next Steps

A Divorce Order does not put an end to your financial relationship.

We advise that a property settlement is conducted before filing for a divorce however, if your divorce has been finalised without a property settlement, this must be completed in order to completely sever the financial relationship.

The Family Law team at Coutts Lawyers and Conveyancers is dedicated to ease the process of divorce. We acknowledge that a separation can be extremely emotional and that the legal procedures are confusing.

Our aim is to provide you with legal advice that does not contain legal jargon in hopes of supporting you through this difficult time. If you wish to book an initial consultation and speak with one of our family lawyers please call 1300 268 887 or send an email to info@couttslgeal.com.au.

Luisa Gaetani
Partner

Isabel Strahan
Paralegal

Navigating Redundancy: What Employers Need to Know in the Current Economy

KEY TAKE OUTS

- Woolworths has made 489 jobs redundant in March 2023 following the closure of a majority of its in-store butcher shops.
- Given the state of our current economy, the future may see a downturn in numbers for businesses leading to increased redundancies and unemployment rates.
- Redundancy is a means of terminating employment and is pursued when the work no longer needs to be performed, there has been a downturn in business or operation changes, or because the business has become bankrupt or insolvent.
- Employers need to follow the correct redundancy procedure to minimise the potential risks of an unfair dismissal or general protection claim.

Woolworths has Closed 250 Instore Butchers

In late January 2023, Woolworths announced that it was closing 250 in-store butcher shops within its supermarkets around Australia as a result of increased customer demand for pre-packaged meats.

As a result, a total of 489 jobs were made redundant in March 2023, when the butcher counters were closed including 420 trade-qualified butchers and 69 non-trade workers.

The change in the businesses decision and resulting redundancies have affected not only the individuals who have lost their jobs, but also the loyal customers of the butcher shops.

In making this change in business decision, Woolworths has had many considerations to factor in, including assisting employees to be re-deployed in other positions where available and ensuring that all entitlements are paid out to those employees who took the redundancy.

Current Climate

It is not surprising given the enormous cost of living pressures that households are under and the fact that the policy response to soaring inflation is raising interest rates that we are seeing a huge impact on the economy. As people begin to tighten their spending budgets, businesses are bracing for a downturn in numbers. With this comes the growing concern that Australia may see itself enter a recession. The painful problem associated with a recession is the need for businesses to make difficult decisions such as redundancy leading to increased unemployment rates.

Genuine redundancy

Employers need to ensure that when making a decision to let staff go by way of redundancy that it is genuine and that they follow the correct process.

A genuine redundancy occurs when an employer:

- No longer requires the job to be performed by anyone (i.e due to a downturn in the business or operational changes);
- Becomes insolvent or bankrupt.

A redundancy is not genuine when:

- The employee's job needs to be performed by someone else;
- The employer has not followed the correct procedure including the requirements to consult with the employee prior to redundancy being made (depending on the award/enterprise agreement);
- The employer could have given the employee an alternative job (re-deployment).

Employer requirements and procedure

In most cases, prior to redundancy being made effective, the employer must proceed with a consultation process (depending on if the employee is covered by an award or enterprise agreement). The consultation process sets out the requirements for the employer to complete prior to making any changes to the business that may result in redundancy of employees. This includes:

- Notifying the employees of the proposed change
- Providing information to the employees about these changes
- Taking precautionary steps to avoid and minimise any negative impacts because of the changes.
- Considering employee ideas about the workplace changes.

The consultation process can lead to an alternative resolution, rather than making an employee's role redundant. Alternatively, employers can reduce wages, reducing or eliminating bonuses or encourage employees to take annual leave. If an alternative solution has been established, then the terms must be in writing.

During the process of consultation, the employer must also consider whether there is an alternative job within the business or a related business that is suitable to the employee. If there is a suitable alternative, the employer should offer the employee the re-deployment opportunity. If it would be reasonable to redeploy a person within the organisation and you decide not to offer that then it is likely to be found that the dismissal is not a case of genuine redundancy.

If you are considering making staff redundant, you should seek legal assistance to ensure that you are following the correct process and requirements. Coutts' employment law team can assist you every step of the way to make the process as smooth as possible during a difficult time for your business.

Larger redundancies

In cases where 15 or more employees are made redundant at one time, for 'Reasons of an economic, technological, structural or similar nature, or for reasons including such reasons.', the Fair Work Act (2009) states that the employer must, prior to dismissal and as soon as possible after making the decision, take the following steps:

- Under section 531(2) of the Fair Work Act, the employer must consult with the relevant union about the reasons, timing, number, and categories of employees to be impacted by the redundancy.
- Under section 531(3)(b) of the Fair Work Act, the employer must consult with the union to 'avert or minimise the proposed dismissals and measures which might include finding alternative employment. '

Employees that are not entitled to a redundancy payment

The Fair Work Act (2009) provides that:

- Where an employee is engaged by a 'small business employer' defined as one employing 'fewer than 15 employees.', the employee is not entitled to redundancy pay.
- There are also special provisions for the transfer of employees. In the instance where a company transfers its business to another company, and the second business offers employment opportunities to the employees from the first business, if the employee decides to reject the offer, then the employee is not entitled to a redundancy payment.

Other exceptions to redundancy payment include:

- Employees employed less than 12 months
- Fixed term employees
- Employees engaged for a specified job
- Employees engaged for a season
- Casual employees
- Apprentices
- Employees completing training programs or employed for a limited duration

Redundancy payment

If your employee has been made redundant and is eligible for redundancy pay, then the payment must be in addition to any other payment the employee is entitled to upon termination of their employment including any outstanding wages/salary, accumulated annual or long service (if applicable) and payment in lieu of notice (if applicable). The amount paid to the employee is based on their period of continuous service, excluding any unpaid leave. The payment must be paid within 7 days of the employee's employment concluding.

Coutts' employment law team can assist you to determine the correct redundancy payment you are required to make to your employee upon making them redundant. It is important to get the figure correct to minimise any potential claims.

Risks of Not Getting it Right

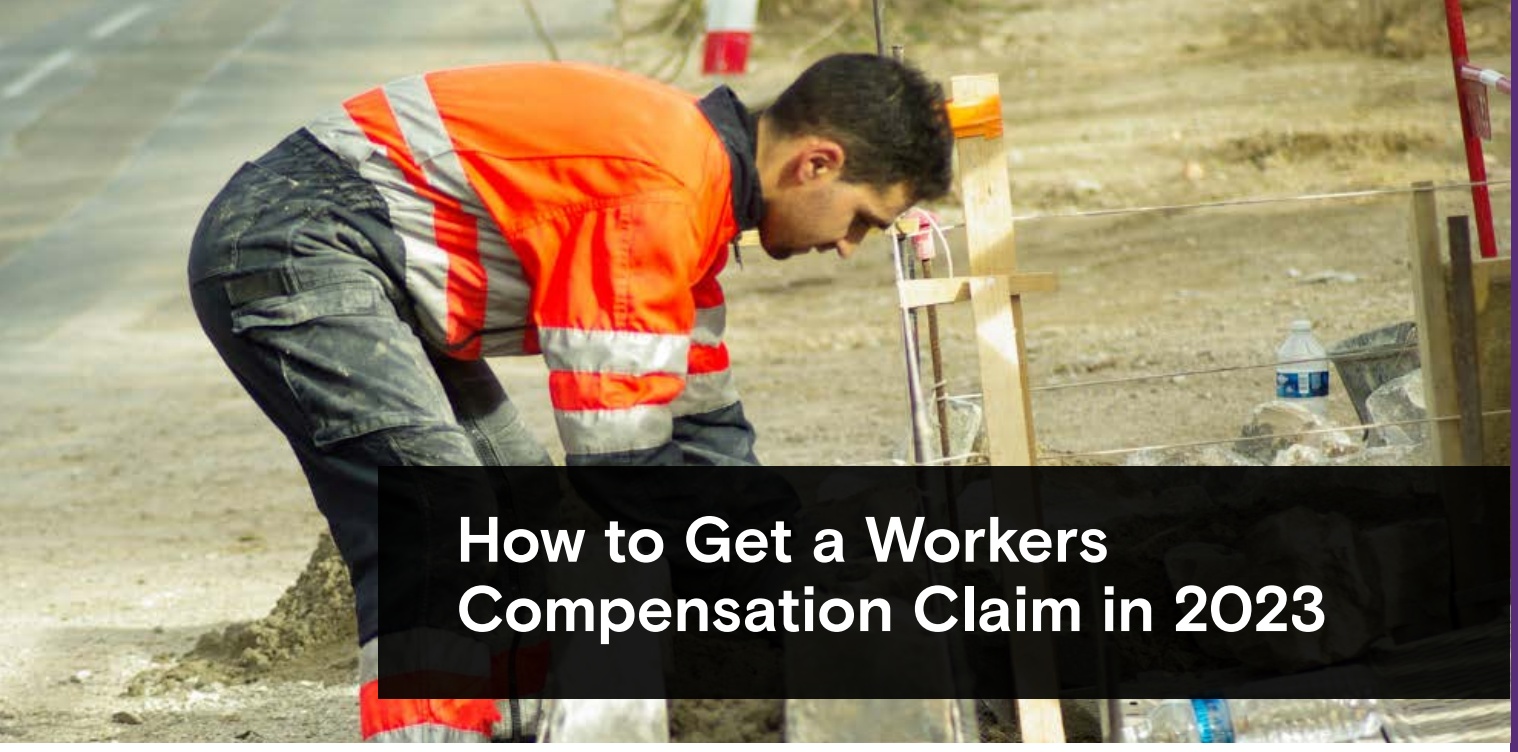
If you fail to make an employee genuinely redundant including following the correct process and requirements, then you risk a claim being brought against your business including an unfair dismissal claim or general protections claim.

We have discussed in detail previously, the possible claims available to employees after employment termination. Please refer to our previous blog titled The Possible Claims available after employment

termination to find out more information about the types of claims that a disgruntled employee could bring against your business.

At Coutts, our friendly Employment Law team have ample experience in drafting responses to applications in the Fair Work Commission, assisting clients in preparation for conciliations as well as appearing at conciliation to provide support and legal expertise and preparing for and attending final hearings/ arbitrations if the matter cannot be resolved before that time. Should a claim be made against your business, don't hesitate to reach out to our Employment Law Team.

Melissa Care
Senior Associate



How to Get a Workers Compensation Claim in 2023

KEY TAKE OUTS

- If you have been injured at work, you may be entitled to workers' compensation.
- There are certain eligibility requirements, and various tests, which must be satisfied in order to receive workers compensation in New South Wales.
- It is important to seek comprehensive legal advice early to ensure you understand your entitlements to maximise your compensation.

Navigating the complexities of workers' compensation in New South Wales can be daunting, but understanding your rights and entitlements is essential for those who have experienced workplace injuries. In this blog, we'll explore the key aspects of the Workers Compensation Scheme, including eligibility criteria, weekly benefits, medical expenses, and lump sum compensation. Stay informed and learn how to maximise your claim with the help of our expert advice, tailored specifically for employees in New South Wales.

How to get Weekly Benefits under the Workers Compensation Scheme in New South Wales

To be entitled to weekly benefits under the Workers Compensation Scheme in New South Wales*:

- You must be a 'worker' as per the Workplace Injury Management and Workers Compensation Act 1988
- You must be injured – an injury means personal injury arising out of or in the course of employment and includes a disease injury. A disease injury is one which is contracted by a worker in the course of employment, and also includes the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease.
- Employment must be a substantial contributing factor to a personal injury.
- Employment must be the main contributing factor to a psychological injury, disease injury, or aggravation, acceleration, exacerbation or deterioration of a disease injury.
- For a psychological injury, the injury cannot be caused by reasonable actions of the employer

- ✓ You must sustain a total or partial incapacity for work as a result of the workplace injury

An injured worker's weekly benefits are paid in accordance with their Pre-Injury Average Weekly Earnings ('PIAWE'). To learn how to calculate your PIAWE and ensure you are receiving your correct weekly benefits, read our blog on PIAWE here, or our blog on weekly benefits here.

*Further provisions/thresholds apply to heart attack injuries, stroke injuries, journey claims, recess claims, claims by trade union representatives, hearing claims, and exempt workers.

How to get Medical Expenses under the Workers Compensation Scheme in New South Wales

Injured workers can claim expenses relating to medical treatments and services, including hospital and rehabilitation, and reasonably necessary travel to obtain such treatments and services. This type of compensation is regulated by Division 3 of the Workers Compensation Act 1987 (NSW) (the Act').

As per Section 60 of the Act, the medical treatment or service must be reasonably necessary because of the injury, and in most circumstances, be pre-approved by the insurer. There are certain circumstances in which pre-approval is not required, such as initial treatment, consultations with a nominated treating doctor, or emergency medical services provided in public hospitals.

However, this does not apply to injured workers in New South Wales who are covered under the Safety and Rehabilitation Act. Such workers are entitled to benefits under the Comcare scheme, which is not covered in this blog.

How to get Lump Sum Compensation under the Workers Compensation Scheme in New South Wales

A claim for lump sum compensation must be accompanied by a report from a permanent impairment assessor listed on the SIRA website. Your lawyer will arrange the relevant appointment for you to be medically assessed.

Physical Injuries

To be eligible to make a claim for lump sum compensation for physical injuries, an injured worker must:

- ✓ Have reached maximum medical improvement. This means that the injury(ies) have stabilised and are unlikely to improve or deteriorate within a 12-month period.
- ✓ For workers injured on or after 1 January 2022 to 18 June 2012, be assessed as at least 1% whole person impairment. However, for hearing loss, a minimum of six percent hearing loss is required. Pain and suffering will also be payable if assessed as at least 10%.
- ✓ For exempt workers, being a police officer, paramedic, or fire fighter, be assessed as at least 1% whole person impairment. Pain and suffering will be payable if assessed as at least 10%.
- ✓ For workers injured on or after 19 June 2012, be assessed as greater than 10% whole person impairment.

Psychological Injuries

To be eligible to make a claim for lump sum compensation for psychological injuries, an injured worker must:

- Have reached maximum medical improvement.
- For workers injured on or after 1 January 2022 to 18 June 2012, be assessed as at least 15% whole person impairment. Pain and suffering will also be payable if assessed as at least 15%.
- For exempt workers, be assessed as at least 1% whole person impairment. Pain and suffering will be payable if assessed as at least 15%.
- For workers injured on or after 19 June 2012, be assessed as greater than 15% whole person impairment.

How Much Will You Receive?

The amount of lump sum compensation you will receive will depend on:

- Your injuries – if you sustain a back injury, you are entitled to claim a 5% uplift of compensation if the only injury you sustain is your back injury.
- Your date of injury.
- Your degree of permanent impairment.

It is important to remember:

- Any payment of lump sum compensation is paid **in addition** to weekly benefits and medical expenses.
- Making a claim for lump sum compensation **does not** close your claim.
- A claim for lump sum compensation is tax-free.
- Your degree of permanent impairment determines how long you are entitled to weekly benefits and medicals

Example One

Sally was involved in an accident at work on 5 August 2019 and broke her leg. Sally required surgery and is no longer able to work in her pre-injury employment. Sally saw an injury compensation lawyer at Coutts and was arranged to be assessed by a SIRA approved medical assessor. Sally was assessed as 12% whole person impairment. Sally was able to make a claim of $27,250 for lump sum compensation and continued to receive weekly benefits as per the statutory scheme and reasonably necessary medical expenses as per Section 60 of the Act.

Example Two

David was seriously injured at work on 15 June 2023. He injured his back in three places and has required surgery and physiotherapy treatment. David saw an injury compensation lawyer at Coutts and was arranged to be assessed by a SIRA approved medical assessor. David was assessed as 18% whole person impairment. David was able to make a claim of $49,560 plus 5% uplift for his back injuries. David's total claim for lump sum compensation is $52,038. David also continued to receive reasonably necessary medical expenses as per Section 60 of the Act and would be entitled to the payment of weekly benefits as per the statutory scheme if he suffers from an incapacity to work.

What About Damages for Past and Future Economic Loss, and Loss of Superannuation?

An injured worker who is assessed as at least 15% whole person impairment may be entitled to make a further claim, referred to as a Work Injury Damages Claim. This is a separate claim to a worker's

compensation claim, but does arise out of the workplace injuries received. We will expand on the elements of this claim and what entitlements are available to injured workers next time!

What Should I Do If I Have Been Hurt at Work?

The process to making a claim for workers compensation, and the initial process, is as follows:

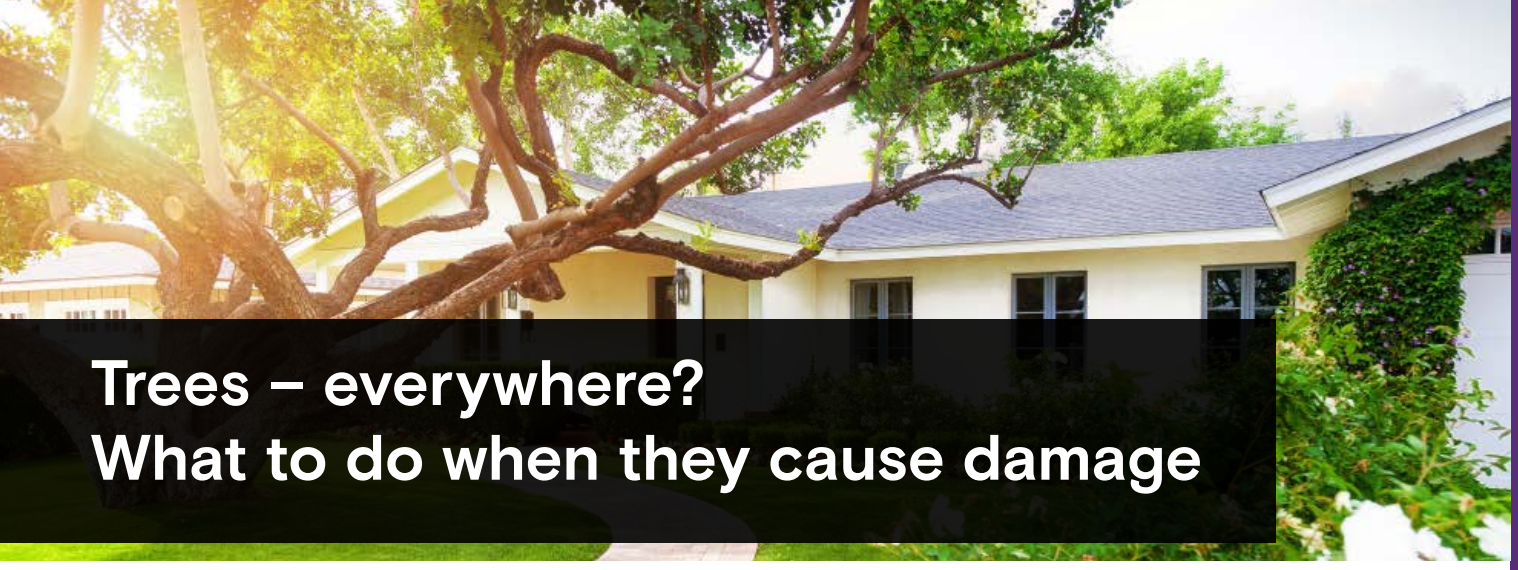
Step 1: Read our Blog 'What Can Be Claimed as a Workplace Injury?" and follow the steps!

Step 2: Contact the team at Coutts to obtain legal advice as soon as possible. Even if a dispute has not arisen with the insurer, they may be additional compensation you are entitled to that you are unaware of.

Want to Know More? Concerned about Costs?

Contact our injury compensation team today to see how we can assist you. At Coutts, we have multiple IRO Approved Lawyers that provide you with legal advice in relation to your workers compensation claim at no cost to you. We also offer No Win, No Fee agreements for injured workers not eligible to receive an IRO grant of funding.

Elly Manoe
Senior Lawyer



Trees – everywhere? What to do when they cause damage

KEY TAKE OUTS

- Before you take steps to remove or trim a tree consider the Trees *(Dispute Between Neighbours) Act 2006*.
- To help you understand the *Trees Act*, we have answered your most common questions including, where does the Trees Act apply? When is a tree a 'tree'? What is the process to make an application under the *Trees Act*?
- Typically, claims under the *Trees Act* pertains to property damage or personal injury and such claims may include claims for compensation.

Everybody has fond memories of beautiful trees in their local playground, neighbourhood or own yard. You may enjoy watching your kids climb beautiful old trees while you are out and about. Trees bring a joyful amenity to their location. But, sometimes those trees in your backyard or your neighbours' backyard are more trouble than treasure.

Have you ever thought any of the following:

1. "That tree needs to come down – those roots are ruining my driveway";
2. "This tree needs to come down, these falling branches are going to hurt someone";
3. "That neighbour's tree is caving in our fence, we need to cut it down ourselves before it causes any more damage".

Before you take any steps to rectify a troublesome tree, you should consider the *Environmental Planning and Assessment Act* 1979 and the *Trees (Dispute Between Neighbours) Act* 2006 (the **Trees Act**), and it may be useful to discuss the issues with a qualified arborist.

To help your understanding of the Trees Act, we have set out some common questions and answers in this article.

When is a Tree a Tree?

Under the *Trees Act*, a tree is defined as being:

"Any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations"

Case law has expanded this definition to include shrubs.

The Trees (Disputes Between Neighbours) Regulation 2007 provides further expansion of the definition to include bamboo and vines, as well as hedges made up of group plantings of trees.

Importantly, the 'tree' must be located entirely or predominantly on the land adjoining the applicant's property.

Where does the Trees Act apply?

The *Trees Act* applies to any privately owned land which is located in a residential, village, township, industrial or business zone.

Rural residential land and Crown land (excluding schools) are exempt.

If you are not sure of the zoning of the affected property, the Environment and Planning team at Coutts can assist you in locating this information.

Are Council Owned Trees Included?

Trees located on council owned land are exempt from the *Trees Act*.

If a Council owned tree is causing issues on your property, this should be taken up directly with the relevant local council.

If you need assistance liaising with Council, the team at Coutts can provide guidance as necessary.

Why would you make an application under the Tress Act?

The best way to resolve any dispute is to try to resolve it directly with the owner of the property on which the problem tree is located.

However, if this proves to be impossible, you can apply to the Land and Environment Court for an order to remedy, restrain or prevent further damage being caused by the tree.

In addition, you may also apply for compensation for any damage already caused by the tree, such as damage to property or to business trade.

The Environment and Planning Team at Coutts can assist you in any dispute regarding trees including making the relevant application in the Land and Environment Court.

Who can make an application?

The owner or occupier of a property which adjoins the property where the problem tree is located can make an application to the Land and Environment Court under the *Trees Act*. This also includes Tenants.

How do you make an application under the Trees Act?

An application can be made directly to the Land and Environment Court.

These applications are dealt with by Commissioners as Class 2 proceedings.

Coutts' Environment and Planning team can assist you with making this application and representing you in the proceedings.

What does the Land and Environment Court take into consideration?

Typically, a claim under the *Trees Act* pertains to property damage or personal injury, such claims may include claims for compensation. In these proceedings, the Land and Environment Court requires the applicant to provide satisfactory evidence that:

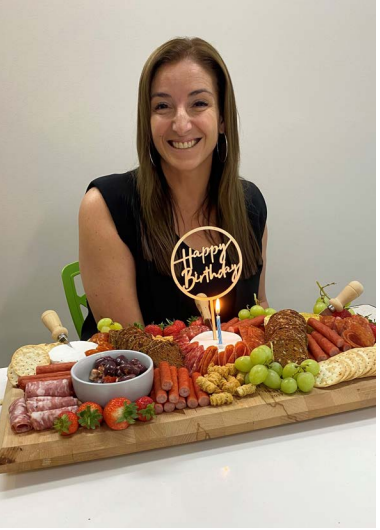
- In accordance with section 10(1) of the *Trees Act*, all reasonable efforts have been undertaken to try and resolve the dispute directly with the owner of the property that the disputed tree is located on
- The subject tree has, is or will cause damage to the applicant's property
- In relation to personal injury claims, that the subject tree has or is more than likely to cause injury to a person

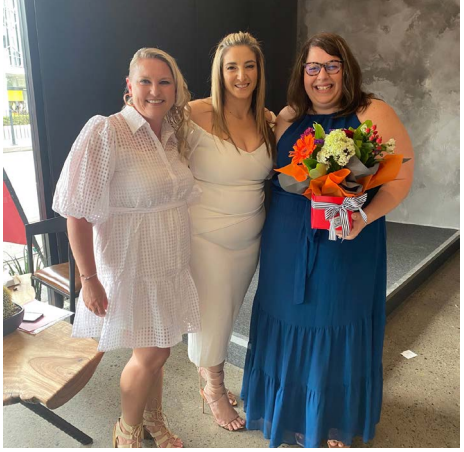
The Land and Environment Court must be satisfied in relation to the matters listed above and to other matters set out in the *Trees Act*, to issue an order, otherwise no order will be issued.

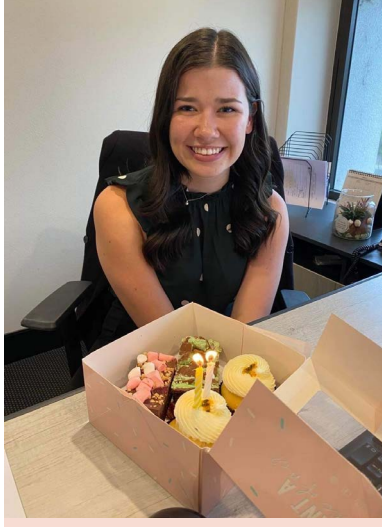
Where the application concerns hedges obscuring sunlight, the court will also consider whether the trees forming the hedge were planted or self sown and whether they are greater than 2.5 metres in height.

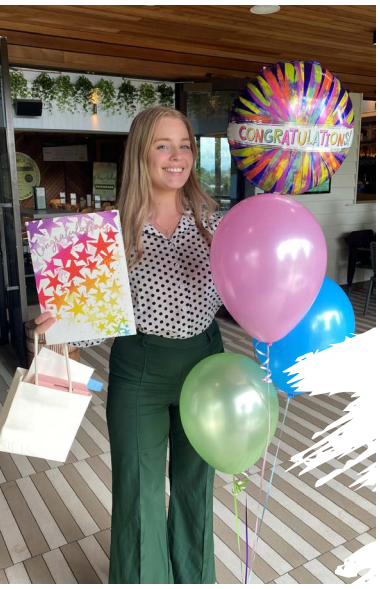
If you intend to commence action against a neighbour under the *Trees Act* reach out to Coutts and we can guide you through the process and advise as to whether your claim satisfies the considerations that must be met under the *Trees Act*.

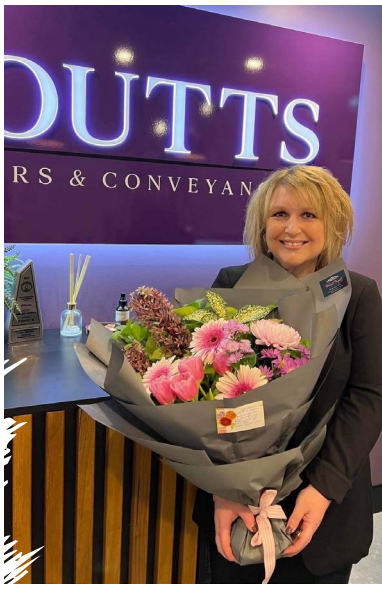
Melissa Care
Senior Associate



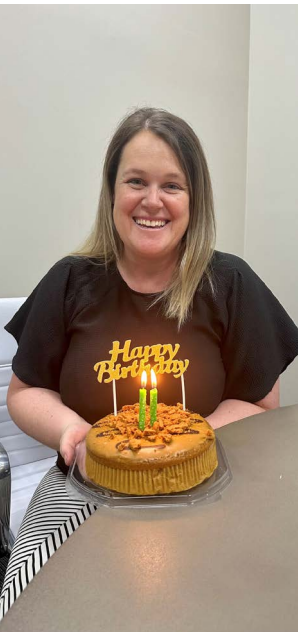


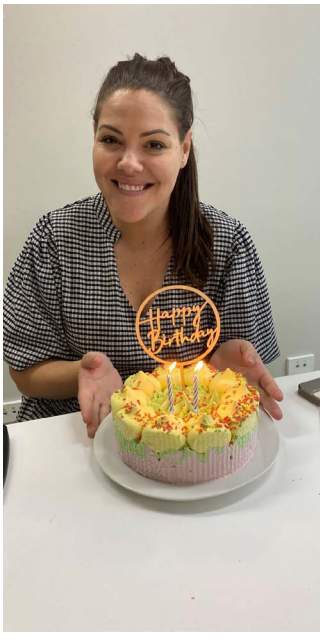






Out and About with COUTTS





A Wine with... Shannan

PROFILE

Position: Law Graduate

Location: Narellan & Campbelltown

Area of Practice: Wills & Estates

Q: How would you describe yourself in two words?

A: Determined & Logical

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

A: Honesty

Q: My favourite motto / mantra is:

A: A person who never made a mistake never tried anything new

Q: My pet peeve is:

A: People who are always late

Q: On the weekends you can find me:

A: Spending time with my partner and puppy Finley

Q: The last book I read was:

A: Gone girl

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

A: ❤️ 😂 😜

Q: My favourite move of all time is

A: Avatar

Your Questions Answered

DO I NEED TO PAY MY EX-MAINTENANCE?

Generally, under the Family Law Act, it is more likely that any final property settlement made between parties will not include maintenance provisions. Spousal/partner maintenance is usually only available under special circumstances and is not something that needs to be paid indefinitely. The kinds of special circumstances that can lead to spousal/partner maintenance are things such as where one party has care of children, where one party has very limited financial resources, or when one party is unable to work due to care of children.

WHAT IS A DEED OF COMPANY ARRANGEMENT?

In instances of administration, if there is a proposal put forward for the business to continue and creditors to be paid, the company and its directors execute a deed of company arrangement. At the time of considering the proposal, the creditors consider a report from the insolvency practitioner as to their recommendations.

Eventually, the decision as to whether a deed of company arrangements is entered into is made by the creditors of the company.

DO I HAVE AN INJURY CLAIM?

Depending on the type of claim we would need to consider if we can establish Breach of Duty, Causation and damage (negligence) (there is a no-fault scheme for workers compensation so you don't need to establish negligence that you had a work accident and work must be a substantial contributing factor or main contributing factor for psychological) then we look at the extent of the damages which could include pain and suffering, economic loss, medical treatment and whether you have needed assistance around the home.

WHAT IS LARCENY IN NSW?

Larceny is the theft of personal property and the penalty associated will be in accordance with the value of the property. For example, if the property stolen does not exceed $2,000, the offender may be charged with a fine of up to $2,200. However, the penalties can range from a fine to imprisonment, dependent on the situation and the property stolen.

CAN CONVEYANCERS GIVE LEGAL ADVICE REGARDING PROPERTY DISPUTES?

A Licensed Conveyancer is not able to provide legal advice and or act in a dispute for a party in relation to the property. A Licensed Conveyancer may only act on your behalf in relation to a transaction regarding the transfer of title of property. If you have a dispute in relation to a property transaction you will be required to instruct a Lawyer to act on your behalf. This is the benefit of Coutts where we have a team of experienced Licensed Conveyancers and Property Lawyers who understand your rights in a property law transaction or dispute.

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

A Power of Attorney is a legal document that 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.

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"Coutts is a powerful female founded law firm with a core value system that puts people first. Our reputation as the legal business of choice is recognised by our achievements and awards."

Adriana Care
Managing Partner

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