

# *Drug Driving Offences (and Defences) in New South Wales*

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## **Introduction**

1. The criminal law in NSW proscribes the driving of motor vehicles after the consumption of illicit and non-illicit drugs in two broad ways.
2. Firstly by criminalising such driving when a person is 'under the influence' of drugs.
3. Secondly, by criminalising driving with the presence of certain illicit drugs 'present' in a bodily fluid, (either blood, urine or saliva).
4. The detection of both offences is aided by broad statutory powers to stop and detain citizens for the purpose of administering tests, regardless of whether reasonable suspicion of offending exists.
5. The first offence focuses on actual impairment and has an obvious and non-controversial link to road safety.
6. The second offence type however applies irrespective of the amount or level of the drug detected. This means that a person can commit a criminal offence even though the illicit drug is present in levels where no 'influence' is present.
7. The prohibition on the mere presence of illicit drugs is fairly new, having been legislated for in NSW only in 2006 and raises complex policy questions, some of which are briefly addressed in this paper.
8. The state government is significantly increasing the resources being dedicated to random testing of drivers for illicit drugs and it is reasonable to expect a continued increase in the numbers of such matters coming before the courts.

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9. An understanding of the offence provisions, the testing powers, the safeguards and possible defences is accordingly important for all criminal lawyers, particularly those with a Local Court practise.
10. In an attempt to assist in the development of such an understanding this paper firstly details the offence provisions that criminalise driving under the influence and driving with the presence of illicit drugs in bodily fluids.
11. These offences are contained within Part 5.1 of the *Road Transport Act 2013* (NSW), being the offences of 'Driving with an illicit drug present in oral fluid, blood or urine' (s111 *Road Transport Act 2013*) and 'Use or attempted use of a vehicle under the influence of alcohol or any other drug' (s112 *Road Transport Act 2013*).
12. This first part of the paper also discusses the various offences applicable to persons who do not comply with directions regarding testing.
13. The paper secondly attempts to explain the historical and policy factors relating to the introduction of drug driving laws.
14. Thirdly, the paper outlines the key operative provisions of the legislation that provide for the testing of persons, the analysing of samples and the proof in court of the offences. This third part of the paper outlines the safeguards applicable to the testing process.
15. Most of the provisions examined in this part of the paper are located in schedule 3 to the Act.
16. The fourth part of the paper examines the technology used for testing, controversies over its accuracy and summarises briefly admissibility issues that may arise following testing. This part of the paper also contains a discussion of some of the controversies around the testing technology and attempts to provide some guidance on the question that will be of key interest to many clients who have been charged with these offences – how long after illicit drug use should I wait before I drive?
17. Finally, this paper explores possible defences to both offences.

### **Offences under Part 5**

18. Part 5.1 provides two offences of "drug driving".

#### The Presence Offences

19. Section 111(1) of the *Road Transport Act 2013* (NSW) states that it is an offence to drive a car with an illicit drug present in blood, saliva or urine:

**S111 (1) Presence of certain drugs (other than alcohol) in person's oral fluid, blood or urine** A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug:

- (a) drive a motor vehicle;
- (b) occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion; or
- (c) if the person is the holder of a driver licence (other than a provisional licence or a learner licence), occupy the seat in a motor vehicle next to a holder of a learner licence who is driving the vehicle.

20. This is an offence of strict liability and the mere presence of any prescribed illicit substance is sufficient for the offence to be made out.

21. No evidence is required of driving impairment and there does not need to be a certain 'minimum reading' for the provision to be breached.

22. **Prescribed illicit drug** is defined in section 4 to mean any of the following:

- (a) delta-9-tetrahydrocannabinol (also known as THC),
- (b) methylamphetamine (also known as speed),
- (c) 3,4-methylenedioxymethylamphetamine (also known as ecstasy).

23. It is also a separate offence to drive with morphine or cocaine present in a person's blood or urine under section 111, subsection 3.

**(3) Presence of morphine or cocaine in person's blood or urine** A person must not, while there is present in the person's blood or urine any morphine or cocaine:

- (a) drive a motor vehicle, or
- (b) occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or
- (c) if the person is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)—occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle.

### The 'Under the Influence' Offence

24. Section 112(1) of the *Road Transport Act 2013* states that it is an offence to drive 'under the influence' of alcohol and other drugs (note the definition of drugs is much broader than that of 'prescribed illicit drug' applicable to the section 111 offence):

**s112 Use or attempted use of vehicle under the influence of alcohol and other drugs**

**(1)** A person must not, while under the influence of alcohol or any other drug:

- (a) drive a vehicle, or
- (b) occupy the driving seat of a vehicle and attempt to put the vehicle in motion, or
- (c) if the person is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)—occupy the seat in or on a motor vehicle next to a learner driver who is driving the vehicle.

**25. Drug** is defined in section 4 to mean:

- (a) alcohol, and
- (b) a prohibited drug within the meaning of the Drug Misuse and Trafficking Act 1985, not being a substance specified in the statutory rules as being excepted from this definition, and
- (c) any other substance prescribed by the statutory rules as a drug for the purposes of this definition.

**26.** This is an offence for which the affection by drugs and actual impairment of driving must be proved.

**27.** There is an abundance of case law on the question of when a person is 'under the influence' arising from a range of statutory contexts.

**28.** In *Sagacious Legal Pty Ltd v Westfarmers General Insurance Ltd (No 4)* [2010] FCA 482 (18 May 2010) Rares J summarises some of the authorities.

**29.** Section 112, subsection 2(b) provides the onus of proof for this provision.

*s112 (2) If a person is charged with an offence against subsection*

- (b) the offence is proved if the court is satisfied beyond reasonable doubt that the defendant was under the influence of:*
  - (i) a drug described in the court attendance notice, or*
  - (ii) a combination of drugs any one or more of which was or were described in the court attendance notice.*

**30. Drive** is defined in section 4 to mean:

- (a) be in control of the steering, movement or propulsion of a vehicle, and
- (b) in relation to a trailer, draw or tow the trailer, and
- (c) ride a vehicle.

## Refusal to be Tested

31. Schedule 3 also outlines a number of offences regarding the refusal to submit to testing including:

- Refusal to submit to oral fluid or sobriety test Cl. 16(1)(c) or 16(1)(d)
- Refusal to submit to taking of blood or oral fluid sample Cl.17(1)(a) or 17(1)(b)
- Refusal to submit to urine sample Cl. 17(1)(c)
- Preventing the taking of blood sample Cl.17(2)

32. Refusal to submit to testing predictably results in harsher penalties. A full penalties table can be found at:

- <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/drugs,-driving-and-you-pamphlet>

## **Why does Part 5.1 Exist?**

### Under the Influence

33. The policy rationale for an offence of driving 'under the influence' (whether by alcohol or drugs) hardly needs to be stated and such an offence has long existed in traffic law in Australia, at least in respect of alcohol<sup>3</sup>.

### Road Safety & Drugs

34. In a report released by the Centre for Road Safety in June 2015, researchers determined that 195 deaths on New South Wales' roads in the period between 2010 and 2013 involved drivers or riders with at least one of the three illicit drugs (cannabis, speed or ecstasy) in their systems.<sup>4</sup> It found that at least 13% of all road deaths involved a driver with drugs in their system.<sup>5</sup>

### The Presence Offences

35. The 'presence' offence however is relatively new and was introduced in NSW by the *Road Transport Legislation Amendment (Drug Testing) Bill* in 2006, as part of the parliamentary response to the 2004 hit and run death of nine year old Dubbo boy Brendan Saul, caused by an unlicensed, underage driver under the influence of an illicit drug. This

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<sup>3</sup> In Victoria at least since the early twentieth century:

[http://www.aic.gov.au/media\\_library/conferences/hcpp/boorman.pdf](http://www.aic.gov.au/media_library/conferences/hcpp/boorman.pdf)

<sup>4</sup> Centre for Road Safety, Transport for NSW *Drug Driving Fact Sheet* (June 2015)

<<http://roadsafety.transport.nsw.gov.au/downloads/drug-driving-f.pdf>>

<sup>5</sup> Ibid.

response also included increased penalties for hit and run drivers (known as 'Brendan's Law) and compulsory testing of persons involved in certain accidents.

36. It was highlighted in the second reading speech that the legislation would "*ensure that motorists who take drugs and drive can be detected and penalised just as those who drink and drive*"<sup>6</sup> and that "*driving with any amount of these illegal drugs in the body is not tolerated in New South Wales*"<sup>7</sup>.
37. Powers were granted to police to "*drug test drivers without prior evidence of impairment in two additional situations – randomly at the roadside or following a fatal crash... for the presence for three illicit drugs in oral fluid: speed, ecstasy and THC, the active ingredient in cannabis.*"<sup>8</sup>
38. This was based on the rationale that these drugs "*affect the skills and sound judgement required for driving*"<sup>9</sup>. These roadside tests allow the police to conduct saliva swabs using drug-screening equipment.
39. The absence of a direct and necessary link with road safety has led some to describe the presence offences as draconian and part of a "war on drugs" by other means, rather than being legitimate road safety measures. This has often been accompanied by calls for an 'impairment based' regime focused only on those driving when under the influence.<sup>10</sup>
40. Defenders of the absolute prohibition however can point variously to the indirect deterrent effect of an absolute restriction, the difficulty in drivers attempting to estimate affectation given the unregulated nature of the illicit drug market and a range of policy and technological difficulties in creating and enforcing illicit drug offences analogous to breath-testing laws for alcohol.

### **Schedule 3: The Process**

#### Power to Stop and Test

41. Clause 6 of Schedule 3 gives police the power to stop a driver and conduct a random roadside drug test for the presence of prescribed

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<sup>6</sup> NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1854–56, (Matt Brown, Parliamentary Secretary to the Minister for Roads)

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> There is much commentary to this effect available online. See for example:

<http://www.abc.net.au/news/2016-01-29/greg-barns-drug-driving-laws-are-unfair/7116994> and <http://davidshoebridge.org.au/2016/02/15/nsw-police-continue-to-wage-war/>

illicit drugs. This random oral fluid testing involves the driver providing a saliva swab that is then analysed by drug screening equipment.

### **6 Power to conduct random oral fluid testing**

*(1) A police officer may require a person to submit to one or more oral fluid tests for prescribed illicit drugs in accordance with the officer's directions if the officer has reasonable cause to believe that:*

*(a) the person is or was driving a motor vehicle on a road, or*

*(b) the person is or was occupying the driving seat of a motor vehicle on a road and attempting to put the motor vehicle in motion, or*

*(c) the person (being the holder of an applicable driver licence) is or was occupying the seat in a motor vehicle next to a learner driver while the driver is or was driving the vehicle on a road.*

*(2) Without limiting any other power or authority, a police officer may, for the purposes of this clause, request or signal the driver of a motor vehicle to stop the vehicle.*

*(3) A person must comply with any request or signal made or given to the person by a police officer under subclause (2).*

*Maximum penalty: 10 penalty units.*

*(4) A police officer may direct a person who has submitted to an oral fluid test under subclause (1) to remain at or near the place of testing in accordance with the police officer's directions for such period as is reasonable in the circumstances to enable the test to be completed.*

*(5) A person must comply with any direction given to the person under subclause (4). Maximum penalty: 10 penalty units.*

### Arrest Following Positive First Test

**42.** If the oral fluid test returns positive, then the police may arrest the driver under Clause 7.

### **7 Arrest following failed oral fluid test or refusal or inability to submit to test**

*(1) A police officer may exercise the powers referred to in subclause (2) in respect of a person if:*

*(a) it appears to the officer from one or more oral fluid tests carried out under clause 6 (1) by the officer that the device by means of which the test was carried out indicates that there may be one or more prescribed illicit drugs present in the person's oral fluid, or*

*(b) the person refused to submit to an oral fluid test required by an officer under clause 6 (1) or fails to submit to that test in accordance with the directions of the officer.*

*(2) A police officer may:*

*(a) arrest a person referred to in subclause (1) without warrant, and*

*(b) take the person (or cause the person to be taken) with such force as may be necessary to a police station or such other place as the officer considers desirable and there detain the person (or cause the person to be detained) for the purpose of the person providing oral fluid samples in accordance with clause 8, and*

*(c) if clause 9 permits the taking of a blood sample from the person—take the person (or cause the person to be taken) with such force as may be necessary to a hospital or a prescribed place and there detain the person (or cause the person to be detained) for the purpose of the person providing such a blood sample in accordance with clause 9.*

### The Second Test

**43.** The purpose of this detention power is to allow a second testing process to occur. Clause 8 provides:

#### ***8 Providing an oral fluid sample for oral fluid analysis following arrest***

*(1) A police officer may require a person who has been arrested under clause 7 to provide an oral fluid sample in accordance with the directions of the officer.*

*(2) An oral fluid sample taken under this clause may be used for the purpose of conducting an oral fluid analysis.*

### When Testing Not Permitted

**44.** Clause 2 of the schedule that delineates circumstances where testing is not permitted by police:

*(a) a person has been admitted to hospital*

This is unless the medical practitioner has been notified and does not object to the requirement, as it would not be prejudicial to the proper care and treatment of that person.

*(b) the authorised sample taker objects on the ground that it might be dangerous to the person's health*

*(c) it appears to the officer that it would be dangerous to the person's medical condition*

*(d) the relevant time for testing, analysis, sample or assessment has expired*

*(e) at a person's home*

45. For oral fluid samples, the investigation period expires after 2hrs from the occurrence of the event that entitled the officer to require the person to undergo the test or sample.
46. For blood or blood and urine samples, the investigation period expires after 4hrs from the occurrence of the event that entitled the officer to require the person to undergo the test or sample.
47. Once the investigation period expires, it is not an offence for a person to willfully alter the amount of drug in their blood or urine as per clause 18.

### The Home Safe Rule

48. Clause 2(e) means a person cannot be tested at their home.
49. The admissibility of a positive test undertaken in breach of the so called 'home safe rule', i.e., at the person's home has been considered in a range of drink driving cases, the same rule long having been present in the drink driving legislation.
50. The better view seems to be that the results of a test undertaken at a person's home are strictly inadmissible and not therefore able to be admitted pursuant to section 138 of the *Evidence Act 1995* (NSW). See *R v Vatner* (1992) 29 NSWLR 311 at 316 and *Director of Public Prosecutions v Skewes* [2002] 1008 (12 November 2002) at 26.
51. A contrary view however emerges from *Merchant v R* [1971] 126 CLR 414, *Haberhauer v Simek* (1991) 9 Petty Sessions Review 4235 and *Police v O'Brien* [2008] NSWLC 12.
52. Close attention of course needs to be paid to the specific statutory context and in the author's opinion the answer lies in a strict application of Part 5 of the schedule, specifically clause 32 which governs the admissibility of test results and states:

*(a) evidence may be given of the presence of a prescribed illicit drug in the oral fluid of the person charged as determined by an oral fluid analysis under this Schedule of a sample of the person's oral fluid, and*

*(b) the presence of a prescribed illicit drug in a person's oral fluid so determined is taken to show the presence of the drug at the time of the occurrence of the relevant event referred to in section 111 (1) (a), (b) or (c) if the oral fluid sample analysed was provided within 2 hours after the event, unless the defendant proves the absence of the drug when the event occurred*

53. Applying the principle of legality an oral fluid analysis taken unlawfully has not been taken “*under [the] schedule*” and accordingly the aid proof provisions do not apply and the certificate cannot be admitted.
54. Whether the home safe rule is considered as a precondition to admissibility or as an element of the offence, the result will likely be the same, the prosecution will be unable to prove the offence.

#### Analysis of the Second Sample

55. The second sample is sent to a government laboratory for analysis. Clause 26 outlines the process by which this sample must be handled.

#### **26 Procedures for the taking of oral fluid samples**

- (1) *A police officer who is provided with an oral fluid sample under clause 8 must:*
- (a) *place the sample into a container, and*
  - (b) *fasten and seal the container, and*
  - (c) *mark or label the container for future identification, and*
  - (d) *give to the person from whom the sample is taken a certificate relating to the sample that contains sufficient information to enable the sample to be identified as a sample of that person’s oral fluid.*
- (2) *The oral fluid sample must be placed in a security box (whether by the police officer or a person acting under the direction of the officer) as soon as is reasonably practicable after the procedures in subclause (1) have been completed.*
- (3) *The oral fluid sample must be kept in the security box until it is submitted to a prescribed laboratory for analysis.*
- (4) *The police officer must make arrangements for the oral fluid sample to be submitted to a prescribed laboratory for an oral fluid analysis.*
- (5) *A police officer may carry out an oral fluid test on a portion of an oral fluid sample provided under clause 8 (1) before dealing with the remaining portion of the sample in accordance with subclause (1).*
- (6) *If an oral fluid test is carried out under subclause (5) on a portion of an oral fluid sample, a reference in this clause and clauses 32 and 36 to the sample that is required under subclause (4) to be submitted to a laboratory is taken to be a reference to the remaining portion of the sample.*

#### Power to Test Blood and Urine

56. Persons can be subjected to urine and or blood tests in certain situations. This is potentially significant in terms of possible defences

as research suggests such tests can be more sensitive and may detect illicit drugs taken longer ago than those detected by saliva tests.

**57.** Urine and or blood tests can be administered in the following circumstances:

- Police hold a reasonable suspicion that the driver has been operating the vehicle under the influence of drugs and the person has failed a sobriety assessment, see clauses 13, 14 and 15
- When a person is hospitalised following an accident, see clause 11
- When a person has been involved in a fatal motor vehicle accident, see clause 12
- When a person exhibits an inability to complete the oral fluid testing, see clause 9, clauses 7 subsection 2(c) and 15 permit police to take the drive to a hospital for a blood or urine test under the supervision of a medical practitioner.

### Safeguards

**58.** It is important to be aware that there are a number of safeguards present in the schedule which indicate how a sample must be legally drawn and stored for oral fluid, blood and urine testing under clauses 24, (oral fluid) 25 (urine) and 26 (blood). It requires the sample to be handled in certain way in a security box as well as a providing a certificate of identification of the sample to the person from whom the sample was drawn.

#### ***26 Procedures for the taking of oral fluid samples***

*(1) A police officer who is provided with an oral fluid sample under clause 8 (1) must:*

- (a) place the sample into a container, and*
- (b) fasten and seal the container, and*
- (c) mark or label the container for future identification, and*
- (d) give to the person from whom the sample is taken a certificate relating to the sample that contains sufficient information to enable the sample to be identified as a sample of that person's oral fluid.*

*(2) The oral fluid sample must be placed in a security box (whether by the police officer or a person acting under the direction of the officer) as soon as is reasonably practicable after the procedures in subclause (1) have been completed.*

*(3) The oral fluid sample must be kept in the security box until it is submitted to a prescribed laboratory for analysis.*

*(4) The police officer must make arrangements for the oral fluid*

*sample to be submitted to a prescribed laboratory for an oral fluid analysis.*

*(5) A police officer may carry out an oral fluid test on a portion of an oral fluid sample provided under clause 8 (1) before dealing with the remaining portion of the sample in accordance with subclause (1).*

*(6) If an oral fluid test is carried out under subclause (5) on a portion of an oral fluid sample, a reference in this clause and clauses 32 and 36 to the sample that is required under subclause (4) to be submitted to a laboratory is taken to be a reference to the remaining portion of the sample.*

## Offences

- 59.** It is an offence under clauses 28, 29 and 30 respectively of the Schedule to destroy, tamper or interfere with the samples, to fail to comply with sample handling procedures as mentioned above in conjunction with using samples for non-drug testing purposes.

### ***28 Offences—destroying or tampering or interfering with samples***

*A person must not destroy or otherwise interfere or tamper with a sample, or a portion of a sample, of a person's blood or urine taken under Part 2 except as follows:*

*(a) after the expiration of 13 months (in the case of a sample taken under clause 12) or 12 months (in any other case) commencing on the day the sample was taken,*

*(b) in the case of a sample—by or at the direction of an analyst:*

*(i) so as to permit a portion of the sample to be sent for analysis by a medical practitioner or laboratory nominated, under clause 22, in an application made under that clause by the person from whom the sample was taken, or*

*(ii) in the course of, or on completion of, an analysis of the sample,*

*(c) in the case of a portion of a sample—by or at the direction of the medical practitioner or laboratory nominated under clause 22 by the person from whom the sample was taken.*

*Maximum penalty: 20 penalty units.*

## Issuance of Court Attendance Notice if Second Sample Positive

- 60.** If the presence of any of the prescribed illicit drugs is confirmed by the laboratory examination, the driver is issued with a court attendance notice for the offence. It is the laboratory results rather than the roadside test results that are relied on by the police as prima facie evidence of a breach of the provision in court.

## Timing of Taking of Sample/Prove of Presence at Time of Driving

**61.** Under clauses 32 and 33 of schedule 3 effective time limits are created (in an aid of proof provision) whereby the presence of drugs in a sample is “*taken to show the presence of the drug at the time of the occurrence of the relevant event*” (i.e. at the time of driving) if the sample taken within 2 (saliva samples) or 4 hours (urine and blood) of the person driving. The contrary can be proven under the provisions by the defendant, i.e., that the person did not have the drug in their system at the time of driving.

**62.** This applies to the offences created both by section 111 and 112.

### **32 Evidence of presence of drugs in proceedings for offences against section 111**

*(cf STM Act, ss 33A and 33C)*

*(1) This clause applies to any proceedings for an offence against section 111 (Presence of certain drugs (other than alcohol) in oral fluid, blood or urine).*

*(2) In proceedings to which this clause applies in relation to a prescribed illicit drug:*

*(a) evidence may be given of the presence of a prescribed illicit drug in the oral fluid of the person charged as determined by an oral fluid analysis under this Schedule of a sample of the person’s oral fluid, and*

*(b) the presence of a prescribed illicit drug in a person’s oral fluid so determined is taken to show the presence of the drug at the time of the occurrence of the relevant event referred to in section 111 (1) (a), (b) or (c) if the oral fluid sample analysed was provided within 2 hours after the event, unless the defendant proves the absence of the drug when the event occurred.*

*(3) In proceedings to which this clause applies:*

*(a) evidence may be given of the presence of a prescribed illicit drug, morphine or cocaine in the blood or urine of the person charged as determined by an analysis of the person’s blood or urine under this Schedule, and*

*(b) the drug the presence of which is so determined is taken to be so present at the time of the occurrence of the relevant event referred to in section 111 (1) (a), (b) or (c) or (3) (a), (b) or (c) if the blood or urine sample was taken within 4 hours after the event, unless the defendant proves the absence of the drug when the event occurred.*

### **33 Evidence of presence of drugs in proceedings for offences against section 112**

*(cf STM Act, s 34)*

*(1) This clause applies to any proceedings for an offence against section 112 (1) (Use or attempted use of a vehicle under the influence of alcohol or any other drug).*

*(2) In proceedings to which this clause applies:*

*(a) evidence may be given of the presence of a drug, or the presence of a particular concentration of drug, in the blood or urine of the person charged, as determined pursuant to an analysis under this Schedule of a sample of the person's blood or urine, and*

*(b) the drug the presence of which is so determined or the particular concentration of the drug the presence of which is so determined (as the case may be) is to be taken to have been present in the blood or urine of that person when the event referred to in section 112 (1) (a) or (b) (as the case may be) occurred if the sample was taken within 4 hours after the event, unless the defendant proves the absence of the drug, or the presence of the drug in a different concentration, when the event occurred*

#### Proof of Analysis in Court

**63.** Provisions in clauses 36-37 exist to facilitate the proof of the taking of samples, the handling of them by police and their analysis, in court.

**64.** These certificates (if valid) are admissible and constitute 'prima facie' proof of the matters stated within them.<sup>11</sup>

**65.** Clause 36 states:

#### ***Certificate evidence about the taking and analysis of samples***

##### ***(1) Proceedings to which clause applies***

*This clause applies to any of the following proceedings:*

- (a) proceedings for an offence against section 110 (Presence of prescribed concentration of alcohol in person's breath or blood),*
- (b) proceedings for an offence against section 111 (Presence of certain drugs (other than alcohol) in oral fluid, blood or urine),*
- (c) proceedings for an offence against section 112 (1) (Use or*

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<sup>11</sup> See also Part 7.7 of the Act itself for other relevant admissibility provisions.

*attempted use of a vehicle under the influence of alcohol or any other drug).*

**(2) Certificates from sample takers**

*A certificate purporting to be signed by an authorised sample taker (the certifier) certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:*

- (a) that the certifier was an authorised sample taker who attended a specified person,*
- (b) that the certifier took a sample of the person's blood or urine in accordance with this Schedule, and any relevant provisions of the statutory rules, on the day and at the time stated in the certificate,*
- (c) that the certifier dealt with the sample in accordance with this Schedule and any relevant provisions of the statutory rules,*
- (d) that the certifier used equipment of a specified description in so taking and dealing with the sample,*
- (e) that the container was sealed, and marked or labelled, in a specified manner.*

*(3) A certificate purporting to be signed by a police officer certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:*

- (a) that the officer took a sample of the oral fluid of the person named in the certificate in accordance with this Schedule, and any relevant provisions of the statutory rules, on the day and at the time stated in the certificate,*
- (b) that the officer dealt with the sample in accordance with this Schedule and any relevant provisions of the statutory rules,*
- (c) that the container was sealed, and marked or labelled, in a specified manner,*
- (d) that the officer arranged for the sample to be submitted for oral fluid analysis to determine the presence of any prescribed illicit drugs in the oral fluid.*

**(4) Certificates from police officers about arrangements for analysis**

*A certificate purporting to be signed by a police officer certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:*

- (a) that the officer received a sample of a specified person's blood or urine in accordance with this Schedule for submission to a prescribed laboratory for analysis,*
- (b) that the officer arranged for the sample to be submitted for*

analysis by an analyst to determine the concentration of alcohol in the sample or the presence or concentration of another drug in the sample (as the case requires),  
(c) that the sample was in a container which was sealed, or marked or labelled, in a specified manner.

**(5) Certificates from analysts**

A certificate purporting to be signed by an analyst certifying any one or more of the following matters:

(a) that a sample of a specified person's blood, urine or oral fluid was received, on a specified day, in a container submitted for analysis under this Schedule,

(b) that the container, as received, was sealed, and marked or labelled, in a specified manner,

(c) that on receipt of the container, the seal was unbroken,

(e) in the case of an analysis of a blood or urine sample carried out to determine the presence or concentration of a prescribed illicit drug or other drug in the blood or urine of the specified person:

(i) that an analysis of the sample was carried out to determine whether any

prescribed illicit drug or other drug (as the case requires) was present in the sample

(ii) that a specified prescribed illicit drug or other drug (as the case requires) ascertained pursuant to the analysis was present in that sample and, if so certified, was present in that sample in a specified concentration,

(f) in the case of an oral fluid analysis carried out on the oral fluid of the specified person:

(i) that an oral fluid analysis of the sample was carried out to determine the presence of any prescribed illicit drugs in the sample, and

(ii) that a specified prescribed illicit drug was determined pursuant to the oral fluid analysis to be present in that sample,

(g) that the analyst was, at the time of the analysis, an analyst within the meaning of this Schedule,

is admissible and is prima facie evidence:

(h) of the particulars certified in and by the certificate, and

(i) that the sample was a sample of the blood, urine or oral fluid of that specified person, and

(j) that the sample had not been tampered with before it was received.

Technology Used for Testing

The Saliva Testing Technology

66. This paper does not analyse the accuracy of the technology used for testing. In the appropriate case, where a client is adamant that a false positive has occurred it would be advisable, where possible, to consider expert evidence. From preliminary research, it seems that claims of 'false positives' are not unknown and the absolute accuracy of testing should not be assumed.
67. One scenario that seems to have definitely occurred is false positives following Ritalin/dexamphetamine use, with only laboratory testing revealing that the particular synthetic amphetamine detected by the saliva test was not methylamphetamine but prescription Ritalin.
68. In the case *Police v Lionel John Snow* [2017] NSWLC at [50], Magistrate Heilpern offers the following statement regarding passive smoking and 'false positives' in assessing a defence expert's evidence at hearing:

*'If there is strength to his evidence as to the potential for detection following passive smoking, then this has serious and significant implications for those exposed to THC indirectly.'*<sup>12</sup>

69. This case is further discussed below in the context of raising an honest and reasonable mistake of fact defence and how expert evidence may assist in proving the defence.
70. As discussed above the initial roadside saliva test is done by way of an 'oral fluid test'. This is defined as follows in the definitions clause of schedule three:

**oral fluid test** means a test carried out by an approved oral fluid testing device for the purpose of ascertaining whether any prescribed illicit drugs are present in that person's oral fluid.

71. In turn 'approved oral fluid testing device' is defined:

**approved oral fluid testing device** means a device that:

- (a) is designed to indicate the presence of any prescribed illicit drug in a person's oral fluid, and
- (b) meets the standards prescribed by the statutory rules for such a device, and
- (c) is approved by the Governor by order published in the Gazette

72. In Government Gazette 54 of 20 June 2014 the following order was published:

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<sup>12</sup> (Unreported, Lismore Local Court of New South Wales, Heilpern Mag, 1 February 2016)

ROAD TRANSPORT ACT 2013

*Order Approved Oral Fluid Testing Device*

*Professor the Honourable Marie Bashir, A.C., C.V.O., Governor. I, Professor the Honourable Marie Bashir, A.C., C.V.O., Governor of the State of New South Wales, with the advice of the Executive Council and in pursuance of the Road Transport Act 2013 do, by this my Order, approve a device of a type described hereunder for the purposes of the definition of approved oral fluid testing device in Clause 1 of Schedule 3 of the Road Transport Act 2013. Type of device:*

*Drager DrugTest® 5000 (manufactured by*

*Draeger Safety Pacific Pty Ltd)<sup>13</sup>*

*Dated this 21st day of May 2014. DUNCAN GAY, M.P., Minister for Roads and Freight*

73. The second test as discussed above is done by way of 'oral fluid analysis'. This is defined as follows:

***Oral fluid analysis*** means a test carried out by an approved oral fluid analysing instrument for the purpose of ascertaining, by analysis of a person's oral fluid, the presence of prescribed illicit drugs in that person's oral fluid.

74. In turn approved 'oral fluid analysing instrument' is defined:

***Approved oral fluid analysing instrument*** means any instrument that:

- (a) is designed to ascertain, by analysis of a person's oral fluid, the presence of any prescribed illicit drug in that person's oral fluid, and*
- (b) meets the standards prescribed by the statutory rules for such an instrument, and*
- (c) is approved by the Governor by order published in the Gazette.*

75. In Government Gazette 22 of 13 March 2015 the following order was published:

*Approved Oral Fluid Analysing Instrument*

*ROAD TRANSPORT ACT 2013 ORDER*

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<sup>13</sup> [https://www.draeger.com/en\\_aunz/Mining/Products/Breath-Alcohol-and-Drug-Testing/Drug-Testing-Devices/DrugTest-5000](https://www.draeger.com/en_aunz/Mining/Products/Breath-Alcohol-and-Drug-Testing/Drug-Testing-Devices/DrugTest-5000)

*Approved Oral Fluid Analysing Instrument*

*GENERAL THE HONOURABLE DAVID HURLEY AC DSC (RET'D), Governor. I, General The Honourable David Hurley, AC DSC (Ret'd), Governor of the State of New South Wales, with the advice of the Executive Council, and in pursuance of the Road Transport Act 2013 do, by this my Order, approve an instrument, of*

*a type described hereunder for the purposes of the definition of approved oral fluid analysing instrument in clause 1 of*

*Schedule 3 of the Road Transport Act 2013.*

*Type of device:*

*AB SCIEX QTRAP® 5500 (manufactured by AB SCIEX Australia Pty Ltd)<sup>14</sup>*

*Dated, this 4th day of March 2015.*

***By His Excellency's Command, DUNCAN GAY, MLC  
Minister for Roads and Freight***

**76.** In the appropriate case, particularly involving a suggestion of a false positive, it would be worthwhile researching the device used, particularly as to whether the manufacturer's recommendations and so forth have been followed.

### **Admissibility/Proof Issues**

**77.** The admissibility and proof issues will obviously depend on the issues in a particular case.

**78.** Issues to be carefully examined may include:

- Have police followed the required procedures under schedule 3? Is there an argument section 138 of the Evidence Act is enlivened? For example, do any of the prohibited circumstances apply and therefore testing was unlawful?
- Does the certificate comply with the provisions of the schedule, if not is it inadmissible?
- Does the certificate evidence all the matters police need to prove?

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<sup>14</sup> <https://sciex.com/products/mass-spectrometers/qtrap-systems/qtrap-5500-system>

- Have the time limits been complied with and therefore do the proof provisions operate?
- Was the machinery used functioning properly (see discussion below)

### How Soon After Illicit Drug Use Can One Drive?

79. The operation of the technology used to test saliva on the roadside for illicit drugs in saliva is not without controversy in terms of how soon after drug use presence can be detected.

80. The government claims the saliva testing used should generally only detect very recent drug use<sup>15</sup>, others however claim the technology is detecting drug use days or weeks after the intoxicating effect has passed. This has been criticised as effectively criminalising driving for those with chronic illicit drug habits.

81. Official government information<sup>16</sup> states as follows:

*“Illegal drugs can be detected in your saliva by an MDT for a significant time after drug use, even if you feel you are OK to drive. The length of time that illegal drugs can be detected by MDT depends on the amount taken, frequency of use of the drug, and other factors that vary between individuals. Cannabis can typically be detected in saliva by an MDT test stick for up to 12 hours after use. Stimulants (speed, ice and pills) can typically be detected for one to two days”.*

82. Most recently this controversy flared with extensive media coverage of a series of decisions of Magistrate Heilpern in Lismore in which government claims that THC (the active chemical in Cannabis) is only detected in saliva tests up to 12 hours after use were rejected.

83. In *Police v Darrell James Squires; Riley Vincent Garlick-Kelly* [2016] NSWLC His Honour stated:

*“I question the accuracy of this statement for three reasons. Firstly I am entitled to take into account my experience on the bench, and I have heard many hundreds of pleas of guilty to this offence over the past months, and read many hundreds of sets of facts where the timing of consumption of cannabis has been disclosed by defendants to police prior to any legal advice. In the vast majority of cases the time frame has been over 12 hours. On not one occasion has the prosecution cavilled with this contention in the facts, or similar submissions from the bar*

<sup>15</sup><http://roadsafety.transport.nsw.gov.au/stayingsafe/alcoholanddrugs/drugdriving/>

<sup>16</sup><http://roadsafety.transport.nsw.gov.au/stayingsafe/alcoholanddrugs/drugdriving/>

*table. Indeed, the prosecution have remained silent on this issue even when submissions are made that cannabis has been consumed by passive smoking, eating hemp seeds, rubbing hemp balm or taking medicinal cannabis tincture. The prosecution have remained silent when people claim that they consumed cannabis weeks prior. Not once has any scientific evidence been produced to this court that supports the contention that the final or any other test (typically) only works for 12 hours. It could be that every single one of those defendants, including this one, are lying to the police at the scene, and then in court. However on balance I find that this is unlikely”.*

84. In *Police v Carrall* (2016) NSWLC Magistrate Heilpern found a man not guilty after accepting his evidence he had not smoked cannabis for nine days before failing a road side saliva test. Despite the government’s claims that a positive test would not occur in those circumstances no evidence was led by the prosecution to this effect.

85. His Honour commented on the, “*mystery and uncertainty by design of the current testing system*”, which requires users to “*run the gauntlet whereby they do not know if they are detectable*”. (This judgment is discussed further below in the context of the defence of honest and reasonable mistake of fact).

86. Magistrate Heilpern further considered the issue in the matter of *Police v Lionel John Snow* [2017] NSWLC which is discussed below in relation to the defence of honest and reasonable mistake of fact.

87. A similar finding was made in *Bugden; Halper v R* [2015] NSWDC 346, His Honour Judge Cogswell stated:

*“I will direct that these reasons be published. This is not for the purpose of drawing the attention of Parliament to the effect of the legislation because Parliament intended the legislation to have just that effect. However, people who use the drug illicitly but privately need to be aware that if they are driving **some days or more afterwards** the drug may well be detected in their system and their licence will be at risk. This is particularly significant for people who, like Mr Halper, live in the country and need their car for normal purposes such as shopping or work.*

*I am not encouraging people to use the drug. As I said, the experience of the courts is that it can mark the commencement of dangerous addictions like alcohol. But those who do use it need to do some research and know that they are not only exposing themselves to prosecution for possession or use of the drug but also putting their driver licence at risk”.*

## Defences Available

### Legislative Defences

#### *Medicinal Purposes*

88. There is a specific legislative defence available to a s111(3) offence under s111(5) and (6):

**(5) Defence for offence relating to presence of morphine in person's blood or urine** *It is a defence to a prosecution for an offence against subsection (3) if the defendant proves to the court's satisfaction that, at the time the defendant engaged in the conduct that is alleged to have contravened the subsection, the presence in the defendant's blood or urine of morphine was caused by the consumption of a substance for medicinal purposes.*

**(6) Meaning of consumption for medicinal purposes** *In this section, a substance is consumed for medicinal purposes only if it is:*

- (a) a drug prescribed by a medical practitioner taken in accordance with a medical practitioner's prescription, or*
- (b) a codeine-based medicinal drug purchased from a pharmacy that has been taken in accordance with the manufacturer's instructions*

#### *Double Jeopardy*

89. Clause 40 of schedule 3 creates a specific double jeopardy defence:

**40 Double jeopardy in relation to alcohol and other drug offences**

*(1) A person is not liable to be convicted of both an offence against section 112 (1) and a related alcohol or drug offence if the offences arose directly or indirectly out of the same circumstances.*

*(2) A person who:*

*(a) is required by a police officer to submit to a breath test by reason of the occurrence of an event referred to in clause 3 (1) (a), (b) or (c) and, as a consequence, to submit to a breath analysis or to provide a sample of the person's blood under Division 2 of Part 2, and*

*(b) submits to the breath analysis in accordance with the directions of a police officer, or to the taking of a blood sample in accordance with the directions of an authorised sample taker,*

*cannot be charged with any of the following offences against section 112 (1):*

*(c) the offence of driving a motor vehicle, at the time of that event, while the person was under the influence of alcohol,*

*(d) the offence of occupying the driving seat of a motor vehicle and attempting to put such motor vehicle in motion, at the time of that event, while the person was under the influence of alcohol.*

*(3) A person who has had a sample of blood taken in accordance with clause 11 because of an accident is not to be charged with an offence against section 112 (1) if it is alleged as a component of the offence that the person was under the influence of alcohol and the offence relates to the same accident.*

*(3A) A person:*

*(a) who submits to the taking of a blood sample under clause 5A, or*

*(b) who is prosecuted for failing or refusing to submit to the taking of a blood sample under clause 5A but who is able to establish the defence under clause 17 (4) in relation to the prosecution,*

*is not liable to be convicted of an offence against clause 16 (1) (b) in relation to the person's inability to submit to a breath analysis that gave rise to the requirement to provide a blood sample.*

*(3B) A person is not liable to be convicted of both an offence against clause 16 (1) (b) and an offence against clause 17 (1) (a1) if the offences arose directly or indirectly out of the same circumstances.*

*(4) In this clause:*

***related alcohol or drug offence*** means an offence against any of the following provisions:

*(a) section 110,*

*(b) section 111,*

*(c) clause 16,*

*(d) clause 17,*

*(e) clause 18.*

## Honest and Reasonable Mistake of Fact

90. This defence exists for strict liability offences which have no *mens rea* requirement<sup>17</sup>, as is the case for a s111(1) offence.
91. Its operation in the context of drug driving raises many of the same issues discussed above in respect of how soon one can drive after consuming illicit drugs without committing the presence offence.
92. In *CTM v The Queen* [2008] HCA 25 at [8], Gleeson CJ, Gummow, Crennan and Kiefel JJ states that:
- 'Where it is a ground of exculpation, the law in Australia requires that the honest and reasonable, but mistaken, belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent. In that context, the word "innocent" means not guilty of a criminal offence. In the case of an offence, or a series of offences, defined by statute, it means that, if the belief were true, the conduct of the accused would be "outside the operation of the enactment'*
93. Once raised, the prosecution are required to bear the burden of disproving the honest and reasonable mistake of fact (HRMF) defence as per the test set out by Golding J in *Appeal of Francesco Medilichiu* NSWDC 182 (27 August 2008) at [20].
94. The matter of *Police v Joseph Ross Carrall*<sup>18</sup>, garnered a significant amount of media attention for Magistrate Heilpern's judgment considering an honest and reasonable mistake of fact defence raised by the defendant, who was apprehended for two counts of the driving with a prescribed illicit drug present in his blood and found not guilty by his Honour of one count under this defence.
95. The accused told the court that some weeks prior to the alleged offence, he had been informed by the police officer performing a RDT that he would be required to '*wait a week*<sup>19</sup> after a smoke before he could drive. There was no unequivocal denial by the police officer of this statement and when pressed in cross-examination, the officer stated that he '*believed the equipment detected cannabis 3-4 days after use*<sup>20</sup>.
96. Magistrate Heilpern firstly considered whether s111(1) was a strict liability offence and if the HRMF defence was available to the accused. The judgment in *DPP v Bone* [2005] NSWSC 1239 (where the defence was held to be available for the offence of High Range PCA) was followed.

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<sup>17</sup> *Proudman v Dayman* (1941) 67 CLR 536

<sup>18</sup> (Unreported, Lismore Local Court of New South Wales, Heilpern Mag, 1 February 2016)

<sup>19</sup> *Ibid* 3 [13].

<sup>20</sup> *Ibid* [15].

97. His Honour found that the defendant's belief was honestly held as the prosecution had been unable to negative it, as well as the view that *'the belief was clearly one of the fact. The defendant knew the law: he believed he no longer had the presence of THC in his saliva'*<sup>21</sup>.

98. In coming to his decision, Magistrate Heilpern considered whether the belief was reasonably held and *'whether a belief can be reasonable where the initiating action was a separate preliminary criminal act committed many days before'*<sup>22</sup>.

99. His Honour was however satisfied in the circumstances that Mr Carrall had made an honest and reasonable mistake of fact, in relying upon the police advice. This finding directly challenges the accuracy of the state government's claim that cannabis can only be detected in a person's saliva for up to 12 hours.

#### Calling Expert Evidence To Assist with a HRMF Defence

100. In running a HRMF defence, there may be circumstances where the accused is required to prove their allegation about the length of time prior to apprehension that consumption occurred is true, in order to assist in establishing the HRMF defence. Calling expert evidence may be of use in order to factually situate when consumption would have occurred.

101. In *Police v Lionel John Snow* [2017] NSWLC, also heard before His Honour Magistrate Heilpern, the defendant was apprehended on two counts of driving with an illicit drug present in his blood (s111 *Road Transport Act 2013*). 233 nanograms/millilitre was found to be present via an oral fluid test on the first occasion, and 26ng/ml on the second occasion which was 8 days later.

102. The accused raised an HRMF defence in order to prove that in the time that had lapsed between consumption and the first apprehension, it was reasonable for the accused to no longer believe that THC was present in his saliva. The accused gave evidence that prior to his first apprehension, he had not smoked for *'about nine days'*<sup>23</sup>.

103. Ultimately, this HRMF defence was not fully made out as the accused had made a number of statements in court and during his conversations with police at the time of apprehension which indicated he knew after five weeks it could still be present in his system.

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<sup>21</sup> Ibid 9 [47].

<sup>22</sup> Ibid 10 [52].

<sup>23</sup> (Unreported, Lismore Local Court of New South Wales, Heilpern Mag, 9 February 2017) 3, [8].

*'Yep cause it's in your system mate. It takes ninety four or fifty four days to get out of your system. So you can test me now and test me tomorrow and you're gonna get the same reading and you're gonna test me the next day for seventy four days mate. If I took that to court and I'd beat it mate. Right. Drive under the influence of marijuana mate.'*<sup>24</sup>

- 104.** Although the accused attempted to attribute the statements to 'memory or police verbal or other such unconvincing excuse', Magistrate Heilpern arrived at the conclusion that the accused's state of mind was inconsistent with a HRMF defence and that the evidence established 'the defendant well knew that the cannabis may still be in his system and chose to drive and run that gauntlet on some misapprehension as to a need to show affectation'<sup>25</sup>.
- 105.** His Honour differentiated *Carrall*, as the defendant had honestly and reasonably formed their opinion based on police advice.
- 106.** But what is worth noting about this case was that the defence called their own expert predominantly to determine whether the amount of THC detected on the first occasion could be consistent with the defendant's statement that cannabis consumption occurred nine days prior and also, on a minor argument, whether the THC detection could be influenced by a recent incident passive smoking.
- 107.** Conflicting expert opinion was then proffered at hearing. Following a review of available literature about saliva testing, the conclusion of the prosecution expert, Dr Perl, was that:
- 'A person using cannabis 9 days prior to the test would definitely NOT have a positive oral fluid result. However the Accused did have a positive result and the scientific studies demonstrate that this is not possible unless cannabis had been used within 12 hours of the oral fluid sampling'*.<sup>26</sup>
- 108.** Conversely, the conclusion reached by the defence expert, Dr Weatherby, was that due to small number of available scientific studies and figures for extrapolation, Dr Perl's extrapolation to reach her conclusion was unsustainable and undercut by the existence of other variables and unknowns.

*"I'm very critical of Dr Perl's comments that these sort of things are a blanket 'no that won't happen'. She cannot say that. There*

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<sup>24</sup> Ibid, 3 [11].

<sup>25</sup> Ibid, 13, [58].

<sup>26</sup> Ibid, 4, [16].

*is no way she is able to say that. Because there is no scientific evidence to do so and that is the big issue”.*<sup>27</sup>

**109.** Magistrate Heilpern also understood Dr Weatherby’s further opinion to be that ‘*a reading in the saliva of 233 ng/ml on day one, without any fresh consumption, could lead to a reading of 26 ng/ml eight days later.*’<sup>28</sup>

**110.** His Honour found both experts were highly qualified, clear, straightforward, rational and reasonable in their evidence [50-51]. He opined on the manner in which he could come to resolve these ‘*radically different positions*’<sup>29</sup> by referring to *Velevski v The Queen* [2002] HCA 4 and the Criminal Trials Bench Book from the Judicial Commission of New South Wales. He concluded that the task entailed the evaluation of the evidence ‘*keeping in mind the onus and burden of proof, [and] the acceptability of the evidence*’<sup>30</sup> and that this case was not the type of case that required him to discount one expert or the other.

**111.** His Honour came to the view that for the prosecution needed to properly fulfil their burden of proof to refute this limb of the HRMF defence, it required them to ‘*seriously dent*’<sup>31</sup> the evidence of the defence expert or provide grounds for accepting Dr Perl’s evidence over Dr Weatherby’s. As such he found that:

*‘The doubt is reasonable and must favour the defendant...I find as a question of fact that had the defendant consumed cannabis nine or ten days prior, and been exposed to a passive smoking situation as described, he may well have tested positive with the levels described in the analyst certificates on each occasion. The prosecution have not excluded this as a reasonable hypothesis.’*<sup>32</sup>

**112.** The HRMF<sup>i</sup> defence will always depend on the facts of each case, but while the seemingly misleading government advice remains official in the public domain, the HRMF defence will can continue to operate successfully towards overturning a drug driving charge.

#### *Accidental Ingestion as an Honest and Reasonable Mistake of Fact Defence*

**113.** *Beattie v Potts*<sup>33</sup> involved an appellant was charged with driving with a prescribed drug in her blood in breach of s20 of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT). The sample taken by

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<sup>27</sup> Ibid, 8, [35].

<sup>28</sup> Ibid, [39].

<sup>29</sup> Ibid, 9, [43].

<sup>30</sup> Ibid, 11, [49].

<sup>31</sup> Ibid, 12, [52].

<sup>32</sup> Ibid, [53].

<sup>33</sup> [2015] ACTSC 350

Canberra hospital in the aftermath of a motor vehicle accident and confirmed the presence of methylamphetamine in her blood.

**114.** The appellant advanced two possibilities for intervening conduct or events mirrored in s10.1 of the *Criminal Code 1995* (Cth) for an honest and reasonable mistake of fact defence for the Magistrate to consider at first instance:

*“(a) the substance was in the appellant’s blood as she had inadvertently inhaled methylamphetamine smoke at a party she had attended two nights prior to the offence; or  
(b) methylamphetamine had come into the appellant’s blood at some time and by some means of which she was unaware.”*<sup>34</sup>

**115.** Burns J determined that the Magistrate had erred in deciding adversely to the appellant ‘*whether the appellant had or had not satisfied the evidentiary burden*’, by reasoning that the appellant ‘*could give no explanation at all as to how the methylamphetamine came to be in her body*’.<sup>35</sup>

**116.** His Honour stated that:

*“If the appellant had satisfied the evidentiary burden, in order to convict the appellant, the Magistrate would have to be affirmatively satisfied that the methylamphetamine did not come to be in the appellant’s blood by the means suggested”*<sup>36</sup>.

**117.** Burns J noted that ‘*it is contrary to general criminal law principles to punish acts or events (including circumstances) which are beyond the control of an accused person*’<sup>37</sup>. His Honour further noted that the lack of evidence before the Magistrate around observations of the accused person by police and other witnesses, as well as expert evidence concerning the sensitivity of testing and the way in which the body metabolise the particular prescribed illicit substance led to orders setting aside the appellant’s conviction.

### Necessity

**118.** Necessity may be a possible defence to negate a drug driving charge in the circumstance where there is a need to drive to avoid a greater harm.

**119.** In *R v Cairns*<sup>38</sup>, it was held an accused will have the defence of necessity available to them if:

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<sup>34</sup> Ibid 3 [7].

<sup>35</sup> Ibid 10 [39].

<sup>36</sup> Ibid, 11 [40].

<sup>37</sup> Ibid, 12 [46].

<sup>38</sup> [1999] 2 Crim App Rep 137

- (i) the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injury to himself or herself, or another;*
- (ii) that necessity was the sine qua non of the commission of the crime; and*
- (iii) the commission of the crime, viewed objectively, was reasonable and proportionate, having regard to the evil to be avoided or prevented.*

**120.** *Re the Appeal of White*<sup>39</sup> involved a speeding motorist with a critically ill child. Perhaps analogous to the drug driving offence under Section 111(1), the conviction for the strict liability offence for speeding in the *Motor Traffic Act 1909 (NSW)* was overturned under the defence of necessity. Justice Shadbolt stated:

*“I can see no reason why, in appropriate circumstances, a choice made to commit an offence of strict liability in order to avoid a greater evil would not also be a defence. That the appellant did not tell the police officer of his plight has, in my view, been satisfactorily explained. It might have caused further delay. I consider his only concern was to get his gravely ill son to hospital. I do not think that he concerned himself particularly with the speed. I do not think his breach was so gross as to create another danger together with the existing one. It was a choice that he made and he made it in order to avert, as he saw it, a real danger and a real possibility of death but I am not of the view that the public would and society’s cohesion would be placed in such jeopardy by the choice, that the defence of necessity should not be available.”*

#### The “I Just Didn’t Do It” Defence

**121.** There is ample case law in the context of drink driving to the effect that evidence can be led to simply create a reasonable doubt about the accuracy of certificate evidence. That is, evidence from persons that the defendant simply did not consume alcohol, or sufficient alcohol, to be guilty as charged.

**122.** This evidence can act to create doubt as to the accuracy of the testing and certificate evidence tendered.

**123.** In the Australian Capital Territory case of *Perkins v. Pohla-Murray* (1983) 51 ACTR 3 Kelly J, in proceedings on appeal from a Magistrate, was confronted with the following situation:

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<sup>39</sup> (1987) 9 NSWLR 427

*“The respondent and her friend gave evidence that she had had two and a half glasses of wine over a period of more than three hours. A certificate under para.41(1)(a) of the Act showed a figure recorded or shown by an approved breath analysing instrument of .130. Dr Slater (the same Dr Slater) gave evidence that a result of .130 could not be achieved by consumption of that amount of liquor in that time”.*<sup>40</sup>

**124.** On appeal His Honour held it was open to the Magistrate to have entertained a reasonable doubt based on an acceptance of the evidence provided by the defendant and her friend, i.e., that the certificate was not unimpeachable evidence bound to be accepted.

**125.** This approach has been followed in a range of case law in the ACT and elsewhere.<sup>41</sup>

**126.** Refshauge J summarised the case law in this way in *Maher v Carpenter* [2012] ACTSC 38 (16 March 2012) at [57] to [61]:

*“The cases show that the evidence of the reading from the Drager Alcotest instrument is prima facie evidence of the blood alcohol content of the defendant but may be challenged by other evidence which a court may find is sufficiently probative to reject the reading.*

*That is to say, the prosecution must prove beyond reasonable doubt that the defendant has driven on a public street whilst his blood alcohol concentration was the prescribed concentration. A reasonable doubt may be induced in the court by other evidence which casts doubt on the reading.*

*Such doubt may be cast by challenges to the operation of the instrument itself, though those have rarely been successful: see, eg, Kerney v Lewis at 63–4; [35]. It is, however, not limited to such challenges.*

*More commonly, the defendant will adduce evidence of the amount of alcohol that he has consumed, or a blood test or other circumstances which are quite inconsistent with the reading returned. Thus, the evidence could include an inconsistent blood test (Harrington v Zaal at 181–2) or evidence which shows that the actual ingestion of alcohol is incompatible with the result obtained (Looper v Forbes at 33–4; McLachlan v Mackey at 10). It does not matter that the evidence does not*

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<sup>40</sup> Facts summarised by Miles CJ in *Looper v Forbes* (1992) 112 ACTR 29

<sup>41</sup> *Chapman v Rogers; Ex parte Chapman* [1984] 1 Qd R 542; *Harrington v Zaal* (1992) 106 FLR 175; *Looper v Forbes* (1992) 112 ACTR 29; *McLachlan v Mackey* (1994) 124 ACTR 1; *Kerney v Lewis* [2005] ACTSC 26; (2005) 191 FLR 54; *Riley v Siep* [2008] ACTSC 72; (2008) 50 MVR 488.

*directly challenge the correct operation of the instrument (Harrington v Zaal at 181).*

*In this case, there were two parts to this issue. As Higgins J (as his Honour then was) said in Harrington v Zaal at 181:*

*Whilst the certificate under s 41(1)(a) provides prima facie evidence that no instrument error occurred, that prima facie inference would be displaced.*

*The same result would follow if the actual amount of alcohol consumed by the subject is inconsistent with the result of the breath analysis. Of course, the more uncorroborated the evidence of such consumption the easier it would be for a tribunal of fact to feel confident about rejecting that evidence”.*

- 127.** There would seem no necessary reason that this reasoning could not be applied to drug driving, whereby human evidence might act to cause a Magistrate to have a doubt about certificate evidence led under schedule 3, which after all is only *prima facie* evidence of the matters to which it relates.
- 128.** The drink driving case law however counsels that this ought be a difficult defence.
- 129.** Kelly J in *Pohla-Murray* stated at [15] that it would only be in exceptional circumstances that such evidence would create a reasonable doubt.
- 130.** Higgins J in *Harrington v Zaal* (1992) 106 FLR 175 noted that at [49] that, *“the more uncorroborated the evidence of such consumption the easier it would be for a tribunal of fact to feel confident about rejecting that evidence”.*

## **Conclusion**

- 131.** In January 2016, the Sydney Morning Herald reported that ‘*more than 3000 drug-driving charges were finalised in NSW courts in the nine months to September 2015, an increase of 109 per cent from the 1456 cases heard in 2014, according to data from the NSW Bureau of Crime Research*’.<sup>42</sup> The same article stated that Deputy Premier Troy Grant has announced that the frequency of roadside drug testing in New South Wales is set to increase from a current 32,000 tests to 97,000 in 2017.

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<sup>42</sup> Lisa Visentin ‘Questions Raised over Fairness of Drug-Driving Charges as Arrests Double’, *Sydney Morning Herald* (online) January 24 2016 <<http://www.smh.com.au/nsw/questions-raised-over-fairness-over-drugdriving-charges-as-arrests-double-20160121-qmatbo.html>>

**132.** Drug driving prosecutions are increasingly common, reason enough to be familiar with the law. They are also however an important area in the interaction between the state and the individual, particularly given their impact on persons who do not necessarily pose a direct risk to road safety and the exceptional coercive powers they rest on.<sup>43</sup>

**133.** The authors hope this paper assists practitioners in representing persons charged and welcome questions and comments on the contact details below.

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<sup>43</sup> This advice from the ACT Human Rights Commissioner summarises some of the human rights engaged by drug testing regimes such as that which exists in NSW:  
<http://www.hrc.act.gov.au/res/Roadside%20drug%20driving%20advice%2029%20June%202010.pdf>