IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A5 of 2015

BETWEEN:

POLICE
Appellant

-and-

JASON ANDREW DUNSTALL
Respondent

APPELLANT'S SUBMISSIONS

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Part I: Certificate for Publication

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues on Appeal

2. Accepting that at the intermediate appellate level the common law of Australia recognises a general residual discretion vested in the judiciary to exclude in a criminal trial lawfully obtained non-confessional evidence that is relevant and admissible, and more probative than prejudicial, for reasons of unfairness, two questions arise on the appeal:
   i. What amounts to "unfairness" in the relevant sense, so as to enliven the discretion; and
   ii. Do the facts of this case enliven the discretion?

3. In summary, the Appellant contends:
   i. The existence of the discretion should be accepted by this Court;
   ii. That the relevant unfairness enlivening the discretion focuses upon the fairness of the trial in a narrow way, and is not directed to some general enquiry as to whether there is unfairness in a broad sense. It is directed to whether the reception of the impugned evidence might place the accused at risk of being improperly convicted or, put another way, whether its reception would create a perceptible risk of a miscarriage of justice;
   iii. The facts of this case, where no right of the accused has been trammelled and there is no evidence indicating unreliability in the blood analysis evidence, do not give rise to any unfairness in the relevant sense so as to enliven the discretion.

Part III: Section 78B Notice

4. The Appellant certifies that a Notice pursuant to s78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: Citations for judgments below

- In the Magistrates Court of South Australia: *Police v Dunstall* [2013] SAMC 25;
- In the Supreme Court of South Australia (single judge): *Police v Dunstall* (2013) 118 SASR 233; [2013] SASC 188;
- In the Full Court of the Supreme Court of South Australia: *Police v Dunstall* (2014) 120 SASR 88; [2014] SASCFC 85 (***Dunstall***).

Part V: Factual Background

Uncontentious facts

5. The facts in this case are not in dispute. What follows is largely taken from the judgment of the Chief Justice sitting in the court below.[1]

a. On 8 January 2012, the Respondent was stopped by police whilst he was driving in suburban Adelaide. He submitted to an alcotest. It returned a positive result. He was then taken to a police station and provided a sample of his breath for analysis. The analysis result revealed that there was present 0.155 grams of alcohol in 100 millilitres of his blood.

b. At his request the police provided the Respondent with a blood test kit and then drove him to a nearby hospital where a medical practitioner took from him a sample of blood which she divided in two, giving one to the Respondent and putting one aside for collection by the police.

c. The police and the Respondent submitted each sample for analysis. In each case the Forensic Science Centre reported that the samples had denatured and were thus unsuitable for analysis.

d. The Respondent was charged that on 8 January 2012 he drove his motor vehicle when there was present in his blood the prescribed concentration of alcohol, contrary to s47B(1)(a) of the *Road Traffic Act 1961* (SA) (**RTA**).

e. At trial, by the tender of a certificate under s47K(5) RTA, the prosecution established that the Respondent submitted to the analysis of a sample of his breath by means of a breath analysing instrument on 8 January 2012 at 12.55am and that the instrument produced a reading of 0.155 grams of alcohol in 210 litres of breath. The prosecution further established, and there was no challenge, that the requirements and procedures in relation to breath analysing instruments and breath analysis under the RTA, including the requirements under s47K(2) and (2a) were complied with. Consequently, the presumption contained in s47K(1) RTA, namely, that the concentration of alcohol so indicated by the breath analysis instrument was present in the blood of the Respondent at the time of the analysis (12.55am) and throughout the preceding two hours, was enlivened.

f. Having regard to s47K(1) and (1ab) RTA, it followed that when the Respondent was stopped by police having been driving on a road at 12.30am on 8 January 2012, he was to be presumed to have a blood alcohol level of 0.155 grams of alcohol in 100 millilitres of

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1 *Police v Dunstall* (2014) 120 SASR 88 (***Dunstall***) at [7]-[11].

blood; see s47EB RTA.[2] That blood alcohol level exceeded the prescribed concentration of 0.05 grams per 100 millilitres of blood; s47A RTA.

g. Accordingly, absent evidence rebutting the presumption, all elements of the offence charged were proven beyond reasonable doubt. As to the rebuttal of the presumption, s47K(1a) RTA provides:

> No evidence can be adduced in rebuttal of the presumption created by subsection (1) except–
>
> (a) evidence of the concentration of alcohol in the blood of the defendant as indicated by analysis of a sample of blood taken and dealt with in accordance with s47I and Schedule 1 or in accordance with the procedures prescribed by regulation; and
>
> (b) evidence as to whether the results of analysis of the sample of blood demonstrate that the breath analysing instrument gave an exaggerated reading of the concentration of alcohol present in the blood of the defendant.

h. For this case, reg 11 of the *Road Traffic (Miscellaneous) Regulations 1999* (SA)[3] prescribed the procedures in accordance with which a sample of a person's blood had to be taken and dealt with for the purposes of s47K(1a). The admissibility of evidence of blood analysis was conditioned on compliance with reg 11. Relevantly, reg 11 required that the sample of blood taken by the medical practitioner had to be such as to furnish two quantities of blood (reg 11(c)), each quantity was to be placed in one of the two containers provided in the kit (reg 11(b)), and each was to be itself of a quantity sufficient to enable an accurate evaluation to be made of any concentration of alcohol present in the blood (reg 11(c)).

i. There was no dispute that the Respondent was provided with a functional blood test kit and that samples of blood were taken by a medical practitioner. The learned Magistrate found that the medical practitioner failed to take a sufficient quantity of blood with the consequence that the samples denatured rendering any analysis of those samples to determine whether they contained alcohol and, if so, how much per 100 millilitres of blood, impossible.[4] That factual conclusion is not challenged.

j. Further, there is no dispute that such factual finding amounts to a finding that there was non-compliance with reg 11(c).

Decisional history

6. Having made these relevant factual findings, the learned Magistrate held:

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2 Section 47EB provides that if a person submits to an alcotest or breath analysis, and the relevant apparatus used produces a reading in terms of a number of grams of alcohol in 210 litres of the person's breath, the reading will, for the purposes of the Act, be taken to be that number of grams of alcohol in 100 millilitres of the person's blood.

3 The equivalent regulation is now contained in *Road Traffic (Miscellaneous) Regulations 2014* (SA), reg 22.

4 *Police v Dunstall* [2013] SAMC 25 at [14].

> ... the defendant has been deprived of his ability to rebut the presumption. He has, despite his best efforts, been denied the only opportunity he had to challenge the only piece of police evidence that implicates him in the offence. He has done all he could do to comply with the requirements necessary to challenge the prosecution evidence, but has been denied of that opportunity, not through his failings, but by the apparent failure of the medical practitioner to comply with the regulations relevant to the taking of a sample of blood. That, in my view, results in a unfairness to this defendant and results in an unfair trial. Accordingly, the evidence of the breath analysis should be disregarded and the charge fails. Accordingly, I order the charge be dismissed. ...[5]

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7. On appeal to a single judge of the Supreme Court, the learned Judge held:

> It is my view that the circumstances which arose in this case did provide a proper basis for the exercise of the residual discretion to exclude the prosecution evidence on the basis of unfairness, first, because the failure of the medical practitioner to comply with reg 11(c) effectively placed the respondent in the same position as if no blood sample had ever been taken, second, because the respondent did do everything in his power to exercise the statutory rights which were given to him, and thirdly, there is in fact nothing else he could have done.[6]

20 8. On appeal to the Full Court of the Supreme Court (Kourakis CJ, Gray and Sulan JJ), the Appellant's appeal was dismissed by majority (Gray and Sulan JJ).

9. For Gray J the error on the part of the medical practitioner resulted in a denial of legal rights and a loss of opportunity akin to situations where the police had failed to discharge a statutory duty connected to the obtaining of evidence and safeguards relevant thereto.[7] His Honour considered:

> In the present case, the safeguards provided by the current statutory regime were rendered nugatory. This was the result of the medical practitioner taking insufficient blood to allow for testing. From the defendant's point of view, he was placed in the same position as if a police
30 officer had not informed him of his rights, or had inadequately informed him of those rights, or had provided a defective blood test kit. Authorities of this Court have treated a number of these circumstances as justifying the discretionary exclusion of otherwise admissible evidence.[8]

10. Justice Gray reviewed the authorities in this State and placed particular reliance upon the reasoning of King CJ in *French v Scarman*.[9] That case concerned a failure on the part of the police to facilitate the taking of a sample of blood as they were obliged to do under s47f(2) RTA as it then was. Relying upon *R v Ireland*,[10] a case involving the exercise of the public policy discretion, King CJ observed that the failure of the police rendered the statutory safeguard illusory. His Honour said:

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5 *Police v Dunstall* [2013] SAMC 25 at [16]. In adjudging that the breath analysis evidence should be "disregarded", it is apparent that the Magistrate's original receipt of the evidence is properly characterised as a receipt *de bene esse*, dependent on the Magistrate's ruling as to whether the evidence should be excluded in the exercise of the Court's discretion.

6 *Police v Dunstall* (2013) 118 SASR 233 at [46].

7 *Dunstall* at [77].

8 *Dunstall* at [79].

9 (1979) 20 SASR 333.

10 (1970) 126 CLR 321.

> In one sense, of course, it can be said that the evidence constituted by the breath analysis was not unlawfully or unfairly obtained, because the obligation to submit to the breath test was not dependent upon compliance by the police with sub-s (2). In my opinion, however, sub-s (2) is a safeguard for the citizen expressly provided by the legislature and it is so closely connected with the obligation to submit to the breath test that non-observance by the police of the safeguard is a sufficient foundation for the discretion. ...
> ...
> In this case, I consider that there was a conscious reluctance to implement the safeguard which resulted in actual, if perhaps unintended, illegality. ...[11]

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11. Like Gray J, Sulan J did not consider *French v Scarman* relevantly distinguishable. Also like Gray J, Sulan J considered that the statutory scheme "provided a defendant with a right to test the accuracy of the breath analysis by having his blood taken and tested".[12] His Honour concluded:

> In my view, the statutory scheme gives a defendant a limited ability to test the accuracy of a breathalyser analysis. If there is a failure, through no fault or conduct of the defendant, to exercise his right then that is a proper basis to enliven the unfairness discretion as the trial will be unfair because the defendant is deprived of that right.[13]

12. The Chief Justice, who was in dissent, summarised his reasons for allowing the appeal as

20 follows:

> In summary I would allow the appeal for the following reasons. First reg 11 does not confer a procedural right to adduce evidence of a blood sample analysis. Secondly, the failure to obtain a sample was not caused by any police misconduct. Thirdly, the police carry no responsibility for the respondent's choice of medical practitioner or that practitioner's failure to obtain adequate samples. Fourthly, there is no evidence casting doubt on the breath analysis. Finally, the trial of the elements which the police were required to prove pursuant to s 47K RTA has not been compromised in any relevant way.[14]

Part VI: Argument

30 *Common law discretions to exclude admissible evidence in criminal trials*

13. It is uncontroversial to recognise three specific discretions exercisable in criminal trials to exclude admissible evidence. First, a public policy discretion, for the exclusion of evidence the product of unlawful or improper conduct on the part of law enforcement authorities.[15] Second, the discretion to exclude evidence more prejudicial than probative.[16] Third, an unfairness discretion confined to confessional evidence, the purpose of which is to ensure that an accused person receives a fair trial and their rights and privileges remain protected.[17]

14. For the purposes of this appeal, it is the existence of a further "residual" discretion to exclude in a criminal trial admissible non-confessional evidence on grounds of unfairness (that is, a general

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11 *French v Scarman* (1979) 20 SASR 333 at 338-339.
12 *Dunstall* at [162].
13 *Dunstall* at [167].
14 *Dunstall* at [57].
15 See R *v Ireland* (1970) 126 CLR 321 at 334-335; *Bunning v Cross* (1978) 141 CLR 54 at 74-75.
16 See R *v Christie* [1914] AC 545.
17 See R *v Lee* (1950) 82 CLR 133; R *v Swaffield* (1998) 192 CLR 159.

unfairness discretion) which is in issue. Whilst at the intermediate appellate level such a general unfairness discretion has been understood to exist, and indeed the Appellant does not contend otherwise, this case marks the first occasion for this Court to determine directly its existence, having previously only considered it in *dicta*. As such the Appellant's submissions consider the source and rationale underpinning this general unfairness discretion, an enquiry also necessary to understand the proper ambit and operation of the discretion.

Dicta in this Court as to the existence of a general unfairness discretion

15. In both *R v Ireland* and *Bunning v Cross*, despite primarily being occasions for the enunciation of the public policy discretion, members of this Court adverted to the existence of a general discretion, not limited to confessional evidence, to exclude admissible evidence where its reception would operate so as to render the accused's trial unfair.[18]

16. In *Driscoll v The Queen* and *Alexander v The Queen*, Gibbs CJ (Gibbs J as he then was in *Driscoll*) characterised the *Christie* discretion as but one example of the operation of a general unfairness discretion.[19] In *Harriman v The Queen*, Brennan J stated:

> As the argument against admissibility in this case relied on the judicial discretion to reject evidence otherwise admissible when it is necessary to do so to secure a fair trial, it is necessary to say something about the scope of the discretion. Is there a residual judicial discretion to reject evidence revealing the commission of another offence or a predisposition to commit an offence on the ground that its prejudicial effect is disproportionate to its probative effect and the evidence is found to be admissible because its probative force clearly transcends its merely prejudicial effect? Obviously, the occasions for the exercise of such a discretion are hard to envisage, the evidence which satisfies the criterion of admissibility is unlikely to attract the exercise of the discretion. Nevertheless, one cannot exclude the possibility of a case where, despite the substantial probative force of the evidence, fairness dictates its exclusion. As against the prospect of such an exceptional case arising, the continued existence of the residual discretion should be admitted.[20]

17. Also in *Harriman v The Queen*, Gaudron J (Toohey J agreeing) spoke of "the discretion which inheres in a judge at a criminal trial to exclude evidence which is technically admissible but which would operate unfairly against an accused."[21]

18. In *Pfennig v The Queen*, Toohey J expressed the view that the unfairness discretion could operate beyond the confines of the circumstances for the *Christie* discretion, leaving the Court with a

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[18] *R v Ireland* (1970) 126 CLR 321 at 334-335 (Barwick CJ, McTiernan, Windeyer, Owen and Walsh JJ agreeing); *Bunning v Cross* (1978) 141 CLR 54 at 68-69 (Stephen and Aickin JJ).

[19] *Driscoll v The Queen* (1977) 137 CLR 517 at 541 (Gibbs J, Mason and Jacobs JJ agreeing); Alexander v The Queen (1981) 145 CLR 395 at 402-403 (Gibbs CJ).

[20] *Harriman v The Queen* (1989) 167 CLR 590 at 594-595 (Brennan J).

[21] *Harriman v The Queen* (1989) 167 CLR 590 at 619 (Gaudron J, Toohey J agreeing).

residual discretion to exclude evidence for unfairness despite its probative value outweighing its prejudicial effects.[22]

19. In *Jago v District Court (NSW)*, in the context of an application for a permanent stay of a criminal prosecution, the various judgments of this Court considered the significance of a court's duty to ensure an accused receives a fair trial, and the powers of a court accompanying such duty. Particularly, Gaudron J stated:

> Another feature attending criminal proceedings and relevant to the grant of a permanent stay thereof is that a trial judge, by reason of the duty to ensure the fairness of a trial, has a number of discretionary powers which may be exercised in the course of a trial, including the power to reject evidence which is technically admissible but which would operate unfairly against the accused.[23]

20. Gaudron J discussed the discretion in greater depth in her Honour's judgment in *Dietrich v The Queen* in passages[24] reproduced at [28] and [38] of these submissions. There, her Honour not only reaffirmed the existence of a general unfairness discretion, but effectively characterised the power to exclude evidence in its exercise as inalienable having regard to the fundamental requirement that a criminal trial be fair.

21. During a consideration by this Court of the public policy discretion in *Ridgeway v The Queen*, Brennan J, whilst acknowledging that the discretion to exclude for unfairness and the public policy discretion may often overlap, identified a distinction between their respective rationales. His Honour stated:

> The purpose of the discretion to exclude evidence on the ground of unfairness is to ensure a fair trial for the accused; the purpose of the discretion to exclude evidence on the ground of unlawfulness is not to ensure a fair trial but to ensure that the conviction of the alleged offender is not bought at too high a price by reason of curial approval of — if not reward for — illegal conduct on the part of the law enforcement agency.
>
> However, there are likely to be few occasions for exercising the *Bunning v Cross* discretion (as I shall call the discretion to exclude evidence on the ground of unlawfulness) divorced from considerations of fairness to the accused. The unlawful conduct of a law enforcement officer which might call for an exercise of the discretion will ordinarily occur in the course of gathering evidence for the prosecution of an offence. It was in that context that Barwick CJ in *Ireland's case* spoke of "the protection of the individual from unlawful and unfair treatment". And in *Bunning v Cross*, Stephen and Aicken JJ noted that the rubric of unfairness as discussed in *King v The Queen* is a concept which "closely approaches what was said in *Ireland's case*". Of course, the same set of facts may enliven a discretion to exclude evidence on the grounds of both unlawfulness and unfairness.[25] (*footnotes omitted*)

Consideration by intermediate appellate courts of a general unfairness discretion

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22 *Pfennig v The Queen* (1995) 182 CLR 461 at 507 (Toohey J).
23 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 77 (Gaudron J).
24 *Dietrich v The Queen* (1992) 177 CLR 292 at 363-364 (Gaudron J)
25 *Ridgeway v The Queen* (1995) 184 CLR 19 at 49 (Brennan J).

22. Several decisions by intermediate appellate courts are supportive of the existence of such a general unfairness discretion. In R *v Edelsten*, the New South Wales Court of Criminal Appeal expressly rejected any suggestion that the unfairness discretion should be limited to the exclusion of confessional evidence, having regard to its underlying purpose.[26] In R *v Peirce* Vincent J stated:

> ... I have no doubt of the existence of a general discretion which may be exercised by a trial judge in appropriate circumstances to exclude virtually any piece of evidence in a criminal trial. This residual discretion represents the concern which has often been expressed that the rules of admissibility of evidence should not operate to produce unfairness to accused persons. There is an overriding responsibility to ensure that the processes of our courts are as just as it is reasonably practicable to make them according to current standards.[27]

23. Comments in each of the three judgments (particularly those of Kelly SPJ and Derrington J) in R *v McLean and Funk; ex parte Attorney-General*,[28] as well as in the decisions in R *v Chai*[29] and R *v O'Neill*[30] are also generally supportive of its existence.

24. In *Rozenes v Beljajev*, the Full Court of the Supreme Court of Victoria identified the existence of a residual general unfairness discretion, operating beyond the three discretions identified at [13] above, with the Court stating:

> The proposition must be accepted that there is a discretion in a criminal case to reject any evidence, whether or not a confession, on the ground that to receive it would be unfair to the accused in the sense that the trial would be unfair. So much must be accepted both on principle and by reason of the authorities. It would be wrong to regard as exhaustive the two particular discretions (that relating to probative value and prejudicial effect and that established by *Bunning v Cross*) put forward by the Attorney-General in *McLean and Funk* as the only discretions available for the exclusion of evidence other than confessional evidence. But while the existence of a residual discretion must be accepted, it is not easy to think of circumstances in which grounds might exist for the exercise of that residual discretion in relation to any evidence – we are not speaking of confessions – which would not bring the case within the more specific principle whereby evidence is not to be admitted where its prejudicial effect is out of proportion to its probative value.[31]

R v Lobban: the general unfairness discretion in South Australia

25. The decision of *R v Lobban*[32] (***Lobban***) provides the first occasion in this State upon which the general unfairness discretion was directly and expressly articulated. In line with the preceding dicta discussed above, Martin J (with whom Doyle CJ and Bleby J agreed) concluded that there was indeed an unfairness discretion which applied to non-confessional evidence and which did

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26 R *v Edelsten* (1990) 21 NSWLR 542 at 552-554 (the Court).
27 R *v Peirce* [1992] 1 VR 273 at 274 (Vincent J).
28 R *v McLean and Funk; ex parte Attorney-General* [1991] 1 Qd R 231.
29 R *v Chai* (1992) 27 NSWLR 153 at 175 (Badgery-Parker J).
30 R *v O'Neill* [1996] 2 Qd R 326 at 415-416 (Fitzgerald P).
31 *Rozenes v Beljajev* [1995] 1 VR 533 at 549 (the Court).
32 (2000) 77 SASR 24.

not require that there be unlawful or improper conduct by law enforcement authorities before it could be employed. That unfairness discretion was concerned with ensuring that the accused received a fair trial, and although it was not predicated on there being improper conduct by law enforcement authorities, any such conduct was a relevant consideration to be taken into account when considering the exercise of the discretion.[33]

The source of the power underpinning the discretion and its rationale

26. The Appellant contends that the rationale underpinning the existence of the discretion may be said to arise from two possible sources, both reducible to the central prescript that no person shall be convicted of a crime otherwise than after a fair trial according to law.[34]

27. First, it inheres in the judicial process entrenched by Ch III of the *Constitution.* As Gageler J stated in *Condon v Pompano Pty Ltd* in the context of the centrality of procedural fairness to the judicial process:

> ... A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made.[35]
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> ...
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> ... Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice.[36]

28. More specifically, in *Dietrich v The Queen*, Gaudron J said:

> It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law. The expression "fair trial according to law" is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness!
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> The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch III's implicit requirement that judicial power be exercised in accordance with the judicial process. Otherwise the requirement that a trial be fair is not one that impinges on the substantive law governing the matter in issue. It may impinge on evidentiary and procedural rules; it may bear on when and where a trial should be held; in exceptional cases it may bear on whether a trial should be held at all. Speaking generally, the notion of "fairness" is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus, in some cases, the requirement

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33 *Lobban* at [82].

34 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J); *McKinney v The Queen* (1991) 171 CLR 468 at 478 (Mason CJ, Deane, Gaudron and McHugh JJ); *Dietrich v The Queen* (1992) 177 CLR 292 at 299 (Mason CJ and McHugh J), 324 (Brennan J), 326 (Deane J), 353-357 (Toohey J).

35 (2013) 252 CLR 38 at [177]; see also, at [88] (French CJ), [169] (Hayne, Crennan, Kiefel and Bell JJ).

36 (2013) 252 CLR 38 at [186].

> results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury. In other cases, the procedures may be modified, for example, to allow evidence to be given through an interpreter, or to allow for special directions to counteract the effect of pre-trial publicity or even something said or done in the trial itself. Sometimes the venue may be changed to counteract some perceived difficulty in obtaining a fair trial in the area in which the offence was committed; in other cases proceedings may be adjourned, for example, to enable evidence to be checked or to allow for pre-trial publicity to abate. The examples are not exhaustive. They are, however, sufficient to show that the requirement of fairness is, and, in various different contexts, has been recognized as, independent from and additional to the requirement that a trial be conducted in accordance with law.
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> The requirement of fairness is not only independent, it is intrinsic and inherent. According to our legal theory and subject to statutory provisions or other considerations bearing on the powers of an inferior court or a court of limited jurisdiction the power to prevent injustice in legal proceedings is necessary and, for that reason, there inheres in the courts such powers as are necessary to ensure that justice is done in every case. Thus, every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial. Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court. [37] *(footnotes omitted)*

Accepting this, the source of the power is drawn from the same well as that which supports the power to stay a trial for unfairness.[38]

29. Second, it may be drawn from the power to set aside a conviction on appeal. In this case that power was contained in s42 of the *Magistrates Court Act 1991* (SA) (**MCA**). Section 42(5) empowered the Supreme Court to, *inter alia*, confirm, vary or quash the judgment subject of the appeal. In *Diehm v Director of Public Prosecutions* this Court considered the similarly broad power vested by s8 of the *Nauru (High Court Appeals) Act 1976* (Cth) as giving rise to the question whether a miscarriage of justice has occurred.[39] Once it is accepted that a judgment may be set aside under s42 MCA on the basis of a miscarriage of justice, then, working backwards, by implication there arises a power vested in a Magistrate to do all things necessary to avert a miscarriage of justice. The same process of reasoning would apply in relation to the common form appeal provision. Hence, for example, a trial judge will declare a mistrial where a perceptible risk of a miscarriage of justice arises.[40]

30. On the first approach "the rhetoric that a trial must be fair before a conviction can properly be recorded is true only to the extent that unfairness leads to a miscarriage of justice".[41] On the

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[37] *Dietrich v The Queen* (1992) 177 CLR 292 at 362-363 and see also at 326 (Deane J). See also, *Lobban* at [77] (Martin J).

[38] In *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [38] French CJ and Crennan J observed that the power to prevent an abuse of process is an incident of the general power to ensure fairness. See also the authorities there cited.

[39] *Diehm v Director of Public Prosecutions (Nauru)* [2013] HCA 42 at [59] (The Court).

[40] *Crofts v The Queen* (1996) 186 CLR 427 at 440-441 (Toohey, Gaudron, Gummow and Kirby JJ).

[41] *Dietrich v The Queen* (1992) 177 CLR 292 at 325 (Brennan J).

second, the position is the same. Both suggest that Martin J was correct, with respect, when he framed the general unfairness discretion in the following terms:

> ... If the admission of the evidence would create a perceptible risk of a miscarriage of justice that cannot adequately be dealt with by appropriate directions to the jury, the proper exercise of the general unfairness discretion would require exclusion of the evidence. In those circumstances the admission of the evidence would result in an unfair trial.[42]

31. So framed and applied, the discretion looks to the risk that an accused may be improperly convicted.[43]

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32. This understanding of the source and rationale of the discretion also tends to conform with the view of the members of the House of Lords in *R v Sang* that, despite the development of specific instances for the exercise of a discretion to exclude admissible evidence in criminal trials (such as the *Lee* or *Swaffield* discretion for confessional evidence, and the *Christie* discretion) each of these are in fact better characterised as simply particular instances of the one general unfairness discretion.[44] Such an approach also echoes the sentiments of this Court in *R v Swaffield*.[45] There, this Court considered whether it might be appropriate to regard the various specific discretions as simply one "overall judicial discretion".[46] As Kirby J explained, such a discretion:

20 > would permit attention to be given to factors which, in the past, this Court has accepted as relevant. They would include unfairness to the accused; disproportionate prejudice outweighing the probative value of such evidence; and relevant public policy considerations. The last might involve official conduct which was illegal or improper or which would otherwise involve securing the conviction of the accused as too high a price.[47]

33. With respect, the Appellant embraces this as a suitable approach. However, a risk exists that adopting one umbrella label such as that of a general or overall unfairness discretion may tend to mask the specific analysis required in any given case; an analysis which will alter depending on the source or nature of the alleged unfairness in the particular case. As such, caution is needed if

30 one is to adopt the nomenclature of a single general discretion.

Unfairness enlivening the discretion

34. Identification of the rationale underpinning the discretion as derived from the requirement that the judicial process be fair serves the further purpose of identifying the focal point of the discretion; here, relevantly, the trial. It is the consequence for the judicial process manifest in the

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42 *Lobban* at [82].
43 *R v Swaffield* (1998) 192 CLR 159 at [54] (Toohey, Gaudron and Gummow JJ).
44 *R v Sang* [1980] AC 402 at 439 (Viscount Dilhorne), 444-445 (Lord Salmon), 446-447, 449 (Lord Fraser), 452-453 (Lord Scarman).
45 (1998) 192 CLR 159.
46 See *R v Swaffield* (1998) 192 CLR 159 at [69]-[70] (Toohey, Gaudron and Gummow JJ), [119] (Kirby J).
47 *R v Swaffield* (1998) 192 CLR 159 at [119] (Kirby J).

trial that admission of the impugned evidence may have that is the focus of the discretion. The inquiry is targeted and specific – how does the admission of this particular evidence give rise to a risk that the accused may be improperly convicted?[48] Hence Doyle CJ remarked in *Police v Jervis; Police v Holland*:

> I repeat that fairness or unfairness is not considered at large. The consideration of fairness focuses upon the trial process and upon the protection of the rights of the defendant.[49]

35. Thus, it is not a matter of whether a conviction could be said to involve unfairness in a more general sense.[50] It is not a matter of an accused having a sporting opportunity to evade the outcome of a proper and lawful investigation and any resultant prosecution.[51]

36. Having regard to *Swaffield*, it may be accepted that the general unfairness discretion may be enlivened in circumstances where the reliability of the evidence is in question (and it was not appropriate to leave the evaluation of reliability to the trier of fact) or the evidence was obtained upon some right or privilege possessed by the accused being trammelled. In this latter regard the unfairness discretion overlaps with the public policy discretion. Reliability and impropriety aside, however, and having regard to the existence of the public policy, *Christie* and *Swaffield* discretions, the scope for the application of the residual unfairness discretion may be considered limited.[52] As Doyle CJ remarked in *R v Lobban*:

> Mere failure to comply with or to satisfy a statutory requirement connected with the obtaining of evidence, to be used by the prosecution, does not of itself amount to unfairness. The exercise of the unfairness discretion requires a more careful consideration of the circumstances. The scope for the exercise of the general unfairness discretion, in cases like *Jervis,* [where a medical practitioner did not deliver to the accused her sample of blood] … will be limited when the matters relied upon by the defendant do not affect the reliability of the evidence tendered by the prosecution, and involve no impropriety or misconduct by the police or law enforcement authorities more generally.[53]

37. Nonetheless, fairness or unfairness has been said to defy "analytical definition" and to "involve an undesirably, but unavoidably, large content of essentially intuitive judgment".[54] Difficulty arises because "the very nature of the concept inhibits great precision."[55]

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48 *Lobban* at [77], [82] (Martin J); see also *Police v Hall* (2006) 95 SASR 482 at [24], [47] (Doyle CJ); *R v Clarke* (2003) 87 SASR 203 at [18] (Doyle CJ); *Rozenes v Beljajev* [1995] 1 VR 533 at 549.

49 *Police v Jervis; Police v Holland* (1998) 70 SASR 429 at 448.

50 *Lobban* at [73], [89] (Martin J); *Police v Hall* (2006) 95 SASR 482 at [80] (Doyle CJ), [95] (Bleby J); *R v Clarke* (2003) 87 SASR 203 at [46] (Vanstone J), [29] (Prior J).

51 *Bunning v Cross* (1978) 141 CLR 54 at 75 (Stephen and Aickin JJ); *R v Swaffield* (1998) 192 CLR 159 at [35] (Brennan CJ).

52 *Lobban* at [2] (Doyle CJ).

53 *Lobban* at [2]; *Police v Hall* (2006) 95 SASR 482 at [118] (Bleby J); see also *Police v Jervis; Police v Holland* (1998) 70 SASR 429 at 448 (Doyle CJ), 450 (Matheson J), 450 (Prior J); *Rozenes v Beljajev* [1995] 1 VR 533 at 549 (the Court).

54 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 57 (Deane J).

55 *R v Swaffield* (1998) 192 CLR 159 at [66] (Toohey, Gaudron and Gummow JJ).

> That is not to suggest that the determination of what is or is not necessary to satisfy the requirements of a fair trial is unprincipled. While the requirement of fairness provides the ultimate rationale and touchstone for the law's adjudgment of the minimum safeguards which must be observed in the administration of the substantive criminal law, the practical content of the requirement in a particular category of case will primarily fall to be determined by the staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices. Inevitably, however, there will arise the rare case in which those processes of legal reasoning are inadequate in a developing area of the law or in which a court, ordinarily a final appellate court, concludes that the circumstances are such that it is entitled and obliged to reassess some rule or practice in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law. It is in such a case that direct reference will necessarily be made to the underlying notion of fairness and that subjective values and perceptions may intrude into the judicial process. Nonetheless, the identification or the reconsideration of the existence and content of the particular rule or practice in such a case is an unavoidable concomitant of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve. Thus, for example, in *Barton v. The Queen*, a majority of this Court held that notwithstanding the long-standing practice of the courts to entertain trials on ex officio indictments, a trial judge was entitled and obliged to stay proceedings if, in the circumstances of a particular case, the absence of committal proceedings would give rise to an unfair trial.[56] *(footnotes omitted)*

38. Importantly, as Gaudron J remarked in *Dietrich v The Queen*:

> The notion of a fair trial and the inherent powers which exist to serve that end do not permit of "idiosyncratic notions of what is fair and just" any more than do other general concepts which carry broad powers or remedies in their train. But what is fair very often depends on the circumstances of the particular case. Moreover, notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. And it is because of those same matters that, save where clear categories have emerged, the enquiry as to what is fair must be particular and individual. And, just as what might be fair in one case might be unfair in another, so too what is considered fair at one time may, quite properly, be adjudged unfair at another.[57] *(footnotes omitted)*

Police v Hall

39. In *Police v Hall*[58] (***Hall***), as in the present case, the Respondent was charged with the offence of driving whilst there was present in his blood the prescribed concentration of alcohol. He had been involved in an accident as a consequence of which he was required to submit to breath analysis. The Respondent requested a blood test kit. He proceeded promptly to a hospital, but, by reason of the more pressing needs of others, was required to wait between 4 and 4 ½ hours before his blood was taken. Upon analysis no alcohol was found in the blood. Without some alcohol being detected in the blood it was not possible for experts to calculate, having regard to alcohol elimination rates, what the Respondent's likely blood alcohol level was at the time of driving. It was not possible then to resort to blood to establish that it was reasonably possible

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56 *Dietrich v The Queen* (1992) 177 CLR 292 at 328-329 (Deane J).
57 *Dietrich v The Queen* (1992) 177 CLR 292 at 362-363 and also at 328 (Deane J).
58 (2006) 95 SASR 482.

that the breath analysis was exaggerated. A magistrate excluded the evidence of breath analysis in purported exercise of the general unfairness discretion.

40. On appeal the matter was referred to the Full Court which sat as a bench of five. By majority (Doyle CJ, Bleby and Vanstone JJ) the appeal was allowed. Chief Justice Doyle, with whom Vanstone J agreed, held:

> I do not accept that the fact that a blood sample is not taken, or that the taking of the sample is delayed, without fault on the part of the driver, makes the use of the result of the breath analysis at a later trial unfair. The statutory scheme leaves it to the driver to get a sample of blood taken. It simply permits that to be done. It does not create an enforceable right to have that done. That being so, only in the most general of senses can it be said to be unfair if, through no fault of the driver, the driver does not have a sample of blood taken, or the sample is taken after such a lapse of time that it cannot be of any forensic assistance. Unfairness in that general sense is not, in my opinion, unfairness in the relevant sense.[59]

41. Justice Bleby held:

> The present legislative scheme contemplates that there may be all sorts of reasons why a suitable sample of blood may not be able to be obtained. The Chief Justice has identified some of them. Those reasons may have nothing to do with the conduct of law enforcement authorities or compliance with regulations by those to whom the taking and processing of blood samples is committed. They may also have nothing to do with the reliability of the evidence justifying the conviction. Where the defendant has greater control over the process which has failed for some reason, the less likely it is that the defendant will be able to engage the unfairness discretion to exclude proof of the offence.
>
> It cannot be said, in the circumstances of this case, that the delay in taking the blood sample brought about by the respondent's choice of facility and intervention of other priorities at that facility rendered the respondent's trial unfair. Otherwise, the fairness of the trial would be dictated by the defendant's choice of medical practitioner or outpatient clinic, the availability of the medical practitioner or the busyness of that clinic at the time. The present respondent was provided with the same opportunity to obtain possible rebuttal evidence as anyone else required to undertake a breath analysis which reveals a concentration of alcohol over the prescribed concentration.[60]

42. The minority judgments (Gray J with whom Nyland J agreed) relied upon the authorities of *Jago v The District Court (NSW)*; *Driscoll v The Queen*; *Van Der Meer v The Queen*; *Harriman v The Queen* ; *Dietrich v The Queen*; and *R v Swaffield*.[61] In each of those cases statutory obligations were offended or impeded by the law enforcement authorities. Those decisions go no further than demonstrating that the unfairness discretion may be enlivened where the obtainment of the evidence in question involves the trammelling of a right or privilege of the accused by, or at the instigation of, the law enforcement authorities.

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59 *Hall* at [58].

60 *Hall* at [120]-[121].

61 *Hall* at [88] (Nyland J), [191] (Gray J); *Jago v The District Court (NSW)* (1989) 168 CLR 23; *Driscoll v The Queen* (1977) 137 CLR 517; *Van Der Meer v The Queen* (1988) 62 ALJR 656; *Harriman v The Queen* (1989) 167 CLR 590; *Dietrich v The Queen* (1992) 177 CLR 292; and *R v Swaffield* (1998) 192 CLR 159.

This case

43. The present case is not relevantly distinguishable from that in *Hall*. Justices Gray and Sulan have embraced the same approach as the minority in that case, contrary to the majority in *Hall* by which they were bound. The result is to exclude lawfully and properly obtained evidence, for which there is no indication of unreliability, where the Respondent has been denied the sole means of challenging that evidence, through no fault of his own, in circumstances where the statutory scheme confers no procedural right on the Respondent to so challenge it.

44. In the present matter, as in *Hall*, the Appellant has not trammelled any right or privilege of the Respondent or acted in a manner to bring about the same. Further and importantly, as in *Hall*, the legislative scheme continues to provide no right or privilege to the accused, merely a method to be complied with if evidence is to be adduced.

45. No unfairness arises from the admission of the evidence of breath analysis in that its admission cannot be said to give rise to a perceptible risk of a miscarriage of justice.[62] The Respondent finds himself in a position not relevantly different to that of the Respondents in *Hall*, *R v Edwards*[63] and *Police v Sherlock*,[64] and the Appellants in *Lobban*. The result here must be the same. The observation of this Court in *R v Edwards* is apposite to each of these cases and to this case:

> ... It is not necessary to consider whether there may be circumstances in which the loss of admissible evidence occasions injustice of a character that would make the continuation of proceedings on indictment an abuse of the process of the court. This is not such a case. The content of the Monitor List and the recording made by the FDR is unknown. In these circumstances it is not correct to characterise their loss as occasioning prejudice to the respondents. The lost evidence serves neither to undermine nor to support the Crown case. ...[65]

Equally, the absence of any blood analysis in this case neither undermines nor supports the prosecution case.

46. It cannot be said that receipt of the evidence might give rise to a risk that the Respondent may be improperly convicted, simply on the basis that the reliability of the breath analysis evidence, to borrow the words of Gaudron J in *Dietrich v The Queen*,[66] "cannot be effectively tested". So much is apparent from consideration of the examples postulated by Kourakis CJ at [53]-[54] of his Honour's reasons. The so-called "risk" of a person being improperly convicted in the circumstances of the present case would be identical to the risk in each of those circumstances postulated by Kourakis CJ.

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62 *Hall* at [48]-[50] (Doyle CJ).
63 *R v Edwards* (2009) 83 ALJR 717.
64 *Police v Sherlock* (2009) 103 SASR 147.
65 (2009) 83 ALJR 717 at [33].
66 *Dietrich v The Queen* (1992) 177 CLR 292 at 363.

47. The Appellant also embraces the five points made by the Chief Justice.[67]

a. *The absence of a right to blood analysis*

As a matter of construction, neither s47K(1a), nor reg 11, confer a right on an accused to adduce evidence of blood analysis in rebuttal of the s47K(1) presumption. The purpose of s47K(1a) is to limit the evidence which an accused person might adduce; there is no sense in which it can be said to give a *right* to adduce the evidence which it renders permissibly adduced. Equally, reg 11 cannot confer any such right. Any apparent duty imposed upon a medical practitioner by the terms of reg 11 cannot be maintained when regard is had to the purpose for which the regulation was authorised by s47K(1a). In this regard, the Appellant respectfully adopts the reasons given by Kourakis CJ at [26]-[36] of his Honour's judgment and contends that Gray and Sulan JJ are, with respect, incorrect in their conclusion to the contrary.[68]

b. *French v Scarman is distinguishable*

Justice Gray considered the logic of King CJ in *French v Scarman* compelling and applicable to the current statutory context.[69] With respect, what his Honour failed to appreciate was that King CJ purported to act in exercise of the public policy discretion which is only triggered by illegality or impropriety in the obtaining of evidence on the part of law enforcement authorities. Justice Sulan is incorrect, with respect, in concluding to the contrary. It is clear from King CJ's consideration of this Court's judgments in *R v Ireland*[70] and *Bunning v Cross*[71] and his conclusion that there *was a conscious reluctance to implement the safeguard resulting in actual illegality* on the part of the police that he applied the public policy discretion.[72] In this regard, Kourakis CJ was correct.[73] In *French v Scarman* the obligation upon the police to do all things necessary to facilitate the taking of a blood sample was to be found in s47f(2) RTA. That section has been repealed. As submitted, neither the RTA nor the related regulations currently burden the police with a duty to assist in the taking of a blood sample in any way other than by providing a blood test kit upon request. No impropriety of any kind on the part of the police occurred in this case. As Kourakis CJ said, "*[i]t is wrong to ignore the amendments to the RTA made by the Parliament after the decision in French v Scarman by mechanically applying that case to what is now a very different statutory regime*".[74]

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67 Summarised in *Dunstall* at [57].

68 *Dunstall* at [77] (Gray J), [162], [167], [170] and [172] (Sulan J). The same is contended with respect to the conclusion of Kelly J at [46] of her Honour's reasons (*Police v Dunstall* (2013) 118 SASR 233) insofar as her Honour refers to the Respondent's "statutory rights".

69 *Dunstall* at [86].

70 (1970) 126 CLR 321.

71 (1978) 141 CLR 54.

72 *French v Scarman* (1979) 20 SASR 333 at 338-340.

73 *Dunstall* at [39]-[44].

74 *Dunstall* at [43].

c. *The statutory scheme burdens the accused*

Admissibility of the results of any breath analysis is not conditioned upon compliance with reg 11(b), (c) or (e).[75] Upon a person submitting to a breath analysis and such analysis revealing the presence of the prescribed concentration of alcohol in his or her blood, the operator of the breath analysing instrument, invariably a police officer, is duty bound, first, to give the person the prescribed oral advice and written notice and, second, to provide the person whose breath has been analysed with an approved blood test kit if such kit is requested.[76] Upon the delivery of the blood test kit to the person whose breath has been analysed, the statutory obligations borne by the State cease until a sample is taken and delivered to police.[77] The State plays no part in facilitating the taking of a sample of blood. Responsibility for facilitating the taking of a sample of blood is borne by the person whose breath has been analysed,[78] and responsibility for the taking of a sample of blood lies with the medical practitioner to whom the blood test kit is delivered.[79] If an accused wishes to adduce evidence of blood analysis, the onus is upon him or her to ensure that reg 11(b), (c) and (e)[80] are complied with.

d. *The RTA accepts that breath analysis may support a conviction*

The statutory scheme permits the Appellant to rely on the breath analysis and a conviction to be based upon the same.[81] The requirements and procedures in relation to the obtaining of the breath sample having been discharged, it must be presumed, in the absence of evidence to the contrary, that the breath analysis result accurately records the concentration of alcohol in the Respondent's blood at the time of analysis (s47K(1) RTA). There is no evidence to suggest that the blood alcohol reading is unreliable. That the breath analysing equipment was operated by a person properly trained, was maintained in proper working order, and was operated correctly was not challenged. There was evidence that the Respondent had consumed alcohol at a time proximate to the taking of the sample of his breath. To suggest that the Appellant may not rely upon s47K(1) RTA as the foundation of an argument as to reliability because no blood sample is available is an argument built on illusion. The comments of Doyle CJ in *Hall* are apposite:

> The evidence on which the prosecution relies, the result of the breath analysis, is not unreliable evidence. To the contrary, the statutory scheme is that ordinarily it is to be

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75 Now *Road Traffic (Miscellaneous) Regulations 2014* (SA), reg 22(b), (c) and (e).

76 RTA, s 47K(2a)(a)-(b).

77 *Road Traffic (Miscellaneous) Regulations 1999* (SA), reg 11(j); now *Road Traffic (Miscellaneous) Regulations 2014* (SA), reg 22(j).

78 *Road Traffic (Miscellaneous) Regulations 1999* (SA), reg 11(a); now *Road Traffic (Miscellaneous) Regulations 2014* (SA), reg 22(a).

79 *Road Traffic (Miscellaneous) Regulations 1999* (SA), reg 11(b), (c) & (e); now *Road Traffic (Miscellaneous) Regulations 2014* (SA), reg 22(b), (c) & (e).

80 Now *Road Traffic (Miscellaneous) Regulations 2014* (SA), reg 22(b), (c) and (e).

81 *Hall* (2006) 95 SASR 482 at [50]-[52] (Doyle CJ).

> treated as reliable, and will provide the basis for an irrebuttable presumption. The inability of Mr Hall to challenge the result of the breath analysis using the result of an analysis of his blood does not involve any unfairness in the sense of raising a risk of the court acting on unreliable evidence, or on evidence that the court cannot adequately assess.[82]

Further, this is not a case where the Respondent points to some other evidence which serves to cast doubt upon the reliability of the breath analysis result, he simply relies upon the absence of blood test evidence, which may have undermined or supported the breath analysis result.

e. *Unfairness is not at large*

It is only unfairness in the adjudication of a criminal charge according to law which can enliven the discretion, because it is only unfairness of that type which gives rise to a perceptible risk of a miscarriage of justice. The extraordinary power of the Court is not to be exercised to try to achieve "some kind of fairness in the broadest sense".[83] As Kourakis CJ observed, having referred to Doyle CJ's finding in *Police v Jervis; Police v Holland* that forensic unfairness was not unfairness "considered at large, with some broad idea of fair play or with whether the forensic contest is an even one", it:[84]

> .. is inimitable to the rule of law for the courts to usurp the legislative function of Parliament by invoking a wide discretion to obstruct prosecutions which are brought in accordance with statutory provisions.[85]

48. In this case the majority have applied the general unfairness discretion on the basis that it is a power to prevent unfairness in a general sense. That, with respect, is erroneous. The Chief Justice was right in his observation:

> It exceeds the proper bounds of judicial power to superimpose over the legislative scheme provided by the RTA for the summary prosecution of drink driving offences, with the aid of statutory proofs, subjective discretions, lacking any statutory foundation, to deny the prosecution those very statutory aids. It is, of course, simply not to the point to observe that other means of proof might have been available to the prosecution. The statutory facilitation of proof of this serious traffic offence is Parliament's response to the notorious difficulties which beset the common law means of proof. The judiciary should only deny the prosecution the statutory aids enacted by Parliament in circumstances amounting to forensic unfairness in the strict sense explained by Doyle CJ in *Police v Jervis*.[86]

Part VII:

49. The relevant legislative provisions are set out in the Annexure.

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82 *Hall* (2006) 95 SASR 482 at [32] (Doyle CJ).
83 *Police v Sherlock* (2009) 103 SASR 147 at [70] (Doyle CJ).
84 *Police v Jervis; Police v Holland* (1998) 70 SASR 429 at 446.
85 *Dunstall* at [22].
86 *Dunstall* at [51].

Part VIII:

Orders sought

50. That:

i. the appeal be allowed;

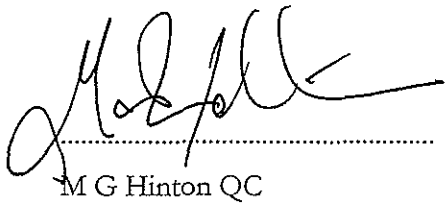
ii. the orders of the Full Court be set aside and in lieu thereof the Appellant's appeal to that Court be allowed;

iii. such further and consequential orders as this Honourable Court deems fit.

Part IX:

10 51. The Appellant estimates that 2 hours are required for the presentation of its oral argument.

Dated: 8 April 2015



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ANNEXURE: RELEVANT LEGISLATIVE PROVISIONS

Road Traffic Act 1961 (SA) – relevant provisions as at 8 January 2012

47A—Interpretation

(1) In this Act—

...

prescribed concentration of alcohol means—

(a) in relation to a person who is not authorised under the *Motor Vehicles Act 1959* to drive the vehicle—any concentration of alcohol in the blood;

(ab) in relation to a person who is driving a prescribed vehicle—any concentration of alcohol in the blood;

(b) in relation to any other person—a concentration of .05 grams or more of alcohol in 100 millilitres of blood;

...

47B—Driving while having prescribed concentration of alcohol in blood

(1) A person must not—

(a) drive a motor vehicle; or

(b) attempt to put a motor vehicle in motion,

while there is present in his or her blood the prescribed concentration of alcohol as defined in section 47A.

Penalty:

(a) for a first offence—

(i) being a category 1 offence—$1 100;

(ii) being a category 2 offence—a fine of not less than $900 and not more than $1 300;

(iii) being a category 3 offence—a fine of not less than $1 100 and not more than $1 600;

(b) for a second offence—

(i) being a category 1 offence—$1 100;

(ii) being a category 2 offence—a fine of not less than $1 100 and not more than $1 600;

(iii) being a category 3 offence—a fine of not less than $1 600 and not more than $2 400;

(c) for a third or subsequent offence—

(i) being a category 1 offence—$1 100;

(ii) being a category 2 offence—a fine of not less than $1 500 and not more than $2 200;

(iii) being a category 3 offence—a fine of not less than $1 900 and not more than $2 900.

(3) Where a court convicts a person of an offence against subsection (1), the following provisions apply:

(a) the court must order that the person be disqualified from holding or obtaining a driver's licence—

(i) in the case of a first offence—

(AA) being a category 1 offence—for such period, being not less than 3 months, as the court thinks fit;

(A) being a category 2 offence—for such period, being not less than 6 months, as the court thinks fit;

(B) being a category 3 offence—for such period, being not less than 12 months, as the court thinks fit;

(ii) in the case of a second offence—

(A) being a category 1 offence—for such period, being not less than 6 months, as the court thinks fit;

(B) being a category 2 offence—for such period, being not less than 12 months, as the court thinks fit;

(C) being a category 3 offence—for such period, being not less than 3 years, as the court thinks fit;

(iii) in the case of a third offence—

(A) being a category 1 offence—for such period, being not less than 9 months, as the court thinks fit;

(B) being a category 2 offence—for such period, being not less than 2 years, as the court thinks fit;

(C) being a category 3 offence—for such period, being not less than 3 years, as the court thinks fit;

(iv) in the case of a subsequent offence—

(A) being a category 1 offence—for such period, being not less than 12 months, as the court thinks fit;

(B) being a category 2 offence—for such period, being not less than 2 years, as the court thinks fit;

(C) being a category 3 offence—for such period, being not less than 3 years, as the court thinks fit;

(b) the disqualification prescribed by paragraph (a) cannot be reduced or mitigated in any way or be substituted by any other penalty or sentence unless, in the case of a first offence, the court is satisfied, by evidence given on oath, that the offence is trifling, in which case it may order a period of disqualification that is less than the prescribed minimum period but not less than one month;

(d) if the person is the holder of a driver's licence—the disqualification operates to cancel the licence as from the commencement of the period of disqualification;

(e) the court may, if it thinks fit to do so, order that conditions imposed by section 81A or 81AB of the *Motor Vehicles Act 1959* on any driver's licence issued to the person after the period of disqualification be effective for a period greater than the period prescribed by that section.

(4) In determining whether an offence is a first, second, third or subsequent offence for the purposes of this section (other than subsection (5)), any previous drink driving offence or drug driving offence for which the defendant has been convicted will be taken into account, but only if the previous offence was committed within the prescribed period immediately preceding the date on which the offence under consideration was committed.

(5) If a person aged 16 years or more is alleged to have committed a category 1 offence that is a first offence, the person cannot be prosecuted for that offence unless he or she has been given an expiation notice under the *Expiation of Offences Act 1996* in respect of the offence and allowed the opportunity to expiate the offence in accordance with that Act.

(6) In determining whether a category 1 offence is a first offence for the purposes of subsection (5), any previous drink driving offence or drug driving offence for which the defendant has been convicted or that the defendant has expiated will be taken into account, but only if the previous offence was committed or alleged to have been committed within the prescribed period immediately preceding the date on which the offence under consideration was allegedly committed.

47EB—Concentration of alcohol in breath taken to indicate concentration of alcohol in blood

Where a person submits to an alcotest or a breath analysis and the alcotest apparatus or the breath analysing instrument produces a reading in terms of a number of grams of alcohol in 210 litres of the person's breath, the reading will, for the purposes of this Act and any other Act, be taken to be that number of grams of alcohol in 100 millilitres of the person's blood.

47K—Evidence

(1) Without affecting the admissibility of evidence that might be given otherwise than in pursuance of this section, evidence may be given, in any proceedings for an offence, of the concentration of alcohol indicated as being present in the blood of the defendant by a breath analysing instrument operated by a person authorised to operate the instrument by the Commissioner of Police and, where the requirements and procedures in relation to breath analysing instruments and breath analysis under this Act, including subsections (2) and (2a), have been complied with, it must be presumed, in the absence of proof to the contrary, that the concentration of alcohol so indicated was present in the blood of the defendant at the time of the analysis and throughout the preceding period of 2 hours.

(1a) No evidence can be adduced in rebuttal of the presumption created by subsection (1) except—

(a) evidence of the concentration of alcohol in the blood of the defendant as indicated by analysis of a sample of blood taken and dealt with in accordance with section 47I and Schedule 1 or in accordance with the procedures prescribed by regulation; and

(b) evidence as to whether the results of analysis of the sample of blood demonstrate that the breath analysing instrument gave an exaggerated reading of the concentration of alcohol present in the blood of the defendant.

(1ab) If, in any proceedings for an offence, it is proved—

(a) that the defendant drove a vehicle, or attempted to put a vehicle in motion; and

(b) that a concentration of alcohol was present in the defendant's blood at the time of a breath analysis performed within the period of 2 hours immediately following the conduct referred to in paragraph (a),

it must be conclusively presumed that that concentration of alcohol was present in the defendant's blood at the time of the conduct referred to in paragraph (a).

(1b) No evidence can be adduced as to a breath or blood alcohol reading obtained from a coin-operated breath testing or breath analysing machine installed in any hotel or other licensed premises.

(2) As soon as practicable after a person has submitted to an analysis of breath by means of a breath analysing instrument, the person operating the instrument must deliver to the person whose breath has been analysed a statement in writing specifying—

(a) the reading produced by the breath analysing instrument; and

(b) the date and time of the analysis.

(2a) Where a person has submitted to an analysis of breath by means of a breath analysing instrument and the concentration of alcohol indicated as being present in the blood of that person by the breath analysing instrument is the prescribed concentration of alcohol, the person operating the instrument must forthwith—

(a) give the person the prescribed oral advice and deliver to the person the prescribed written notice as to the operation of this Act in relation to the results of the breath analysis and as to the procedures prescribed for the taking and analysis of a sample of the person's blood; and

(b) at the request of the person made in accordance with the regulations, deliver an approved blood test kit to the person.

(3) A certificate—

(a) purporting to be signed by the Commissioner of Police and to certify that a person named in the certificate is authorised by the Commissioner of Police to operate breath analysing instruments; or

(b) purporting to be signed by a person authorised under subsection (1) and to certify that—

(i) the apparatus used by the authorised person was a breath analysing instrument within the meaning of this Act; and

(ii) the breath analysing instrument was in proper order and was properly operated; and

(iii) the provisions of this Act with respect to breath analysing instruments and the manner in which an analysis of breath by means of a breath analysing instrument is to be conducted were complied with,

is, in the absence of proof to the contrary, proof of the matters so certified.

(3a) A certificate purporting to be signed by a police officer and to certify that an apparatus referred to in the certificate is or was of a kind approved under this Act for the purpose of performing alcotests, a drug screening test or an oral fluid analysis is, in the absence of proof to the contrary, proof of the matter so certified.

(3b) A certificate purporting to be signed by a police officer and to certify that a person named in the certificate submitted to an alcotest on a specified day and at a specified time and that the alcotest indicated that the prescribed concentration of alcohol may then have been present in the blood of that person is, in the absence of proof to the contrary, proof of the matters so certified.

(3c) A certificate purporting to be signed by a police officer and to certify that a driver testing station had been established pursuant to section 47DA at a place and during a period referred to in the certificate is, in the absence of proof to the contrary, proof of the matters so certified.

(4) Subject to subsection (17) a certificate purporting to be signed by an analyst, certifying as to the concentration of alcohol, or any drug, found in a specimen of blood identified in the certificate expressed in grams in 100 millilitres of blood is, in the absence of proof to the contrary, proof of the matters so certified.

(5) Subject to subsection (17) a certificate purporting to be signed by a person authorised under subsection (1) and to certify that—

(a) a person named in the certificate submitted to an analysis of breath by means of a breath analysing instrument on a day and at a time specified in the certificate; and

(b) the breath analysing instrument produced a reading specified in the certificate; and

(c) a statement in writing required by subsection (2) was delivered in accordance with that subsection,

is, in the absence of proof to the contrary, proof of the matters so certified.

(7) A certificate purporting to be signed by a person authorised under subsection (1) and to certify—

(a) that, on a date and at a time specified in the certificate, a person named in the certificate submitted to an analysis of breath by means of a breath analysing instrument; and

(b) that the prescribed oral advice and the prescribed written notice were given and delivered to the person in accordance with subsection (2a)(a); and

(c) that—

(i) the person did not make a request for an approved blood test kit in accordance with the regulations; or

(ii) at the request of the person, a kit that, from an examination of its markings, appeared to the person signing the certificate to be an approved blood test kit was delivered to the person in accordance with subsection (2a)(b),

is, in the absence of proof to the contrary, proof that the requirements of subsection (2a) were complied with in relation to the person.

(8) A prosecution for an offence will not fail because of a deficiency of a kit delivered to the defendant in purported compliance with subsection (2a)(b) and the presumption under subsection (1) will apply despite such a deficiency unless it is proved—

(a) that the defendant delivered the kit unopened to a medical practitioner for use in taking a sample of the defendant's blood; and

(b) by evidence of the medical practitioner, that the medical practitioner was, because of a deficiency of the kit, unable to comply with the prescribed procedures governing the manner in which a sample of a person's blood must be taken and dealt with for the purposes of subsection (1a).

(9) A certificate—

(a) purporting to be signed by the Commissioner of Police and to certify that a person named in the certificate is authorised by the Commissioner of Police to conduct oral fluid analyses or drug screening tests; or

(b) purporting to be signed by a person authorised to conduct oral fluid analyses or drug screening tests under section 47EAA and to certify that the apparatus used to conduct an oral fluid analysis or a drug screening test was in proper order and the oral fluid analysis or drug screening test was properly conducted,

is admissible in proceedings before a court and is, in the absence of proof to the contrary, proof of the matters so certified.

(10) A certificate purporting to be signed by a police officer and to certify that a person named in the certificate submitted to a drug screening test on a specified day and at a specified time and that the drug screening test indicated that a prescribed drug may then have been present in the oral fluid of the person is, in the absence of proof to the contrary, proof of the matters so certified.

(11) Subject to subsection (17), an apparently genuine document purporting to be a certificate under Schedule 1 and purporting to be signed by a police officer, medical practitioner or analyst, or copy of such a certificate, is admissible in proceedings before a court and is, in the absence of proof to the contrary, proof of the matters stated in the certificate.

(12) If a certificate of an analyst relating to a sample of blood taken under section 47E or 47I is received as evidence in proceedings before a court and states that the prescribed concentration of alcohol has been found to be present in the sample of blood to which the certificate relates, it will be presumed, in the absence of proof to the contrary, that the concentration of alcohol stated in the certificate was present in the sample when the sample was taken.

(13) If it is proved by the prosecution in proceedings for an offence that a concentration of alcohol was present in the defendant's blood at the time at which a sample of blood was taken under section 47E or 47I, it will be conclusively presumed that that concentration of alcohol was present in the defendant's blood throughout the period of 2 hours immediately preceding the taking of the sample.

(14) If a certificate of an analyst relating to a sample of oral fluid or blood taken under section 47EAA, or a sample of blood taken under section 47E or 47I, is received as evidence in proceedings before a court and states that a prescribed drug has been found to be present in the sample of oral fluid or blood to which the certificate relates, it will be presumed, in the absence of proof to the contrary, that the prescribed drug stated in the certificate was present in the sample when the sample was taken.

(15) If it is proved by the prosecution in proceedings for an offence that a prescribed drug was present in the defendant's blood or oral fluid at the time at which a sample of oral fluid or blood was taken under section 47EAA, or a sample of blood was taken under section 47E or 47I, it will be conclusively presumed that that prescribed drug was present in the defendant's oral fluid or blood (as the case may require) throughout the period of 3 hours immediately preceding the taking of the sample.

(16) If certificates of a police officer and analyst, or a medical practitioner and analyst, under Schedule 1 are received as evidence in proceedings before a court and contain the same identification number for the samples of oral fluid or blood to which they relate, the certificates will be presumed, in the absence of proof to the contrary, to relate to the same sample of oral fluid or blood.

(17) A certificate referred to in subsection (4), (5) or (11) cannot be received as evidence in proceedings for an offence—

(a) unless a copy of the certificate proposed to be put in evidence at the trial of a person for the offence has, not less than 7 days before the commencement of the trial, been served on that person; or

(b) if the person on whom a copy of the certificate has been served under paragraph (a) has, not less than 2 days before the commencement of the trial, served written notice on the complainant or informant requiring the attendance at the trial of the person by whom the certificate was signed; or

(c) if the court, in its discretion, requires the person by whom the certificate was signed to attend at the trial.

(18) The provisions of this section apply in relation to proceedings for an offence against this Act or the *Motor Vehicles Act 1959* or a driving-related offence, subject to the following exceptions:

(a) subsections (1a), (1ab) and (13) apply only in relation to proceedings for an offence against section 47(1) or 47B(1), or an offence against the *Motor Vehicles Act 1959*;

(b) subsection (3)(b)(ii) does not apply in relation to an offence against section 47E(3);

(c) subsection (15) applies only in relation to proceedings for an offence against section 47(1) or 47BA(1), or an offence against the *Motor Vehicles Act 1959*.

(19) In this section—

proceedings for a driving-related offence means proceedings for an offence where the conduct with which the defendant is charged involves driving a vehicle or attempting to put a vehicle in motion.

Statutes Amendment (Heavy Vehicle National Law) Act 2013 (SA) — providing for later amendments to the relevant provisions of the *Road Traffic Act 1961* (SA)

Schedule 1—Statute law revision amendment of *Road Traffic Act 1961*

Provision amended	How amended
...	
Section 47B(3)	Delete "Where" and substitute: If
...	
Section 47EB	Delete "Where" and substitute: If
...	
Section 47K(1)	Delete "in pursuance of" and substitute: under
Section 47K(2a)	Delete "Where" and substitute: If
Section 47K(3c)	Delete "pursuant to" and substitute: in accordance with
...	

Road Traffic Act 1961 (SA) – form of relevant provision under consideration in *French v Scarman* (1979) 20 SASR 333

47f

(1) A person required in accordance with this Act to submit to an alcotest or breath analysis may request that a sample of his blood be taken at his expense by a medical practitioner nominated by him.

(2) A member of the police force to whom a request is made under subsection (1) of this section shall do all things necessary to facilitate the taking of the sample and if that sample is taken by the medical practitioner he shall so take it in the presence of a member of the police force.

(3) A sample of blood taken by a medical practitioner in accordance with a request under subsection (1) of this section shall be divided by that practitioner into approximately three equal parts and placed in sealed containers of which-

(a) two shall be handed to the member of the police force present at the taking of the sample;

(b) one shall be retained by the medical practitioner and dealt with in accordance with the directions of the person from whom it was taken.

(4) Nothing in this section contained shall absolve a person from the obligation imposed on him by subsection (3) of section 47e of this Act.

***Road Traffic (Miscellaneous) Regulations 1999* (SA) (now repealed by *Road Traffic (Miscellaneous) Regulations 2014*) – relevant regulations as at 8 January 2012**

11—Procedures for voluntary blood test

The following are the prescribed procedures in accordance with which a sample of a person's blood must be taken and dealt with for the purposes of section 47K(1a) of the Act (Evidence):

(a) the person must cause the sample to be taken by a medical practitioner of the person's choice and must deliver the blood test kit supplied to the person under section 47K(2a)(b) of the Act (Evidence) to the medical practitioner for use for that purpose;

(b) the medical practitioner by whom the sample of the person's blood is taken must place the sample, in approximately equal proportions, in 2 containers (being the containers provided as part of the blood test kit);

(c) each container must contain a sufficient quantity of blood to enable an accurate evaluation to be made of any concentration of alcohol present in the blood and the sample of blood taken by the medical practitioner must be such as to furnish 2 such quantities of blood;

(d) the medical practitioner must seal each container by application of the adhesive seal (bearing an identifying number) provided as part of the blood test kit;

(e) it is the duty of the medical practitioner to take such measures as are reasonably practicable in the circumstances to ensure that the blood is not adulterated and does not deteriorate so as to prevent a proper assessment of the concentration of alcohol present in the blood of the person from whom the sample was taken;

(f) the medical practitioner must then complete a certificate in the form set out in Schedule 3 (being a form provided as part of the blood test kit) by inserting the particulars required by the form;

(g) the certificate must be signed by the medical practitioner certifying as to the matters set out in the form;

(h) the certificate must also bear the signature of the person from whom the blood sample was taken, attested to by the signature of the medical practitioner;

(i) the original of the signed certificate must then be delivered to the person from whom the blood sample was taken together with 1 of the sealed containers containing part of the blood sample;

(j) a copy of the signed certificate must be delivered by the medical practitioner together with the other sealed container containing part of the blood sample to a police officer or an approved courier;

(ja) a police officer to whom a copy of the signed certificate and the other sealed container is delivered under paragraph (j) must deliver the copy and container to Forensic Science SA or to an approved courier;

(jb) an approved courier to whom a copy of the signed certificate and the other sealed container is delivered under this regulation must deliver the copy and container to Forensic Science SA;

(k) the blood sample container and copy of the certificate referred to in paragraph (j) must not be delivered into the possession of the person from whom the sample was taken;

(l) on receipt of the blood sample container and certificate at Forensic Science SA, the blood in the container must be analysed as soon as reasonably practicable by or under the supervision of an analyst to determine the concentration of alcohol present in the blood expressed in grams in 100 millilitres of blood;

(m) the analyst must then complete and sign a certificate certifying as to the following matters:

(i) the date of receipt at Forensic Science SA of the blood sample container and the certificate accompanying the blood sample container;

(ii) the identifying number appearing on the adhesive seal used to seal the blood sample container;

(iii) the name and professional qualifications of the analyst;

(iv) the concentration of alcohol found to be present in the blood expressed in grams in 100 millilitres of blood;

(v) any factors relating to the blood sample or the analysis that might, in the opinion of the analyst, adversely affect the accuracy or validity of the analysis;

(vi) any other information relating to the blood sample or analysis or both that the analyst thinks fit to include;

(n) the analyst's certificate must be sent by post to the person from whom the blood sample was taken at the address shown as the person's address on the certificate accompanying the blood sample container;

(o) a copy of the analyst's certificate must be sent to or retained on behalf of the Minister;

(p) a copy of the analyst's certificate must also be sent to the Commissioner of Police;

(q) the person from whom the blood sample was taken may cause the sample of blood as contained in the blood sample container delivered to that person to be analysed to determine the concentration of alcohol present in the blood.

Road Traffic (Miscellaneous) Regulations 2014 **(SA) (replaces reg 11 of *Road Traffic (Miscellaneous) Regulations 1999*) – reg 22 as currently in force**

22—Procedures for voluntary blood test (section 47K(1a) of Act)

The following are the prescribed procedures in accordance with which a sample of a person's blood must be taken and dealt with for the purposes of section 47K(1a) of the Act:

(a) the person must cause the sample to be taken by a medical practitioner of the person's choice and must deliver the blood test kit supplied to the person under section 47K(2a)(b) of the Act to the medical practitioner for use for that purpose;

(b) the medical practitioner by whom the sample of the person's blood is taken must place the sample, in approximately equal proportions, in 2 containers (being the containers provided as part of the blood test kit);

(c) each container must contain a sufficient quantity of blood to enable an accurate evaluation to be made of any concentration of alcohol present in the blood and the sample of blood taken by the medical practitioner must be such as to furnish 2 such quantities of blood;

(d) the medical practitioner must seal each container by application of the adhesive seal (bearing an identifying number) provided as part of the blood test kit;

(e) it is the duty of the medical practitioner to take such measures as are reasonably practicable in the circumstances to ensure that the blood is not adulterated and does not deteriorate so as to prevent a proper assessment of the concentration of alcohol present in the blood of the person from whom the sample was taken;

(f) the medical practitioner must then complete a certificate in the form set out in Schedule 1 Form 6 (being a form provided as part of the blood test kit) by inserting the particulars required by the form;

(g) the certificate must be signed by the medical practitioner certifying as to the matters set out in the form;

(h) the certificate must also bear the signature of the person from whom the blood sample was taken, attested to by the signature of the medical practitioner;

(i) the original of the signed certificate must then be delivered to the person from whom the blood sample was taken together with 1 of the sealed containers containing part of the blood sample;

(j) a copy of the signed certificate must be delivered by the medical practitioner together with the other sealed container containing part of the blood sample to a police officer or an approved courier;

(k) a police officer to whom a copy of the signed certificate and the other sealed container is delivered under paragraph (j) must deliver the copy and container to Forensic Science SA or to an approved courier;

(l) an approved courier to whom a copy of the signed certificate and the other sealed container is delivered under this regulation must deliver the copy and container to Forensic Science SA;

(m) the blood sample container and copy of the certificate referred to in paragraph (j) must not be delivered into the possession of the person from whom the sample was taken;

(n) on receipt of the blood sample container and certificate at Forensic Science SA, the blood in the container must be analysed as soon as reasonably practicable by or under the supervision of an analyst to determine the concentration of alcohol present in the blood expressed in grams in 100 millilitres of blood;

(o) the analyst must then complete and sign a certificate certifying as to the following matters:

(i) the date of receipt at Forensic Science SA of the blood sample container and the certificate accompanying the blood sample container;

(ii) the identifying number appearing on the adhesive seal used to seal the blood sample container;

(iii) the name and professional qualifications of the analyst;

(iv) the concentration of alcohol found to be present in the blood expressed in grams in 100 millilitres of blood;

(v) any factors relating to the blood sample or the analysis that might, in the opinion of the analyst, adversely affect the accuracy or validity of the analysis;

(vi) any other information relating to the blood sample or analysis or both that the analyst thinks fit to include;

(p) the analyst's certificate must be sent by post to the person from whom the blood sample was taken at the address shown as the person's address on the certificate accompanying the blood sample container;

(q) a copy of the analyst's certificate must be sent to or retained on behalf of the Minister;

(r) a copy of the analyst's certificate must also be sent to the Commissioner of Police;

(s) the person from whom the blood sample was taken may cause the sample of blood as contained in the blood sample container delivered to that person to be analysed to determine the concentration of alcohol present in the blood.

Magistrates Court Act 1991 (SA) - relevant provisions as at 6 September 2013

42—Appeals

(1) A party to a criminal action may, subject to this section and in accordance with the rules of the appellate court, appeal against any judgment given in the action (including a judgment dismissing a charge of a summary or minor indictable offence but not any judgment arising from a preliminary examination).

(1a) An appeal does not, however, lie against an interlocutory judgment unless—

(a) the judgment stays the proceedings; or

(b) the judgment destroys or substantially weakens the basis of the prosecution case and, if correct, is likely to lead to abandonment of the prosecution; or

(c) the Court or the appellate court is satisfied that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial and grants its permission for an appeal.

(2) The appeal lies—

(a) in the case of an action relating to an offence categorised under the *Summary Procedure Act 1921* as an industrial offence—to the Industrial Court; or

(ab) in the case of a sentence passed on the conviction of a person of an offence that is, or offences that include, a major indictable offence—to the Full Court of the Supreme Court with the permission of the Full Court; or

(b) in any other case—to the Supreme Court constituted of a single Judge (but the Judge may, if he or she thinks fit, refer the appeal for hearing and determination by the Full Court).

(2a) The Chief Justice may determine that the Full Court is to be constituted of only 2 judges for the purposes of hearing and determining an appeal to the Full Court of a kind referred to in subsection (2)(ab).

(2b) The decision of the Full Court when constituted by 2 judges is to be in accordance with the opinion of those judges or, if the judges are divided in opinion, the proceedings are to be reheard and determined by the Full Court constituted by such 3 judges as the Chief Justice directs (including, if practicable, the 2 judges who first heard the proceedings on appeal).

(4) On an appeal, the appellate court may, if the interests of justice so require, re-hear any witnesses or receive fresh evidence.

(5) On the hearing of the appeal, the appellate court may exercise any one or more of the following powers:

(a) it may confirm, vary or quash the judgment subject to the appeal and, if the Court thinks the interests of justice so require, it may vary or quash any other judgment given in the same or related proceedings;

(b) it may remit the case for hearing or further hearing before the Magistrates Court;

(c) it may make any other order (including an order for costs) that may be necessary or desirable in the circumstances.

(6) Where a judgment or order has been confirmed, varied or made on appeal under this section, the Magistrates Court has the same authority to enforce that judgment or order as if it had not been appealed against or had been made in the first instance.

***Statutes Amendment (Attorney-General's Portfolio No 2) Act 2013* (SA) – providing for later amendment to s 42 of *Magistrates Court Act 1991* (SA)**

10—Amendment of section 42—Appeals

(1) Section 42(5)(c)—after "including" insert:

, subject to subsection (5a),

(2) Section 42—after subsection (5) insert:

(5a) The Full Court may not make an order for costs in relation to an appeal to the Full Court of a kind referred to in subsection (2)(ab).