

Reasonable Cause CPD Conference

24 March 2018

Motor Traffic Law:

Legislation and case law update

Presented by

Nic Angelov

Barrister

Ada Evans Chambers

ROAD TRANSPORT AMENDMENT (DRIVER LICENCE DISQUALIFICATION) ACT 2017

Overview

The *Road Transport Amendment (Driver Licence Disqualification) Act 2017* Act introduced amendments to the *Road Transport Act 2013* that commenced at the end of October 2017.

The history of offence provisions in road transport legislation has usually reflected a ratcheting up of penalties and disqualification periods and reduction in judicial discretion.

These reforms go some way to ameliorating the harshness of the penalties and disqualification provisions for unauthorised driving offences. According to the second reading speech, the reforms were introduced with the following rationale:

First, the current driver licence disqualification framework increases the risk of reoffending, with evidence showing longest qualifications are not a deterrent to unauthorised driving, and yet some people have disqualification periods of more than 10 years in addition to fines and imprisonment terms. **Secondly**, it has a serious adverse social impact, particularly on vulnerable people and people in regional and rural areas, as long disqualifications affect the ability to travel for education and employment purposes. **Thirdly**, it contributes to the over-representation of Aboriginal people in the criminal justice system, with more than 14 per cent of those sentenced and almost a third of those imprisoned for unauthorised driving identifying as Aboriginal. **Fourthly**, it is harsher by comparison with other jurisdictions. **Fifthly**, it imposes a significant burden on the criminal justice system, with about 12 per cent of people sentenced in New South Wales being sentenced for unauthorised driving offences, increasing pressure on the court and prison systems.

The following problems were identified with disqualification laws:

First, long disqualification periods have a serious adverse impact on a person's mobility, access to education, and access to essential goods and services. **Secondly**, disqualification from driving can also have a significant negative effect on a person's employment prospects by removing a person's transport to work or their ability to gain work-related skills. This is particularly the case in remote and regional areas of the State. **Thirdly**, disproportionate effects of unauthorised driving sanctions in regional parts of New South Wales are particularly acute for Aboriginal communities.

Summary of selected amendments

Habitual Traffic Offenders

The Habitual Traffic Offender provisions (Part 7.4 Division 3) were abolished.

Removal of Licence Disqualifications

A new Part 7.4 Division 3A Removal of Licence Disqualifications (ss 221A to 221E), was inserted. It provides for applications to be made to the Local Court for the removal of all licence disqualifications if the disqualified person has not been convicted of any driving offence for conduct during the relevant offence-free period before the removal of the licence disqualifications and the Court considers that it is appropriate to do so.

Section 221A is the definitions provision.

Section 221B outlines the appeal rights and the matters the Court is to take into account in determining whether it is appropriate to remove the licence disqualifications.

Section 221C provides for the application procedure.

Section 221D lists certain offences which would make a disqualified person ineligible to make an application (eg murder/manslaughter by use of motor vehicle, predatory driving, negligent driving occasioning death or GBH)

Section 221E provides for a rehearing and redetermination of an application where, after the making of an order, there is evidence that the applicant committed a driving offence during the relevant offence-free period that would have precluded the making of the order.

Reduction in penalties for unauthorised driving offences

Section 53 / 54 reduction in penalties

Consolidation of disqualification provisions / reduction in disqualification periods for driving

Section 54 (8) – (10) repealed. Disqualification provisions for certain unauthorised driving offences now in s 205A. Provision of minimum disqualification periods (in line with other traffic offences)

s 205A Table:

	Offence	Default period of disqualification	Minimum period of disqualification
1	Section 53 (3)—second or subsequent offence (Driver never licensed)	12 months	3 months
2	Section 54 (1), (3) or (4)—first offence (Driving while disqualified, suspended or after licence refusal or cancellation)	6 months	3 months
3	Section 54 (1), (3) or (4)—second or subsequent offence	12 months	6 months
4	Section 54 (5)—first offence (Driving after licence suspended or cancelled for non-payment of fine)	3 months	1 month
5	Section 54 (5)—second or subsequent offence	12 months	3 months

Section 225(3) was repealed and now s 206B deals with the effect of immediate or other licence suspensions on a period of disqualification

s 206B – Effect of immediate or other licence suspension on period of disqualification

(1) This section applies where a driver licence has been suspended under section 224 or under any other provision of this Act or the statutory rules for an alleged offence.

(2) A court that determines a charge for the offence (or for a related offence) is required to take into account the period of suspension when deciding on any period of disqualification from holding or obtaining a driver licence on conviction for the offence (or for the related offence).

(3) An offence is related to another offence if it relates to the same act or omission that gave rise to the other offence.

(4) The period of suspension satisfies all or the relevant part of any minimum period of disqualification that is or is required to be imposed under this Act on conviction for the offence (or for the related offence). Accordingly, the total of the period of suspension and of the period of disqualification is not to be less than that minimum period of disqualification.

(5) The court may order that the period of disqualification ends on a day specified by the court.

Concurrency of multiple disqualifications

s 207A – Commencement of disqualification

(1) The disqualification of a person from holding a driver licence as a consequence of being convicted of an offence by a court begins on the day that the court convicts the person unless the court orders that the disqualification begin on a later day specified by the court.

(2) This section is subject to section 206A.

Police imposition of vehicle sanctions

Amendments to ss 238, 239 and 240 that provide for police to impose vehicle sanctions, such as confiscation of number plates and the ability to impound vehicles of those who continue to drive whilst unauthorised and disqualified drivers who commit certain serious driving offences.

ROAD TRANSPORT RELATED LEGISLATION AMENDMENT ACT 2017

Sch 1.1 and 1.2 assented to and commenced on 23 November 2017. Sch 1.3 not yet in force.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of Road Transport Act 2013 No 18

1.1 Amendment concerning maximum penalty for offences against statutory rule

Schedule 1.1 increases the current maximum penalty that can be prescribed for an offence against the statutory rules under the *Road Transport Act 2013* from 34 penalty units (currently, \$3,740) to 50 penalty units (currently, \$5,500).

1.2 Amendments concerning detection of dimension offences

Schedule 1.2 provides for the approval and use of traffic enforcement devices (including devices that are camera devices) to detect offences against the *Road Transport Act 2013* or the statutory rules under that Act (or the *Heavy Vehicle National Law (NSW)* or the regulations in force for the purposes of that Law) that involve driving vehicles in contravention of maximum dimension requirements applicable to them.

1.3 Amendments concerning written-off heavy vehicles

Schedule 1.3 inserts a new Part 4.5A dealing with written-off heavy vehicles. The new Part includes the following provisions:

Division 1 defines words and expressions used in Part 4.5A.

Division 2 requires Roads and Maritime Services (*RMS*) to maintain a register of written-off heavy vehicles (called the *NSW written-off heavy vehicles register*).

The Division requires RMS not to register, renew or transfer the registration of any heavy vehicle (or if the vehicle is registered, RMS must cancel the registration of the vehicle) if its vehicle identifier is the same as:

- (a) a statutory written-off heavy vehicle or an interstate written-off heavy vehicle, or
- (b) a written-off heavy vehicle that RMS reasonably believes has suffered non-repairable damage.

Division 3 sets out procedures, notifications and other requirements in connection with the assessment of damage to certain heavy vehicles.

ROAD TRANSPORT LEGISLATION AMENDMENT (ROAD SAFETY) BILL 2018

Introduced and Second Reading Speech in the Legislative Assembly on 6 March 2018.

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Road Transport Act 2013*:

- (a) to include cocaine as a prescribed illicit drug, and
- (b) to bring the consequences for driving a motor vehicle while under the influence of drugs into line with those for doing so with a high range prescribed concentration of alcohol, and
- (c) to authorise a police officer to prevent a person suspected of being under the influence of alcohol or another drug from using a vehicle, and
- (d) to authorise the use of devices for the enforcement of offences relating to the use of a mobile phone by drivers of motor vehicles, and
- (e) to make other amendments of a minor, miscellaneous or consequential nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on 1 July 2018.

Schedule 1 Amendment of Road Transport Act 2013 No 18

Provisions relating to inclusion of cocaine as prescribed illicit drug

Schedule 1 [1]–[3] and [18] extend existing provisions prohibiting a person from driving a motor vehicle with prescribed illicit drugs (such as cannabis, ecstasy and speed) in the person's oral fluid, blood or urine to include prohibiting a person from driving with cocaine in the person's oral fluid, blood or urine.

Provisions relating to consequences for driving motor vehicle while under influence of drugs or alcohol

Schedule 1 [4] brings the penalties that apply for a person who, while under the influence of alcohol or another drug, drives or attempts to drive a motor vehicle or occupies the seat next to a learner driver who is driving a motor vehicle into line with the penalties for a person who does so with a high range prescribed concentration of alcohol in the person's breath or blood.

Schedule 1 [16] and [17] make similar amendments with respect to the period of disqualification applicable to, and the immediate suspension of the driver licence of, a person who drives or attempts to drive a motor vehicle while under the influence of alcohol or another drug.

Provisions relating to mobile phone use offence cameras

Schedule 1 [5] allows the Governor to approve devices to photograph drivers of motor vehicles for the purpose of enforcing an offence against the statutory rules involving the use of a mobile phone by the driver of a motor vehicle.

Schedule 1 [6]–[12], [14] and [15] make consequential amendments including amendments relating to the information to be included in or with such photographs and the admissibility of those photographs in evidence.

Provision relating to prevention of driving by persons suspected of being under influence of drugs

Schedule 1 [13] allows a police officer to prohibit a person from driving for 48 hours if the police officer is of the opinion that a person is under the influence of alcohol or any other drug, or a combination of drugs, and the person has been arrested after failing to undergo or pass a sobriety assessment.

Summary of selected amendments

s 111 – Presence of certain drugs (other than alcohol) in oral fluid, blood or urine

Cocaine added to the definition of “prescribed illicit drug”

s 112 – Use or attempted use of a vehicle under the influence of alcohol or any other drug

Increase in maximum penalties:

Maximum penalty:

- (a) in the case of a first offence—30 penalty units or imprisonment for 18 months, or both, or
- (b) in the case of a second or subsequent offence—50 penalty units or imprisonment for 2 years, or both.

s 134 – Approval of devices by Governor / s 135 – Use of evidence obtained from approved traffic enforcement devices / s 138 – Admissibility of photographs taken by devices-generally

Approval of devices for photographing the driver of a vehicle using a mobile phone

s 139A – Admissibility of photographs taken by devices (other than a device approved for mobile phone use offences) for mobile phone use offences

(1) A photograph of a vehicle:

(a) taken by an approved traffic enforcement device (other than a device approved for mobile phone use offences) that is evidence under this Division of a detectable traffic offence (other than a mobile phone use offence), or

(b) taken by an approved toll camera that is evidence of a toll offence against section 250A of the *Roads Act 1993*,
may also be tendered in evidence in proceedings for a mobile phone use offence involving the driver of the vehicle.

(2) For this purpose, the provisions of this Division or section 250A of the *Roads Act 1993* that apply in relation to the tendering, admission and use in evidence of a photograph for the detectable traffic offence (for which the device is approved) or toll offence of which the photograph is also evidence are taken to extend to the tendering, admission and use in evidence of the photograph for the mobile phone use offence.

(3) Nothing in this section prevents a photograph taken by an approved traffic enforcement device being tendered and used in evidence both in proceedings for a mobile phone use offence and proceedings for a detectable traffic offence (other than a mobile phone use offence) or toll offence.

s 148EA – Additional power to prevent driving by persons who are under the influence of alcohol or other drugs following failure to submit to (or pass) sobriety assessment

Without limiting the power of a police officer under section 148E (1), a police officer who arrests a person under clause 14 of Schedule 3 may prohibit the person from driving a motor vehicle for a period of 48 hours.

s 205 – Disqualification for certain major offenders

Disqualifications for s 112 DUI increased

1st offence – 3 years auto, 12 months minimum

2nd offence – 5 years auto, 2 years minimum

s 224 - When immediate licence suspension notice may be issued by police Officer

Section 112 DUI offence added to list of immediate licence suspension notice offences.

OTHER REFORMS ON THE HORIZON

Transport for NSW, Centre for Road Safety is developing a Road Safety Plan 2021 (available at www.towardszero.nsw.gov.au/roadsafetyplan). In the area of enforcement of road transport legislation the report proposes:

Increased penalties for driving under the influence

Swift, strong and certain penalties for lower range drink driving and drug presence first offenders

Alcohol interlocks for mid-range offenders

Doubling mobile drug testing to 200,000 tests by 2020

Including cocaine testing in roadside drug enforcement

Extending the requirement for mandatory alcohol interlocks to mid-range offenders

Exploring the option for vehicle sanctions at the roadside for high risk offenders

Extending the availability and requirement to complete a proven impaired driving education course to more offenders.

Investigate opportunities to use in-car dashboard camera footage to report illegal behaviour

Implement changes to the law to allow camera based detection of mobile phone offences.

Expand the heavy vehicle average speed camera program to metropolitan areas to address risks associated with greater truck movements.

Review the penalty framework for speeding offences, including demerit points and fine levels, the potential to apply intelligent speed technology to repeat offenders, and consider options to test for and reduce driving tired.

According to media reports (eg <https://www.smh.com.au/national/nsw/plan-to-keep-drunk-motorists-from-facing-court-20171223-h09o3a.html>) some first time and low range PCA offenders could be dealt with by way of penalty infringement notice rather than facing court, a plan that will “declutter” the court system and align NSW PCA penalties with those in Victoria.

ROAD TRANSPORT ACT 2013

s 36 – Driver may elect to be of good behaviour as alternative

Appeal against demerit point suspension

Not only is it not an appealable decision, it does not constitute a “decision” by the RMS as the suspension automatically or necessarily arises in consequence of the requirements of the provision:

Roads & Maritime Services v Staniforth [2017] NSWSC 158

s 110 – Presence of prescribed concentration of alcohol in person’s breath or blood

Sentencing – practice and procedure

A driver returned a reading of 0.051. There was evidence he had consumed five schooners of full strength beer prior to driving. In an appeal against sentence, it was held that there was an error in the Magistrate’s emphasis on the quantity of alcohol consumed, rather than on the reading. Held, if a person drives a motor vehicle after consuming a large amount of alcohol and is apprehended and found to have a high reading then that excessive consumption of alcohol is to be condemned and acted upon. If, however, regardless of the amount of alcohol consumed, only a reading barely above the limit is produced, then the court should approach sentencing on the basis of the reading:

Richards v Burnes [2017] ACTSC 117; (2017) 80 MVR 264.

s 117 - Negligent, furious or reckless driving

Negligence: breach of a regulation

The prosecution does not need to demonstrate that a road rule has been breached before driving can be negligent: *R v Wells* [2016] NSWDC 169. The driver's appeal was dismissed: *Wells v The Queen* [2017] NSWCCA 242.

Negligent driving occasioning death: causation

The deceased did not die in the collision between the vehicle in which she was a passenger and the accused's vehicle. She was in the process of getting out of the car when she was struck by a third vehicle, this collision causing her death. The Court found that a collision between an approaching vehicle and the victim's vehicle was almost inevitable. It held that her death was caused by the accused's negligent driving: *R v Wells* [2016] NSWDC 169. The driver's appeal was dismissed: *Wells v The Queen* [2017] NSWCCA 242.

Negligent driving occasioning death: sentencing

The driver of a Rural Fire Service vehicle performed an unsafe u-turn in circumstances where there was no urgency to attend an incident, killing the passenger of another vehicle. He had no criminal record but a traffic record which included an infringement for negligent driving. The court did not accept that the driver accepted responsibility for the collision. There were strong subjective circumstances. A sentence of 18 months to be served by an intensive corrections order was imposed: *R v Wells (No 2)* [2016] NSWDC 313. The driver's appeal was dismissed: *Wells v The Queen*

[2017] NSWCCA 242.

The driver was responsible for two deaths. In performing a right hand turn he failed to see an approaching motorcyclist and pillion passenger, the motorcycle colliding with his vehicle. He was 60 years of age with no criminal or traffic record. He entered early pleas of guilty. The negligent act was a momentary one. He was placed on s 9 bonds totaling three years and disqualified from driving for 15 months: *R v Clout* [2017] NSWDC 114.

The driver failed to keep a proper lookout while turning, killing a cyclist. The inattention was a matter of seconds. The moral culpability was assessed as at the lower end, the driver was of good character with an average driving record who entered a relatively early plea He was sentenced to 300 hours community service and was disqualified from driving for 2 years: *R v Fageer* [2017] NSWLC 18.

Manner dangerous: falling asleep at the wheel

It is not to the point that a driver, subjectively, did not feel tired until a certain point in the journey. On the objective evidence, the driver was sleep deprived and taking a risk at the time he began his journey. A subjective belief by a driver that he or she was not tired is of little consequence in the same way a driver believing (incorrectly) he or she is below the legal blood alcohol limit is of little consequence: *R v Manok* [2017] NSWCCA 232.

s 204 – Court may disqualify driver on conviction

Appeals – stay of disqualification in appeal from District to Supreme Court

Upon commencing proceedings in the Supreme Court to review a judgment of the District Court, s 69C of the *Supreme Court Act 1970* operates to stay a disqualification in the matter: *Tay v Director of Public Prosecutions (NSW)* (2014) 239 A Crim R 138; [2014] NSWCA 53. See also *Tay v Director of Public Prosecutions (NSW)* [2014] NSWCA 267 and *Bagshaw v Office of the Director of Public Prosecutions* [2017] NSWCA 293.

s 260 – Averments

Specified time

Various charges, including charges of driving whilst disqualified, were dismissed at first instance on the basis that the time of the offence particularised in each court attendance notice was not proved to the requisite standard. On appeal, the court held, that it could not be suggested, considering the circumstances of the charges with which the Local Court was dealing, that the time of the offence was an essential element or ingredient of the offence. Even if the time of the offence were an essential ingredient, or the timing in the charge denied the accused a reasonable opportunity to prepare and to present a defence or to test the prosecution, then the court would be required to allow an amendment to the charge or an adjournment to the defendant, respectively: *Director of Public Prosecutions (NSW) v Chaheh* [2017] NSWSC 1061.

s 267 – Appealable decisions may be appealed to Local Court

Jurisdiction

A driver paid a penalty infringement notice which activated s 36(4) of the *Road Transport Act 2013* (RTA) (licence suspension for demerit point breach of good behaviour period). She purported to “appeal the penalty notice” under the Part 4 Special Jurisdiction of the *Local Court Act 2007* and the Magistrate ordered the offence proved and dismissed under s 10 of the *Crimes (Sentencing Procedure) Act 1999*. Held, there is no jurisdiction in an appeal under Part 7.8 for the Court to make an order in relation to the offence that gave rise to the suspension. Section 44 (a) of the *Local Court Act 2007* specifically excludes criminal proceedings from the operation of Part 4 Application Proceedings. There were never any criminal proceedings in accordance with the *Criminal Procedure Act 1986* in relation to the offence before the court. Further, s 268(4) of the RTA precludes a challenge to the underlying offence giving rise to a suspension: *Roads & Maritime Services v Staniforth* [2017] NSWSC 158.

s 268 – Determination of appeals against appealable decisions

Determination of appeal – relevant considerations

The plaintiff appealed a decision of the Local Court dismissing the plaintiff’s appeal against a decision of the RMS to cancel its authority to operate an Authorised Inspection Station. Held, the court is required to give proper reasons. Where factual findings are made as to relevant breaches of rules alleged by the RMS as the basis for its decision, reasons need to be given for those findings. Where these findings are then used as a basis to conclude the plaintiff is not a fit and proper person to hold such authorization, adequate reasons need to be given for reaching that conclusion: *Dee Why Auto Clinic & Anor v Roads and Maritime Services* [2017] NSWSC 377.

ROAD TRANSPORT (GENERAL) REGULATION 2013

cl 6 – Service of notices on persons under driver licensing law

Subs (2) – whether notices must be served on all known addresses

The driver sought relief against a suspension notice on the basis of a denial of procedural fairness as it had not been received by him, it having been delivered only to his mailing address. The driver had provided a PO Box address to the RMS as his mailing address. The RMS also had a record of his residential address. The notice was sent to his mailing address only. Held, the notice complied with the obligations under cl 6(2). There was no obligation to send the notice to the residential address in addition to the mailing address. The structure of the legislative scheme is intended to place some onus on the licensed person to provide a current and relevant mailing address (or addresses) for the service of notices: *Fisher v Roads and Maritime Services New South Wales* [2018] NSWSC 139.

Denial of procedural fairness due to non-receipt / late receipt of notice

Whether non-receipt of a notice may constitute a denial of procedural fairness will depend on all the circumstances of the case. In the circumstances of this case, it was held that the fact that the driver did not receive the notice, which was sent to his authorised mailing address, was not something that constituted a denial of procedural fairness: *Fisher v Roads and Maritime Services New South Wales* [2018] NSWSC 139.

ROAD TRANSPORT (DRIVER LICENSING) REGULATION 2017

cl 96 – Interstate and international visitors

“not a fit and proper person” – cl 96(4)(g)

An interstate driver’s visiting driver privileges were withdrawn on the basis he was not a fit and proper person to drive in this State in view of offences recorded on his traffic record within a three year period: *Lochner v NSW Roads and Maritime Services* [2017] NSWSC 974.

HEAVY VEHICLE NATIONAL LAW (NSW)

s 594 – Matters court must consider when imposing sanction for noncompliance with mass, dimension or loading requirement

Sentencing – severe risk breaches

In the following case, the offender pleaded guilty, as consignor of loads of mulch, to fifty mass overload breaches, approximately half of which were severe risk breaches. The offending was assessed as being in the mid range. The pleas of guilty were not early, the offender assisted authorities once the breaches were brought to its attention, active steps had been taken to ensure no such breaches occurred again, the risk of reoffending was assessed as unlikely and the offender had no prior convictions. The total fines imposed were approximately \$594,000: *Roads & Maritime Services v Remondis Australia Pty Ltd* [2017] NSWLC 15.

Nic Angelov

Ada Evans Chambers

24 March 2018