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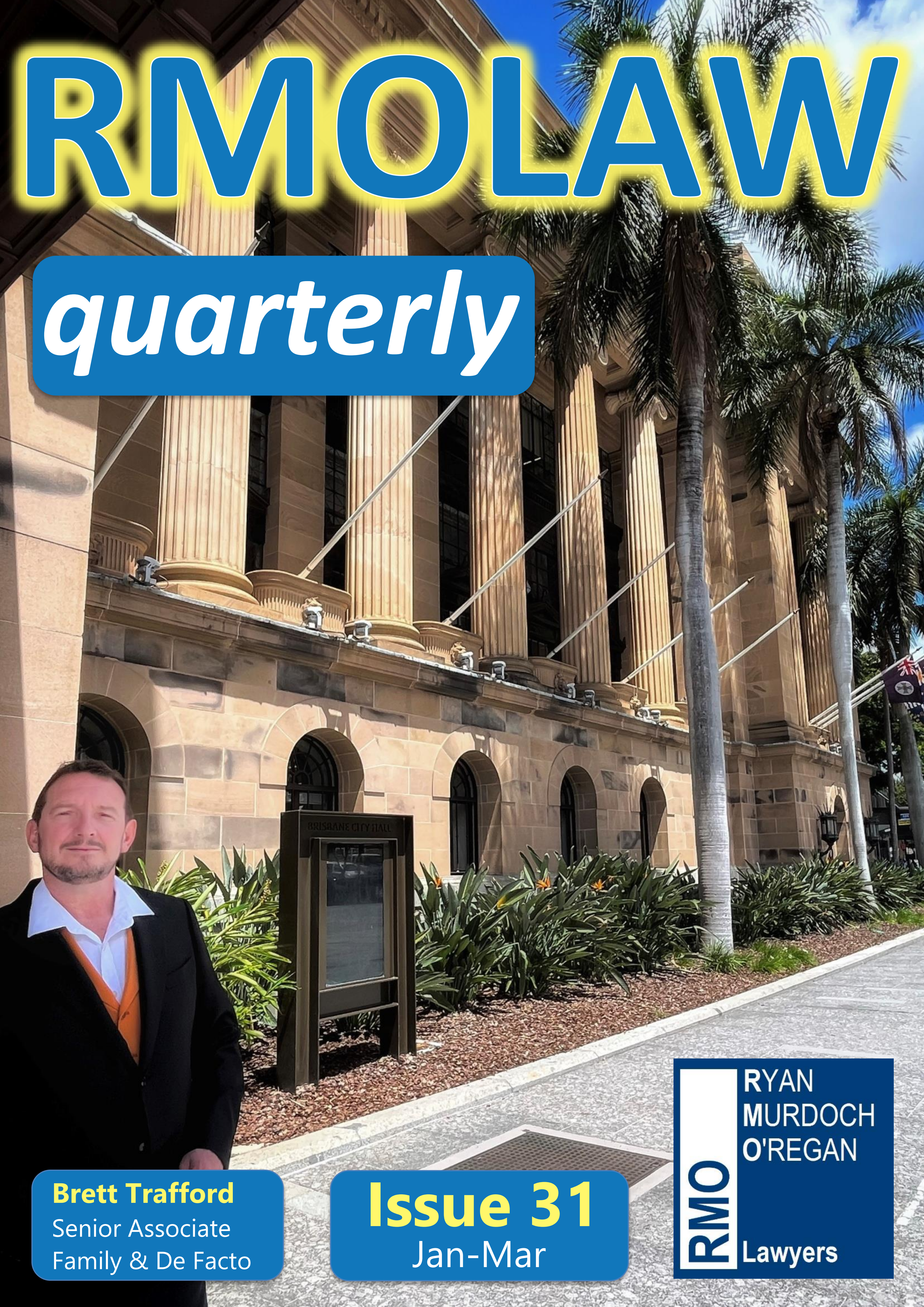

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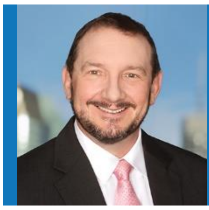
What is a Financial Agreement?



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A Financial Agreement is a document that sets out in advance how the property of a marriage or a de facto relationship will be dealt with in the event of a separation. It can prevent either party from bringing a claim against the other for a property settlement following the breakdown of a marriage or de facto relationship.

A Financial Agreement is:

- A legally binding contract entered into by people before, during or after they were married or in a de facto relationship together.
- An enforceable written agreement setting out how property and financial resources will be divided following the breakdown of a marriage or de facto relationship.
- An agreement of the parties to contract out of, and not be bound by, the sections of the Family Law Act 1975 that generally apply to matrimonial/de facto property settlements.
- Similar to a Will, in that it sets out who gets what property if a marriage or de facto relationship dies.

Why would you want a Financial Agreement?

A Financial Agreement is a relatively quick, inexpensive and stress-free way for parties to determine how their assets and property will be divided at the end of a marriage or de-facto relationship. A Financial Agreement is a lot cheaper and quicker than applying to court for property orders after a separation.

Example 1: A couple separates after a marriage or a de facto relationship with no Financial Agreement in place. If they cannot agree about how to divide their property then one of them may need to apply to a court for orders that the other party pays them money, or transfers property or superannuation to them.

The process of applying to a court for a family law property settlement is often expensive, time-consuming and stressful and should only be commenced as a last resort if the parties involved cannot agree on how to divide their property.

Example 2: A couple separates after a marriage or a de facto relationship and there is a Financial Agreement in place.

The couple has already decided in their Financial Agreement about how they will divide their property if they ever separate, so there is no need for court proceedings. Both parties will save money by not having to go to court, and their property can be divided quickly as set out in the Financial

Agreement. Both parties can avoid the stress and the cost of being involved in court litigation.

How does it work?

A Financial Agreement can protect some or all of your property from any future claim following a separation. A Financial Agreement can also protect future property that has not yet been acquired.

Example: Naomi has inherited her parent's home and wants to be certain that it will be protected from any future property dispute with her partner if they should ever separate.

Naomi and her partner make a Financial Agreement stating clearly that Naomi's home will not be taken into account for the purposes of any future family law property settlement.

If Naomi and her partner separate, Naomi has the security of knowing that her parent's home is "off the table" as far as any future property dispute with her partner is concerned.

What are the advantages of entering into a Financial Agreement?

- A Financial Agreement provides a final property settlement on terms that a couple decide between themselves. It gives them the power to decide how their assets and/or spousal maintenance entitlements will be dealt with following separation.

- A Financial Agreement enables you to avoid the significant time and expense of having a court decide how your property will be divided, possibly on terms that you are not happy with.

- A Financial Agreement is an effective estate planning tool that can ensure your property can pass to successive generations as intended.

- A Financial Agreement provides stamp duty and Capital Gains Tax relief for separated couples (subject to some exceptions)

Some disadvantages of entering into a Financial Agreement:

- By entering into a Financial Agreement you are contracting out of your right to have a court determine your entitlement to property settlement and/or spousal maintenance. A court might determine that you are entitled to a more favourable property settlement than your Agreement provides.

A Financial Agreement can protect some or all of your property from any future claim following a separation. A Financial Agreement can also protect future property that has not yet been acquired.

- A Financial Agreement may remain legally binding despite any unexpected change of circumstances including serious injury, ill health or death, or the worsening of a party's financial circumstances due to loss of employment or failure of a business.

- A Financial Agreement may remain legally binding despite significant increases or decreases in the value of the property, financial resources or liabilities of each party. For example, if the value of your real estate property were to decrease significantly in value in the next few years you would still be bound by the terms of the Agreement.

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When Does a Public Authority Owe a Duty of Care?

Billy Duan
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Western Power found liable for the 2014 Parkville Bushfire – When does a Public Authority owe a Duty of Care?

Overview

On 7 December 2022, the High Court of Australia upheld the decision of the Supreme Court of Western Australia Court of Appeal that Electricity Network Corporation trading as Western Power ("**Western Power**") has a duty to avoid or minimise the risk of injury to all other persons within the vicinity of its electricity distribution system from the ignition and spread of fire in connection with the delivery of electricity. Western Power was also found liable for negligence by breaching its duty of care in exercising its statutory powers.

Background

This case concerned a jarrah point of attachment pole ("**PA Pole**") which was installed by Mrs Campbell's late husband in 1983. Western Power has been supplying electricity to Mrs Campbell through service cables attached and connected to this PA Pole. Whilst Mrs Campbell owned and PA Pole, Western Power owned the service cables.

Western Power engaged Thiess Services Ltd ("**Thiess**") to construct, maintain and manage aspects of Western Power's distribution system. In July 2013, a crew from Thiess was tasked to remove and replace the service between the PA Pole and one of Western Power's poles.

In 2014, the PA Pole fell because of fungal decay and termite damage and ignited dry vegetation, causing the 2014 Parkville bushfire. A number of parties who suffered damage during the bushfire commenced legal proceedings against Mrs Campbell, Thiess and Western Power.

At first instance, the Supreme Court of Western Australia found Thiess had failed to comply with the industry standard, namely to inspect and check the PA Pole to identify signs of deterioration and digging around the PA Pole to detect surface decay and termite attack. The Supreme Court found both Thiess and Mrs Campbell were liable for negligence and nuisance and attributed 70% of the liability to Thiess and 30% to Mrs Campbell. However, all claims against Western Power were dismissed because the Supreme Court found it had discharged its duty of care.

The Court of Appeal's Decision

This decision was appealed and the West Australian Court of Appeal found Western Power:

1. owed a broader duty of care to persons in the vicinity of its electrical distribution system in terms of its temporal scope, that is even if work was not done in the area; and

2. owed to persons in the vicinity of its electrical distribution system a duty to take reasonable care to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system; and

3. Failed to perform periodical inspection of PA poles owned by consumers.

The liabilities were apportioned as follows:

1. 50% – Western Power

2. 35% – Thiess

3. 15% – Mrs Campbell

The High Court's rulings: The Duty of Care owed by a Statutory Authority

The High Court's starting position was that there is not an established principle on whether or when a common law duty of care of a body created by statute can arise, but the analysis must start from the statutory framework under which the public authority operates. A statutory authority may still owe a duty if it exerts "control" and creates a relationship with a class of persons in the actual exercise of its powers.

The High Court examined the relevant rules and legislations that govern Western Power and how Western Power has been exercising the power granted under those statutes. In upholding the Court of Appeal's decision, the High Court held that:

A statutory authority may nevertheless owe a duty of care even if the governing statutes do not expressly provide one.

1. Western Power connected its services cable to the PA Pole. This was undertaken within the powers granted to Western Power. It was because of their work, the persons within the vicinity were subject to further risks and potential harm;

2. Western Power is required to maintain its equipment, e.g. the service cables; and

3. Western Power had the power to enter into the land and premises of its consumers in order to carry out its functions of constructing and maintaining its electricity distribution system.

4. Western Power created a relationship with others where a common law duty of care can be attached.

Key Takeaways from this High Court Decision

1. A statutory authority may nevertheless owe a duty of care even if the governing statutes do not expressly provide one; and

2. The existence and extent of a duty of care owed by a statutory authority can be found by reference to the wording used in the statutory framework and the manner of the statutory authority in performing its functions.

Contact Us

Talk to one of the commercial litigation lawyers for advice on all commercial law matters, call 1800 999 529 or email mail@rmolaw.com.au.

Powers of Attorney and Property Transactions

Duncan Murdoch
Director
Property & Business Conveyancing

On occasions a seller or a buyer will not be able to sign a document themselves but will instruct their attorney to sign under a power of attorney. These are some issues that need to be considered when dealing with a power of attorney.

Has the power of attorney been properly constituted?

There are two forms of power of attorney. The first is a general power of attorney and the second is an enduring power of attorney. The power of attorney should be checked to see if it has been properly constituted and whether there are any limitations imposed.

Who is giving the power of attorney?

This should be obvious in the case of an individual but care must be taken when dealing with companies. A power of attorney given by a company will usually be for the company only and will not be a power of attorney that allows the attorney to sign on behalf of individual directors.

Where a company acts as trustee, care must be taken to see if the power of attorney is given for the company in its own capacity, in its capacity as trustee of the trust of both.

Who is the attorney and how can he/she act?

This should be obvious in the case of one attorney. However, in the case of multiple attorneys further investigation will be required. Can those attorneys act independently or do they have to act jointly? This needs to be checked to ensure that a document is validly executed by the attorney(s).

There are two forms of power of attorney. The first is a general power of attorney and the second is an enduring power of attorney.

More complex powers of attorney may appoint either named persons or persons who have a particular rank/title within a company. They may specify or place a limit on specific documents that the attorneys can sign.

Has the power of attorney been registered at the Titles Office?

Whilst an unregistered power of attorney can be used to sign a contract, a power of attorney must be registered at the Titles Office for any documents that need to be registered at the Titles Office.

These are just a few of the issues that need to be addressed when dealing with powers of attorney. Care needs to be taken to ensure that there are no anomalies which would lead to an invalid execution of documents.

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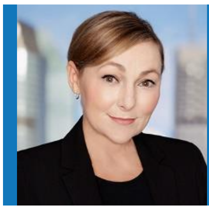
Gift and Loan Back



Kylie Shaw
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Wills & Estates

A "gift and loan back" arrangement has been used by clients as a popular strategy to reduce the assets in their personal name.

A gift and loan back arrangement involves an individual gifting their wealth to a de-risked related entity like a discretionary family trust. The discretionary family trust then loans the money back to that individual and takes a secured mortgage over the property.

Clients have typically used this strategy for two reasons:

1. To protect their personal assets from risks associated with business (creditors).

2. As an estate planning strategy (where notional estate does not apply) to shift assets out of their personal name/s to reduce the estate pool which may be vulnerable to a family provision claim/contest.

As an example:

Peter runs his own business and owns a home valued at $2 million. No mortgage.

Under a gift and loan back arrangement:

1. Peter would gift $2 million to his discretionary family trust;

2. The discretionary family trust would then loan the $2 million back to Peter; and

When considering a gift loan arrangement it is important that the gift and subsequent loan involve a physical transfer of consideration/funds and that the documentation implementing the arrangement are both valid and complete.

3. The discretionary family trust would put a mortgage on Peter's home for the $2 million loaned.

If a creditor then sued Peter, the $2 million would not be available as the discretionary family trust would have security over Peter's home for $2 million dollars.

However, in the recent decision of Re Permewan No. 2 [2022] QSC 114 (Re Permewan), the Supreme Court has scrutinised these types of arrangements.

Prudence Permewan ("the deceased") died in 2019 leaving behind three adult children.

The deceased's only son was appointed as executor of the estate, which had a value of approximately $3 million comprising the deceased's home and some shareholdings.

The deceased's will gifted the entirety of the estate to her existing family discretionary trust, and also appointed the deceased's son as the controller of that trust. The effect of this was that the son was in control of all the deceased's assets to the exclusion of her other two children.

The case examined a number of transactions which the deceased undertook in 2018. The deceased gifted $3million dollars to the family trust via a promissory note (which represented her approximate net worth at the time). The family trust then loaned the $3million back to her, which was documented via a loan agreement. The family trust registered a mortgage over the deceased's home and also registered security over her shares.

The deceased did not have sufficient liquidity to gift cash to the trust, and no money 'changed hands'. The effect was that all of the deceased's 'worth' shifted into the trust, leaving the estate with little value for the deceased's other two children to claim against.

The other two children filed an application for family provision on the basis that the transactions that their mother had entered into were invalid and unenforceable.

The Court found that the transaction was a 'sham' in that there was no intention for the deceased to pay back the $3 million loan and the trust never intended to enforce payment of the loan. There was no evidence that the promissory note had been delivered, which meant that the transaction was technically incomplete.

The Court made it clear that in gift and loan back arrangements, it will not accept illusory transactions that attempt to circumvent important legislation that requires that members of a deceased family are provided for financially where they are found to be in need. The Court ultimately found that the gift loan back arrangement in this case was invalid and unenforceable.

The Court's comments in Re Permewan are concerning for anyone with a gift and loan back arrangement. When considering a gift loan arrangement it is important that the gift and subsequent loan involve a physical transfer of consideration/funds and that the documentation implementing the arrangement are both valid and complete.

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Can You Refuse a Roadside Breath Test (RBT)?

Roly O'Regan
Director
Criminal Law

Police have the power and control to pull your vehicle over at any time and request that you participate in a breath test to ascertain whether you are intoxicated from alcohol or drugs while you are in charge of your vehicle. If the Police are of the reasonable belief that you have been actually drink driving they also have the power to request a breath sample from you. These tests measure the amount of alcohol in your blood.

What are the consequences if I don't pull over for an RBT?

Police have the power and control to pull your vehicle over at any time and request that you participate in a breath test to ascertain whether you are intoxicated from alcohol or drugs while you are in charge of your vehicle.

If you don't pull over, you will be charged with an offence. Moreover, if the police were in a marked police vehicle and you are aware that they have activated their sirens for you to pull over and you don't, you will be charged with the offence of Failing to Stop and you could spend 50 days in prison or a fine of up to 50 penalty units. You will also lose your licence for 2 years.

What is the process of an RBT?

If the police request that you pull over your vehicle, you will be asked for your personal particulars, that is your name, address as well as providing them with your driver's licence. If you don't answer the questions truthfully, for example you provide a false name, this amounts to an offence.

The next step provided you have complied with the above, is that you will be asked to blow into a plastic tube of the breath analyser. The legal alcohol limit is 0.05% and if you are over this limit, you will be asked to provide another test. However, if you refuse to attend a police station for the second test, the police have the power under the *Transport Operations (Road Use Management) Act 1995* to use reasonable and necessary force to transport you to the police station. If it is evidenced that the second test is over 0.05%, you will be charged with drink driving.

Can I refuse a RBT?

The short answer is no. It is considered a serious offence to do so (Section 80(5A) of the *Transport Operations (Road Use Management) Act 1985* and you will expose yourself to 40 penalty units or 6 months imprisonment. However, you may lawfully refuse a test if you have valid medical reasons to do so. Of course, you will need evidence to provide of this to the police preferably from a Doctor.

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To speak to one of our experienced criminal lawyers call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

Have you been caught Drink or Drug Driving? Contact our Traffic Lawyers today.

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