ORIGINAL

**IN THE HIGH COURT OF AUSTRALIA**
**ADELAIDE REGISTRY**

**No. A5 of 2015**



BETWEEN:

**POLICE**
Appellant

and

**JASON ANDREW DUNSTALL**
Respondent

## RESPONDENT'S (AMENDED) SUBMISSIONS

### PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

### PART II CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. On the footing contended for by the appellant and supported by the respondent (namely that there exists a residual discretion in a criminal trial to exclude lawfully obtained non-confessional evidence where it would result in an unfair trial) the issues are:

2.1. did the majority (Gray and Sulan JJ) err in failing to find that the exercise of the discretion had been affected by error of a relevant kind, in circumstances where, through no fault of the respondent, and by reason of a contravention of the applicable regulations by a medical practitioner, the respondent was denied the opportunity to obtain evidence which was necessary in order to entitle him to challenge the otherwise conclusive effect of compulsorily obtained breath analysis evidence?

2.2. did it involve error of a relevant kind to exercise the discretion to exclude the evidence of the breath analysis reading because:

(a) no "*right*" of the accused had been trammelled (at all, or by law enforcement agencies engaging in impropriety);

(b) the breath analysis evidence was not "*unreliable*";

(c) the "*unfairness*" is in some way required by the legislation?

---

Filed by: Caldicott Lawyers
53 Wright Street
ADELAIDE SA 5000

Telephone: (08) 8110 7900
Facsimile: (08) 8110 7901
Ref: Casey Isaacs

3. In summary, the respondent advances the following contentions.

3.1. The trial court had a duty, and correlative powers, to ensure that the respondent was not convicted, other than following a fair trial, of the charge of contravening s 47B of the *Road Traffic Act* 1961 (SA) (**the Act**), namely, driving a motor vehicle when there was present in his blood the prescribed concentration of alcohol.

3.2. In some circumstances, the duty to ensure a fair trial will find expression in the grant of a permanent stay because a fair trial cannot be achieved. Here, since it was open to the prosecution to rely on other evidence, the appropriate means of avoiding an unfair trial was to exercise the discretion to exclude evidence of the breath analysis pursuant to a residual discretion.

3.3. The unfairness arose because:

(a) the statutory scheme erects an artificial series of presumptions with the consequence that the reading of a (potentially inaccurate) breath analysis may be taken to establish the blood alcohol concentration of a driver at an earlier time~~, irrespective of intervening events~~;

(b) the statutory scheme contemplates, as a safeguard to reduce the risk of a wrongful conviction, a facility for a defendant to challenge the breath analysis by a blood test, and in order to ensure the efficacy of that regime, the statutory scheme imposed obligations upon medical practitioners undertaking the sampling process;

(c) through no fault of the respondent, and by virtue of a contravention by the medical practitioner of a relevant regulation, the respondent was not able to challenge the breath analysis;

(d) in the circumstances, the breath analysis, if not excluded but admitted into evidence, would be required to be treated as conclusive of guilt, notwithstanding the patent possibility of a reasonable doubt as to contravention of the offence.

3.4. The unfairness inheres in the requirement that evidence be given a weight exceeding that which it may naturally bear, by reason of the operation of an irrebuttable presumption, and the fact that the prosecution sought to rely on that evidence notwithstanding that, through the fault of a third party entrusted with a role in the statutory safeguard, the respondent is deprived of an ability meaningfully to challenge the prosecution evidence.

3.5. In order for the appellant to demonstrate relevant error in the exercise of the discretion, it is driven to contend for limitations upon the scope of the discretion which are not supported by authority or the broad rationale of the discretion.

(a) The discretion is not limited to cases where the evidence is "*unreliable*". In any event, here the evidence is less reliable than would be justified by the conclusive effect it would be accorded by virtue of s 47K of the Act if admitted into evidence.

(b) The discretion is not limited to cases where the evidence to be excluded, or the evidence which is lost which would potentially counter the evidence to be excluded, is procured by or lost by reason of the infringement of a "*right*" of the defendant.

(c) The discretion is not limited to cases where there is impropriety on the part of law enforcement agencies.

(d) The discretion is an aspect of the Court's power and duty to ensure a fair trial and avoid a miscarriage of justice.

(e) The exercise of the discretion would not usurp the legislative function, since the legislative regime does not evince an intention to abrogate the exercise of a discretion designed to ensure a fair trial; certainly not where the benefit of the safeguards contemplated by the regime have been denied to the defendant. Indeed, it is doubtful that the legislation could (validly) frustrate the Court's duty to ensure a fair trial.

## PART III SECTION 78B OF THE JUDICIARY ACT 1903 (Cth)

4. It is understood that the appellant has now given a notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

## PART IV RESPONSE TO STATEMENT OF FACTS OR CHRONOLOGY

5. The appellant's summary of the facts and chronology is accurate but incomplete as relates to the submission made by the appellant that there was no other evidence which served to cast doubt on the reliability of the breath analysis results (AS [47](e)).

6. In connection with the application to have the breath analysis excluded:

6.1. Richard Byron Collins, a medical practitioner practising as consultant forensic pathologist, gave evidence with respect to the potential for inaccuracies and discrepancies by the use of breath analysis [AB14-31];

6.2. the respondent gave evidence that between the time he returned home from work after around 5.00 pm and the time he left the Port Noarlunga Hotel at around 12.10 am, a period of over about seven hours, he consumed only five alcoholic beverages [AB33-35].

## PART V RESPONSE TO STATEMENT OF APPLICABLE LEGISLATION ETC.

7. The legislation and relevant regulations are accurately stated in the appellant's annexure. In addition to those extracts, it should be noted that[1]:

7.1. the definition of a "*category 3 offence*" is an offence against s 47B(1) involving a blood alcohol concentration of .15 grams or more in 100 millilitres of blood. Accordingly, subject to the discretionary exclusion of the breath analysis in the present case, the respondent would have been convicted of a "*category 3 offence*"; and

7.2. by dint of s 47E, a police officer may require any person who is believed on reasonable grounds to have driven a motor vehicle to submit to an alcotest or breath analysis and it constitutes an offence not to comply with the direction.

## PART VI RESPONDENT'S ARGUMENT

Introduction

8. The appellant accepts that, apart from the public policy discretion (concerning the exclusion of evidence the product of unlawful or improper conduct on the part of the law enforcement authorities), the discretion to exclude evidence on the basis that it is more prejudicial than probative, and the unfairness discretion concerned with confessional evidence, there is a residual discretion to exclude relevant and non-confessional evidence which is concerned with ensuring a fair trial for the accused (AS [13]-[33]). The respondent supports the appellant's submission as to the existence of a residual discretion to exclude relevant and non-confessional evidence such as the evidence of a breath analysis.

9. After referring, *inter alia*, to the three discretions mentioned above, the learned author of *Cross on Evidence* (10th Australian edition, 2015) describes the discretion in these terms (at [11125]):

> (e) **There is a residual discretion to reject any evidence if the strict rules of admissibility would operate unfairly against the accused – that is, it is rejected on the ground that to receive it would be unfair to the accused in**

---

1 These provisions, and extracts from Schedule 1 to the Act, are set out in an annexure.

> **the sense that the trial would be unfair**[2]. It has been said that, confessions apart, 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 which would not fall within the more specific principle that evidence will not be admitted where its prejudicial effect exceeds its probative value[3]. The unreliability of a witness has been held not to attract the discretion[4], on the ground that this interferes unduly with the division of function between judge and jury, and would amount to an anticipatory ruling which would be erroneous if given at the close of the Crown case[5]. A difficult area of potential application concerns accomplices. **An example of the discretion may exist where the weight and credibility of the evidence cannot be effectively tested**[6]. Another example may exist in relation to excessively inflammatory evidence such as gruesome photographs. [Emphasis added; some footnotes not reproduced]

10. To the authorities cited in *Cross* may now be added the comprehensive survey of the authorities concerning the discretion in *Haddara v The Queen*[7].

Unfairness inherent in inability effectively to test prosecution evidence

11. The proposition that the discretion may be exercised where the weight and credibility of evidence cannot be effectively tested requires elaboration by reference to the circumstances of the present case.

12. It is accepted that the mere loss of evidence which, depending on what it would have revealed, may have assisted in testing or challenging evidence to be led by the prosecution, may not give rise to relevant unfairness, nor to the risk of a miscarriage of justice.

---

2 *Driscoll v R* (1977) 137 CLR 517 at 541; *R v Sang* [1980] AC 402 at 444-5; *Stephens v R* (1985) 156 CLR 664 at 669; *Harriman v R* (1989) 167 CLR 590 at 594-595; *R v McLean and Funk; Ex parte A-G* [1991] 1 Qd R 231 at 236-240, 241-242 and 251-252; *R v Chai* (1992) 27 NSWLR 153 at 175; *Rozenes v Beljajev* [1995] 1 VR 533 at 549; *R v Grimes* [2013] 1 Qd R 351 at [31]-[44]. Subparagraph (e) was quoted by Martin J in *R v Lobban* (2000) 77 SASR 24 at [76]: the case contains a detailed discussion of various of the discretions referred to in the subparagraph. See also *Police v Dunstall* (2013) 118 SASR 233.

3 *R v McLean and Funk; Ex parte A-G* [1991] 1 Qd R 231 at 252; *Rozenes v Beljajev* [1995] 1 VR 533 at 553-554.

4 *R v Oliver* (1984) 57 ALR 543 at 547-548; *R v McLean and Funk; Ex parte A-G* [1991] 1 Qd R 231 at 260; *Rozenes v Beljajev* [1995] 1 VR 533 at 553-554 (though a verdict based on that witness's evidence may be set aside on appeal as unsafe or unsatisfactory: *R v Ralph* (1988) 37 A Crim R 202 at 210; approved in *Chidiac v R* (1991) 171 CLR 432 at 446); *R v Grimes* [2013] 1 Qd R 351 at [31]-[44]. The contrary was assumed but not decided in *Hardwick v Western Australia* (2011) 211 A Crim R 349.

5 *Doney v R* (1990) 171 CLR 207; see [11100].

6 *Dietrich v R* (1992) 177 CLR 292 at 363; *Rozenes v Beljajev* [1995] 1 VR 533 (discussing the inability to cross-examine the deceased maker of an admissible statement and citing *R v Moore* (1973) 17 CCC (2d) 348); *R v Collins* [1986] VR 37; *R v NRC* [1999] 3 VR 537 at [51]; in *Scott v R* [1989] AC 1242 at 1258 the discretion to exclude depositions of deceased persons was recognised, though it was said that it "should be exercised with great restraint").

7 [2014] VSCA 100 at [15]-[50] (Redlich and Weinberg JJA).

13. That is why, in the ordinary case, something more would be required to justify a stay of a prosecution than the mere loss or destruction of evidence which may or may not have assisted the defence. In that context, it was observed in *R v Edwards*[8] that:

> Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair[9].

14. In *Edwards*, there was no reason to conclude one way or the other whether the lost evidence would have assisted the defendants, and the Court did not need to resolve whether there may be circumstances in which the loss of admissible evidence occasions injustice of a character that would make the continuance of the proceedings on indictment an abuse of the process of the court. However this was in circumstances where the prosecution evidence remained susceptible of challenge. Indeed, the Court emphasised that matter in the context of an observation that the loss of the evidence served neither to undermine nor to support the Crown case, saying[10]:

> It is to be observed that if the Crown is unable to exclude the hypothesis, that the runway lighting was illuminated as the aircraft moved along it and that it ceased operating coincidentally at the time of the take-off, it would fail to establish an element of the principal and the alternative offence.

15. A critical difference between the ordinary case of a loss of evidence and the present case is that, in the present case, the inability to obtain a blood test in accordance with the statutory regime had the consequence that, by dint of s 47K, it was required to be presumed that the concentration of alcohol indicated by the breath analysing instrument was present in the blood of the defendant at the time of the analysis, throughout the preceding period of two hours and, critically, at the time of driving.

16. In other words, subject to the tender of a certificate[11] (itself presumed accurate in the absence of proof the contrary), in the absence of a complying blood test, the trial court was compelled (artificially[12]) to accept the following matters (which are sufficient to

---

8 (2009) 83 ALJR 717; [2009] HCA 20 at [31] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

9 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34 per Mason CJ and at 47 per Brennan J; *Williams v Spautz* (1992) 174 CLR 509 at 519 per Mason CJ, Dawson, Toohey and McHugh JJ.

10 (2009) 83 ALJR 717; [2009] HCA 20 at [33] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

11 Certifying that an authorised person administered the breath analysing instrument, that the instrument was in proper order and was properly operated, and that the provisions of the Act relating to the breath analysing instrument were complied with.

12 *Singh v Police (SA)* (2000) 31 MVR 279 at [21] (Martin J).

prove the relevant offence, and thus to bring about potentially serious consequences for the defendant[13]):

16.1. that the breath analysing instrument's reading of the concentration of alcohol in the breath of the person's breath was (perfectly) accurate;

16.2. that the grams of alcohol in 210 litres of the person's breath reflects the number of grams of alcohol in 100 millilitres of the person's blood; and

16.3. that the number of grams of alcohol in 100 millilitres of the person's blood is **unchanged for the two hour period preceding the breath test**.

17. It is self-evident that the first two of those propositions may not be true (or perfectly accurate) in a given case, and it is self-evident that other than in rare cases the third proposition will be false, with the consequence that if the presumptions apply, without contradiction, there is some inherent risk that a person will be wrongly convicted, or convicted for an offence of the wrong category. Of course, for these purposes, one cannot adopt the circular approach of assuming the accuracy of the breath analysis[14].

18. Indeed, the fallibility of the three propositions is recognised by the legislature by the facility or safeguard of the blood analysis[15]. That regime presupposes that a blood test is intrinsically superior to a breath test in terms of accuracy[16]. The evidence before the magistrate was that even where both tests are carried out properly and simultaneously they may suggest different results and it is possible for a breath sample

---

13 Apart from the criminal penalties, a driver is exposed in the event of a conviction to recovery action by the compulsory third party personal injury insurer and a driver's rights to comprehensive insurance are likely to be prejudiced. There are also consequences in civil cases that may be significant. See the observations of Gray J in *Police v Hall* (2006) 95 SASR 482 at [161].

14 *Police v Dunstall* (2014) 120 SASR 88 (**FC**) at [166] (Sulan J) [AB128].

15 In *Shearer v Hills* (1989) 51 SASR 243 at 247, King CJ said "*[T]he place which the breathalyser occupies in the legislative scheme does not necessarily imply any vouching on the part of the legislature for the accuracy of the breathalyser, but is just as readily explicable on the footing that the legislature has found it necessary to sanction the use of the breathalyser and to validate its results irrespective of precise and consistent accuracy in order to combat the notorious social evil of drink driving. I would be unwilling in my present state of knowledge to take judicial notice of the supposed accuracy of the breathalyser result. I am aware of the controversy over the years as to the accuracy of the instrument. ... I do not believe that it can be said with truth that the breathalyser has become an instrument whose accuracy may be assumed as a matter of common experience so that judicial knowledge may be taken of it*". See also *Lamb v Morrow* [1986] VR 623; *Miles v Gilmore* [1989] VR 413.

16 *Evans v Benson* (1986) 46 SASR 317 at 320-321 (King CJ) ("*I feel no difficulty in accepting as an implication of subs (1a), that the result of the blood analysis is to be accepted as intrinsically superior to the result of the breath analysis*"). See also *Shearer v Hills* (1989) 51 SASR 243 at 247 (King CJ) and *Police v Hall* (2006) 95 SASR 482 at [48] (Doyle CJ). See also FC [120] (Sulan J) [AB118]. Indeed, where the Court has been free to consider the matter at large, it has on occasions been found that the subsequent breath analysis could not be a reliable measure of blood alcohol concentration at the time of the relevant accident: see, eg, *Bliss v The Queen* (1993) 173 LSJS 255; [1993] SASC 4228.

to overestimate the alcohol content compared with peripheral blood in the absorption phase[17].

19. As *Edwards* illustrates, where the prosecution is required to prove its case without the benefit of any particular evidentiary aid, and where the evidence led by the prosecution will carry only the weight which it naturally bears, the mere loss of relevant evidence (the effect of which is unknowable by the Court) would ordinarily not amount to unfairness in the conduct of the trial. In many instances, the absence of relevant evidence would cause the trier of fact to feel a degree of unease inconsistent with a conclusion of guilt beyond reasonable doubt. In that way, the loss of relevant evidence often disfavours the party bearing the burden of proof.

20. Likewise, where a statutory regime restricts a party's capacity to challenge evidence led against that party's interests, usually the Court can decide to place little weight on it having regard to the fact that an affected party has not had an opportunity to see it or test it. Indeed, the capacity to ascribe that limited weight may be important in preserving the institutional integrity of the court to which the relevant function is assigned[18].

21. However, where the inability to obtain other evidence (which, it may be assumed would be *more* accurate than the prosecution evidence) renders irrebuttable a presumption of the accuracy of the prosecution evidence, it is submitted that is capable of amounting to unfairness in the conduct of the trial because the prosecution evidence will carry weight it does not naturally bear. Almost by definition, it will have a prejudicial effect that outweighs its probative value, in that it is required to be given conclusive effect.

22. The significance of the loss of other evidence here is not limited by the extent to which that evidence would itself have proved or disproved guilt. It also detracts from (and here entirely destroys) the capacity to test the prosecution evidence. That is a critical distinction[19].

---

17 Evidence of Richard Byron Collins, see [6.1] above.

18 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), referred to in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [80] (French CJ) and at [166] (Hayne, Crennan, Kiefel and Bell JJ), cf. at [209]-[211] (Gageler J).

19 See, eg, the discussion by Nettle JA in *El Bayeh v R* (2011) 31 VR 305 at [29] (pointing out that in *R v Lobban* (2000) 77 SASR 24, there had been no denial by the accused that the destroyed material was correctly identified as cannabis), at [30] (emphasising that in *Police v Sherlock* (2009) 103 SASR 147, the destruction of the security camera footage did not deprive the magistrate of the ability to assess the evidence of witnesses to the theft), at [31] (emphasizing that in *R v Wells* [2010] VSCA 100, the destruction of the motor vehicle did not deprive the applicant of a forensic answer to the expert evidence relied upon by the Crown who had inspected the vehicle). For similar reasons, while inability to cross-examine a witness is a relevant consideration

23. Moreover, the defendant is prevented from challenging the presumptions enlivened by the prosecution evidence, despite the fact that it will ordinarily be self-evident that a breath analysis undertaken some time after the defendant has stopped driving will not reflect the blood alcohol concentration relevant to the commission of the offence.

24. In that respect the present case is:

    24.1. *a fortiori* the examples given in *Cross* and reproduced at footnote 6 above; and

    24.2. analogous to the circumstances in which it has been found that the combination of a loss of relevant evidence and the invocation by the prosecution of an averment provision has given rise to an abuse of process: *Holmden v Bitar*[20].

10 Unfairness in the present case

25. In the present case, there is an additional feature which touches upon the question of unfairness. Whereas in *Edwards* the loss of the evidence did not involve a contravention of any statutory provision, in the present case, the unchallenged finding[21] was that the medical practitioner conducted the blood sampling process in contravention of regulation 11(c) of the *Road Traffic (Miscellaneous) Regulations* 1999 (SA) (reproduced at [AS] p 27).

26. It is true that there was no misconduct by police or the prosecution. However, since the focus of the discretion is upon the unfairness at trial of the tender of the evidence (which may be influenced, but is not exclusively governed, by the unfairness of the

---

for the purposes of discretionary exclusion of evidence (see, eg, *R v Suteski* (2002) 56 NSWLR 184 at [126] (Wood CJ at CL), as explained by Heydon JA in *R v Clark* [2001] NSWCCA 494 at [164] ff, mere inability to cross-examine the maker of a statement admitted in exception to the hearsay rule will not, of itself, give rise to unfairness.

20 (1987) 47 SASR 509. Under s 86D of the *Quarantine Act* 1908 (Cth), an averment of the prosecutor in the information was "*in the absence of proof to the contrary, deemed to be proved*". The quarantine officers seized and destroyed tins apparently containing meat pate, depriving the respondent the opportunity of calling evidence in rebuttal of the prosecution case. Cox J said (at 517):

> [The power to stay criminal proceedings as an abuse of process] is a quite exceptional remedy. Any procedural device that has the effect of denying an informant a trial on the general issue is a very drastic one indeed. ...
>
> Was this a proper case? I think it may have been. What was very unusual here was the combination of the averment provision and the destruction of the actual evidence. Obviously the former would not have been enough without the latter, and in many cases a court would be able to find a less dramatic but equally effective way of dealing with the mere destruction of an important piece of evidence – by reaching the same conclusion by another route, perhaps, or by finding that the prosecution had not proved its case beyond reasonable doubt. However, such a course was not open to the learned magistrate here. Because of s 86D, if the case proceeded to judgment in the ordinary way the respondent (it would seem) had to be found guilty.

21 *Police v Dunstall* [2013] SAMC 25 at [13] (Magistrate Dixon) [AB44], AS [5](i).

conduct of the investigation[22]), and while misconduct by the police or prosecution may strengthen a contention of unfairness, in the present case, the identity of the person entrusted with the conducting of the blood sample is a medical practitioner simply because the police are not equipped to conduct medical procedures.

27. If it be necessary or relevant to approach the matter in this way, it can fairly be said that for these purposes the medical practitioner becomes a functionary of the State[23], and a person of whose contravention "*the Crown ought not to take advantage*"[24]. The prosecution may choose to prove guilt of the offence without relying on an irrebuttable presumption[25]. It is not artificial to point to unfairness on the part of the prosecution in seeking to rely on the presumption in a case in which the safeguards have failed the defendant. Particularly is that so when it is remembered that the breath test itself, though authorised by statute, involved a significant invasion of personal liberty[26].

The appellant's arguments

28. Even if the "*residual discretion*" to exclude evidence on the basis of unfairness is not a discretion in the broadest meaning of that expression[27], it is submitted that, nevertheless, as in the context of the inherent jurisdiction to grant a stay, appellate review of the exercise of the power looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration[28].

29. Accordingly, the appeal can only succeed if it is correct to submit that:

29.1. the defendant does not have a relevant "*right*" to deploy the evidence produced

---

22 See the discussion of the distinction between the public policy discretion and the general unfairness discretion in *Bunning v Cross* (1978) 141 CLR 54 at 73-74 (Stephen and Aickin JJ).

23 The parliamentary materials disclose that, among others, the Australian Medical Association were consulted and had input into the scheme. The special status of medical practitioners in the administration of the scheme is also recognised by the provisions of Schedule 1 to the Act which provide, *inter alia,* that a practitioner is immune from suit in relation to any good faith compliance or purported compliance with the Act (cl 6), but that in respect of specific duties imposed by the Act (namely, the obligations in relation to accidents under s 47I), the practitioner is exposed to punishment if he or she does not comply with his or her statutory duties.

24 The expression used in *King v The Queen* [1969] 1 AC 304.

25 See the opening words of s 47K(1) and the observation in *Police v Henwood* (2005) 92 SASR 15 at [33] (Doyle CJ) in relation to the predecessor provision. See also FC [65] (Gray J) [AB99], [172] (Sulan J) [AB129].

26 *Police v Jelinek* (1998) 200 LSJS 441 at [18]-[19] (Mullighan J).

27 In other words, if admission of the evidence would be relevantly unfair, the Court presumably must exclude the evidence.

28 *R v Carroll* (2002) 213 CLR 635 at [73] (Gaudron and Gummow JJ), *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [7] (Gleeson CJ, Gummow, Hayne and Crennan JJ). See also Heydon, *Cross on Evidence* (10th Australian edition, 2005) at [11120].

by a blood analysis, and the discretion cannot be invoked unless a "*right*" is "*trammeled*" upon (see, eg, AS [44], [47](a)); or

29.2. there was no impropriety by the law enforcement authorities, and compliance with the scheme is a matter of the defendant's responsibility, and the discretion cannot be invoked in those circumstances (see, eg, AS [47](b) and (c)); or

29.3. a conviction in the present case is contemplated by the legislation and the application of the discretion involves the usurpation of the legislative scheme (see, eg, AS [47](d) and (e)), such that the discretion cannot be invoked.

30. For reasons to be developed, none of those propositions can or should be accepted in absolute terms, with the consequence that the appellant's complaint fails to disclose relevant error in the exercise of the discretion. The exercise of discretion was open to the magistrate, as the majority and the single justice on appeal found[29].

The nature of the discretion, and the duty and power to ensure a fair trial

31. The first and general reason why the propositions just identified cannot be sustained in absolute terms is that, as the appellant's submissions acknowledge, while "*unfairness*" is not "*at large*", nor an invitation to apply idiosyncratic views, it is nevertheless a concept which defies "*analytical definition*"[30] by reason of the "*very nature of the concept*"[31] (AS [37]). Whether the necessary uncertainty is undesirable is a matter for debate[32].

32. And in the context of the power to order a permanent stay of a criminal proceeding on the basis that the trial would be unfair resulting in an abuse of process, the Court in *Edwards* noted the well-established proposition that the circumstances justifying such a course are not susceptible of exhaustive definition[33], referring to *Ridgeway v R*[34], *R v Carroll*[35] and *Batistatos v Roads and Traffic Authority of New South Wales*[36].

---

29 FC [88] (Gray J) [AB109], [173] (Sulan J) [AB129]; *Police v Dunstall* (2013) 118 SASR 233 at [50] (Kelly J) [AB62].

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

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

32 It has been argued in the context of confessional evidence that certainty is not an important consideration and that "*[n]o advantage would be secured by advising investigating authorities of the precise point at which impropriety on their part would render a confession inadmissible*": C R Williams, "An Analysis of Discretionary Rejection in Relation to Confessions" (2008) 32 *Melbourne University Law Review* 302 at 308.

33 (2009) 83 ALJR 717; [2009] HCA 20 at [33] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

34 (1995) 184 CLR 19 at 74-75 (Gaudron J).

35 (2002) 213 CLR 635 at [73] (Gaudron and Gummow JJ).

36 (2006) 226 CLR 256 at [9]-[15] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

33. *Batistatos* is a powerful illustration of the width of the concept of an unfair trial. There, a proceeding instituted many years after the relevant events but within time, and without any relevant fault on the part of the plaintiff, was stayed as an abuse of process notwithstanding it could not be shown the plaintiff's claim was "*clearly without foundation*". This was because the proceedings had a burdensome effect upon the defendants by virtue of the lapse of time and a fair trial was not possible.

34. And as *Dietrich v The Queen*[37] illustrates, there will be circumstances where it is incumbent upon a court, in order to avoid an unfair trial, to adjourn or even stay a trial until legal representation is obtained.

10 35. There can be no hard and fast definition of what is or is not a fair trial[38], and there has been no judicial attempt to list exhaustively the attributes of a fair trial[39].

36. The unfairness discretion in the confessional context has been said to be concerned with the right of an accused to a fair trial and therefore to overlap with the power or discretion to reject evidence which is more prejudicial than probative, "*each looking to the risk that an accused may be improperly convicted*". But while unreliability may be a touchstone of unfairness, it is not the sole touchstone[40]. In *R v Swaffield*, reference was made, in the context of the discretion to exclude evidence more prejudicial than probative, to the question of fairness as involving fairness of the trial, "*in the sense of a trial that does not involve a perceptible risk of a miscarriage of*
20 *justice*"[41].

37. The concept of a miscarriage of justice is itself broad and not immediately concerned with the question of whether the defendant is or was guilty of the offence charged[42].

---

37 (1992) 177 CLR 292.

38 *Police v Sherlock* (2009) 103 SASR 147 at [68] (Doyle CJ).

39 *Dietrich v The Queen* (1992) 177 CLR 292 at 300 (Mason CJ and McHugh J).

40 *R v Swaffield* (1998) 192 CLR 159 at [19] (Brennan CJ), [54] and [78] (Toohey, Gaudron and Gummow JJ).

41 *R v Swaffield* (1998) 192 CLR 159 at [64] (Toohey, Gaudron and Gummow JJ).

42 In the context of the Court's power to dismiss an appeal where no substantial miscarriage of justice has actually occurred, while the proviso should not be applied unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the verdict was returned, but there may still be cases where it would be proper to allow an appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt, including for example where there has been a significant denial of procedural fairness: *Weiss v The Queen* (2005) 224 CLR 300 at [44]-[45] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

Relevance of, or necessity to demonstrate interference with, a "right"

38. In the respondent's submission, the exercise of a discretion to exclude evidence is not precluded save where there has been a demonstrable interference with a substantive or procedural "*right*" of the defendant.

38.1. It is acknowledged that in *Swaffield,* Toohey, Gaudron and Gummow JJ said that the purpose of the discretion was the protection of the rights and privileges of the accused, including procedural rights[43]. However, that observation was made in the context of the discretion to exclude confessional evidence, where the so-called "*right to silence*" and the privilege against self-incrimination loom large.

38.2. In the context of the inherent jurisdiction or inherent power of a court of justice to permanently stay a proceeding on the basis of abuse of process, that power may be exercised where the proceeding or procedure "*although not inconsistent with the literal application of [the Court's] procedural rules, would nevertheless be manifestly unfair to a party to litigation before it*"[44]. Accordingly, it is not essential, in order to demonstrate relevant unfairness, to point to a non-compliance with procedural rules.

38.3. In *Dietrich*, this Court denied that Australian law recognised that an indigent accused on trial for a serious criminal offence had a "*right*" to the provision of counsel at public expense, yet accepted that depending on all the circumstances, lack of representation might mean that an accused was unable to receive a fair trial[45]. Although the right to a fair trial[46] means a fair trial according to law it does not follow that if there has been no departure from any identifiable provision of procedural or substantive law the trial is necessarily fair in the relevant sense. As Deane J said, it is desirable that the requirement of fairness be separately identified since it transcends the content of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be

---

43 *R v Swaffield* (1998) 192 CLR 159 at [78] (Toohey, Gaudron and Gummow JJ).

44 *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 (Lord Diplock), referred to with approval in *Walton v Gardiner* (1993) 177 CLR 378 at 393 (Mason CJ, Deane and Dawson JJ) and in *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [6] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

45 (1992) 177 CLR 292 at 311 (Mason CJ and McHugh J). See also, eg, at 350 (Toohey J).

46 Indeed it may even be incorrect to speak of an accused's right to a fair trial - the preferable and more accurate proposition being that a person has a right not to be tried unfairly or that a person has an immunity against conviction otherwise than after a fair trial: *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 56-57 (Deane J); referred to in *Dietrich v The Queen* (1992) 177 CLR 292 at 299 (Mason CJ and McHugh J) and 326 (Deane J).

observed in the administration of the substantive criminal law[47]. Or, as Gaudron J put it, the requirement of fairness is independent from and additional to the requirement that a trial be conducted in accordance with law[48].

38.4. Further, a trial may be unfair because of media coverage that has occurred[49], but that conclusion would not rest on identifying the interference with any subsidiary "*right*" of an accused to enjoy balanced or measured media coverage.

38.5. In *Batistatos*, the Court cautioned against any negative implication from the non-contravention of a statutory limitation period and said that in the context of the case it was unsatisfactory to speak of a common law "*right*" which may be exercised within the applicable limitation period, and noted the difficulty with the expression "*a legal right*". The plurality observed that while the plaintiff certainly had a "*right*" to institute a proceeding, the defendant also had "*rights*", including, in addition to the right to plead a limitation defence the right to seek the exercise of the power of a court to stay its processes in certain circumstances. The "*right*" of the plaintiff with a common law claim to institute an action was not at large; it was subject to the operation of the whole of the applicable procedural and substantive law administered by the court whose processes are enlivened in particular circumstances, including the principles respecting abuse of process[50].

38.6. It is therefore inconsistent with authority, and inconsistent with the technique of the common law, to resolve the question whether the admission of evidence would make a trial unfair by posing an intermediate question: whether there has been a violation of an identifiable "*right*". To undertake that inquiry would be to pose a question which detracts from the ultimate inquiry[51], and an inquiry made all the more difficult because of the different shades of meaning which the notion of a (procedural) right bears.

39. Further, and in any event, it is submitted that if it is necessary to inquire whether, in the present case, there has been a denial of a procedural right, it would not be

---

47 *Dietrich v The Queen* (1992) 177 CLR 292 at 326 (Deane J).

48 *Dietrich v The Queen* (1992) 177 CLR 292 at 363 (Gaudron J).

49 *Murphy v The Queen* (1989) 167 CLR 94, *R v Glennon* (1992) 173 CLR 592; cf. *Dupas v The Queen* (2010) 241 CLR 237.

50 (2006) 226 CLR 256 at [62]-[65] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

51 Cf. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] (McHugh, Gummow, Kirby and Hayne JJ) (in relation to the inutility of the "*mandatory*" vs. "*directory*" distinction), and *Re Minister for Immigration and Multicultural and Indigenous Affairs v Lam* (2003) 214 CLR 1 (in relation to the limited utility of the "*legitimate expectation*" concept).

unnatural or strained to say that the facility or safeguard of the blood test comprises a procedural right which, by virtue of the non-compliance of the medical practitioner with the relevant regulation, was denied to the respondent, in that it was rendered practically ineffectual.

40. Ultimately, what is important is not the label which is placed upon the defendant's capacity to access a blood test, but the role that that capacity plays, and its importance, in preventing a miscarriage of justice, in the context of the particular statutory regime. As King CJ said in *Ujvary v Medwell*[52]:

> The blood test is the only means by which a citizen can question the correctness of the result of the breath analysis. It must be the paramount concern of the Courts to ensure that the citizen has ready access to that check. If obstacles are placed in the way of the citizen, the evidence of the breath analysis should be excluded unless there is some cogent reason to admit it.

Relevance of, or necessity to demonstrate, impropriety by law enforcement authorities

41. Next, it is submitted that it is not necessary, in order to enliven the discretion, to identify impropriety by a law enforcement authority in connection with the evidence sought to be excluded or, here, the inability to obtain evidence in order to challenge the evidence sought to be excluded.

41.1. First, it may be noted that in the context of the power to stay a proceeding as an abuse of process, including in circumstances where there can no longer be a fair trial, the Court has resisted the notion that there is any necessity to demonstrate oppressive conduct by the other party to the litigation[53].

41.2. Returning to the context of a discretion to exclude evidence, the question is not whether the police have acted unfairly but whether it would be unfair to the accused to use the relevant evidence against him[54].

41.3. Where the public policy discretion is invoked, matters of impropriety or unlawfulness take on a particular importance because of the "*large matters of public policy*" which are under consideration[55]. But it is submitted that there is no reason why impropriety should be the focus of, or a necessary ingredient in enlivening, the unfairness discretion.

---

52 (1985) 39 SASR 418 at 420.

53 *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [69] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

54 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666 (Wilson, Dawson and Toohey JJ), referred to in *R v Swaffield* (1998) 192 CLR 159 at [53] (Toohey, Gaudron and Gummow JJ).

55 *Foster v the Queen* (1993) 67 ALJR 550 at 554 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ), referred to in *R v Swaffield* (1998) 192 CLR 159 at [60] (Toohey, Gaudron and Gummow JJ).

41.4. While the absence of impropriety or misconduct by police or law enforcement authorities may give rise to or form part of a composite consideration of unfairness[56], authority does not dictate that it is a necessary condition of the enlivenment of the discretion[57].

41.5. The authorities in South Australia, which were not challenged in the Full Court in this case, do not suggest such a requirement[58]. Nor do other intermediate appellate court decisions[59].

41.6. Furthermore, if and to the extent that the discretion to exclude evidence on the footing that its prejudicial effect outweighs its probative value is, as has sometimes been suggested[60], simply a common instance of the general discretion to exclude admissible evidence where to admit it would be unfair to the accused, then there have been countless instances of the discretion being invoked without any suggestion of impropriety by the prosecuting or law enforcement authorities.

42. It is a distraction to inquire whether the relevant regulation imposes a "*duty*" upon the medical practitioner, the breach of which could or should be characterised as involving "*impropriety*". Like the language of "*rights*", the language of "*duty*" involves a degree of imprecision[61]. That said, the medical practitioner in the present case did not comply with the relevant regulation, and the regulation is expressed in mandatory terms[62]. The medical practitioner was entrusted by the legislature with the function of carrying out the blood test procedure. In that sense the practitioner was made a functionary of the State, and breached the obligation imposed upon the practitioner by the regime.

---

56 *R v Lobban* (2000) 77 SASR 24 at [82] (Martin J, Doyle CJ and Bleby J relevantly agreeing), referring, *inter alia*, to *Callis v Gunn* [1964] 1 QB 495 at 501 (Lord Parker CJ).

57 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666.

58 *R v Lobban* (2000) 77 SASR 24 at [2] (Doyle CJ) ("*the scope for the exercise of the general unfairness discretion ... 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*"), at [77] (Martin J, with whom Bleby J agreed); *Police v Hall* (2006) 95 SASR 482 at [24], [77] (Doyle CJ), [88] (Nyland J), [118] (Bleby J), [177], [181], [191] (Gray J).

59 See, eg, authorities recognising the applicability of a general discretion in relation to the evidence of indemnified witnesses and accomplices, such as *R v McLean; ex parte Attorney-General* [1991] 1 Qd Rd 231; *Rozenes v Beljajev* [1995] 1 VR 533.

60 See, eg, *Driscoll v The Queen* (1977) 137 CLR 517 at 541 (Gibbs J, with whom Mason, Jacobs and Murphy JJ agreed); *Bunning v Cross* (1978) 141 CLR 54 at 74 (Stephen and Aickin JJ); *R v Sang* [1980] AC 402 at 447 (Lord Fraser of Tullybelton) and at 453 (Lord Scarman); *R v Lobban* (2000) 77 SASR 24 at [86] (Martin J, Doyle CJ and Bleby J relevantly agreeing).

61 See, eg, the discussion of duties in *Atkas v Westpac Banking Limited* (2010) 241 CLR 79 at [68]-[69] (Heydon J) and in *Momcilovic v The Queen* (2011) 245 CLR 1 at [232] (Heydon J).

62 The characterisation of the duty or obligation upon the medical practitioner would also require a consideration of cl 6 of Schedule 1 to the Act.

43. Looked at from another perspective, the respondent did everything reasonably possible within his power to avail himself of the statutory safeguard, and it was only by reason of a contravention of the regulations that the safeguard was frustrated. That circumstance provides the basis, if one is required (AS [43]), to distinguish the present case from the decision in *Police v Hall*. As Bleby J there emphasised, the defendant chose to attend the Royal Adelaide Hospital to obtain a blood sample where he encountered significant delays but in circumstances where there are a number of public and private 24-hour outpatient facilities and many 24-hour medical clinics he could have attended[63].

10 Contention that the "*unfairness*" is dictated and authorised by the legislation

44. Finally, the respondent submits that it is no answer, in the present case, to say that the unfairness, which inheres in the inability to contest guilt by reference to the inherent strength or fragility of the breath test analysis, is in effect mandated by the legislation.

44.1. The public interest in the administration of justice requires that the Court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike, a consideration which applies with greater force in the criminal law[64].

44.2. It is a fundamental prescript of the criminal law in Australia that no person shall be convicted of a crime except after a fair trial according to law[65].

20 44.3. The appellant did not submit below[66] that the residual unfairness discretion has somehow been abrogated or excluded in respect of breath analysis evidence. A clear manifestation of intention would be required in order to reach that conclusion[67], even if it is constitutionally permissible. (It appears to be common ground between the parties that it is not[68].)

---

63 (2006) 95 SASR 482 at [97]. See also at [97] ("*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*").

64 *Williams v Spautz* (1992) 174 CLR 509 at 520 (Mason CJ, Dawson, Toohey and McHugh JJ), referred to in *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [8] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

65 *Dietrich v The Queen* (1992) 177 CLR 292 at 299 (Mason CJ and McHugh J), at 326 (Deane J), at 362 (Gaudron J).

66 The appellant below disavowed a submission of implied abrogation of the discretion by the Act: Transcript of argument, p 38-39, 44.

67 *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J), referred to in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [42] (French CJ).

68 The appellant has cited, without qualification, the observations of Gageler J in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [177] (see also [71] (French CJ, referring to the plurality in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at [39]), [156] (Hayne, Crennan, Kiefel and Bell JJ) and Gaudron J in *Dietrich v The Queen* (1992) 177 CLR 292

44.4. There is no such manifestation of intention here[69]. Arguably, the inclusion of s 47K(8) is explicable on the footing that the legislature has assumed that, generally speaking, the trial court's powers to exclude evidence or stay proceedings in order to avoid unfairness are otherwise preserved.

44.5. It may readily be accepted that a trial is not unfair because, in the view of the Court, the substantive nature of the offence is unfair. The right to a fair trial is not one that impinges on the substantive law governing the matter in issue[70].

44.6. The distinction between the substantive and procedural law may not always involve a bright line but it is submitted that, in the present case, the dissenting member of the Full Court (Kourakis CJ) was wrong to assert that, by reading the offence provision together with s 47K[71]:

> the offence, in substance, is not an offence of driving with a prescribed concentration of alcohol, but is one of driving with a period of two hours before a breath analysis, conducted in accordance with s 47K of the RTA, produces a reading of more than the prescribed concentration of alcohol, but with a defence which can be raised by evidence of an analysis of a blood sample taken in accordance with reg 11. The failure to raise the defence does not impinge on the fairness of the determination of the primary prosecution case.

That approach ignores that the s 47B offence can be proved by other means apart from by relying upon the breath analysis and hence the substantive offence cannot be the one his Honour describes. It is also artificial in the extreme, and inconsistent with the Act's own description of s 47K ("*Evidence*"). Parliament has not set out to punish the class of persons identified by the Chief Justice. It has set out to prohibit and punish the driving of a motor vehicle with a prescribed blood alcohol concentration[72]. The offence cannot be recharacterised and then insulated from the effect of the Court's obligation to ensure a fair trial of the relevant offence.

---

at 362-363. In *Condon*, Gageler J also made reference (at [185]) to the fact that in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, two members of the majority specifically held that a function cannot be conferred on a court compatibly with Ch III if that function is "*antithe[tical]*" or "*repugnant*" to the "*judicial process*", explained in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 to require "*that the parties be given an opportunity to present their evidence and to challenge the evidence led against them*" (at [56]). And at [188], Gageler J referred to the requirement of procedural fairness that a person whose right or legally protected interest may finally be altered or determined by a court order has a fair opportunity to respond to evidence on which that order might be based.

69 *Police v Hall* (2006) 95 SASR 482 at [88] (Nyland J), [166] (Gray J) (referring to observations in *Director of Public Prosecutions v Moore* (2003) 6 VR 430 at [27] (Batt J)).

70 *Dietrich v The Queen* (1992) 177 CLR 292 at 362-363 (Gaudron J).

71 FC [55] (Kourakis CJ) [AB97-98].

72 See, eg, s 47K(1ab), which refers back to "*the conduct referred to in paragraph (a)*" (namely, driving a vehicle, or attempting to put a vehicle in motion).

44.7. For the same reasons, care is required in relation to the proposition of Doyle CJ in *Police v Hall*[73] that:

> [o]btaining a conviction on the basis of the result of the breath analysis and the statutory presumption under [the predecessor provision to s 47K] of the RTA cannot be said to make the trial unfair. Parliament provides for proof of guilt in this matter.

If that proposition was intended[74] to convey that any result which might follow upon the literal application of the provisions cannot for that reason result in unfairness in a way which requires the Court's intervention, it is too broad, for reasons explained above.

45. In the end, it is not necessary to resolve an abstract proposition about the interplay between s 47K and the duty to ensure a fair trial because the present case involves more than that – it involves a finding of relevant unfairness where there has been a breakdown in or failure of the statutory safeguard contemplated by the legislature.

46. The case cannot be resolved by asserting that a conviction was contemplated by the legislature in the present case; that is a question-begging assertion which assumes that the legislature contemplated that there would be a contravention of an apparently mandatory regulation and that a court would not in those circumstances exercise its inherent powers.

47. Moreover, the exercise of discretion was not to be overturned by pointing to what might be thought to be less meritorious cases for the exercise of the discretion and asserting that there are no "*statutory or common law measuring sticks*" by which to distinguish them[75]. That there might not be a bright line between the cases identified by Kourakis CJ and the present case does not mean that they would not be decided differently, nor does it deny that the present case may have involved relevant unfairness[76].

---

73 (2006) 95 SASR 482 at [81].

74 It is respectfully submitted that this was not the intended meaning of Doyle CJ. In *Police v Hall* (2006) 95 SASR 482, Doyle CJ (at [35]) expressly declined to revisit (and confine) *R v Lobban* (2000) 77 SASR 24. In *Lobban*, Doyle CJ (at [2]) (with whom Bleby and Martin JJ relevantly agreed), indicated that his approach to the discretion in the earlier decision of *Police v Jervis* (1998) 70 SASR 429 was too narrow. Doyle CJ specifically agreed with Martin J's reasons (at [1]), and Martin J (at [58]) expressed reservations about the reasoning in *Jervis*. Accordingly, the observations of Kourakis CJ in this case (FC [51] [AB97]), relied upon by the appellant (AS [48]) concerning *Jervis* must be understood in that light.

75 FC [51]-[53] (Kourakis CJ) [AB96-96].

76 The existence of twilight does not invalidate the distinction between night and day: A M Gleeson AC, "Judicial Legitimacy" (2000) 20 *Australian Bar Review* 4 at 11.

Conclusion

48. Accordingly, the suggested limitations upon the scope of the unfairness discretion should be rejected.

49. ~~If they were accepted, the consequence would be that, even if the uncontroverted evidence in the present case was that a defendant consumed alcohol only between stopping his vehicle and undertaking the breath analysis test[77], the Court would be required to convict if the breath test indicated a prescribed concentration. That (extreme) example tends to point up that the duty to ensure a fair trial of a substantive offence cannot be hedged in by limitations~~.

10 50. Once the suggested limitations on the scope of the unfairness discretion are rejected, it should be recognised that the discretion did not miscarry in the present case.

51. There was relevant unfairness, and, if it be necessary, a perceptible risk of a miscarriage of justice. Through no fault of his own, and as a result of non-compliance with a provision of the statutory scheme, not only was the respondent denied an opportunity to obtain (likely more accurate) evidence which may (or, it is accepted, may not) have positively assisted his defence of the charge, but critically he was deprived of the capacity to make any submission about whether the evidence tendered by the prosecution could be relied on as proving, beyond reasonable doubt, the offence with which he was charged.

20 52. For the reasons given by the majority in the Full Court, there was no relevant error in excluding the evidence, and the appeal to this Court should be dismissed with costs.

**PART VIII ESTIMATE OF THE NUMBER OF HOURS FOR ORAL ARGUMENT**

53. The respondent estimates that oral submissions on his behalf will require one and a half hours.

Dated: 23rd April 2015


| | M E Shaw QC | B J Doyle |
|---|---|---|
| Phone: | 08 8232 3146 | 08 8212 6022 |
| Fax: | 08 8232 3145 | 08 8231 3640 |
| 30 Email: | mshaw@senet.com.au | bdoyle@hansonchambers.com.au |

Counsel for the respondent


---

77 ~~For example, where the police receive a report that a person has been driving while intoxicated and require the breath test to be undertaken some time after the person has ceased driving, or where there has been consumption of alcohol following an accident: see, eg, *R v Parkin* [2011] SADC 80.~~

## ANNEXURE: RELEVANT LEGISLATIVE PROVISIONS

### Extracts from Part 3, Division 5 of the Act

### 47A—Interpretation

(1) In this Act—

***category 1 offence*** means an offence against section 47B(1) involving a concentration of alcohol of less than .08 grams in 100 millilitres of blood;

***category 2 offence*** means an offence against section 47B(1) involving a concentration of alcohol of less than .15 grams, but not less than .08 grams, in 100 millilitres of blood;

***category 3 offence*** means an offence against section 47B(1) involving a concentration of alcohol of .15 grams or more in 100 millilitres of blood;

### 47E—Police may require alcotest or breath analysis

(1) Subject to this Act, if a police officer (whether or not performing duties at or in connection with a driver testing station) believes on reasonable grounds that a person—

(a) is driving, or has driven, a motor vehicle; or

(b) is attempting, or has attempted, to put a motor vehicle in motion; or

(c) is acting, or has acted, as a qualified supervising driver for the holder of a permit or licence,

the police officer may require the person to submit to an alcotest or a breath analysis, or both.

(2) A police officer may direct a person driving a motor vehicle to stop the vehicle and may give other reasonable directions for the purpose of making a requirement under this section that a person submit to an alcotest or a breath analysis.

(2a) A person must forthwith comply with a direction under subsection (2).

Maximum penalty: $2 900.

### Extracts from Schedule 1—Oral fluid and blood sample processes

### 6—Provisions relating to medical practitioners etc

(1) No proceedings lie against a medical practitioner or registered nurse in respect of anything done in good faith and in compliance, or purported compliance, with the provisions of this Act.

(2) A medical practitioner must not take a sample of a person's blood under this Act if, in his or her opinion, it would be injurious to the medical condition of the person to do so.

(3) A medical practitioner is not obliged to take a sample of a person's blood under this Act if the person objects to the taking of the sample of blood and persists in that objection after the medical practitioner has informed the person that, unless the objection is made on genuine medical grounds, it may constitute an offence against this Act.

(4) A medical practitioner who fails, without reasonable excuse, to comply with a provision of, or to perform any duty arising under, section 47I is guilty of an offence.

(5) No proceedings can be commenced against a medical practitioner for an offence against subclause (4) unless those proceedings have been authorised by the Attorney-General. ...