

Enforcing a cone of silence: Difficulties with using criminal law to limit mobile phone use in vehicles in an environment of technological change

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The offence of using a mobile phone while driving is the subject of public safety campaigns and requires high levels of police enforcement. It affects a large proportion of the population, yet as a summary offence it has rarely been considered by the higher courts. Despite being procedurally summary in nature, it is very complex, and there are significant questions over the correct interpretation of key concepts. Largely, this is due to the difficulty in defining exactly what form of behaviour is prohibited in an environment where technology is rapidly changing. This article provides a detailed analysis of the elements of the offence, highlighting areas of uncertainty and alternative interpretations. It provides a critique of the reliance on technological forms as a way of defining the prohibited behaviour, showing how amendments to the offence have struggled to keep pace with changing technology and driver behaviour.

TRAFFIC OFFENCES AND LEGAL COMPLEXITY

Traffic offences are summary in nature and rarely the subject of consideration by higher courts. McBarnet has described an ideology of a lack of “legal relevance” that is often applied to summary offences – the notion that the lesser penalties applicable and quicker court processes are based on a belief that such offences “do not involve much law or require much legal expertise or advocacy”.¹ In fact, the potential complexity of these decisions can be as high, or higher, than more serious offences.² McBarnet noted:

The construction of a case as straightforward or as involving points of law is very much the product of the advocate’s trade. Case law, after all, develops exactly because advocates present cases which draw subtle distinctions and shades of meaning; in short, complicate the simple, in arguing for the treatment of the case in hand as different from previous cases.

What is more, case law and the development of complicated and difficult legal issues in specific types of offence and case, is predicated largely on ... [appeals] on points of law, and both the nature of the appeal procedure in the lower courts and the lack of lawyers to formulate an appeal on a point of law, means that there is little opportunity to develop difficult and complex case law on minor offences. It is not in the nature of drunkenness, breach of the peace or petty theft to be less susceptible than fraud, burglary or murder to complex legal argument; it is rather in the nature of the procedure by which they are tried.³

¹ McBarnet D, “Magistrates’ Courts and the Ideology of Justice” (1981) *British Journal of Law and Society* 181 at 192. These ideas are explored in greater depth in McBarnet D, *Conviction* (1981).

² For a similar analysis in relation to offensive language and behaviour offences, see Quilter J and McNamara L, “Time to Define the ‘Cornerstone of Public Order Legislation’: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)” (2013) 36 *University of New South Wales Law Journal* 534. The broader issues this raises are discussed in Brown D et al, *Criminal Laws Materials and Commentary on Criminal Law and Process in NSW* (5th ed, Federation Press, 2011) pp 142ff.

³ McBarnet, n 1 at 192. McBarnet’s comments relate to United Kingdom magistrates courts in the late 1970s, but the underlying point remains relevant.

The offences relating to use of mobile phones whilst driving provide a good example of this conundrum. The offences contain complex layers of definition, and have been the subject of constant amendment since the 1990s. They are widely enforced and their enforcement consumes a significant of police time and money.⁴ Yet there are many elements of the offences which remain unclear, and inappropriately over-inclusive. Busy practitioners are unlikely to have the time, nor their clients the resources, to critically examine all the complexities of the offence. This article therefore provides an in-depth analysis of the offence to the level that would be expected of more serious offences. The aim is to demonstrate McBarnet's point that complexity resides in all law, but it is only exposed when lawyers require courts to engage with the legal issues.

Justifying the offence and its scope

One fundamental issue at the heart of the mobile phone offences is the underlying justification for prohibiting a form of conduct that is entirely lawful in other contexts. That justification is clearly based on safety issues.⁵ Driver distraction is a significant cause of road accidents, with studies indicating it may be the basis of over 20% of car and 70% of truck crashes.⁶ One of these potential distractions is the use of mobile phones while driving. The potential distractions are not limited to engaging in phone conversations, but also extend to forms of text-based interaction, and distraction when viewing audio-visual content. However, there are many ways in which a driver can be distracted, which do not all cause the same level of distraction. While there is clear evidence that use of technology while driving is distracting, the level of distraction does not appear to be significantly greater than some other distractions, such as listening to music⁷ and talking to passengers;⁸ and significantly less than others, such as looking for items, applying make-up⁹ and interacting with children.¹⁰ Further, studies have suggested that drivers engaging in phone conversations intuitively compensate for the higher risks associated by driving more conservatively.¹¹

Nevertheless, the use of phone-based technology has been specifically prohibited in the *Australian Road Rules* since 1999. This raises the question of whether singling out the use of mobile phones for criminal prohibition, and not other driver behaviour, is justified. That question that is considered elsewhere.¹² In this article, the more pragmatic question of appropriate definition is considered. In an environment where technology is rapidly

⁴ Steel A, "Criminalisation and Technology: What's the Harm of Using Mobile Phones While Driving?" in Loughnan A and Crofts T (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, forthcoming, 2015).

⁵ See, for example, *DPP (NSW) v Chresta* (2005) 62 NSWLR 604; 152 A Crim R 379; National Transport Commission, *Australian Road Rules 8th Amendment Package*, Draft Discussion Paper (November 2008) p 31.

⁶ Regan M et al, *Submission to the Joint Standing Committee on Road Safety (Staysafe) Inquiry into Driver and Road User Distraction* (18 May 2012), <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/0522FEC17F74DBF4CA257A0E0020143E>.

⁷ Hughes GM, Rudin-Brown CM and Young KL, "A Simulator Study of the Effects of Singing on Driving Performance" (2013) 50 *Accident Analysis & Prevention* 787.

⁸ Charlton SG, "Driving While Conversing: Cell Phones that Distract and Passengers Who React" (2009) 41 *Accident Analysis & Prevention* 160. However, drivers are more able to modulate the cognitive demands of conversations with passengers and thus avoid risk.

⁹ Klauer S, Dingus T, Neale V, Sudweeks J and Ramsey D, *The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data*, Paper No HS 810-594, National Highway Traffic Safety Administration (2006).

¹⁰ Koppel S et al, "Are Child Occupants a Significant Source of Driving Distraction?" (2011) 43 *Accident Analysis & Prevention* 1236.

¹¹ Shutko J et al, *Driver Workload Effects of Cell Phone, Music Player, and Text Messaging Tasks with the Ford SYNC Voice Interface versus Handheld Visual-Manual Interfaces*, SAE Technical Paper 2009-01-0786 (20 April 2009), <http://papers.sae.org/2009-01-0786/>; Hanowski R, Olson RL, Hickman JS and Bocanegra J, "Driver Distraction in Commercial Motor Vehicle Operations" in Regan MA, Lee JD and Victor T (eds), *Driver Distraction and Inattention: Advances in Research and Countermeasures* (Ashgate, 2012) p 141.

¹² Steel, n 4.

changing, is Parliament able to properly define the conduct it wishes to prohibit, and is the way in which the offence has been defined appropriate?

A criminal offence should be sufficiently precisely worded to cover only the conduct intended to be prohibited and not other conduct.

Lord Williams of Mostyn, then United Kingdom Attorney-General, described this as a requirement that offences should be “tightly drawn and legally sound”.¹³ Offences should also be clear enough to allow predictability – that is, so the public can determine relatively easily whether any particular action will fall within or outside of the prohibition. In perhaps the classic statement of this principle of legality, Oliver Wendell Holmes Jr J in *McBoyle v US* stated:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.¹⁴

This is particularly important for offences that criminalise in certain circumstances otherwise lawful behaviour, and where the restriction on behaviour affects widespread sections of the community.

As this article demonstrates, the mobile phones offences fail to comply with these requirements. Due largely to the rate of technological change in mobile phones, the offences are both over and under-inclusive and difficult to understand. Furthermore, it is questionable whether they properly address the underlying issues justifying regulation.

The offence as introduced

The prohibition on mobile phone use is contained in the *Australian Road Rules*, a uniform set of traffic offences determined by the National Transport Commission and incorporated into the law of each State and Territory jurisdiction by way of regulation.¹⁵ Courts appear to assume the Road Rules create strict liability offences,¹⁶ and this is made explicit in New South Wales and the Australian Capital Territory.¹⁷ The national nature of the offence also has the effect that decisions of courts across Australian jurisdictions are more likely to be seen as persuasive. In this article, the wording of the New South Wales offence will be examined and interpreted as an offence of strict liability, and decisions from all Australian jurisdictions considered.

A first national version of the offence came into effect in 1999. There have been significant amendments to it over time, and at times individual jurisdictions have preferred alternate wording. The original 1999 *Australian Road Rules* contained the following offence:

¹³ House of Lords, *Parliamentary Debates*, Vol 602, WA 57 (18 June 1999).

¹⁴ *McBoyle v US* 283 US 25 (1931) at 27.

¹⁵ *Road Rules 2008* (NSW), r 300(1); *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld), r 300(1); *Australian Road Rules 1999* (SA), r 300(1); *Road Rules 2009* (Tas), r 300(1); *Road Transport (Safety and Traffic Management) Regulation 2000* (ACT), s 6B, r 300; *Traffic Regulations 1999* (NT), Sch 3, cl 300(1); *Road Safety Road Rules 2009* (Vic), r 300(1); *Road Traffic Code 2000* (WA), s 265(2).

¹⁶ See, for example, *Agar v Dolheguy* (2010) 246 FLR 179; *Draoui v Police* [2010] SASC 94.

¹⁷ *Road Rules 2008* (NSW), r 10-1; *Road Transport (Safety And Traffic Management) Regulation 2000* (ACT), r 4B. Interestingly, in both jurisdictions, the regulations also explicitly incorporate Ch 2 of the Commonwealth *Criminal Code* into the Rules. This appears to mean that, in those jurisdictions, the Rules are to be interpreted in the same way as the Code. The result of the incorporation of Ch 2 of the Code would appear to be that the Road Rules are not common law offences and instead are to be interpreted in accordance with the jurisprudence on the Code. This means the offences do not have actus reus and mens rea but instead physical and fault elements. Furthermore, the incorporation of all of Ch 2 of the Code permits the conviction of corporations for violations of the Road Rules. New South Wales has also enacted a general defence of accident or reasonable effort (r 10-1(3)).

300 Use of hand-held mobile phones

(1) The driver of a vehicle (except an emergency vehicle or police vehicle) must not use a hand-held mobile phone while the vehicle is moving, or is stationary but not parked, unless the driver is exempt from this rule under another law of this jurisdiction.

(2) In this rule:

mobile phone does not include a CB radio or any other two-way radio.¹⁸

Under this offence, exceptions aside, the key physical elements are the definitions of “driver”, “vehicle”, “use”, “hand-held mobile phone” and “is moving, or is stationary but not parked”. These elements will be examined in turn, together with ensuing amendments and further definitions.

Driver of a vehicle

The prohibited activity must be engaged in by a driver of a vehicle. “Vehicle” is a defined term in the National Road Rules:

15 What is a vehicle

A vehicle includes:

- (a) a motor vehicle, trailer and tram, and
- (b) a bicycle, and
- (c) an animal-drawn vehicle, and an animal that is being ridden or drawing a vehicle, and
- (d) a combination, and
- (e) a motorised wheelchair that can travel at over 10 kilometres per hour (on level ground),

but does not include another kind of wheelchair, a train, or a wheeled recreational device or wheeled toy.

References to “drivers” are defined to include riders (r 19). The definition of “vehicle” has not changed over the history of the Road Rules. It is a compendious definition that probably goes beyond common understandings of a vehicle and is over-inclusive for a mobile phone offence.¹⁹ The problem arises because the Road Rules create only two categories of road users: those in vehicles and those who are pedestrians. As the definition of vehicle notes, a vehicle does not include a “wheeled recreational device or a wheeled toy”. The result is that there is both an over-extension of the offence to cover bicycle and horse riders, and a resulting unprincipled exception for anyone on skateboards, unicycles, rollerblades etc. A uniform approach to all types of recreational vehicles is required because of the extended concept of a road (discussed below).

Considering the justification of the offence on safety grounds, there may well be significant differences in risk between a person attempting to use a mobile phone whilst in a car or riding a bicycle as opposed to a tractor or in a motorised wheelchair that is

¹⁸ National Transport Commission, *Australian Road Rules* (19 October 1999) incorporated by cl 6 of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999* (NSW).

¹⁹ In *McBoyle v US* 283 US 25 (1931) at 27, the United States Supreme Court refused to extend the meaning of “motor vehicle” to include an aeroplane. Holmes J held: “When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely the picture of vehicles moving on land.”

travelling slowly (though capable of speeds over 10 km). While clearly a motor vehicle driver is responsible for the direction of the vehicle, and momentary inattention can be a critical cause of crashes; riding a horse may be significantly different. The horse as a sentient being is arguably carrying the majority of the cognitive load of reacting to unexpected risks, and so a rider might safely use a phone in many circumstances. There does not appear to be any clear reason why it should be illegal to use mobile phones while riding a bicycle, but perfectly legal to do so on a skateboard or while rollerblading.²⁰ Whether the use of a phone is more dangerous than drinking from a water bottle while riding could be questioned. The broad definition is thus blind to issues of speed and control between possible vehicles.

Lest it be thought that law enforcement would not be likely to enforce the full breadth of the offence, there have been reported cases of bicyclists and drivers of horse drawn carriages being charged. One case involving a bicyclist elicited statements supportive of the police action from the Queensland Premier.²¹

It is also problematic that the definition of vehicles extends to forms of transport that do not need to be licensed for road use. The application of demerit points to a driver's licence is a primary form of sanction for breach of the offence.²² Application of demerit points would not in any way inhibit the further use of a bicycle or horse and would be an inappropriately tangential penalty if applied to the offender's motor vehicle driver's licence.

Where the driving can occur is also broadly defined. Under r 11, the offence applies to drivers on both roads and road-related areas, both of which are defined. Roads are "areas open to or used by the public and developed for, or has as one of its main uses, the driving or riding of motor vehicles" (r 12(1)). The offence thus extends to roads across private property when the public are permitted to use the road. The definition of "road related area" in r 13 extends the prohibited use of mobile phones to drivers on footpaths, nature strips, and cycle and animal areas or any area that is "open to or used by the public for driving, riding or parking vehicles". Thus, answering a phone whilst the car driver was in a McDonald's car park was the basis of the charge in *Draoui v Police*.²³ In essence, anywhere publicly accessible by vehicles or ridden animals is covered by the Rules. The use of a mobile phone whilst riding a horse or a bike in a park is thus prohibited and there are recent Queensland media reports of police warning cyclists on cycle paths.²⁴

This issue of over-inclusivity seems to be because the Rules reasonably seek to allow police to control the ways in which motor vehicles are used in areas adjacent to roads such as car parks. However, because the definition of "vehicle" has also been extended to include bicycles and horses, and both are used in areas remote from roads, the prohibited mobile phone use extends into a range of recreational areas. It appears to be an offence to use a mobile phone on a bicycle inside a velodrome or at BMX track, or on a horse in a riding paddock or national park trail.

Moving, or stationary and not parked

²⁰ While bicycles can achieve higher speeds, it would be unlikely that a rider would attempt to use a phone at high speed. As rollerblading and skateboarding are largely hands free, the temptation to use the phone might be higher.

²¹ See the discussion of these charges in Jessop G, "Who's on the Line? Policing and Enforcing Laws Relating to Mobile Phone Use While Driving" (2008) 36 *International Journal of Law, Crime and Justice* 135 at 138.

²² See, for example, *Road Transport (Driver Licensing) Regulation 2008* (NSW), Sch 1.

²³ *Draoui v Police* (SA) [2010] SASC 94.

²⁴ Mackander M, "Fine Time If Cyclists Caught on the Phone", *Sunshine Coast Daily* (4 January 2014), <http://www.sunshinecoastdaily.com.au/news/fine-time-if-cyclists-caught-on-the-phone/2130675/>.

It is clear that the main vice to which the offence is aimed concerns the intentional use of phones while simultaneously driving a car. However, instead of a positive requirement of driving – and consequently an implied requirement of intention on the part of the accused, the offence refers to two physical states that are independent of the accused's intentions. The first, "moving", would require some proof of movement of the vehicle from one point to another, but could be a slight as a roll of a vehicle's tyre. Any movement irrespective of other factors would be sufficient. This is problematic for any person on a horse as it is unlikely the horse would be entirely still.

Interpreting the meaning of the alternate requirement of "stationary but not parked" requires some complex logic. First, the prosecution must prove the vehicle was stationary. Without more this has the effect of disproving the offence.²⁵ So the prosecution must continue to the next step of proving a form of "stationary" that falls outside the meaning of "parked". As the burden of proof should be on the prosecution, this would appear to require that prosecution is required either to establish an additional action or a circumstance inconsistent with the vehicle being parked.²⁶

"Park" is partly defined in the Dictionary to the Road Rules as:

park, in Part 12 and for a driver, includes stop and allow the driver's vehicle to stay (whether or not the driver leaves the vehicle).

This definition is particularly unhelpful for the mobile phone offences, and seems intended to assist law enforcement establish the elements of offences that prohibit parking in particular places. As such, it sets out a *de minimus* requirement of non-movement. But the opposite is required for the mobile phone offences. The offence already requires proof of non-movement; the issue is instead what more is required.

Thus, a car that is stationary at traffic lights is stopped. If the driver places the car into neutral, does that mean that the driver has allowed the vehicle to stay and is therefore parked? This is intuitively unlikely. The partial definition thus requires the courts to determine the extent of the ambit of park.

Case law to date has only involved two stationary factual scenarios – stopped at a red light: "It is clear that a car at a red light is stationary but is not parked";²⁷ and "stationary in a line of traffic".²⁸ In neither situation has the court elaborated on such findings. Both suggest that to be parked a vehicle must not be in the midst of traffic lanes, and that the relationship of the stationary vehicle to the surrounding environment is a factor in determining if the car is parked. A driver, who is in a car that is stationary in a driveway, but has the engine running to warm the engine on a cold morning, might be seen to be still parked.

The definition of "park" specifically allows the driver to remain in the vehicle, and so the placing of a car into neutral, turning off the engine and removing the key are all possible indicia of "park". While turning off the engine and the removal of keys are likely to be clear indicators that the vehicle *is* parked, failure to do so may not prove a vehicle is *not* parked. Further clarity over what amounts to parking is necessary because well-intentioned drivers might pull over to the side of the road to make a telephone call, but keep their engine running to power their air-conditioning. Victoria has recognised this difficulty and in 2013 amended its offence to include:

²⁵ That is, the prosecution has proved that the vehicle is not "moving".

²⁶ An alternative would be to establish that the elements of "parked" were not satisfied. This might be more complex because "park" is not comprehensively defined.

²⁷ *Burns v Police* (2007) 171 A Crim R 503.

²⁸ *Andersen v Winston* [2011] QDC 14.

- (5) For the purpose of this rule a vehicle may be parked even though—
- (a) the key to the vehicle is located in the vehicle's ignition lock; or
 - (b) the engine of the vehicle is running.²⁹

But this merely removes two indicia that might have suggested a vehicle was not being parked. It fails to provide guidance as to what parking actually means in this offence. It would seem that, absent further legislative definition, the underlying intention of the driver would be necessary to determine if a vehicle is “parked”. Parking a vehicle implies an intention to put a vehicle in a set place for a period of time beyond merely stopping the car. How long that intended time would need to be might not be significant. Rule 168 states:

168 No parking signs

- (1) The driver of a vehicle must not stop on a length of road or in an area to which a *no parking sign* applies, unless the driver:
- (a) is dropping off, or picking up, passengers or goods, and
 - (b) does not leave the vehicle unattended, and
 - (c) completes the dropping off, or picking up, of the passengers or goods, and drives on, as soon as possible and, in any case, within the required time after stopping.

...

- (3) In this rule:

required time means:

- (a) if information on or with the sign indicates a time – the indicated time, or
- (b) if there is no indicated time – 2 minutes.

If this is applied to the mobile phone offences, then a vehicle is parked if the vehicle is stationary outside of traffic lanes and the driver intends it to remain there for more than two minutes. Such an interpretation would ensure consistency between the no parking and mobile phone offences.

However, the offence is one of strict liability. Consequently, the question arises whether the intentions of the driver can be taken into account in determining if the vehicle is parked. In principle, this should be possible. The driver's intention is, in this situation, not a fault element, but instead a constituent part of the characterisation of the circumstance in which the use of the phone occurs. Mental elements can form a part of physical elements, such as the victim's state of mind in determining lack of consent in sexual assault and theft offences. But courts have been resistant to requiring proof of an accused's awareness of circumstances as part of actus reus elements of common law offences³⁰ and so it is more likely that the courts would look to external objective factors. Legislative clarity is thus necessary. If Parliament felt that more was required than intention to stop beyond two minutes – such as switching off engines and removing keys, that would be more appropriately done via a special definition or alternate wording.

²⁹ *Road Safety Road Rules Amendment (Mobile Phones and other Devices) Rules 2013* (Vic), reg 5.

³⁰ See, for example, the discussion of the interpretation of dishonesty in Steel A, “Describing Dishonest Means: The Implications of Seeing Dishonesty as a Course of Conduct or Mental Element and the Parallels with Indecency” (2010) 31 *Adelaide Law Review* 7.

As mentioned above, the definition of vehicle is also very widely cast. This causes further difficulties with the notion of parking. It is not entirely clear whether it is possible to “park” a horse or a motorised wheelchair. It would seem unlikely that a bicycle or horse would be “parked” unless the rider had dismounted, but the definition of “park” specifically permits the rider to not leave the vehicle. There is no engine to turn off in either instance and so, absent dismounting, parking might be close to indistinguishable from being merely stationary other than based on the position of the vehicle in relation to the road. Again, well-intentioned cyclists and horse riders are unable to ascertain what is necessary to comply with the law. Indeed for cyclists, it is likely to be far safer to stay astride the bike when speaking on the phone rather than trying to find a place to safely leave the bike. Queensland police appear to see this differently.³¹ Oddly, the New South Wales Parliament’s Staysafe Committee seemed unaware of this extension to cyclists and recently pondered whether such an extension was warranted.³²

In summary, the definitions of both “vehicle” and “park” create unintended complexities and uncertainty because both rely on general definitions intended for other purposes. The legislation should be amended to specify with clarity how these general definitions should be applied.

Use

What amounts to use of a mobile phone is, by contrast, an issue that has been the subject of both judicial reasoning and repeated legislative amendment. It illustrates the difficulty of prohibiting behaviour based on technological function. At the time the offences were first drafted, the only real use of mobile phones was to make audio phone calls via telephone carrier services. Since then the number of functions of mobile phones has exploded and significant convergence has occurred between phones and other electronic devices. The issue of whether the use of non-telephonic functions of a phone amounts to use of the phone has been a recurring issue.

In *DPP v Chresta*,³³ the defendant driver gave evidence that she did not intend to use her phone in any real sense. She claimed that to avoid the phone waking her baby she had picked up the phone to switch it off and then handed it to a passenger. On appeal, Greg James J discussed the breadth of possible uses of a phone and whether safety considerations could inform the scope of the term in the offence. He held that “use” in this offence was used in a broad way to include any operation of the phone – including merely turning it on or off:

The distraction, to which the safety requirement said to be behind the rule might apply, would occur in the receiving and making of communications but, of course, that is not the only way hand-held mobile phones may be used. They may be used nowadays, not only as message-sending devices, but also as cameras for the purpose of photography, music playing devices, calendars or calculators, they may have all manner of functions, but they are still popularly described, even when those other functions or uses are being resorted to, as hand-held mobile phones ... I accept that the purpose of the legislation is, at least, to proscribe the operation of the communication function or the device to give the potential for such function and to proscribe that use of the device as involves the removal of

³¹ *Pushbike Phone Penalty* <<http://au.news.yahoo.com/today-tonight/lifestyle/article/-/18530838/pushbike-phone-penalty/>>.

³² StaySafe Committee, *Report On Driver And Road User Distraction*, Report No 2/55 (March 2013) at [4.18].

³³ *DPP v Chresta* (2005) 62 NSWLR 604.

a driver's proper attention from the road and the hand or hands from the safe operation of the vehicle.³⁴

Greg James J accepted that use did not include using the phone as a blunt object, but held any "operation" of the phone was sufficient.

the ambit is sufficiently wide to include the use of the hand held phone by turning it on or off or operating it, including by sending text, telephone or other messages or receiving them through it, or operating from it any of its functions to communicate as might serve to distract the driver from having both hands and full attention engaged upon the task of driving.³⁵

In *Burns v Police*, the accused admitted to depressing a button on a mobile phone sitting in his car's centre console in order to activate a Bluetooth wireless device. Gray J held that despite this minimal physical contact with the phone this was a "use" of the phone, noting:

There are many ordinary and well-known ways in which one may "use" a "hand-held mobile phone". These include saving a phone number in the phone's electronic address book, retrieving a phone number from the phone's electronic address book, dialling a phone number, talking on the phone, answering an incoming phone call, writing and sending an SMS (Short Message Service), reading a received SMS, writing and sending an e-mail, reading a received e-mail, playing a video game, listening to music, reading news articles from the internet or subscription based services, browsing the internet and downloading content (eg videos, music, games), taking a photo and browsing the user's photo library, and recording a video and browsing the user's video library.

It is possible that a number of these activities were not envisaged by the legislature at the time that it enacted the Australian Road Rules, but this does not mean that "use" should not encompass these broader activities – what is important is the fact that the offence that the legislature enacted proscribes the "use" of a hand-held mobile phone.

As the number of uses of mobile phones has expanded over the years, so has the number of activities that Rule 300 prohibits. ... Rule 300 is sufficiently wide in its natural meaning to apply to the present case. Moreover, there is no reason to interpret Rule 300 in any other way. This interpretation accords with the purpose behind Rule 300 of ensuring that the safety of motorists and pedestrians is not adversely affected by motorists using hand-held mobile phones. The appellant diverted his attention from the task of driving in order to answer the incoming call and then speak on the phone. It is clear that the legislature intended to prohibit any ordinary use of a hand-held mobile phone. ... But there is no reason to limit "use" so that it does not include depressing a button on the phone to answer an incoming call.³⁶

Echoing the statements in *Chresta*, Gray J justified this approach on the basis that:

The overriding purpose of Rule 300 is to prevent drivers from causing a danger to themselves and to other motorists and pedestrians as a result of

³⁴ *DPP v Chresta* (2005) 62 NSWLR 604 at [14], [18].

³⁵ *DPP v Chresta* (2005) 62 NSWLR 604 at [20], [24].

³⁶ *DPP v Chresta* (2005) 62 NSWLR 604 at [12]-[27].

using a mobile phone. A driver can be distracted by a mobile phone in a number of ways. Use of a mobile phone can result in a driver diverting attention from the task of driving by looking at the mobile phone instead of the road ahead, and can also result in one or both of a driver's hands being unavailable for driving. Preventing distraction of the eye is an important purpose of Rule 300.³⁷

Neither of these decisions consider mobile phone distractions in the context of other distractions not prohibited, nor is there any recognition that many of the functions listed are perfectly legal if operated via other devices.

The expansive definition of "use" in *Chresta* was taken up by the National Transport Commission in its 2005 recommended amendments³⁸ to the Rules. These were adopted across jurisdictions from 2007-2009.³⁹ The following definition was added to Rule 300:

(2) In this rule:

...

use, in relation to a mobile phone, includes the following:

- (a) holding the phone to, or near, the ear (whether or not engaged in a phone call),
- (b) writing, sending or reading a text message on the phone,
- (c) turning the phone on or off,
- (d) operating any other function of the phone.

This definition clearly aims to adopt Greg James J's use of "operate" as a synonym for use: setting out forms of operation, and then in (2)(d) using "operating" as a catchall definition. This appears to have been an attempt to future-proof the offence. But this is at the expense of over-criminalisation of a range of relatively risk-free operations. In such circumstances one might have expected the courts to have recognised a *de minimis* principle would operate in enforcement of the offence.

The South Australian Supreme Court has not accepted such an approach. In *Savage v Police*,⁴⁰ the defendant picked up his analog mobile phone and placed it in his lap where he had glanced down at it to check the time which was permanently displayed on the phone screen. Although not stated in the appeal decision, this could only have amounted to "operating any other function of the phone". The appeal concerned whether such a breach was minimal enough to avoid the imposition of demerit points. Savage's counsel argued that the offence was atypical, and that he was using the phone in the same way as a watch or looking at the car radio to check the time. The road conditions were good and he had not glanced away from the road for more than two seconds.⁴¹

Nyland J disagreed:

³⁷ *DPP v Chresta* (2005) 62 NSWLR 604 at [12].

³⁸ As recommended in National Transport Commission, *Australian Road Rules Amendment Package 2005 Regulatory Impact Statement* (November 2005) (2005 Amendment Package) and approved in 2006. The rate of adoption is set out in National Transport Commission, *Review of the Australian Road Rules and Vehicle Standards Rules Draft Evaluation Report* (July 2013) p 26, <http://www.ntc.gov.au/Media/Reports/%28BCD73CCA-CFE1-2B69-3708-07BA12553001%29.pdf>.

³⁹ *Road Rules 2008* (NSW), r 300(2); *National Transport Commission (Model Amendments Regulations: Australian Road Rules – Package No 5 – General) Regulations 2009* (Cth). South Australia adopted the amendment in 2007: *Australian Road Rules Variation Rules 2007* (SA), reg 4; Queensland in 2009: *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld), s 300.

⁴⁰ *Savage v Police* (2011) 208 A Crim R 571.

⁴¹ *Savage v Police* (2011) 208 A Crim R 571 at [5].

In my opinion, this cannot be regarded as an atypical example of the offence. The offence created by Rule 300 is directed at the distraction that is created by use of a phone and the consequent danger to road users or pedestrians from a distracted driver. In modern times mobile phones have a multitude of functions, all of which have the potential for distraction and that is not limited to simply making a call or texting.⁴²

Statements such as these can have a serious impact on local court magistrates who might be otherwise inclined to not convict for minor infringements. In Nyland J's view, there are no minor infringements, and very little scope for judicial discretion.

The facts of *Savage* raise two further issues not discussed in the judgment, but which have both subsequently led to further amendment of "use". The first relates to whether merely moving a phone, without pushing a button is a "use". The legislative definition discussed above impliedly limits the scope of any operation to a form of interaction with the phone, because the only prohibited "holding" of the phone is in proximity to the ear. In *Chresta*, Greg James J had noted:

It was accepted that the simple use of the phone as, eg, a bludgeon to deal with some insect or pest, would not be within Rule 300, although, on one view of it, it might produce a situation equally if not more unsafe than a use to communicate.⁴³

As discussed below, it became clear that there were a number of ways of operating a phone that were dangerous, yet not hand-held, which led to further recommendations for legislative amendment in 2008,⁴⁴ enacted in 2012. But as part of that amendment the definition of "use" was again amended. It now reads:

300(4) ...

use, in relation to a mobile phone, includes any of the following actions by a driver:

- (a) holding the body of the phone in her or his hand (whether or not engaged in a phone call), except while in the process of giving the body of the phone to a passenger in the vehicle,
- (b) entering or placing, other than by the use of voice, anything into the phone, or sending or looking at anything that is in the phone,
- (c) turning the phone on or off,
- (d) operating any other function of the phone.

This definition now extends "use" significantly beyond its normal meaning and beyond the scope of operation to now include any passive holding of a phone. Strangely, it allows for the quite distracting activity of finding a ringing phone and passing it awkwardly to a passenger who could be in a back seat, yet does not permit the action of placing a phone into a hands-free cradle. Given the holding of a phone per se is not more dangerous than that of holding of any other object in a vehicle, the definition appears to be aimed at assisting law enforcement rather than describing principled limits based on cognitively distracting activities.

The second issue raised by the facts of *Savage* is the question of whether looking at a phone is an "operation" of the phone if the time is automatically displayed. If *Savage* had

⁴² *Savage v Police* (2011) 208 A Crim R 571 at [16].

⁴³ *Savage v Police* (2011) 208 A Crim R 571 at [15].

⁴⁴ National Transport Commission, Draft Discussion Paper, n 5.

glanced at the phone without picking it up would he have “used” the phone, and could he have been said to have “operated” it?

A similar conundrum appears to have presented itself to the National Transport Commission and its 2008 recommended changes, enacted in 2012, included a surprisingly worded exclusion in relation to use of a mobile phone, added to r 300:

- (3) For the purposes of this rule, a driver does not use a phone to receive a text message, video message, email or similar communication if:
 - (a) the communication is received automatically by the phone; and
 - (b) on and after receipt, the communication itself (rather than any indication that the communication has been received) does not become automatically visible on the screen of the phone.

There was no explanation given as to precisely what this exclusion is designed to address. It also appears to contradict Greg James J’s interpretation in *Chresta* of use as “operation”. That approach, which requires some manual interaction with the phone, logically means that no fully automatic function of a phone could amount to any operation of a phone. Contrary to Greg James J’s interpretation, the exclusion appears to address an extreme interpretation of use of a phone that implies that the mere fact that the phone is operating and connected to wireless services that push messages means that the driver is using the phone. While expressed as an exclusion, the wording appears to criminalise any driver who has a phone that automatically places messages on the screen – even if the driver has placed the phone in a part of the vehicle where it cannot be seen.⁴⁵

There are further complexities over what “the communication itself” might mean as opposed to “any indication that the communication has been received”. Many phones provide a summary of the message –such as the first three lines (or the whole message if it is less than that) as an automatic alert on the phone’s lock screen. Would a court accept such an alert to not be “the communication” because the communication, or part of it, is inside another function of the phone and that has to be accessed by unlocking the screen? It is arguable that a message on the screen “You have email” is opaque enough to not be the communication itself, but if the first three lines of the email are displayed does this move the display from an alert that an email has arrived to an excerpt of the communication itself, and if so, would such an excerpt be prohibited? Courts will be faced with a choice between seeing the communication as either the exact format in which it was sent⁴⁶ or the underlying message it provides.⁴⁷

The Rules are likely to come into community disrepute if drivers are required to constantly change the operational settings of their phone to disable alerts each time they drive. The Rules should be drafted so as to criminalise particular methods by which drivers interact with the devices – or particular forms of communication – and not the way in which devices are configured.

Hand-held mobile phone

Perhaps the most contentious issue has been around what constitutes a relevant mobile phone. One early issue was whether the phone itself needed to be held, or whether

⁴⁵ In light of the decision in *Savage*, this exclusion could arguably imply that any phone that automatically displays the time is being used by a driver if the time is being automatically adjusted by the phone’s carrier service and that is seen as a communication (carriers do this via the Network Identification and Time Zone protocol.

⁴⁶ That is, the communication is the full email with headers and signatures as sent from the author and anything less is not the actual communication from the author, but an excerpt or adaptation.

⁴⁷ That is, the courts look beyond the technology or format surrounding the message and instead concentrate on whether the underlying message the author intended to be understood by the phone user has been so understood.

holding something attached to the phone fell within the prohibition. In *Kyriakopoulos v Police*, the defendant was using an earpiece with integrated microphone rather than holding the phone to his ear. However, he was observed holding the earpiece to his ear. White J held:

The ARR do not proscribe altogether the use of a mobile telephone while driving. Mobile telephones which are hands free may be used. ... What ARR 300 proscribes is the use of a mobile telephone while it is hand-held. This suggests that ARR 300 is concerned not so much with the avoidance of a circumstance of distraction to the driver but with avoidance of a circumstance in which the driver will not have both hands and arms available for control of a vehicle, and perhaps with avoidance of a circumstance in which the vision (in particular the peripheral vision) of the driver may be restricted by the position of the arms in holding a mobile telephone to the ear. It would be consistent with this purpose that r 300 should be understood as proscribing the holding of an earpiece to the driver's ear where that was necessary to permit use of a mobile telephone ...

In my opinion, the magistrate was correct in concluding that the cord, earpiece and microphone formed part of the appellant's mobile telephone so that the holding of the earpiece, while the appellant conducted a conversation, constituted a holding of the mobile telephone. Each was attached to the other and the mobile telephone unit. Each formed an integral part of the equipment being used by the appellant to conduct the conversation. ... It is not necessary to consider in this case, the use of wireless earpieces.⁴⁸

His Honour considered that the earpiece was similar in effect to the holding of a phone by a rigid rod, the attachment of a handle to an electric drill, or poles on a sign. The decision in *Kyriakopoulos* thus prohibited any use of methods for using phones without holding it to the ear ("hands-free") if anything touched was in some way connected to the phone.

This rejection of makeshift attempts to find a hands-free way to use a phone was reinforced in *Fauska v Jones*⁴⁹ in which the accused driver was found to have been holding her phone in her hand against the steering wheel whilst talking on speaker phone. She argued that this was not within the intended scope of the rule. McKechnie J held that such behaviour clearly fell within the scope of the offence without further elaboration: "The phone was being used by the appellant at the time. She was holding it in her hand and was speaking, albeit by speaker phone." Although not stated in the short judgment, the decision could be seen to stand for the proposition that "hand-held" included any positioning of a phone which involved a hand, and was unrelated to the method by which the phone was being used.

Expressly excluded from the reasoning in *Kyriakopoulos* was the use of wireless extensions of phones. One could have thought that use of such devices were lawful under that wording of the offence. Surprisingly, the two reported decisions on the issue have upheld convictions.

In *Burns*, as mentioned above, the driver had installed a Bluetooth hands-free kit for his car, presumably in order to comply with the Road Rules. It must have come as a shock to

⁴⁸ In *Kyriakopoulos v Police* [2006] SASC 71 at [16], [19].

⁴⁹ *Fauska v Jones* [2008] WASC 173.

Burns to discover that the South Australian Supreme Court considered such widely sold devices were illegal in vehicles. Gray J took the extraordinary step of interpreting the offence to exclude any use of a mobile phone at all:

The phrase “hand-held mobile phone” in Rule 300 should be read in its entirety. The term “hand-held” operates as an adjective to qualify the noun phrase “mobile phone”, rather than an adverb qualifying the verb “use”. The Macquarie Dictionary defines the adjective “hand-held” as:

- (1) held in the hand; supported only by the unaided hand;
- (2) of or relating to a device which is designed to be small enough to be held in the hand: a hand-held computer.

A “hand-held mobile phone” is a mobile phone which is designed to be small enough to be held in the hand. If, at any particular time, it is not held in the hand, it does not lose its character as a “hand-held mobile phone” – in the same way that a pocket calculator is still a pocket calculator even when it is not placed in a pocket.

This interpretation gives effect to the intention of Parliament in enacting Rule 300. As earlier observed, an evident purpose of the Rule was to prevent motorists becoming distracted by mobile phones whilst driving.

... It is clear that the legislature intended to prohibit any ordinary use of a hand-held mobile phone. This does not mean that the mobile phone must be held in the hand at the time of use, because as observed above, the phrase “hand-held” is operating as an adjectival phrase rather than an adverbial phrase – qualifying “mobile phone” rather than “use”.⁵⁰

Combined with the exceptionally wide interpretation of “use”, the decision in *Burns* had the potential effect of creating a blanket prohibition of mobile phones in vehicles.

Wireless devices were again the subject of a charge in *Cresente v DPP*.⁵¹ Cresente claimed to have been holding a Bluetooth earpiece in his ear that he had operated by pressing a button on his car steering wheel. The District Court judge in *Cresente* took a different, but equally expansive approach to the offence:

... the first issue to be decided is this, is a mobile phone that incorporates a Bluetooth function a mobile phone? Any device which activates a carriage service so that there can be a transmission of a telecommunication and is portable constitutes a mobile phone. If the Bluetooth device is one capable of being held in the hand and capable of conveying or activating a carriage service then it constitutes a mobile phone. What other functions it does, does not matter. ...

[His/Her Honour accepted the Magistrate’s finding that a device had been held in Cresente’s hand.] [W]hether the device that was in his hand was a Bluetooth or whether the device in his hand was your normal average mobile phone, the Appellant was using it in his hand . At the end of the day I am satisfied beyond reasonable doubt that the offence has been proved.⁵²

⁵⁰ *Burns v Police* (2007) 171 A Crim R 503 at [17]-[19], [27].

⁵¹ *Cresente v DPP* [2009] NSWDC 129.

⁵² *Cresente v DPP (NSW)* [2009] NSWDC 129 at [7], [11].

This approach, rather than prohibiting any use of a mobile phone, instead deems any device that connects to a carriage service is a phone – whether or not it is the phone itself or a means of connecting to a phone.

Legislative reactions

But such extreme approaches appear to have never been the legislative drafter's intention and certainly seemed to defeat any possibility of finding permissible uses of phones in vehicles. The problems with the approach to interpretation emerging in the courts were known to the National Transport Commission as early as 2005. In November 2005, the National Transport Commission had recommended a change to r 300. Its reasons for so doing were:

4.59 Use of hand-held mobile phones – Rule 300

Rule 300 prohibits a driver using a hand-held mobile phone while the vehicle is in motion or stationary but not parked. There has been considerable conjecture as to what constitutes a “hand-held mobile phone”. As all mobile phones can generally said to be hand-held, any use of these devices would be prohibited. The intention was to ban a mobile phone that was held in the hand of the driver, not a mobile phone in a cradle. It is planned to make the rule clear in its intention by specifically stating a mobile phone must not be held in the driver's hand.⁵³

But these recommended amendments did not make their way into force until 2008 and so both *Cresente* and *Burns* were convicted as a result of the slow legislative reform process. The 2008 New South Wales Road Rules as originally introduced thus contained an amended offence (notes excluded and amendment emphasised):

300 Use of mobile phones by drivers (except holders of learner or provisional P1 licences)

(1) The driver of a vehicle (except an emergency vehicle or police vehicle) must not use *a mobile phone that the driver is holding in his or her hand* while the vehicle is moving, or is stationary but not parked, unless the driver is exempt from this rule under another law of this jurisdiction.⁵⁴

This remains the wording in Queensland. However, this attempt to overcome the extreme approach of the reported decisions had its own unintended consequences. It appears to have encouraged drivers to adopt risky ways of using phones that did not involve the use of a hand, or alternatively highlighted existing practices that were now legal. The National Transport Commission admitted in 2008:

State and territory road agencies have raised concern about the wording of rule 300 of the Rules in that it does not prohibit the use of a mobile phone, by a driver while driving, that is:

- held by the shoulder and neck;
- seated in a cradle and used to send short message service (SMS);

⁵³ National Transport Commission, 2005 Amendment Package, n 38, p 31.

⁵⁴ *Road Rules 2008* (NSW) under the *Road Transport (Safety and Traffic Management) Act 1999* (NSW). South Australia has taken an alternative route. Its 2008 amendment permits under s 300(2) a driver to use a mobile phone if the phone was used to make or receive a phone call while secured in a commercially available mounting affixed to the vehicle or “remotely operated by means of a device (whether connected to the phone by means of a wire or otherwise): (i) affixed to the vehicle; or (ii) worn by the driver in the manner intended by the manufacturer, and the phone is not being held by the driver. (3) To avoid doubt, nothing in subrule (2)(b) authorises a person to use a mobile phone by pressing a key on the phone, or by otherwise manipulating the body or screen of the phone, if the phone is not secured in a mounting affixed to the vehicle. It has not been updated to take account of more recent ARR amendments”: *Australian Road Rules Variation Rules 2008* (SA), reg 4.

- located on a driver's knee, hand or the front passenger seat and used to send SMS or loud speaker conversation (not near the ear).

Although the rule was modified by the 5th Amendment Package (2005), it is not considered that those changes prohibited these additional behaviours. The original intent of the Rules was that a driver should not to use a mobile phone while driving, except by using a hands-free device. At the time it was not anticipated that some drivers, while driving, would circumvent the rule.⁵⁵

Consequently, further amendments were recommended and subsequently enacted across most Australian jurisdictions from 2008 to 2012.⁵⁶ Under the current r 300 there is now no longer any reference to "hand-held phones" or phones "held in the hand" and instead there is a blanket prohibition on all use of mobile phones unless the phone is within a cradle or hands-free also and used only in two specific ways – oral phone conversations and as a driver's aid. New South Wales and Victoria permit an additional permitted use of an "audio playing function" (noted in italics below). A mobile phone may thus be used in New South Wales when driving if:

(a) the phone is being used to make or receive a phone call (other than a text message, video message, email or similar communication) *or to perform an audio playing function* and the body of the phone:

(i) is secured in a mounting affixed to the vehicle while being so used; or

(ii) is not secured in a mounting affixed to the vehicle and is not being held by the driver, and the use of the phone does not require the driver, at any time while using it, to press any thing on the body of the phone or to otherwise manipulate any part of the body of the phone; or

(b) the phone is functioning as a visual display unit that is being used as a driver's aid and the phone is secured in a mounting affixed to the vehicle.

The rule goes on to further require that a mounting affixed to a vehicle must be a commercially manufactured product or an integrated part of the car. The new definition thus takes account of the increasing trend for new vehicles to have a dock for mobile phones that allows them to be integrated into either a hands-free in-car phone system or the vehicle's audio player system.

Importantly, the current wording now appears to reverse the reasoning of the reported cases that found users of earpieces and Bluetooth devices liable. Under the new rule, it is permissible to use a phone not held in a cradle so long as the main part of the phone is not touched.⁵⁷ Thus a phone can be answered by pressing a button on an earpiece or on a headphone cord but not any button on the phone. As the National Transport Commission noted:

[A]ll phones are provided with an earpiece and the proposed change does not prohibit the use of an earpiece providing the driver does not touch the body of the phone. ... [The] proposal ... allows a driver to manipulate a

⁵⁵ National Transport Commission, Draft Discussion Paper, n 5, pp 9-10.

⁵⁶ *Road Safety Road Rules Further Amendment Rules 2009* (Vic), reg 16; *Road Rules 2009* (Tas), reg 300; (ACT), reg 6B; *Traffic Amendment (Australian Road Rules) Regulations 2011* (NT), reg 300. Western Australia adopted a similar, but slightly more restrictive version in 2010: *Road Traffic Code Amendment Regulations (No 3) 2010* (WA).

⁵⁷ Rule 300(4): "body, in relation to a mobile phone, means the part of the phone that contains the majority of the phone's mechanisms."

Bluetooth device providing the driver is not touching anything on the body of the phone.⁵⁸

Together, these two permitted ways of using a phone (three in New South Wales which permits listening to music etc) suggest that the safety-based justification for the prohibition of mobile phone use is now confined entirely to the dangers of drivers taking their eyes away from the road to either read or send texts, or to find a button on a phone to press. Presumably pressing buttons on phones in cradles is not feasible to prohibit without prohibiting the use of phones entirely, and in many cases the button would be within the peripheral vision of the driver.

Whereas early decisions on the offence, such as *Chresta* and *Burns*, could see a clear safety-based prohibition on the use of mobile phones generally, the new definitions, despite the default prohibition, much more clearly show an intention to permit the general use of mobile phones in hands-free environments. While texting remains prohibited, a much larger range of functions become lawful.

Despite this clearer intention there remain difficulties with the new wording. Under the new rule the meaning of "held" is defined to include "held by, or resting on, any part of the driver's body, but does not include held in a pocket of the driver's clothing or in a pouch worn by the driver". Thus drivers can only have phones touching their body if in a pocket or pouch – and also being used without touching the phone to activate it. One can clearly see the reasons behind such a definition – to prohibit the resting of phones on knees, but to permit people who get in and out of vehicles regularly to keep the phone on their person – but it seems doomed to immediate technological obsolescence. Soon to be on the market are wrist based phones, and glasses with communications functions. Such devices appear to be prohibited under this rule,⁵⁹ but neither type of device has any likelihood of distracting a driver's attention from the road any more than hands-free phone use.⁶⁰ In fact, when internet and phone capable eyewear in time become indistinguishable from eyewear generally it is likely to make enforcement of such a prohibition impossible. Whether such devices fall within the concept of a "phone" is also moot (discussed below).

What is the scope of the permitted conduct?

Further uncertainties arise with the permitted use of "make or receive a phone call" in r 300(1)(a). Most current phones allow a phone call to be received by pressing a button or swiping the screen. The driver would then often have to engage in another action to put the phone on "speaker" function to speak hands-free. These actions are likely to be seen to be integral to answering the phone and within the permitted behaviour. On the other hand "making" a phone call could involve a more elaborate process. First, the phone might be protected by a passcode, which would need to be entered. Then, if the person knew the number to be called, it would need to be entered. However, in most cases, it is likely that the number would be unknown to the user and instead stored in a contacts directory. Does the rule contemplate permission of searches through directories to find a number to ring – a very high cognitive load and one that requires significant concentration on a screen? Presumably searching the internet to find a number would fall outside the scope of the permission, but the cognitive load on searching a directory could be only slightly less intense. It might be that police and courts accept the risk of such behaviour and hope drivers search for numbers responsibly (such as when stopped at traffic lights).

⁵⁸ National Transport Commission, Draft Discussion Paper, n 5, pp 25-26.

⁵⁹ In the United States, a driver has already been charged with using Google Glass: AP, "US Driver Booked for Wearing Internet Glasses", *The Australian* (1 November 2013), <http://www.theaustralian.com.au/technology/us-driver-booked-for-wearing-internet-glasses/story-e6frgaxx-1226751059035>.

⁶⁰ This is assuming pushing a button on a wristphone activates a speaker function or a connected Bluetooth earpiece.

One less risky way to find a number is to use the voice commands on many smartphones – the most well known being the “Siri” function on Apple iPhones. Such applications allow voice-activated searches of contact directories without taking the driver’s eyes from the road. While the technology is still emergent, it suggests a future where much of the use of phones can be hand- and eye-free when driving.

This leads to a further interesting complexity surrounding the New South Wales and Victorian additional permission of “perform[ing] an audio playing function” of the phone. In light of the history of digital music devices and their convergence with phones this might be interpreted to merely permit the playing of music files held in phones through the car’s inbuilt stereo systems. This is presumably the primary legislative intent. However, because of the emergence of voice commands and reader functions on phones, the phrase could be interpreted more broadly to cover any audio emanating from the phone. Irrespective of the source of the audio, it is being produced by a function of the phone. If so interpreted, asking a function such as Siri to read incoming emails and texts would amount to a permitted audio playing feature of the phone and be a way for drivers to hear text-based messages without breaching the rule. Interestingly, the rule specifically permits the use of voice-activated commands to compose and send messages,⁶¹ providing a contextual argument in favour of the broader interpretation.

In principle, this should not be seen to be a derogation from the safety intent of the rule. It is clear that the rule permits speaking and listening to phones in a hands-free manner. Using the phone to translate text to audio, and the driver’s audio to text involves no additional cognitive load or distraction and so is within the general intent of the legislation. It may presage a future where text to audio translation technology is such that r 300 becomes largely redundant.

Is it a phone?

Whether a hand-held device falls within the definition of a “phone” is also a contentious issue. Modern phones incorporate a large number of functions which the case law on “use” has noted. In its 2008 report, the National Transport Commission recognised this expansion but considered it had no impact on the scope of the offence:

The National Transport Commission considers the identity of a mobile phone does not alter because of its use; whether it uses GPS, games, note book, clock etc, it is still a mobile phone. Rule 300(4) defines use as (amongst other things) operating any other function of the phone; this would capture a GPS function

Rule 300 does not define mobile phone other than to say that it is not a CB or two-way radio. The Macquarie dictionary provides an adequate definition “a portable cellular telephone” and for the purposes of interpretation it is considered there is no need to replicate this definition. Use is defined (among other things) as “operating any other function of the phone”, this would seem to address concerns about functionality of mobile phones.⁶²

What this response does not recognise is that there is a range of functions that a phone now has that are equally present in other devices and that it is not an offence to use those devices. The simplest example is the use of a wristwatch to tell the time. Two others are music players and GPS navigation devices. There is nothing of the nature of a phone about

⁶¹ Rule 300(4)(b) defines “use” as “entering or placing, *other than by the use of voice*, anything into the phone, *or sending* or looking at *anything that is in the phone*” (emphasis added).

⁶² National Transport Commission, Draft Discussion Paper, n 5, pp 25-26.

such devices. It does not seem justifiable to convict a defendant such as Savage (discussed above) for using a phone to check the time, and not someone who consults a watch.

In *Ryan*,⁶³ the defendant's case was that the charging police officer had mistaken her use of an iPod for that of a phone. It was admitted that whilst stationary at traffic lights, Ryan had held an iPod in her hand and used her thumb to check the time. On appeal, Nyland J held that such facts did not disclose the commission of any offence under r 300.

Her Honour did not elaborate on why this would be so. The likely explanation would be that it was not connected to a telephone carriage service and thus, while electronic, it was not a mobile phone. Such an interpretation raises interesting issues around the use of laptop and tablet devices. Presumably the device, if it does not have a SIM card, is not connected to a telephony service provider and is therefore not a phone. Using the argument ventilated in the 2008 National Transport Commission's Discussion Paper, one could argue that whatever other functions these devices have, they are still laptops and tablets – not phones. But if rather than relying on marketing terms, underlying functions were used to define objects, some interesting questions arise. Is a phone defined by its ability to create oral telephonic conversations? Need this be via a carrier service? If the carrier service offers non-telephonic connections, is that relevant? Tablets with data-only SIM cards are currently only available via companies that also offer telephony services, but the data-only SIMs do not provide oral communication via standard phone lines. On the other hand, they have non-telephonic services offered by telephone carriers. The rise of internet-based communications – such as Skype, Facetime or other VOIP services – allow audio and visual communication via telephonic services. This raises questions as to whether communication via such channels on a tablet amounts to the use of a phone. Emerging products such as smart watches and glasses seem deliberately to merge the functions of multiple devices. It seems impossible to use the Commission's approach to determine that, whatever else it is, Google Glass is a pair of glasses or phone or a tablet.

Fundamentally, the issue is between defining the prohibition in terms of a device – the form and function of which changes over time, or the underlying function – which can be technology neutral. Thus if what is intended to be prohibited is the concept of two-way communication then all forms of telephony, text messaging, emails, videocasting etc should be prohibited irrespective of the technology used. However, if what is intended to be prohibited is a device, then the ability of a differently labelled device to fulfil a function of the prohibited device should not bring its use within the offence. Thus a tablet, GPS, smart watch, ebook reader, music player etc are all not phones, even if later generations of the devices incorporate communication capabilities. These devices seem to be defined by their marketing label when first introduced to the market.

Is it a driver's aid?

Further complicating the question is the existence of the increasingly anachronistically worded r 299:

299 Television receivers and visual display units in motor vehicles

(1) A driver must not drive a motor vehicle that has a television receiver or visual display unit in or on the vehicle operating while the vehicle is moving, or is stationary but not parked, if any part of the image on the screen:

- (a) is visible to the driver from the normal driving position, or
- (b) is likely to distract another driver.

⁶³ *Police v Ryan* [2011] SASc 16.

Maximum penalty: 20 penalty units.

(2) This rule does not apply to the driver if:

(a) the driver is driving a bus and the visual display unit is, or displays, a destination sign or other bus sign, or

(b) the visual display unit is used as a driver's aid and either:

(i) is an integrated part of the vehicle design, or

(ii) is secured in a mounting affixed to the vehicle while being used, or

(ba) the visual display unit is a mobile data terminal fitted to a police vehicle or an emergency vehicle, or

(c) the driver or vehicle is exempt from this rule under another law of this jurisdiction.

Examples of driver's aids.

1 Closed-circuit television security cameras.

2 Dispatch systems.

3 Navigational or intelligent highway and vehicle system equipment.

4 Rearview screens.

5 Ticket-issuing machines.

6 Vehicle monitoring devices. ...

(3) For the purposes of subrule (2)(b)(ii), a visual display unit is secured in a mounting affixed to the vehicle only if:

(a) the mounting is commercially designed and manufactured for that purpose, and

(b) the unit is secured in the mounting, and the mounting is affixed to the vehicle, in the manner intended by the manufacturer.

There are no available decisions on the interpretation of this rule or its previous versions.

Rule 299 predated large screen smartphones and tablets, and was clearly intended to refer primarily to buses and taxis. However, it is conceivable that any device with a display screen could fall within this rule and so the rule could prohibit the use of phones by passengers sitting beside the driver of a vehicle. While undoubtedly originally drafted with only the driver in mind, it seems unreasonable that an expansive interpretation would prevent the use of devices by passengers in the front seat on the basis that a driver might feel compelled to look at what the passenger was up to.

All phones have a visual display screen, as do all computers and tablets. Whether their considerable computing power beyond mere display affects their designation as a visual display unit is a moot point at present. This technological convergence of phones and visual display units is a significant concern for the interpretation of the Road Rules. It is something that in 2008 the National Transport Commission was aware of:

[Rule 299] prohibit[s] a driver viewing the screen of a television or a visual display unit while the driver is driving. However, there is allowance for the driver to view the screen of a visual display unit, if the unit is a driver's aid. The maintenance group expressed concern that many new mobile phones can also be used as a driver's aid as they have global positioning system

(GPS) abilities. Although the maintenance group did not wish to change the intent of the rule, they were concerned that such devices could be held in a driver's hand while the driver was driving, yet other rules relating to mobile phones did not allow a driver to have a mobile phone in his/her hand. The proposal seeks to provide consistency within the rules in that a GPS must be an integrated part of the vehicle or secured in a mounting affixed to the vehicle (except a motor bike).⁶⁴

Because of this the rule was amended to require that the visual display unit be held in a cradle in similar terms to a phone. While this provides consistency in the way in which the device should be affixed to a vehicle, it fails to clarify the difficult demarcation between phones, driver's aids and other devices.⁶⁵ It is unclear whether use of a tablet device is governed by r 299 or r 300. The difficulty arises because, as discussed above, the rules are defined around stereotypical devices not forms of behaviour or technologies. In r 299, the stereotypical device is a device which solely or predominantly displays visual images provided from another source, such as a DVD screen displaying the contents of a DVD. Whether a multifunction device such as a tablet can be seen in a reductionist way as merely a visual display unit with extras is something courts may feel tempted to do to prevent frustration of the offence, but it would come at the expense of the plain English meaning of the offence. Again there is a patchy criminalisation in that the reading of static material on a visual display screen such as an e-reader appears to be an offence, yet reading a book, newspaper, work documents while stopped at traffic lights is not. Many modern cars now incorporate a visual display screen into the dashboard with multiple purposes. While at times it can be a rear-view camera or a navigational device and hence be a driver's aid, at other times it may display the time, the temperature, the car's entertainment options, and may even be able to play DVD movies. Whether such devices are driver's aids or not for the purposes of r 299 is unclear. It seems ludicrous that it would be illegal to drive such a vehicle without disabling the dashboard display.

CONCLUSION

This examination of the prohibition on the use of mobile phones whilst driving provides an interesting case study into the pressures on criminal regulation of common behaviours around emerging technologies. Initially, a simple over-inclusive offence was introduced based on safety fears associated with a new technology and indicative research into those dangers. Interpretation of the offence by the courts has been overwhelmingly expansive with no judicial concerns expressed around over-criminalisation. Safety concerns underlie this approach. However, it has transpired that the legislative approach has been less restrictive of use than that of the courts.

Over the last decade, the pervasive use of mobile technology and functional convergence of such devices has led the offence to be amended repeatedly, and the prohibited uses narrowed and extensively defined. The result is an offence of high complexity that contains many unclear boundaries of scope. Perhaps in response to persistent public use of the technologies, the offence now carves out lawful ways to communicate whilst driving. But the boundaries of that permission remain unclear and subject to the vagaries of technological innovation. Although summary in nature, the offence is difficult to understand and explain. Worryingly, many of the words in the offence have been defined into terms of art that go beyond common understandings of those words. To more positively paraphrase McBarnet, there is significant scope for lawyers to

⁶⁴ National Transport Commission, Draft Discussion Paper, n 5, p xiii.

⁶⁵ A further amendment to the Rules has been proposed that clarifies that a mobile phone can be used as a driver's aid, but does not further define "mobile phone": National Transport Commission, *Australian Road Rules 10th Amendment Package Explanation of Amendments* (July 2013).

highlight the subtle distinctions and shades of meaning, to demonstrate the complexity of the apparently simple, and to argue for the treatment of the case in hand as different from previous cases.

Phone use is only one of a range of driver distractions, most of which are not controlled by regulatory prohibitions. When radios were first introduced into vehicles, there were calls for them to be banned because of the distraction they would cause.⁶⁶ Operation of car stereos continue to be implicated in vehicle accidents but no regulation of their use has eventuated. While the restrictions on the use of mobile phones are currently unlikely to be removed, technological evolution of the devices and their incorporation into the entertainment and communication infrastructure of new vehicles is likely to make the range of prohibited behaviours engaged in increasingly minor. Instead of a fixation on criminal prohibition, a more holistic education program on driver distraction might lead to safer driving and a subsequent recognition that mobile phone use while driving needs to be controlled in the same way as all other dangerous and distracting driver habits.

⁶⁶ Barret Wallin A, "Cell Phones Pose a Distraction to Drivers but Legislative Ban Is Not the Answer" (2009) 98 *Kentucky Law Journal* 177 at 188.