RMOLAW

quarterly

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Lawyers

In Charge While Under The Influence

Matthew McGann
Lawyer
Criminal & Traffic

Imagine a situation where you have driven around to the pub, had a few too many to drink and decide that you don't want to risk driving home and so you sleep it off in the car while you sober up. If you thought that you would be doing the right thing, think again! You may in fact be liable for the offence of being in charge of a motor vehicle while there is alcohol in your system.

Section 79 of the *Transport Operations (Road Use Management) Act 1995* creates the offence of driving etc. while there is alcohol in your system. Driving relates to driving and the 'etc.' relates to a person attempting to put into motion or being in charge of a motor vehicle.

The offences of driving and attempting to put into motion a motor vehicle are intuitively understood. It is uncontroversial to the average punter that driving or trying to drive a car while drunk is antisocial behaviour which should be avoided and addressed by law enforcement.

What is less clear to the average driver is the scope of the idea of being in charge of a motor vehicle. The law currently provides that any person who appears, acts or behaves as the driver or person having custody, care, or management of any vehicle shall be presumed to be the person in charge of the vehicle. This applies even in circumstances where the person said to be in charge is unaware that it is impossible to drive the vehicle.

What this means is that if you have had a few to drink and are anywhere near a car that you believe you could drive if you wanted to, then you may be charged with the offence of being in charge of that vehicle while there is alcohol in your system.

If the court finds that you were in charge of the vehicle while there is alcohol in your system there are circumstances where they are not to convict you provided by section 79(6) of the *Transport Operations (Road Use Management) Act 1995*.

These circumstances are:

1. You need to have either not been in the driver's compartment of the vehicle, or been outside the vehicle at the time of the alleged offence;

2. You need to prove that you were either not in the driver's compartment or the car at all because you had formed an intention not to drive and not for some other reason;

3. You need to show that you were not so drunk that you could not have formed the intention not to drive;

4. The car has to be parked safely; and

5. You can't have been convicted of an offence relating to driving etc. while

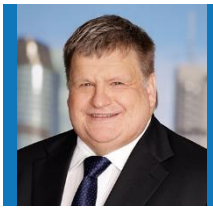
there is alcohol or drugs in your system for at least a year prior to the date of the charge.

As is apparent the law is complex and structured in a way that makes it difficult to rebut the presumption that the offence is being committed.

We can assist you with sort of offence by writing to Police Prosecutions to request that they withdraw the charge on the basis that it is not in the public interest to charge people who are 'sleeping it off'. If they do not withdraw the charge then we can represent you in court and make submissions that the Court should not convict you of the offence.

If you require legal advice in relation to a vehicle offence involving liquor or other drugs, the team at Ryan Murdoch O'Regan can assist you.

Shareholders and Confidentiality Agreements – Company Formation "Pre-nups"



Peter Kronberg
Senior Associate
Commercial Litigation

For those thinking of starting up a company by way of incorporating a partnership or novel processes or ideas to exploit, it must be kept in mind that forming a company could be considered to be entering into a relationship, albeit a financial one, which may have the potential of falling out or causing some grief along the way.

It is important to give consideration to particularly two types of Agreements:

1. Shareholders Agreements;

2. Confidentiality Agreements, especially if there is intellectual property or commercially confidential information being utilised for the prospective company.

Shareholders Agreement

There are many advantages in having a Shareholders Agreement entered into prior to the formation of the company.

Disputes

As with any sort of relationship there may be disputes between shareholders and directors or between directors themselves. The Shareholders Agreement can provide some established dispute resolution processes or even provide for some disputes to be referred to shareholders for approval or vice versa.

Avoiding Oppression

It is sometimes asserted by minority shareholders that the majority shareholders are not acting in not only the

interest of the company, but also which effects them unnecessarily. The Shareholders Agreement can cover changes to the Standard Articles of Association to allow a minority shareholder to have more say in respect of issues that concern them primarily. There can also be provisions where the shares are being "taken over" by a third party to protect the interests of minority shareholders.

Deadlock

As with any relationship, sometimes directors and shareholders do not agree on the course of decisions concerning the company. This may ordinarily result in the company's business being put on pause until something can be done to resolve the issue. A Shareholders Agreement can seek to avoid this by providing resolutions in a quick manner for the parties to resolve the issues or to buy each other out. It is otherwise difficult for such deadlocks to be resolved in accordance with the standard company articles, and thus the Shareholders Agreement would be useful.

Transfer of Shares

It may be considered important that there is some limitation on transfer of shares, especially to third parties. A Shareholders Agreement can set in train clauses which enable other shareholders to purchase those shares first. It can also cover that any person acquiring shares in the company will be bound by the Shareholders Agreement as well.

Confidentiality Agreements

These can be very useful in ensuring all parties are aware of what may be regarded as confidential. How and in what context confidential information can be provided to third parties to enable the company to exploit for that information. Such Agreements invariably will set out clauses as to damages or remedies that can be sought if the confidentiality is breached, either by damages or the ability to seek an injunction.

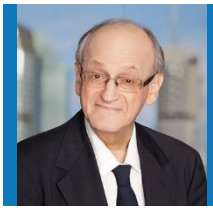
The advantage clearly is that all parties are in a better position to understand what is regarded as confidential and will be more mindful of keeping confidential information to the company.

It must be kept in mind that forming a company could be considered to be entering into a relationship, albeit a financial one, which may have the potential of falling out or causing some grief along the way.

It might seem trite to say that parties should be aware of confidential information being limited in being shared. It is surprising, however, how often disputes do arise over what is regarded as confidential information, especially if key shareholders/directors leave for whatever reason. It is therefore best to have a set process in place that makes it abundantly clear to all parties what it is that they can or cannot use in certain circumstances.

If you already have Shareholders Agreements or Confidentiality Agreements in place, it is prudent for these to be reviewed from time to time. Further, RMO Lawyers can assist you in drafting Confidentiality and Shareholders Agreements for you if you are minded to form a company or a partnership.

Leasing



Gary Kliger
Lawyer
Property & Business

Leasing, it's easy, just get the dollars and the term of the lease right and that's the end of it, nothing more to do, right?

A lease document in fact is a very involved, very detailed contract that sets the terms and conditions in which a tenant (or subtenant or new business owner as assignee, but they're all different topics al on their own) gains the right to occupy someone else's property and pay rent and sometimes an array of other monies for the privilege to do so.

There are many issues that arise in leasing, way too many for an article like this, so let's just concentrate on one, the use of the premises.

First things first; the use has to be defined properly in the lease. Using some vague terms, or using a short form of words might end up causing more problems than it ever should.

The tenant has to be aware of what exactly he wants to do in the premises. That's a perfectly obvious statement, but it's something that often is overlooked. If you sign up a lease and then realise that in fact your plans for the premises involve several activities that you have NOT DESCRIBED in the permitted use, you are then faced with the problem that you may not be allowed to do what it is that you want because either the landlord declines to consent to the amendment in the use, OR it is not allowed by the local government planning scheme that governs the premises.

You must obtain the consent of the landlord to changing the use in the lease and there's no guarantee that that consent will be given, or given without the landlord charging you for the 'time and trouble' it takes to gain their consent.

Then you must take steps to learn whether the use is permitted by the Local Council. If you leave that until after you sign the lease, you may find out that the use is NOT permitted under the planning scheme and you are obliged to make a Planning Application seeking variation to the scheme to allow the use in the premises. That application is expensive and non-refundable, and there are no guarantees whatever that the Council will approve the variation to the planning scheme.
Without the planning permission in place the Council can literally shut the business down.

All of that resolvable by a phone call to Council BEFORE you sign anything.

And that's just one little element of a lease that needs to be dealt with before signing the lease.

There are a huge number of issues that arise for consideration in each lease. Contact one of our commercial solicitors whenever you are contemplating a lease of any sort-and we haven't even touched on the various types of lease, Retail, Commercial, and Industrial, all with their own niceties of language and liabilities and disclosure requirements- to get help through the minefield.

Contact RMO Lawyers today for advice on all things property and business.

Water Allocations

Duncan Murdoch
Director
Property & Business Conveyancing

Water allocations are a topic that needs to be considered when purchasing rural properties.

Queensland Titles holds a register of water allocations which can be searched in a similar way as for titles to land.

The search will reveal (amongst other things) who owns the water allocation and the number of litres that is covered by the water allocation.

Water allocations can be bought and sold. They will normally be dealt with by way of a special condition in the land contract.

One quirk is that water allocations currently cannot be dealt with through PEXA and so must be dealt with by means of a paper Transfer.

Queensland Titles will not register a transfer of water allocation without the relevant water company supplying a Form W2F152. The water company will not supply this form until the seller and the buyer sign the water company's application from, the buyer signs the water company's form of water supply agreement and all fees and charges are paid.

These are just a few of the things that need to be considered when buying a water allocation. Further investigation will be needed on a case by case basis.

Water allocations are a topic that needs to be considered when purchasing rural properties.

Capacity To Make A Will Or Power Of Attorney – What Do I Need To Know?

Graham Morrison
Senior Associate
Wills & Estates

One of the difficulties in advising clients and taking instructions when preparing an Enduring Power of Attorney or Will is to ascertain if the person giving the instructions has the 'capacity' to provide their instructions and therefore they can then sign the created document.

"Capacity" can be difficult to assess even for persons qualified to make such an assessment. Even so, to create a legal document that is binding and cannot be questioned at a later time an appropriate assessment needs to be undertaken of the person's capacity.

There is often some angst from family members if a client's instructions cannot be accepted due to a lack of capacity. Ironically, the rejected instructions are often those that a client might give or the appointment they would want if they had capacity and are often what the family would consider appropriate.

The starting point for capacity is a presumption that **every adult has capacity to make all decisions until proven otherwise**. A person with a disability, mental illness or a very elderly person may still have capacity despite their circumstances and it is up to a person challenging that person's decision making capacity to prove that they have impaired capacity. Interestingly, capacity can change from time to time due to health issues and a person can lose and regain capacity temporarily even from day to day.

ENDURING POWER OF ATTORNEY

When an adult is providing their instructions for an enduring power of attorney the person providing these instructions needs to be capable of **understanding the nature and effect of the document** and **making the document freely and voluntarily**.

The level of understanding will vary depending upon the nature and complexity of the personal and financial affairs of the person giving their instructions, the types of decisions which will be made and the scope and terms of the power being given to the attorney. In the event that a person is seeking to give power to make decisions about financial affairs where there is a **high level of complexity then a higher level of understanding is required** by the person giving the enduring power of attorney instructions.

The person must **give their instructions freely and voluntarily** without any coercion or undue influence. There must be no pressure on the person giving their instructions to make a decision and

provide instructions. Pressure or coercion can occur from well-meaning family, relatives or friends who even if they have the person's best interests at heart are seeking to influence the making of an enduring power of attorney because they think it is the right thing to do and is in the person's best interest.

The role of the witness when confirming that a person has signed a power of attorney document is to identify the person and to carry out an assessment of their capacity at the time the document is signed.

A **letter from a medical practitioner** is often sought where there are issues of concern about capacity. A letter from a medical practitioner can sometimes fall short of dealing with capacity issues in any meaningful way. The best evidence of capacity from a medical practitioner confirms that 'capacity testing' has taken place, a report of the results of the testing and whether or not a person has capacity to provide their instructions. Ideally the letter should be provided to the witness immediately after the assessment at the time the document/s is/are signed.

WILLS

Many of the issues relating to powers of attorney also relate to **'testamentary capacity'** (competence to make a will).

A 'testator' (the person making the will) must **understand that they are actually providing instructions for signing a document which disposes of their assets upon their death, they must be aware of the assets that they own and the liabilities in their name including the nature and extent of those assets and liabilities and they must be able to give instructions about how the assets are to be divided and who they want to receive the benefit of their estate (the beneficiaries) as well as understand the reasons why they intend those persons to be beneficiaries.** The testator should also be able to consider anyone else that might be entitled and if a family member is excluded explain the reasons why they should not be included or otherwise why somebody who is not a family member should be included.

The testator's knowledge about their own circumstance need not be specific. A general knowledge of their own circumstances, assets and their wishes to distribute their assets upon their death will often be sufficient. This may however depend upon the nature and complexity of the estate assets and the intricacies of dealing with distribution of those assets.

ASSESSED CAPACITY CREATES A BINDING DOCUMENT

Provided that the capacity issues are addressed when the person is providing their instructions and/or signing their documents and sufficient evidence relating to capacity is retained, by the solicitor or witness, the document will be binding and effectual. The problem is of course that the Testator, Principal and Witness do not make the decision about validity. That decision is made by a Judge who was not present to gauge the conduct and demeanour of the person when the document was signed. The

Judge can only rely upon what evidence there is in support from the people present at the time or from other interested parties including for example other family members, doctors, hospital or nursing home employees who may hold a different view about the person's capacity.

ASSESSED INCAPACITY

Effect on Estate

The effect of incapacity means that a signed will may be set aside by the court and this could have significant impacts upon the estate which could either result in a previous valid will being upheld or the testator dying without a will. When there is no will the Intestacy Rules in the Succession Act 1981 Qld apply to the distribution of the estate. These rules apply a formula for distribution between family members. This can sometimes be detrimental to the family or other named beneficiaries and is often outside of the intention of the deceased.

Effect on Decisions

If the principal lacked capacity an enduring power of attorney document could be set aside by the Queensland Civil and Administrative Tribunal (QCAT. If that occurs the process to have somebody appointed to administer the affairs of the incapacitated person would require an application to QCAT to ask for the appointment of an administrator and/or a guardian for the incapacitated person. The appointment could be of a family member or a friend who has the best interests of the person at heart but QCAT could even appoint the Public Trustee and the Office of the Public Guardian to those roles. The QCAT process can take many months until a decision is made.

MATTERS FOR YOUR IMMEDIATE CONSIDERATION

1. Consideration should be given to making of a will or an enduring power of attorney document as soon as possible;

2. Do not delay in seeking out legal advice and giving instructions particularly if you or someone you know is aging in later life, very elderly or there are early onset medical issues which effect capacity.

ISSUES TO CONSIDER AT RYAN MURDOCH O'REGAN LAWYERS

At Ryan Murdoch O'Regan Lawyers we believe:

- Every client has human rights whether affected by illness, mental health issues or disabilities and should be treated equally.

- Clients should be treated with dignity, autonomy and have a right to self determination

- Where there is impaired capacity a substitute decision maker is an important part of giving that person the right to make decisions under the law

- All persons irrespective of issues of capacity have a right to their privacy, confidentiality and to uphold their integrity and reputation.

- Capacity assessments should be carried out in a way which seeks to

uphold a client's sense of worth and value.

- Where there are difficulties in coming to terms with losing capacity we provide a caring and supportive role. We accept and acknowledge that for the client who is confronted with capacity issues this is part of their life's journey and they should receive care and understanding in the midst of their uncertainty and confusion both now and into the future.

We encourage you to consider these issues and the need for early or urgent action to address these matters. Please contact us should you wish to discuss these issues or make an appointment to discuss or make an enduring power of attorney or will.

We trust that this information has given the reader some insight into the assessment of capacity when making a will and enduring power of attorney.

Please contact one of our offices should you wish to discuss the issues raised in this article or make an appointment with one of our Wills and Estates Team Members. Our team members will provide you with our **Will, enduring power of attorney and advanced health directive instruction packs / Questionnaires** so that you can consider your needs and have the necessary information readily available for your appointment.

Why Formalise Property Settlement?

Tim Ryan
Director
Family & De Facto

Formal finalisation can take the format of a Binding Financial Agreement which requires each party to obtain independent legal advice, or Consent Orders which are registered with the court and reviewed by a registrar.

Each option requires disclosure to be undertaken and each party needs to be satisfied that all property, debts and superannuation have been disclosed with proper values attributed to each item.

Whilst it may seem tedious to get to this point, there are some very valid reasons why it may well be in your best interests to finalise your settlement by either of the just mentioned options.

If you are transferring a house or other item that attracts stamp duty, there is a stamp duty exemption available to a party under the *Family Law Act 1975* (Cth) ("**the Act**") and the *Duties Act* (Qld)[1].

You will still have to pay conveyancing fees and registration/processing fees, however, you will not have to pay stamp duty on the portion of property being acquired.

There may be capital gains tax roll-over relief that can be addressed. As with all taxation matters, advice from your accountant is imperative. There are further

obligations in this regard where the property transaction is over $2 million dollars.

Whilst you may be separated but not divorced, for married couples, no limitation date applies. So, if you happen to win the mega-draw in lotto, it is fair game for property settlement. Whilst your former spouse may not have made a contribution to the acquisition of that win, it is still a financial resource for family law purposes and you may be required to make a payment to the other party[2]. By not only undertaking property settlement but also obtaining a divorce, the avenues to try and claim against those monies become significantly reduced – the claiming party then has a lot of explaining to do as to why they should be allowed to make an application.

If you were in a de facto relationship, there is a limitation date of two years from the date of separation to either resolve by agreement or issue proceedings. The vulnerability of your lotto win remains live during this time. Applying after a limitation date has past requires explanation as to why you should be allowed to proceed.

Undertaking formal property settlement gives you the peace of mind in knowing that your financial ties with the other party have been finalised.

Section 81 of the Act[3] tells us:

"In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."

So, the only aspect that would not be finalised, once the order is made is the actual mechanics of putting the order into action.

Having finalisation of your property settlement means you no longer have to consult the other party about what colour to paint a room, whether there should be improvements or any other aspect which might increase or decrease the value of the property. It gains peace of mind.

Judgments & Laws Mentioned

1. Sections 90 and 90WA Family Law Act 1975; section 424 Duties Act Qld

2. Farmer & Bramley[2000] FamCA 1615

3. Section 90ST for de facto relationships

RMO News

Promotions:

RMO Lawyers' are pleased to announce the promotion of Lejla Pehlivanovic to **Team Leader** of the **Criminal & Traffic Law** team.

Lejla is committed to protecting and defending her clients' rights and adopts a confident, meticulous approach from the first meeting through to the completion of court proceedings.

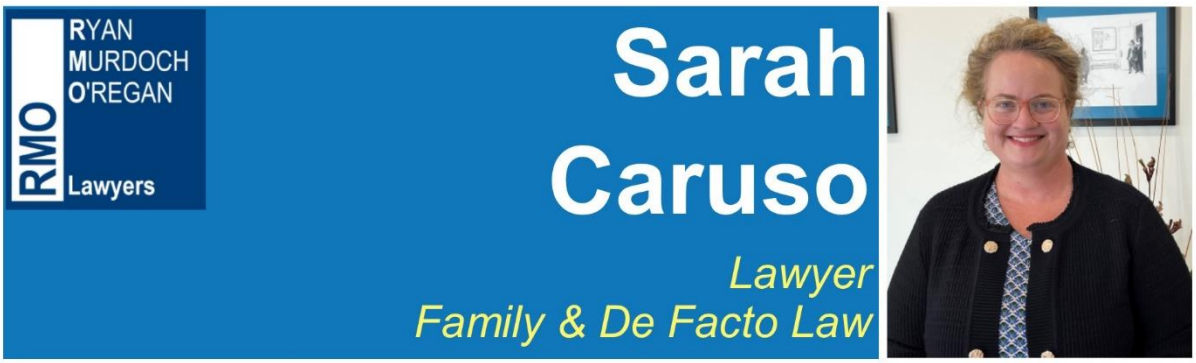
Admitted to the Supreme Court of Queensland and High Court of Australia, Lejla has successfully represented clients across a range of criminal and traffic law charges. This includes representing clients at bail applications and mentions through to briefing counsel at sentences and trials.

RMO Lawyers' are pleased to announce the promotion of Elle Marshall to **Associate** in the **Family & De Facto Law** team.

Elle provides legal advice and representation across family law matters including property settlement, children's matters, de facto disputes and finance agreements.

Elle enjoys assisting clients to understand their rights and potential entitlements so that they can make well informed decision about the best way to achieve the most optimal resolution possible under their unique circumstances.

Welcome Aboard:

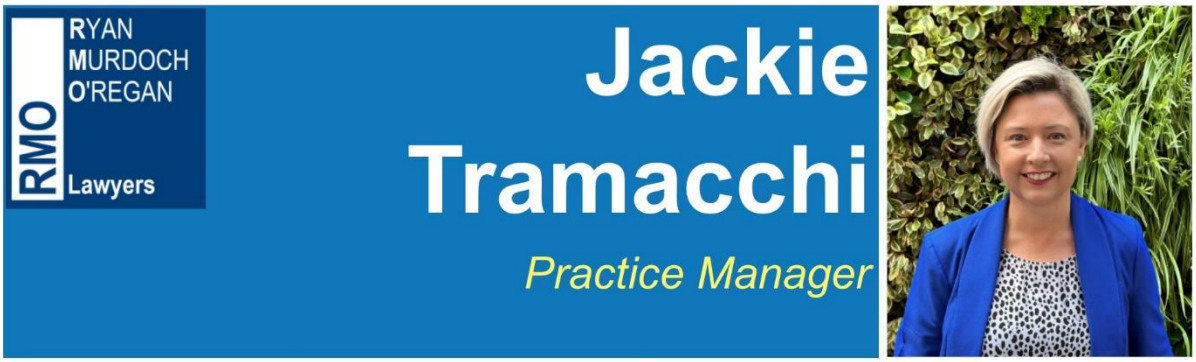


Sarah is a Lawyer in Ryan Murdoch O'Regan Lawyers' Family & De Facto Law Team.

Sarah was admitted in 2015 and has considerable experience assisting clients with a range of family law matters, including divorce, property settlements and disputes, children's issues, consent orders and other parenting matters.

Sarah represents clients across various courts including the Federal Circuit and Family Court of Australia.

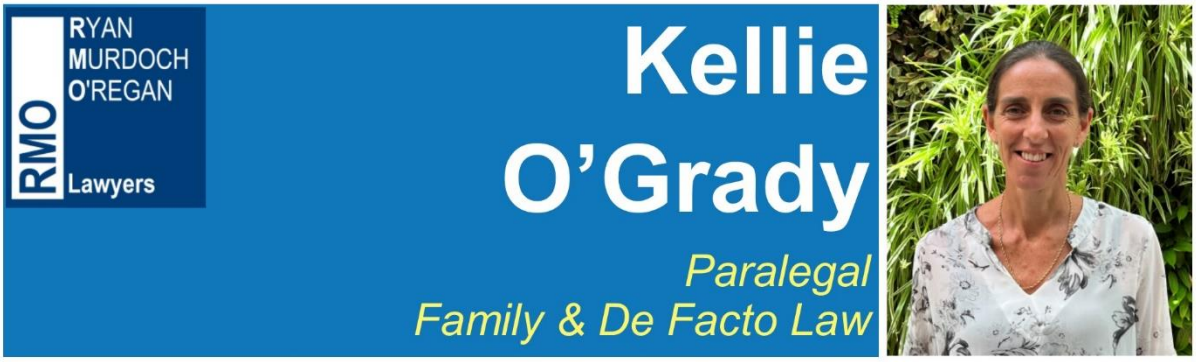
Taking time to clearly understand her clients' needs, both now and in the future, Sarah adopts a calm, compassionate approach to her client's family law matters and quickly places clients at ease during what is often a stressful time in their lives.



Jackie is the Practice Manager at Ryan Murdoch O'Regan Lawyers. Jackie has an extensive background in accounts management and practice management having worked in various legal firms for over 20 years.

Jackie has completed a Bachelor of Commerce degree at the University of Southern Queensland, is an associate member of the Queensland Law Society, a Public Accountant and a Commissioner for Declarations.

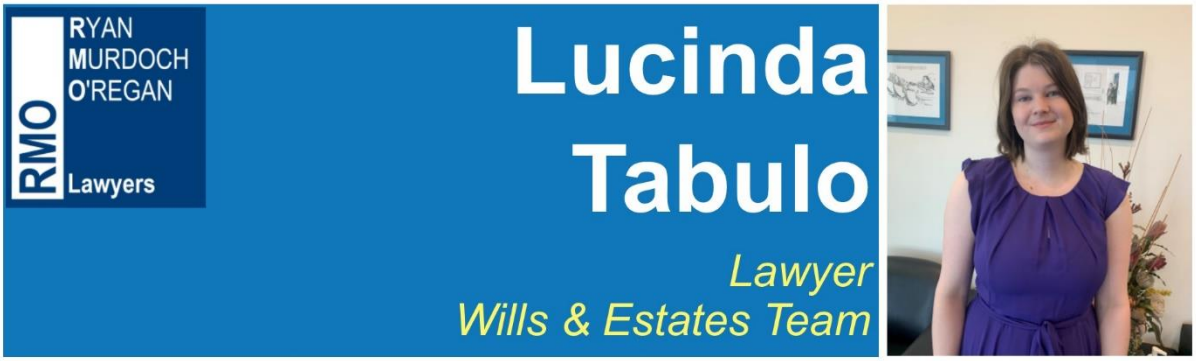
As Practice Manager Jackie plays a vital role in the development of staff within the firm.



Kellie is a Paralegal in Ryan Murdoch O'Regan Lawyers' Family & De Facto Law Team.

Kellie has worked in the legal profession for over 20 years in various administrative and secretarial positions. She has extensive experience working as a legal secretary for both solicitors and barristers.

Kellie adopts a careful, tactful approach when working with clients. The approach, combined with Kellie's dedication to communicate effectively, ensures clients receive clear, focussed advice and certainty at what is often a stressful time in their lives.



Lucinda is a Junior Lawyer in Ryan Murdoch O'Regan's Wills & Estates Team.

Lucinda has a passion for preparing effective wills, securing estate planning needs and carefully managing deceased estates.

With a detailed knowledge of wills and estates legislation and its application, Lucinda ensures her clients are fully informed across all aspects of their legal matter. Lucinda's extensive experience and knowledge allows her to prepare documentation accurately and in a timely manner that meets her clients' needs.

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