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CRIMINAL LAW MASTERCLASS

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A PRACTICAL APPROACH TO ROAD TRAFFIC LAW - PART 2

DRINK AND DRUG DRIVING (AND ASSOCIATED PART 2 OFFENCES):

PART A - CHECKLIST, POSSIBLE DEFENCES, EVIDENTIARY PROVISIONS, EXPERT EVIDENCE

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PROFILE - NIC ANGELOV, BARRISTER, ADA EVANS CHAMBERS (www.adaevanschambers.com)

Nic Angelov has been practising at the bar since 2006. His main area of practice is criminal law. Before being called to the bar he was a solicitor for five years. He was admitted to practice in 2001. He has been a casual lecturer in criminal law at the University of Sydney and since 2008 author of the commentary to Volume One of *Leslie and Britts Motor Vehicle Law NSW*.

INTRODUCTION

Drink and drug driving and associated offences are dealt with in Part 2 of the *Transport (Safety and Traffic Management) Act 1999* and Part 7 and Schedule 4 of the *Transport (Safety and Traffic Management) Regulation 1999*, although other parts of the NSW Road Transport Legislation are relevant, particularly the *Road Transport (General) Act 2005*.

There is a lot to digest. The relevant provisions cover 52 sections (ss 8 to 39A) and 6 clauses (cls 127 to 130B). My word count check gives a figure of 19,042 words in the Act and 1,256 in the Regulation, totalling 20,298 words.

A BRIEF OVERVIEW OF PART 2 OF THE ACT – ALCOHOL AND OTHER DRUG USE

Sections 8 to 8B are interpretation provisions.

Sections 9 to 11A are the offence provisions for prescribed concentrations of alcohol. Section 11B is the offence provision for prescribed illicit drugs (cannabis, speed and ecstasy). Section 12 is the "under the influence" alcohol/other drug offence provision.

Sections 13 to 18 cover random breath testing and breath analysis. They specify the powers and procedures to be followed in conducting breath tests/analyses. Section 17 provides for when a breath test/analysis is not permitted. There are offence provisions relating to refusing or failing to undergo a breath test, and wilfully altering blood alcohol concentration.

Sections 18A to 18H essentially cover the same matters as sections 13 to 18, but in relation to random oral fluid testing (saliva test) for prescribed illicit drugs.

Sections 19 to 24 cover blood analysis of accident patients following accidents. Sections 24A to 24D deal with blood and urine analysis of persons who are not accident patients following fatal accidents. Sections 25 to 29 deal with sobriety assessments and related drug analysis.

Section 30 is repealed. Section 31 permits a police officer to remove a vehicle involved in a prescribed offence.

Sections 32 to 38 are the provisions that deal with evidentiary and other procedural matters. Note in particular section 33 on the evidentiary certificate of the blood alcohol reading.

Section 39 deals with personal liability of sample takers (ie no civil or criminal liability when undertaken in good faith).

Section 39A permits a police officer to conduct both a breath test and oral fluid test on a person.

A BRIEF OVERVIEW OF PART 7 / SCHEDULE 4 OF THE REGULATION – ALCOHOL AND OTHER DRUG USE / SUBSTANCES PRESCRIBED AS DRUGS

Clause 127 provides that the substances listed in Schedule 4 are prescribed for the purposes of the definition of "drug" in the Dictionary of the Act.

Clause 128 prescribes certain establishments as hospitals for the purposes of ss 19 and 26. Section 129 prescribes DAL, Lidcombe as the testing laboratory for various sections.

Clauses 130 to 130A deal with security for blood, urine and oral fluid samples. Clause 130B deals with standards for the oral fluid analysing and testing instruments.

TABLE

What follows is a table / checklist format, rather than a narrative paper, with the hope that it can be of some use as a "ready reckoner" or starting point for further research. Sections are arranged thematically and possible issues for consideration are identified with (a limited) selection of relevant cases and short comments. Point 16 (pleas of guilty) is only dealt with cursorily in this paper. Comments and feedback are welcome at angel@adaevanschambers.com

Nic Angelov

DRINK AND DRUG DRIVING (AND ASSOCIATED PART 2 OFFENCES): CHECKLIST, POSSIBLE DEFENCES, EVIDENTIARY PROVISIONS, EXPERT EVIDENCE

(unless otherwise specified all sections/clauses referred to are in the RT(STM) Act/Reg)

	ISSUE	CONSIDER	SECTION/CLAUSE	CASE	COMMENT
1	Get thorough instructions	<p>The facts - who, what, where, why, when with whom, how etc</p> <p>Obtain facts sheet, criminal record, traffic record and any "written statement" eg s 15(3)</p> <p>Subjectives - background, age, education, occupation and work history, incomings/outgoings, health, family etc</p>			
2	Check elements, definitions	<p>What fact and admissible evidence to support each element?</p> <p>Do facts fit defined terms? eg words and phrases such as "drive", "driver", "drug", "motor vehicle", "prescribed illicit drug", "road", "road related area" are defined</p>	<p>Various offence provisions in Pt 2</p> <p>ss 8 - 8B, Dictionary, Sch 4 Reg</p>	<p>"Drives", numerous cases:</p> <p><i>Eggmolese v Bruce</i> [2008] QCA 393</p> <p><i>Harvey v P</i> [2009] SASC 302</p> <p><i>Buxton v Newell</i> [2011] TASSC 64</p>	<p>Outside car - not driving</p> <p>Intent is a factor</p> <p>Using clutch - driving</p>

8	<p>Power of arrest following failed breath test</p> <p>Arrest following failed oral fluid test</p> <p>Arrest following fatal accidents</p> <p>Arrest following failed sobriety assessment</p>		<p>s 14 - arrest following failed breath test</p> <p>s 18C - arrest following failed oral fluid test etc</p> <p>s 24A - power to arrest persons involved in fatal accidents etc</p> <p>s 26 - arrest following failure to submit/pass sobriety assessment</p>	<p><i>Baulman v R</i> (2007) 6 DCLR (NSW) 1</p>	<p>Failure to make it clear driver is under arrest may make arrest unlawful</p>
9	<p>Power to conduct breath analysis</p> <p>Oral fluid analysis following arrest</p> <p>Blood sample following arrest</p>	<p>"must deliver a written statement"</p>	<p>s 15 - breath analysis following arrest</p> <p>s 18D - providing an oral fluid sample/analysis etc</p> <p>s 18E- taking blood sample following arrest</p>		<p>Compliance with s 15(3) is precondition for an admissible s 33 certificate (33(1)(f))</p>

	<p>Blood sample in hospital</p> <p>Procedure for blood sample analysis</p> <p>Procedure following accident</p> <p>Procedure following arrest for failed sobriety assessment</p>	<p>Admissibility of unlawfully obtained sample</p> <p>Admissibility of unlawfully obtained sample</p>	<p>s 20 - blood samples to be taken in hospitals from accident patients</p> <p>s 23 - analysis of samples of blood taken under this division</p> <p>s 24B - procedure for taking samples following arrest</p> <p>s 27 - procedure for taking samples following arrest</p>	<p><i>R v Camilleri</i> [2007] NSWCCA 36</p> <p><i>DPP v Clear</i> [2010] NSWSC 392</p> <p><i>DPP v Langford</i> [2012] NSWSC 310</p>	<p>Driver attends hospital to visit wife. Does not attend for "examination or treatment" etc (subs (1)). Nurse mistakenly believes she must take blood sample. Held, innocent breach of law, applying s 138 EA 1995 balancing exercise, certificate should be admitted</p> <p>Subs (1) "blood and urine" - police can ask for both or either</p> <p>Cited <i>Camilleri</i> with approval - where breach innocent and alleged offence serious, must be powerful countervailing considerations before evidence rejected</p>
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10	<p>Wilfully alter alcohol concentration</p> <p>Wilfully alter/introduce prescribed illicit drug</p> <p>Hinder/obstruct taking of blood sample</p> <p>Refuse/fail to submit blood/urine sample, wilfully alter/introduce</p> <p>Refuse/fail to submit sobriety assessment, blood /urine sample, wilfully alter/introduce</p>	Voluntariness	<p>s 16 - wilfully altering alcohol concentration etc</p> <p>s 18G - offences related to testing/sampling for drugs</p> <p>s 22 - hindering or obstructing health professional taking blood sample</p> <p>s 24D - offences related to testing for drugs</p> <p>s 29 - offences related to sobriety assessments/testing for drugs</p>	<p><i>Dover v Doyle</i> [2012] VSC 117</p> <p><i>DPP v Clear</i> [2010] NSWSC 392.</p>	<p>Driver has head injury, aggressive and uncooperative at hospital. Refused to allow blood sample. Expert evidence that injury affected reasoning. Held, person cannot be guilty of a crime which they did not consciously and voluntarily commit.</p> <p>Subs (2)(a) "blood or urine", no requirement that demand be put in alternative of blood or urine</p>
11	Exclusions to power to request breath test/analysis	Admitted to hospital for medical treatment and doctor objects	s 17 - when breath test or analysis not permitted		

	<p>When oral fluid test, sampling not permitted</p> <p>When taking of samples not permitted following fatal accidents</p>	<p>Dangerous to person's medical condition</p> <p>After 2 hours from occurrence of event entitling officer under s 13(1)</p> <p>At person's home</p> <p>Similar considerations as for s 17 (blood sample has 4 hr limit)</p> <p>Similar considerations as for s 17 (4 hr limit from time of accident)</p>	<p>s 18F - when oral fluid test or sampling not permitted</p> <p>s 24C - when taking of samples not permitted</p>	<p><i>R v Olejarnik</i> (1994) 33 NSWLR 567</p> <p><i>DPP v Linnett</i> [2006] NSWSC 1086</p> <p><i>DPP v Skewes</i> (2002) 37 MVR 545; [2002] NSWSC 1008</p> <p><i>P v O'Brien</i> [2008] NSWLC 12</p>	<p>Certificate obtained in breach of 2 hr limit not admissible</p> <p>Access road to permanent caravan not at person's home</p> <p>Driver within grounds of his block of units was at home</p> <p>A person can have more than one home</p>
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	When sobriety assessment and taking of samples not permitted	Similar considerations as for s 17 (4 hrs limit)	s 28 - when SA and taking of samples not permitted		
12	Evidentiary certificates - PCA	"unless defendant proves" Admissible and prima facie evidence	s 32 - evidence of alcohol consump	<p><i>DPP v Zhang</i> [2007] NSWSC 308</p> <p><i>Riley v Siep</i> [2008] ACTSC 72</p> <p><i>P v Tully</i> [2011] SASC 242</p> <p><i>Douglas v P</i> [2011] SASCFC 148</p>	<p>Legal onus - balance of probabilities</p> <p>Cannot go behind certificate NB - issues that cannot be raised at admissibility stage may still be relevant in substantive proceedings</p> <p>Uncorroborated evidence of driver's recollection of alcohol consumption will not displace statutory presumption</p> <p>Expert evidence - reading "could have been as low as 0.04%". Held possibility of lower reading not enough</p> <p>Difference between breath analysis and blood sample - defence successful</p>

	<p>Evidentiary certificates - drugs</p> <p>Other RT evidential provisions</p>	<p>"authorised"</p> <p>Discretion to reject certificates remains?</p> <p>Some may have relevance</p>	<p>s 33 - certificate evidence</p> <p>ss 33A - 35</p> <p>Pt 5.6 RT(G)A 2005</p>	<p><i>P v Short</i> [2011] SASC 131</p> <p><i>Johnson v Poppeliers</i> (2008) VR 92</p>	<p>Certificate on its face must show authority is current at the time of the offence</p> <p>After breath analysis, officer actively dissuaded driver from obtaining blood test, held, certificate improperly obtained</p> <p>ie s 230, s 233(2)</p>
13	Defences	<p>Honest & reasonable mistake of fact</p> <p>Necessity/duress</p> <p>Automatism/voluntariness</p>		<p><i>DPP v Bone</i> (2005) 64 NSWLR 735</p> <p><i>Riley v Siep</i> [2008] ACTSC 72</p> <p><i>Bayley v P</i> (2007) 99 SASR 413</p> <p><i>Appeal of Kingston</i> [2008] NSWDC 86</p>	<p>Section 9 offences are not absolute liability. Case involved "drink spiking"</p> <p>Mistake as to recollection of amount consumed unlikely to be successful defence</p> <p>Summary of principles</p> <p>"Sleep driving" caused by Stilnox. Effect of intoxication relative to alcohol qualitative, not quantitative,</p>

		Higher reading?	s 11 - presences of higher concentration of alcohol not defence		distinguishing <i>Russell v R</i> (1993) 70 A Crim R 17 Higher reading not a defence
		NRPCA - statutory defence	s 11A - defence for NRPCA		If alcohol comes from source other an alcoholic beverage (eg medicine) and that source not consumed for purpose of consuming alcohol "if the defendant proves" - legal onus on defendant (on balance of probabilities)
		Prescribed Illicit Drug - statutory defence	s 11B(5) - defence for morphine		Morphine for medicinal purposes
		DUI - not "under the influence"?	s 12 - DUI	<i>Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 4)</i> (2010) 16 ANZ Insurance Cases 61-842; [2010] FCA 482.	No "norm", determination one of fact and degree based on evidence, possible person may not be DUI even though effects observable later

	<p>Unable on "medical grounds" to undergo breath test etc</p> <p>"Wilfully alter" etc</p> <p>Wilfully alter etc - statutory defences</p> <p>Other substances?</p>	<p>ss 13(2), 15(5), 18B(3), 18D(3), 24D(2), 29 (3)</p> <p>s 16 etc</p> <p>s 18G, s 24D, s 29</p>	<p><i>Police (SA) v Guede (2007)</i> 48 MVR 486; [2007] SASC 351</p> <p><i>Murphy v P</i> [2011] SASC</p> <p><i>McRae v Bower</i> (1988) 5 MVR 413.</p> <p><i>Maher v Carpenter</i> [2012] ACTSC 38</p>	<p>"if the defendant satisfies the court" - legal or evidentiary onus ?</p> <p>Includes psychiatric conditions</p> <p>Expert evidence that heart condition led to breathlessness when stressed, defence successful</p> <p>Unjust to convict in the absence of evidence that as at the time had liquor, he intended to go to hospital and knew, or should have known, a blood sample would be taken</p> <p>Qualitative or quantitative difference?</p> <p>Ulcer preparation may affect RBT but effects dissipate after 5-10 mins</p>
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16	If PG	<p>Representations?</p> <p>Juvenile?</p> <p>Max penalty, second or subsequent offence?</p> <p>Intervention programs, eg Traffic offender program</p> <p>Disqualification provisions</p> <p>Other sanctions - compensation orders</p> <p>Disq - taking suspension into account</p> <p>Habitual offender</p> <p>Interlock licence</p> <p>HRPCA guideline judgment</p>	<p><i>s 28 Children(CP) Act 1987, s 8 Young Offenders Act 1997, s 210 Criminal Procedure Act 1986</i></p> <p>Ch 7 Pt 4 <i>CP Act</i>, Ch 8 <i>CP Reg 2010</i></p> <p>ss 187 - 189</p> <p>ss 208 - 216</p> <p>s 205</p> <p>ss 198 - 203</p> <p>ss 190 - 197</p>	<p><i>Re AG Application (2004)</i> 61 NSWLR 305</p>	<p>eg consider DUI rather than fail to submit to breath analysis (MRPCA v HRPCA penalty equivalents)</p> <p>Be aware of specific provisions</p>
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