

IN THE MAGISTRATES' COURT OF VICTORIA
AT SUNSHINE

CRIMINAL DIVISION

Case No. C13238618

GEORG BERK

Informant

v

STEVEN GRENVILLE

Accused

MAGISTRATE:	MAGISTRATE MACCALLUM
WHERE HELD:	SUNSHINE MAGISTRATES' COURT
DATES OF HEARING:	17 DECEMBER 2015
DATE OF DECISION:	1 APRIL 2016
CASE MAY BE CITED AS:	VICTORIA POLICE V GRENVILLE

REASONS FOR DECISION

APPEARANCES:	Counsel	Solicitors
For the Prosecution	LSC PAUL MAHER	SUNSHINE PROSECUTIONS UNIT
For the Accused	S. HARDY	N/A

MAGISTRATES' COURT OF VICTORIA – UNREPORTED DECISION – 1
APRIL 2016



HER HONOUR:

The Charges

1. The Accused, Mr Steven Grenville, has been charged with two charges. The Prosecution advises me that these charges are not brought as alternative charges. They are:
 - a. the Accused at Derrimut on 13 October 2014 drove a motor vehicle while the prescribed concentration of drugs was present in his oral fluid, contrary to section 49(1)(bb) of the Road Safety Act 1986 (hereafter referred to as 'the Act'); and
 - b. the Accused at Derrimut on 13 October 2014 did within 3 hours after driving a motor vehicle provide a sample of oral fluid in accordance with section 55E and the sample having been analysed by a properly qualified analyst within the meaning of section 57B did find at the time of analysis a prescribed illicit drug was present in that sample in any concentration and the presence of the drug in that sample was not solely due to the consumption or use of that drug after driving or being in charge of a motor vehicle, contrary to section 49(1)(h) of the Act.
2. The maximum penalty for the offence against section 49(1)(bb) or section 49(1)(h) of the Act, if found proven, depends on whether the offence is the first or a subsequent offence. The Act provides:

S 49 (3AAA) A person who is guilty of an offence under paragraph (bb), (eb), (h) or (i) of subsection (1), other than an accompanying driver offence, is liable—

- (a) in the case of a first offence, to a fine of not more than 12 penalty units; and

- (b) in the case of a second offence, to a fine of not more than 60 penalty units; and
 - (c) in the case of any other subsequent offence, to a fine of not more than 120 penalty units.
- 3. Where a person is convicted or found guilty of an offence against section 49(1)(bb) or section 49(1)(h), the Court must cancel their licence and disqualify them from driving for a minimum of three months for the first offence, and six months for a subsequent offence (s 50(1E)).
- 4. Relevant parts of section 49(1) and section 50(1E) of the Act are set out in Attachment A.

The relevant standard of proof

- 5. I must decide whether I am satisfied that the Prosecution has proven to the criminal standard of proof, that is, beyond reasonable doubt, that Mr Grenville has committed the offences.

The elements of the crimes

- 6. These crimes are absolute liability offences. They have several elements that the Prosecution must prove beyond reasonable doubt. If the Prosecution do not satisfy the Court that each of the elements is proven beyond reasonable doubt, the charges will be dismissed.
- 7. For the offence against section 49(1)(bb), the Prosecution must prove beyond reasonable doubt that:
 - a. the accused is the alleged offender; and
 - b. the accused was driving or in charge of a motor vehicle; and
 - c. the accused had a drug or drugs in his or her blood or oral fluid; and

- d. at the time of driving or being in charge of the motor vehicle the concentration of drugs was the prescribed concentration, or more, of the drugs.¹

8. In relation to section 49(1)(bb), a statutory presumption is created by section 48(ac) which provides:

(ac) if it is established that at any time within 3 hours after an alleged offence against paragraph (bb) or (bc) of section 49(1), a certain drug was present in the blood or oral fluid of the person charged with the offence it must be presumed, until the contrary is proved, that that drug was present in the person's blood or oral fluid at the time at which the offence is alleged to have been committed.

9. For an offence against section 49(1)(h), the Prosecution must prove beyond reasonable doubt that:

- a. the accused is the alleged offender; and
- b. the accused was driving or in charge of a motor vehicle; and
- c. the accused had a sample of oral fluid taken from him or her:
 - i. in accordance with section 55E; and
 - ii. within three hours of driving or being in charge of the motor vehicle; and
- d. the sample was analysed by a properly qualified analyst within the meaning of section 57B; and
- e. the analyst found a prescribed illicit drug in that oral fluid sample; and
- f. the drug in the oral fluid sample was not solely due to the consumption or use of that drug after driving or being in charge of the motor vehicle.²

10. These offences are complex and involve the Court being satisfied of a number of inter-related material facts. These material facts are matters

¹ Connellan, G, Cockcroft, K and McDonald, K, *Road Safety Law Victoria*, 2015, paragraph 4.8.2482.

² Connellan, G, Cockcroft, K and McDonald, K, *Road Safety Law Victoria*, 2015, paragraph 4.8.2662.

of proof for the Prosecution. I have set out the legislative provisions applying to the proof of the above offence elements and material facts in Attachments B and C to this decision.

Issues for determination

Agreed issues

11. The following material facts were agreed by the Accused and the Prosecution:

- a. The date, time and place of the alleged incident;
- b. The identity of the driver as the Accused;
- c. That the Accused was driving or in charge of a motor vehicle.

12. Therefore, I find with respect to those matters that elements (a) and (b), that the accused is the alleged offender and was driving or in charge of a motor vehicle at the time of the alleged offences against section 49(1)(bb) and section 49(1)(h)) are proven beyond reasonable doubt.

13. It was also conceded that:

- a. a sample of oral fluid was requested from the Accused and that he cooperated with the request;
- b. the intercept by police of the Accused's vehicle was lawful; and
- c. the legal requirements regarding the transfer and continuity of the oral fluid sample have been met.

14. In relation to the concession by Defence regarding the transfer and continuity of the sample, the statement of Sue Bordon sworn on 15 October 2014 was tendered as an agreed exhibit and its contents were conceded by Defence. Despite that concession at the start of the hearing, Mr Hardy cross-examined the Informant about possible contamination of the oral fluid sample. Based on the responses from the Informant, and the absence of any direct evidence that the sample

was contaminated, interfered with or negligently handled, I am satisfied that the rebuttable presumptions of regularity and continuance usually applying to such certificates should not be disturbed.³

15. No issues were raised in relation to the Informant's authority to conduct the preliminary and oral fluid tests, and his certificate of authority to do so was tendered without objection. I find therefore beyond reasonable doubt that the Informant was authorised in writing and appropriately trained, in accordance with the requirements of the Act as stipulated in sub-paragraph (x) of Attachment B, and sub-paragraph (j) of Attachment C.

Issues in Dispute

16. Counsel for the Accused raised two issues with respect to the lawfulness of the oral fluid sample test. It was submitted that the test conducted by the Informant did not comply with the legislation, the Prosecution could therefore not rely on it, and as a result there is insufficient evidence for it to prove these offences beyond reasonable doubt. Mr Hardy stated at the commencement of the hearing that the manner in which the oral fluid test was conducted did not comply with sections 55D and 55E of the Act. The prescribed devices and procedure for carrying out a preliminary oral fluid test are set out in regulations 16 and 17 of the *Road Safety (General) Regulations 2009*. The prescribed device and procedure for carrying out an oral fluid test is set out in regulations 16, 18 and 19 of the *Road Safety (General) Regulations 2009*. Those provisions are reproduced in Attachment D to this decision.

17. The second issue raised by Counsel for the Accused is that the VIFM Toxicology Certificate tendered by the Prosecution does not state that it is signed by the analyst who analysed the substance. It was submitted that this is a requirement of section 57B(4) of the Act, and

³ See *Collins v Mithen* (unreported, VSC, 21 May 1975), page 9; *Mallock v Tabak* [1977] VR 78 at pages 6-7.

having failed to comply with that provision, the charges should be dismissed. The particulars for a section 57B certificate are prescribed under regulation 21 of the *Road Safety (General) Regulations 2009* (see Attachment D).

18. I will return to consider these submissions, but I will first set out the evidence led by the parties.

The evidence

19. The Prosecution called the Informant, Leading Senior Constable Georg Berk as its sole witness.

20. The Prosecution relies on the following exhibits which were tendered in evidence:

- a. P1 – Certificate of Authority, G Berk, 13 January 2010;
- b. P2 – Certificate of Authorised Officer of the Taking of Oral Fluid Sample, under section 57B(3) of the Road Safety Act 1986;
- c. P3 – Certificate of Sue Borden regarding continuity of the sample, 15 October 2014;
- d. P4 – VIFM Toxicology Certificate issued under section 57, 57A and 57B of the Road Safety Act 1986, dated 28 October 2014.

21. The Accused elected to give evidence and was subjected to cross-examination.

Analysis and findings

22. I have considered all of the evidence before the Court, the submissions of the parties and the relevant sections of the Act and the Regulations. I have reviewed in addition to the cases which Counsel for the Defence referred me to (as set out below) various Supreme Court authorities

interpreting the disputed provisions of the legislation. I make the following findings.

Evidence of the Informant

23. The Informant gave evidence that he is certified and authorised to conduct oral fluid samples, and his certificate of authorisation was tendered without objection. On Monday, 13 October 2014 he was performing patrol duties with the Heavy Vehicle Unit. At 5.30 pm he observed on Doherty's Road a blue prime mover towing an empty trailer west bound on Doherty's Road, Derrimut. He and the other officer present pulled the vehicle over for checks and asked the driver to produce his licence and log book, and identified him as the Accused. After conducting other relevant checks, he then conducted a preliminary breath test using a prescribed device being the Lion Alcolmeter SD-400. The result that indicated no alcohol present in his system. He then conducted a preliminary oral fluid test on the Accused. The transcript then reads as follows:

Informant: Yes?---Using a prescribed device being a SureTec Drugwipe II Twin.

Her Honour: Sure-Tec?---S-u-r-e-T-e-c.

Yes?---Drugwipe, one word, II as in II.

Yes?---Twin.

Yes?---Being a prescribed device. I took this device out of a sealed container and used that device to conduct the test.

Thank you?---I stated to him at the time, normal format, as the driver of a motor vehicle in the last three hours.

Yes?---I require you to undergo a preliminary oral fluid test.

Yes?---I then explained to him exactly what to do as in wipe down the tongue. I generally ask them to wipe down their tongue twice. He complied with that command. The container - the device I used had come from a sealed container. After some minutes the device indicated a presence of an illicit substance. I then stated to the accused as a result of the preliminary fluid test I require you to remain for the purpose of a further oral fluid test. You're required to remain for the purpose of the test, until the test has been successfully completed.

Yes?---Or until three hours, whichever is the sooner. I then - he complied with that command. I then conducted an oral fluid test.

MR MARK: Where was this oral fluid test done?---This oral fluid test was conducted on the roadside where he was intercepted. We were parked in front of him. It was conducted between the rear of our car and the front of his truck.

This was a preliminary oral fluid test?---So it was preliminary and the evidentiary.

So they're both done at the same place?---Both done at the same place, correct.

HER HONOUR: Yes?---Where was I. Yes, he complied with that. I then used a SureTec Drugwipe II Twin combo which is a prescribed device and that device was also taken from a sealed container. As a result of that test - sorry. As a result of that test, indicated a presence of an illicit substance being methylamphetamine or MDMA. Prior to conducting that test I actually conducted an interview which was done by asking the questions and immediately writing the answers on what we call a pro forma. Did you want me to go through that statement?

MR MARK: Can you recall any of the conversation you had with him?---Well, in the main the first part of it is identity. Once I asked his name and address which he gave the same. He also gave me his phone number, his date of birth. I can't recall, I remember he's 36, I can't recall his exact date of birth at the moment short of checking the notes and the rest were mainly along the lines of he's used anything, what he's used. He denied use of any previous illicit substances. I also asked if he had any other illnesses or medications. All were to the negative.

So in relation to the oral fluid test itself, can you go through the procedure for that and how it was conducted?

---Certainly. The oral fluid test is conducted. I - firstly before I even start we put on rubber gloves, wear them. I then - we take out the sample. I explained to him what to him what to do. Once again it's the same, wiping the device down his tongue. Once he's done that I put that sample to one side and make a note of the time and I believe it was 17.54 when that sample was taken. Sorry, when I first take - sorry, when I first start he does the Drugwipe Twin 22 combo, takes that, put that to one side. I then as part of the kit, there is what we call an oral fluid collection device, we refer to it as a paddle.

HER HONOUR: Oral fluid collection device?---Correct.

Go on?---Right. I then asked him to take this device, first of all wipe it on his tongue and on his cheeks.

MR MARK: Where did you get that device from?---That device is part of the kit in which the Drugwipe combo kit is. It's a plastic bag which contains the Drugwipe. It contains the oral fluid collection device. It contains two little plastic vial bottles in which we put the oral fluid sample. It contains a small pad which in most cases we don't use. I didn't need to use it in this particular case.

HER HONOUR: Yes?—Right. When he's got the - as I said before for convenience I'll call it the paddle, in his mouth, he's required to keep that in his mouth for a period until we know it's saturated enough.

Yes?—And the indication it is saturated enough is that at the end of it, of this paddle, the little stick, it actually changes colour. When that's taken out, when it changes colour I then retrieve the paddle.

Yes?—At this point I make a note of the time that it's actually retrieved and that time was 17.54.

Yes?—Right. The paddle itself then I put on a flat surface and generally the cover in which it comes because that's still a clean sterile item, I put the paddle on there. The Drugwipe combo I then press firmly on the paddle. All right. I make sure both sides of the paddle so that there is sufficient of that fluid sample on the Drugwipe II. I then attach the cover of the Drugwipe II, break the seal on that to get the fluid running to run the test for the Drugwipe II. The paddle itself then is put in, there's another tube - sorry, it's one of the things I neglected to mention in part of the kit. There's a tub which has a liquid. The paddle is put in there, the end of the soft part, the felt part of that is put in there, is mixed with that.

Yes?—That fluid is then divided into two parts into the two vials which I mentioned earlier. So it's approximately evenly divided between the two vials.

Yes?—The vials are then sealed. Over the vial not only are they closed seal but over the vial we then have another piece of tape which goes over it with the date and initials of the accused.

Yes?—I then write the - I fill out the certificate.

MR MARK: What certificate are you talking of?—I'll get onto that. Sorry, just prior to actually writing out the certificate by this stage I've already started to get an indication on the Drugwipe II which in this particular indicates that there was a presence of methylamphetamine or MDMA.

HER HONOUR: Yes?—The certificate I've got is the certificate I present here which is a certificate of authorised officer of the taking of an oral fluid sample.

MR MARK: I tender that certificate, Your Honour.

#EXHIBIT P2 - Certificate of the authorised officer of the taking of the oral fluid sample.

MR MARK: So you've taken the sample?—Yeah.

You've provided it up?—I've provided, I've provided it up. There are actually there's the original and there's three copies of that certificate. Two of the copies are a white copy to which the vial is attached. So I attach one vial to each of those white copies. I then handed - there is also a pink copy which is the accused copy. I then handed one of those vial copies with the vial and sample and the pink copy, I then handed that to the accused.

HER HONOUR: Yes?---And as per the rear of that certificate, that certificate was handed to the accused at 6.05 pm.

Yes?---I then advised the accused of the result of the analysis. I further advised him that on the basis of that analysis we forward our sample to the VIFM.

MR MARK: Which is?---The Victorian Institute of Forensic Medicine.

HER HONOUR: Yes?---They further analyse it.

Yes?---And the result of that analysis indicates any further action by us.

Yes?---The accused was then grounded as per normal procedure with that result which ran it for 12 hours.

Was then what for 12 hours?---It's grounded, the vehicle, so he's not allowed to drive for 12 hours from that period.

When you say he's grounded for 12 hours what do you mean by that?---He's not allowed to drive for 12 hours from the time of interception.

MR MARK: Is that in relation to all drivers or just in relation to heavy vehicle drivers?---No, that applies to all drivers.

HER HONOUR: Yes?---I explained to him, as I said, what the procedure would be and other than conversations so I asked him - sorry, I had a further conversation. I asked him what his reason was. I can't remember his exact words but he said that in effect the same, that he hadn't taken any substances. I can refer to my notes as far as to his exact words if you like.

MR MARK: Yes, if Mr Hardy takes no issue.

MR HARDY: I've got no problem with you referring to your notes.

MR MARK: Yes?---I asked him, "Do you have any comment to make". He said, "No".

HER HONOUR: Yes?---I said, "What is your reason for driving a motor vehicle with a prescribed illicit drug in your oral fluid".

Yes?---He said, "I haven't taken anything". I asked him further, "Is there anything further you wish to say in relation to the matter".

Yes?---And he said, "No". I then deposited the oral fluid in a refrigerator, locked refrigerator in the testing vehicle. At 9.25 the next morning on 14 October I retrieved that sample from the vehicle.

Yes?---All right. I kept the oral fluid sample in my possession and conveyed it to the Road Policing Drug and Alcohol Section at Dawson Street.

Yes?---At 9.40 am on 14 October, at that location I placed the oral fluid sample in a locked refrigerator.

MR MARK: Subsequently that sample went to?---That sample is sent away and the result I get in the form of a certificate from the Institute of Forensic Medicine.

Before we go there, there'd previously been the concession in relation to the continuity so I'll tender the continuity statement by Sue Bordon?---Sue Bordon.

HER HONOUR: Thank you?---Hang on, I've got the original here if you want.

MR MARK: I'll tender the original.

HER HONOUR: I'll mark the statement of Sue Bordon?---Bordon, B-o-r-d-e-n, or d-o-n, my apologies.

#EXHIBIT P3 - Statement of Ms Sue Bordon.

HER HONOUR: Thank you.

MR MARK: If I may approach, Your Honour?

HER HONOUR: Yes.

MR MARK: So that sample was subsequently the subject of analysis?---Subject to analysis. I'll just find the certificate, I know I've got it here. Right. I viewed the VIFM toxicology certificate indicating that from the analyst, indicating that methylamphetamine was detected.

I'll tender that, Your Honour.

#EXHIBIT P4 - VIFM toxicology certificate.

24. The Informant was then cross-examined by Counsel for the Defence, as follows.

MR HARDY: So he was cooperative with you. It's fair to say that there was no interference with other traffic?---Sorry?

The driving was normal?---Yeah, there were no issues as far as that initially, no

It's fair to say that there was no interference with other traffic?---Sorry?

The driving was normal?---Yeah, there were no issues as far as that initially, no.

He didn't present as someone who was affected by alcohol or drugs?---No.

You did an interview with him on a pro forma, is that correct?
---Correct.

And one of the questions on the pro forma was whether or not he consumed any illicit drugs today or yesterday?---Correct.

Do you recall what his answer was?---I think from memory it was no.

Are you an operator of evidentiary breath test machines?

---Correct, yes.

And are you familiar with how a driver tries to sample a breath into that machine?---Sorry?

Are you familiar with the way the drivers samples to a breath machine?---Yes.

That they exhale into a tube that goes directly in the machine?---Yes, yes, yes.

It's analysed and the results produced by the machine?---Yes.

The process for oral samples though has the potential for interference to occur between when the paddle is taken from his mouth to the point where it's analysed by the vial - - -

HER HONOUR: Mr Hardy, can I just get you to speak up a little and if you can just move that microphone closer to your mouth, thank you.

HARDY: Do you agree that the taking of an oral sample of fluid is somewhat different in that there's a potential for contamination of the sample when the paddle is removed from his mouth to the point where it's put into the sealed vial?---I don't know where the contamination was because he's right beside the testing vehicle and in this particular case we have a station wagon so we were either sort of undercover, although it was a fine day/evening as it was and it goes, from there it's sprayed onto where I conducted the sample. There's nothing there immediately that I can think of that would be a contaminant. And as I said before, it's on a fresh, you know, fresh surface, clean surface so.

Did you have any conversation with the accused about any further tests that he might have conducted, any blood tests or other - - -?---There was no conversation about blood tests.

Are you aware that he went to see a doctor to get a further test taken that day?---Some time later after the - after I put the brief forward and that, I think after the first hearing that I was made aware that he'd had a urine sample taken.

But there's no discussion of any of that at that point of time?---No.

How long have you been doing the oral fluid sample tests for? The authority says 2010?---I'd started the course in January 2010.

Have you been doing them since then?---Yes.

The time periods, he was pulled over at 5.30 and it was at 5.54 that the sample was retrieved?---Yes.

What do you say about that time period, is it normal for it to occur that quickly?---Yeah, not unusual at all. It's varies greatly the times but that's concerning, as I said, with the vehicle itself there wasn't - well, not a (indistinct) officer on the day. He checked mostly over the vehicle. I checked any paintwork to be done, licence. We were into that side of it fairly soon, within probably five minutes. Yeah, 15 minutes, it's probably about ten to 15 minutes is about an average time. Sometimes it can be a lot longer.

To do the second test or the whole lot?---Well, the first one takes about three minutes roughly and you start into the second test, well, even sort of stretching it, ten minutes even. Yeah, that's not unusual for it. It depends purely and it varies greatly for the accused. It depends purely whether he has much saliva in his mouth or whether he is very dry. If he has a lot of saliva in his mouth, you know, which is not unusual, then the sample can be - well, it can be as quick as five minutes.

I suggest that you haven't used the correct processes to obtain a final sample from the accused. What do you say about that?---I disagree with that.

You say that you told the accused he was grounded for 12 hours. By what section do you ground someone for 12 hours?

---It's a policy that we've been given from the office and that's actually dictated by (indistinct) drug policing, drug and alcohol section. That's by their instructions.

If he drives in that 12 hours he runs the risk of disobeying a police direction and driving whilst suspended, would that be right?---Police direction it would be, yes. His licence isn't suspended at that point, no.

I'm just clarifying that issue. No further questions.

MR MARK: No re-examination, Your Honour.

HER HONOUR: Thank you. The witness may be excused

Evidence of the Accused

25. The Accused denied that he had taken any drugs before driving and said he was in disbelief when there was a positive result to the test taken by the Informant. He said that he went to his doctor immediately to give a urine sample. He said that his doctor did not perform blood tests. Counsel for the Defence attempted to tender the urine test result, but withdrew upon the Prosecution objection to the document constituting hearsay evidence (p.22 transcript). The Accused confirmed in cross-examination that he was given a sample of result of his oral

fluid analysis, and said that he did not get it tested. It was put to him that he did not do so as he knew that the test would show that he had methylamphetamine in his system, which he denied.

26. A question arises as to whether the evidence of the Accused constitutes 'evidence to the contrary' within the meaning of the Act, and as judicially considered. The legal meaning of the phrase 'evidence to the contrary' has been judicially considered in the context of drink driving and speeding cases. In *DPP v Cummings* [2006] VSC 327, his Honour Kellam J stated (at paragraph 35):

"35 The phrase "to the contrary" means "to the opposite effect". In my view, to be evidence to the contrary the evidence must at least be accepted by the tribunal of fact as having some weight."

27. This principle of law has been affirmed in successive Supreme Court decisions. See also *Agar v Petrov* [20015] VSC 168; *Agar v McCabe* [2014] VSC 309 and *Agar v McCabe* [2015] VSC 378 at paragraphs 20-23. In this last decision, Her Honour Zammit J sets out the relevant test as follows:

"20. The concept of 'evidence to the contrary' has been considered by this Court, most recently in *Agar v McCabe* ('*McCabe* ') and *Agar v Petrov* ('*Petrov*').

21. In *DPP v Cummings* ('*Cummings*'), Kellam J discussed a definition of evidence to the contrary in the context of proceedings where the respondent had sought to rebut a statutory presumption of the facts and matters set out in a certificate under s 57(3) of the RSA in relation to the taking of a blood sample. Kellam J found that the phrase 'to the contrary' meant 'to the opposite effect', and that it 'must at least be accepted by the tribunal of fact as having some weight'. Slight or unconvincing evidence would not be enough to constitute evidence to the contrary.

22. This interpretation has subsequently been accepted in cases dealing with speeding offences and certificates issued pursuant to

and 83A of the RSA, with T Forrest J adopting the definition in McCabe, and McDonald J following this approach in *Petrov*.

23. As per Kellam J's approach, two separate elements must be made out to establish evidence to the contrary, with the first element being that there is evidence to the opposite effect of the matters set out in s 83A of the RSA, and the second element being that the tribunal of fact accepts that such evidence has some weight (footnotes omitted)."

28. I accept that the evidence of the Accused given on oath that he did not take any drugs before driving his truck is 'evidence to the contrary'. However I cannot accept that the Accused's evidence is of sufficient weight that it would displace the statutory presumption, as evidenced by the section 57B certificate relied on by the Prosecution, that methylamphetamine was present in his oral fluid at the time that the offences are alleged to have been committed. The Accused's evidence is unsupported by any scientific analysis of his oral fluid. He agreed that one half of the oral fluid was given to him by the Informant. He provided no satisfactory explanation for why the portion of the oral fluid sample given to him was not tested by him independently, and he had ample opportunity to do so. He did not call his doctor to give evidence about the result of the urine test that he says was conducted after the accident. His assertion that there was no methylamphetamine in his blood at the time of the commission of the alleged offences is entirely uncorroborated.

Submissions of the parties

29. Regulation 16 of the *Road Safety (General) Regulations* 2009 provides that the prescribed device for the purposes of section 55D of the Act is the SECURETEC DRUGWIPE TWIN or the SECURETEC DRUGWIPE II TWIN. The prescribed device for conducting the oral fluid test is the SECURETEC DRUGWIPE II TWIN COMBO. Defence submitted in

closing that when the Informant gave evidence he said that he conducted the preliminary oral fluid test with a SureTec Drugwipe II Twin. He spelt the name of the device as S-u-r-e-T-e-c. Mr Hardy submitted that this device is not a prescribed device for the purposes of the regulations.

30. I have highlighted the relevant portion of the Informant's evidence in bold above. The specific challenge was not put to the Informant in cross-examination. All that was put to him was that he had not used the correct processes to obtain an oral fluid sample from the Accused, which he disagreed with. The rule in *Browne v Dunne* (1893) 6 R 67 is an important rule of fairness which applies in cross-examination. The failure by Counsel for the Defence to put the specific challenge to the Informant denied the Informant the opportunity to explain his evidence, and also denied the Prosecution the opportunity to re-examine the Informant.

31. Having made that comment, it is unnecessary to pursue it further, as it is a matter for me as to whether I am satisfied that the Informant used a prescribed device to conduct the preliminary and evidentiary oral fluid tests, and I am satisfied beyond reasonable doubt that he did. The Prosecution submitted in closing that the Informant had merely made a spelling error. I accept that when the Informant was giving evidence and when he was spelling the name of the prescribed device, it was a mere error in the spelling of the technical name. When he gave evidence, the Informant referred to the device as a prescribed device and his description of it is indeed very close to the language used in Regulation 16. See also *O'Connor v County Court of Victoria & Anor* [2014] VSC 295 at paragraph 56 where the Court of Appeal held that it was a matter for the judge whether there was a relevant discrepancy between the evidence of a police officer and a recorded conversation, and any inferences were to be drawn from that discrepancy.

32. In his submissions, Mr Hardy further relies on the authority in *Sirajuddin v Ziini* [2005] VSC 418. The effect of that decision is that the Prosecution must lead evidence that preliminary breath tests are conducted by prescribed devices as this is an element of the offence (see paragraphs 51 to 62). I do not disagree with the meaning of that authority. However, I disagree that the present facts give rise to the same deficiency in the prosecution case as the Informant clearly gave evidence that he used a prescribed device.

The VIFM toxicology certificate

33. The second issue raised by defence is that the VIFM Toxicology Certificate that is tendered by the Prosecution does not state that it is signed by the analyst who analysed the substance. The defence submitted that this is a requirement of section 57B(4) of the Act.

34. Section 57B of the Act provides:

57B Evidentiary provisions—oral fluid tests

(1) In this section—

approved analyst means a person who has been approved by Order of the Governor in Council published in the Government Gazette as a properly qualified analyst for the purposes of this section;

properly qualified analyst means—

- (a) an approved analyst; or
 - (b) a person who is considered by the court hearing the charge for the offence to have scientific qualifications, training and experience that qualifies him or her to carry out the analysis and to express an opinion as to the facts and matters contained in a certificate under subsection (4).
- (2) If a question as to the presence of a prescribed illicit drug in the body of a person at any time is relevant—
- (a) on a trial for murder or manslaughter or for negligently causing serious injury arising out of the driving of a motor vehicle; or
 - (b) on a trial or hearing for an offence against Subdivision (4) of Division 1 of Part I of the **Crimes Act 1958** arising out of the driving of a motor vehicle; or

- (c) on a trial or hearing for an offence against section 318(1) or 319(1) of the **Crimes Act 1958** arising out of the driving of a motor vehicle but not the operating of a vessel; or
- (d) on a hearing for an offence against section 49(1) of this Act; or
- (e) in any proceedings conducted by a coroner—

then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given—

- (f) of the providing by that person, after that person drove or was in charge of a motor vehicle, of a sample of oral fluid under section 55E;
 - (g) of the analysis of that sample of oral fluid by a properly qualified analyst within twelve months after it was taken;
 - (h) of the presence of a prescribed illicit drug in that sample of oral fluid at the time of analysis.
- (3) A certificate containing the prescribed particulars purporting to be signed by the person who carried out the procedure in the course of which the sample of oral fluid was provided is admissible in evidence in any hearing referred to in subsection (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.
 - (4) A certificate containing the prescribed particulars purporting to be signed by an approved analyst as to the presence in any sample of oral fluid analysed by the analyst of a substance that is a prescribed illicit drug is admissible in evidence in any hearing referred to in subsection (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.
 - (5) A certificate given under this section must not be tendered in evidence at a hearing referred to in subsection (2) without the consent of the accused unless a copy of the certificate is proved to have been served on the accused more than 10 days before the day on which the certificate is tendered in evidence.
 - (6) A copy of a certificate given under this section may be served on the accused by—
 - (a) delivering it to the accused personally; or
 - (b) leaving it for the accused at his or her last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age.
 - (7) An affidavit or statutory declaration by a person who has served a copy of the certificate on the accused is admissible in evidence at a hearing referred to in subsection (2) and, as to the service of the copy, is proof, in the absence of evidence to the contrary, of the facts and matters deposed to in the affidavit or stated in the statutory declaration.
 - (8) An accused who has been served with a copy of a certificate given under this section may, with the leave of the court and not otherwise, require the person who has given the certificate or any person employed, or engaged to provide services at, the place at which the sample of oral fluid was provided, to attend at all subsequent

proceedings for cross-examination and that person must attend accordingly.

(9) The court must not grant leave under subsection (8) unless it is satisfied—

(a) that the informant has been given at least 7 days' notice of the hearing of the application for leave and has been given an opportunity to make a submission to the court; and

(b) that—

(i) there is a reasonable possibility that the oral fluid referred to in a certificate given by an analyst under subsection (4) was not that of the accused; or

(ii) there is a reasonable possibility that the oral fluid referred to in a certificate given under subsection (3) had become contaminated in such a way that a drug found on analysis would not have been found had the oral fluid not been contaminated in that way; or

(iii) there is a reasonable possibility that the sample was not taken within 3 hours after the person who provided the sample drove or was in charge of the vehicle; or

(iv) for some other reason the giving of evidence by the person who gave the certificate would materially assist the court to ascertain relevant facts.

(10) An accused who has been served with a copy of a certificate given under this section may not require the person who has given the certificate or any person employed, or engaged to provide services at, the place at which the sample of oral fluid was provided, to attend the court on the hearing of an application for leave under subsection (8).

(11) Evidence of a kind permitted to be given by subsection (2) in legal proceedings of a kind referred to in subsection (2)(a), (b), (c), (d) or (e) is inadmissible as evidence in any other legal proceedings.

35. The evidentiary effect of the certificate is that it is admissible and in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

36. Mr Hardy said during the hearing that he did not take issue with any of the particulars on the form and the certificate was admitted into evidence without objection (see lines 6 to 12, page 26, transcript of hearing). In his final submissions to the Court, Mr Hardy raised, for the first time, the argument that section 57B(4) requires that the certificate must be signed by an approved analyst as to the presence in any sample of blood analysed by the analyst. He submits that nowhere on

this certificate does it provide that Mr Tu Ngoc Vo, forensic toxicologist and approved analyst himself analysed the sample. The certificate states:

"Tu Ngoc Vo states:

I am an approved analyst under Section 57, 57A and 57B of the Road Safety Act, employed at the Victorian Institute of Sciences (RMIT University).

Specimens were received and results obtained as above."

37. The Defence submits that the certificate of toxicology is not evidence of the oral sample containing a prescribed drug because in order to be evidence it needs to comply with the Act and its failure to comply with the Act means that the Court is not allowed to rely on the result obtained in it. The Defence relies on the County Court decision in *Wesselman v Warren*, unreported decision 15 April 2014 (see pages 8-9 from line 20 onwards), in which Judge Lacava held in relation to section 57 (the equivalent provision with respect to blood alcohol content) that strict compliance with the legislation is required and the certificate that is signed must be signed by the analyst who did the sample. Specifically, Judge Lacava found that the prosecution had not proved its case beyond reasonable doubt as the form which the analyst signed, and which stated "I am responsible for this analysis" did not comply with the section because he did not certify that he was the person who conducted the analysis referred to in the certificate (at paragraph 9).

38. The Prosecution informed the Court that it was not aware of any existing authority challenging the validity of the certificate on these grounds, and Mr Hardy informed the Court that the issue had not been considered by the Supreme Court.

39. The Prosecution submitted that the Court may infer from the certificate that Mr Vo was the person who conducted the analysis. The Prosecution submitted that the certificate was valid as it had been

served on the Accused within the 10 day time limit provided for in the legislation (section 57B(5)), and that it had been tendered in evidence without objection.

40. The Prosecution further submitted that pursuant to section 57B(8), an Accused who has been served with a copy of a certificate must seek the leave of the court to have the person who gave the certificate or other relevant person attend for cross-examination. The court must not grant leave under sub-section (8) unless satisfied that (a) the informant has been given at least seven days notice of the application for leave and has been given an opportunity to make a submission to the court and (b) there is:

- i. a reasonable possibility that the oral fluid referred to in a certificate given by an analyst under subsection (4) was not that of the accused; or
- ii. a reasonable possibility that the analysed sample has been contaminated in such a way that the drug found on the analysis would not have been found had the oral fluid been contaminated in that way; or
- iii. a reasonable possibility that the analysed sample was not conducted within three hours after the person drove or was in charge of the motor vehicle; or
- iv. in the case of blood the sample was not taken in accordance with the "Code of Practice for Taking Blood Samples from Road Accident Victims; or
- v. for some other reason the giving of evidence by the person who gave the certificate would materially assist the court to ascertain the relevant facts.

41. No such application pursuant to section 57B(8) of the Act to cross-examine the maker of the certificate was made by Defence. This was the appropriate procedure to have followed if there was any concern that Mr Vo was not the approved analyst who undertook the analysis of

Mr Grenville's sample. In the interests of justice and fairness, given the matter had not been raised by Mr Hardy until final submissions, the Prosecution was invited by the Court to make application to re-open its case, in order to require the attendance of Mr Vo for cross-examination. That invitation was declined.

42. Once admitted into evidence, the Act provides that a certificate containing the prescribed particulars purporting to be signed by an approved analyst as to the presence in any sample of oral fluid analysed by the analyst of a substance that is a prescribed illicit drug is admissible in any hearing for an offence under section 49(1) of the Act, and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

43. However, the certificate must comply with all aspects of the legislation if it is to fulfil its evidentiary purpose. I disagree with the Prosecution that I may infer from the certificate that Mr Vo was the approved analyst who undertook the analysis of the Accused's oral fluid sample. On the face of the certificate, I cannot be satisfied that Mr Vo was the approved analyst who undertook the testing of the oral fluid sample, as Mr Vo did not certify that he was the person who conducted the analysis. All the certificate states is: "Specimens were received and results obtained as above." As stated by Judge Lacava (at page 8) :

Section 57(4) in terms, and leaving aside completely regulation 13, requires the certificate to refer to the fact that the person giving the certificate is the analyst, where it refers to 'any blood sample analysed by the analyst'. The statutory framework is elaborate but must be complied with strictly in order to overcome what are, at common law, normal evidentiary provisions. The statutory framework enables the police to prove the blood alcohol content by the provision of certificate rather than the calling of the analyst, to give such certificate. Such evidence via the certificate would or could be hearsay. That is not the intention of the statutory framework setting up these provisions.

The intention is clearly to provide a system to prove by certificate but with strict compliance. Where Mr Chu uses the words 'I am responsible for the analysis' in my view he has not complied with the section, because he has not certified that he was the person who conducted the analysis referred to in the certificate.

44.I therefore find that the Prosecution has failed to prove that the Accused drove a motor vehicle while the prescribed concentration of drugs was present in his oral fluid (s 49(1)(bb)), or that the Accused within 3 hours of driving a motor vehicle provided a sample of oral fluid that sample having being analysed by a properly qualified analyst who found at the time of the analysis a prescribed illicit drug was present in that sample in any concentration (s 49(1)(h)). The charges are dismissed.

49 Offences involving alcohol or other drugs

(1) A person is guilty of an offence if he or she—

.....

- (bb) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of drugs or more than the prescribed concentration of drugs is present in his or her blood or oral fluid; or

.....

- (h) within 3 hours after driving or being in charge of a motor vehicle provides a sample of oral fluid in accordance with section 55E and—
 - (i) the sample has been analysed by a properly qualified analyst within the meaning of section 57B and the analyst has found that at the time of analysis a prescribed illicit drug was present in that sample in any concentration; and
 - (ii) the presence of the drug in that sample was not due solely to the consumption or use of that drug after driving or being in charge of the motor vehicle; or

.....

(3AAA) A person who is guilty of an offence under paragraph (bb), (eb), (h) or (i) of subsection (1), other than an accompanying driver offence, is liable—

- (a) in the case of a first offence, to a fine of not more than 12 penalty units; and
- (b) in the case of a second offence, to a fine of not more than 60 penalty units; and
- (c) in the case of any other subsequent offence, to a fine of not more than 120 penalty units.

.....

- (5) It is a defence to a charge under paragraph (g), (h), (i) or (j) of subsection (1) for the person charged to prove that the result of the analysis was not a correct result.

.....

- (6A) In any proceedings for an offence under paragraph (h), (i) or (j) of subsection (1) evidence as to the effect of the consumption or use of a drug on the accused is admissible for the purpose of rebutting the presumption created by section 48(1B) but is otherwise inadmissible.

.....

- (9) If on a prosecution for an offence under paragraph (ba) of subsection (1), the court is not satisfied that the accused is guilty of that offence but is satisfied that the accused is guilty of an offence under paragraph (bb) of that subsection, the court may find the accused guilty of an offence under paragraph (bb) and punish the accused accordingly.

- 50 (1E) On convicting a person, or finding a person guilty of an offence under section 49(1)(bb), (h) or (i), the court must, if the offender holds a driver licence or permit, cancel that licence or permit and, whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for—

- (a) in the case of a first offence, a period not less than 3 months; and

- (b) in the case of a subsequent offence, a period not less than 6 months.

- (2) Any period of suspension imposed on a person under section 51 must be deducted from the period of disqualification imposed on that person under this section.

ATTACHMENT B – MATERIAL FACTS RELEVANT TO A
PROSECUTION UNDER SECTION 49(1)(bb) of the Act

1. The material facts relevant to a Prosecution for an offence of driving or being in charge of a motor vehicle while prescribed illicit drugs (namely, delta-9-tetrahydrocannabinol or methyl amphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA)) are present in the person's oral fluid or blood, contrary to s 49(1)(bb) of the Act are as follows:
 - i. the defendant drove or was in charge of the motor vehicle;
 - ii. a member of the police force could lawfully require that the defendant undergo a preliminary oral fluid test, see s 55D(1) of the Act;
 - iii. the device used for the oral preliminary fluid test was a prescribed device, see reg 16(1) of the Road Safety (General) Regulations 2009;
 - iv. the preliminary oral fluid test was carried out in accordance with the prescribed procedure, see s 55D(3), (6) and (6A) of the Act and reg 17 of the Road Safety (General) Regulations 2009;
 - v. the preliminary oral fluid test was provided within three hours of the defendant driving or being in charge of the motor vehicle, see s 55D(8) of the Act;
 - vi. the preliminary oral fluid test in the opinion of the member of the police force, in whose presence it was made, indicates that the person's oral fluid contains delta-9-tetrahydrocannabinol or methylamphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA), see s 55E(2) of the Act;
 - vii. the defendant was requested by a member of the police force to accompany the member to a place or vehicle for the

- purpose of providing a sample of oral fluid for testing by a prescribed device, s 55E(2) and (3) of the Act;
- viii. the device used for the oral fluid test was a prescribed device, see reg 16(2) of the Road Safety (General) Regulations 2009;
 - ix. the provision of a sample of oral fluid must be carried out in accordance with the prescribed procedure; see s 55E(4), (9) and (9A) of the Act and reg 18 of the Road Safety (General) Regulations 2009;
 - x. the police officer taking the sample of oral fluid must be 'authorised' in writing and appropriately trained, see s 55E(6), (7) and (22) of the Act and reg 20 of the Road Safety (General) Regulations 2009;
 - xi. if the sample of oral fluid in the opinion of authorised officer who carried out the procedure indicates the presence of delta-9-tetrahydrocannabinol or methyl amphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA) the authorised officer must deliver a part of the sample to the defendant and another part of the sample to the member of the police force who required the sample, see s 55E(11) of the Act);
 - xii. the sample of oral fluid sample was provided within three hours of the defendant driving or being in charge of the motor vehicle, see s 55E(10) of the Act;
 - xiii. the prescribed procedure after the taking of the sample was complied with, see reg 19 of the Road Safety (General) Regulations 2009;
 - xiv. the certificate under s 57B(3) which contains the prescribed particulars, see reg 20 of the Road Safety (General) Regulations 2009; and which purports to be signed by the person carrying out the procedure is admissible in evidence and in the absence of evidence to the contrary proof of the matters and facts contained in it;

xv. the certificate under s 57B(4) which contains the prescribed particulars, see reg 21 of the Road Safety (General) Regulations 2009, and which purports to be signed by an approved analyst as to the presence of delta-9-tetrahydrocannabinol or methylamphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA) in any sample of oral fluid is admissible in evidence and in the absence of evidence to the contrary proof of the matters and facts contained in it.⁴

⁴ Summary of legislative elements extracted from *Lexis Nexis, Motor and Traffic Law*, paragraph [5610.263ZK] and cross-referenced for accuracy against the Act and relevant regulations.

ATTACHMENT C – MATERIAL FACTS RELEVANT TO A
PROSECUTION FOR AN OFFENCE AGAINST SECTION 49(1)(h)

1. The material facts relevant to a Prosecution for an offence of providing a sample of oral fluid within 3 hours of driving or being in charge of a motor vehicle that has been analysed by a properly qualified analyst and found to have the prescribed illicit drugs, namely, delta-9-tetrahydrocannabinol or methylamphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA), are as follows:
 - a. the defendant drove or was in charge of the motor vehicle;
 - b. a member of the police force could lawfully require that the defendant undergo a preliminary oral fluid test, see s 55D(1) of the Act;
 - c. the device used for the oral preliminary fluid test was a prescribed device, see *reg 16(1) of the Road Safety (General) Regulations 2009*;
 - d. the preliminary oral fluid test was carried out in accordance with the prescribed procedure, see ss 55D(3), (6) and (6A) of the Act and reg 17 of the Road Safety (General) Regulations 2009;
 - e. the preliminary oral fluid test was provided within three hours of the defendant driving or being in charge of the motor vehicle, see s 55D(8) of the Act;
 - f. the preliminary oral fluid test in the opinion of the member of the police force, in whose presence it was made, indicates that the person's oral fluid contains delta-9-tetrahydrocannabinol or methylamphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA), see s 55E(2) of the Act;
 - g. the defendant was requested by a member of the police force to accompany the member to a place or vehicle for the purpose of providing a sample of oral fluid for testing by a prescribed device; s 55E(2) and (3) of the Act;
 - h. the device used for the oral fluid test was a prescribed device, see reg 16(2) of the Road Safety (General) Regulations 2009;

- i. the provision of a sample of oral fluid must be carried out in accordance with the prescribed procedure; see s 55E(4), (9) and (9A) of the Act and reg 18 of the Road Safety (General) Regulations 2009;
- j. the police officer taking the sample of oral fluid must be “authorised” in writing and appropriately trained, see s 55E(6), (7) and (22) of the Act and reg 20 of the Road Safety (General) Regulations 2009;
- k. if the sample of oral fluid in the opinion of authorised officer who carried out the procedure indicates the presence of delta-9-tetrahydrocannabinol or methyl amphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA) the authorised officer must deliver a part of the sample to the defendant and another part of the sample to the member of the police force who required the sample, see s 55E(11) of the Act;
- l. the oral fluid sample was provided within three hours of the defendant driving or being in charge of the motor vehicle, see s 55E(10) of the Act;
- m. the prescribed procedure after the taking of the sample was complied with, see reg 19 of the Road Safety (General) Regulations 2009.
- n. the certificate under s 57B(3) which contains the prescribed particulars, see reg 20 of the Road Safety (General) Regulations 2009, and which purports to be signed by the person carrying out the procedure is admissible in evidence and in the absence of evidence to the contrary proof of the matters and facts contained in it;
- o. the certificate under s 57B(4) which contains the prescribed particulars, see reg 21 of the Road Safety (General) Regulations 2009, and which purports to be signed by an approved analyst as to the presence of delta-9-tetrahydrocannabinol or methyl amphetamine or 3,4-Methylenedioxy-N-Methylamphetamine (MDMA) in any sample of oral fluid is admissible in evidence and

in the absence of evidence to the contrary proof of the matters and facts contained in it;

- p. the presence of the drug in that sample was not solely due to the consumption of or use of that drug after driving or being in charge of the motor vehicle, see s 48(1B) of the Act.⁵

⁵ Summary of legislative elements extracted from *Lexis Nexis, Motor and Traffic Law*, paragraph [5610.640C] and cross-referenced for accuracy against the Act and relevant regulations.

ATTACHMENT D – SECTION 55D OF THE ACT

55D Preliminary oral fluid tests

- (1) A police officer may at any time require—
- (a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; or
 - (b) the driver of a motor vehicle that has been required to stop at a preliminary testing station under section 54(3); or
 - (c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident; or
 - (d) any person who he or she believes on reasonable grounds was, within the last 3 preceding hours, an occupant of a motor vehicle when it was involved in an accident, if it has not been established to the satisfaction of the police officer which of the occupants was driving or in charge of the motor vehicle when it was involved in the accident—
- to undergo a preliminary oral fluid test by a prescribed device and, for that purpose, may further require the person, if inside a motor vehicle, to leave the motor vehicle for the purpose of undergoing the test.
- (2) An officer of the Corporation or of the Department of Transport, Planning and Local Infrastructure who is authorised in writing by the Corporation or the Secretary, as the case requires, for the purposes of this section may at any time require any person he or she finds driving a commercial motor vehicle or in charge of a commercial motor vehicle to undergo a preliminary oral fluid test by a prescribed device and, for that purpose, may further require the person, if inside a motor vehicle, to leave the motor vehicle for the purpose of undergoing the test.
- (3) A preliminary oral fluid test must be carried out in accordance with the prescribed procedure.
- (4) The Corporation or the Secretary may only authorise an officer for the purposes of this section if satisfied that the officer has the appropriate training to carry out a preliminary oral fluid test in accordance with the prescribed procedure.
- (5) A prescribed device may be comprised of a collection unit and a testing unit and one or more other parts.
- (6) A person required to undergo a preliminary oral fluid test must do so by placing the prescribed device, or the collection unit of the device, into his or her mouth and carrying out the physical actions that are necessary to ensure that, in the opinion of the

person who, under this section, is requiring the test to be undergone, a sufficient sample of oral fluid has been captured by the device or unit.

- (6A) A person who, under this section, is requiring another person to undergo a preliminary oral fluid test may give any reasonable direction as to the physical actions that are necessary for the person to undergo the test.
- (7) Without limiting section 54(3), a person required to undergo a preliminary oral fluid test is required to remain at the place at which the test is being carried out until the sample of oral fluid provided has been tested by a prescribed device.
- (8) A person is not obliged to undergo a preliminary oral fluid test if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.

55E Oral fluid testing and analysis

- (1) In this section—

authorised officer means—

- (a) a police officer or police custody officer authorised in writing under subsection (6) by the Chief Commissioner of Police; or
- (b) an officer of the Corporation authorised in writing under subsection (6) by the Corporation; or
- (c) an officer of the Department of Economic Development, Jobs, Transport and Resources authorised in writing under subsection (6) by the Secretary;

enforcement officer means an officer of the Corporation or of the Department of Economic Development, Jobs, Transport and Resources authorised under section 55D(2) for the purposes of section 55D.

- (2) If a person undergoes a preliminary oral fluid test when required to do so under section 55D by a police officer or an enforcement officer and—

- (a) the test, in the opinion of the police officer or enforcement officer in whose presence it is made, indicates that the person's oral fluid contains a prescribed illicit drug; or
- (b) the person, in the opinion of the police officer or enforcement officer, refuses or fails to carry out the test in the manner specified in section 55D(6)—

any police officer or, if the requirement for the preliminary oral fluid test was made by an enforcement officer, any police officer or any enforcement officer may require the person to provide a sample of oral fluid for testing by a prescribed device and, if necessary, analysis by a properly qualified analyst within the meaning of section 57B and for that purpose may further require the person to accompany any police officer or, if the requirement for the preliminary oral fluid test was made by an enforcement officer, any police officer or any enforcement officer to a place or vehicle where the sample is to be provided and to remain there until—

- (c) the person has provided the sample and any further sample required to be provided under subsection (5), the sample has been tested by a prescribed device and the person has been given (if necessary) a part of the sample under subsection (11) and complied with any requirement made of him or her under section 59; or
- (d) 3 hours after the driving, being an occupant of or being in charge of the motor vehicle—

whichever is the sooner.

Example

A person may be required to go to a police station, a public building, a booze bus or a police car to provide a sample of oral fluid under this section.

- (3) A police officer may require any person who is required to undergo an assessment of drug impairment under section 55A or to furnish a sample of breath for analysis by a breath analysing instrument under section 55 to provide a sample of oral fluid for testing by a prescribed device and, if necessary, analysis by a properly qualified analyst within the meaning of section 57B and may, for that purpose, require the person to remain at the place at which the person is required to remain for the purposes of the assessment or furnishing the sample of breath until—
 - (a) the person has provided the sample of oral fluid and any further sample required to be provided under subsection (5), the sample has been tested by a prescribed device and the person has been given (if necessary) a part of the sample under subsection (11) and complied with any requirement made of him or her under section 59 and the assessment

has been carried out or the sample of breath has been furnished (as the case requires); or

- (b) 3 hours after the driving, being an occupant of or being in charge of the motor vehicle—

whichever is the sooner.

- (4) The provision of a sample of oral fluid under this section must be carried out in accordance with the prescribed procedure.
- (5) The person who required a sample of oral fluid to be provided under subsection (2) or (3) may require the person who provided it to provide one or more further samples if it appears to him or her that the prescribed device is incapable of testing for the presence in the sample, or each of the samples, previously provided of a prescribed illicit drug because the amount of sample provided was insufficient or because of a power failure or malfunctioning of the device or for any other reason whatsoever.
- (6) Only the following persons may carry out the procedure for the provision of a sample of oral fluid under this section—
 - (a) a police officer or police custody officer authorised in writing by the Chief Commissioner of Police for the purposes of this section; or
 - (b) an officer of the Corporation authorised in writing by the Corporation for the purposes of this section; or
 - (c) an officer of the Department of Economic Development, Jobs, Transport and Resources authorised in writing by the Secretary for the purposes of this section.
- (7) The Chief Commissioner of Police may only authorise a police officer or a police custody officer, and the Corporation or the Secretary may only authorise an enforcement officer, for the purposes of this section if satisfied that the police officer, police custody officer or enforcement officer (as the case requires) has the appropriate training to carry out the prescribed procedure for the provision of a sample of oral fluid under this section.
- (8) A prescribed device may be comprised of a collection unit and a testing unit and one or more other parts.
- (9) A person required to provide a sample of oral fluid under this section must do so by placing the prescribed device, or the collection unit of the device, into his or her mouth and carrying out the physical actions that are necessary to ensure that, in the opinion of the authorised officer, a sufficient sample of oral fluid has been captured by the device or unit.
- (9A) An authorised officer who, under this section, is requiring another person to provide a sample of oral fluid may give any reasonable direction as to the physical actions that are necessary for the person to provide the sample.

- (10) A person is not obliged to provide a sample of oral fluid under this section if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.
- (11) If a test by a prescribed device of a sample of oral fluid provided under this section indicates, in the opinion of the authorised officer who carried out the procedure in the course of which the sample was provided, that the person's oral fluid contains a prescribed illicit drug, the authorised officer must deliver a part of the sample to the police officer or the enforcement officer who required the sample to be provided and another part to the person by whom the sample was provided.
- (12) A person must not be convicted or found guilty of refusing to provide a sample of oral fluid in accordance with this section if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against him or her.
- (13) The person who required a sample of oral fluid to be provided under subsection (2) or (3) may require that person to allow a registered medical practitioner or an approved health professional nominated by the person who required the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
- (a) that person is unable to furnish the required sample of oral fluid on medical grounds or because of some physical disability or condition; or
 - (b) the prescribed device is incapable of testing for the presence in the sample of a prescribed illicit drug for any reason whatsoever—
- and for that purpose may further require that person to accompany a police officer to a place where the sample of blood is to be taken and to remain there until the sample has been taken or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is the sooner.
- (14) The registered medical practitioner or approved health professional who takes a sample of blood under subsection (13) must deliver a part of the sample to the person who required it to be taken and another part to the person from whom it was taken.
- (15) A person who allows the taking of a sample of his or her blood in accordance with subsection (13) must not be convicted or found guilty of refusing to provide a sample of oral fluid in accordance with this section.
- (16) A person must not hinder or obstruct a registered medical practitioner or an approved health professional attempting to take a sample of the blood of any other person in accordance with subsection (13).

Penalty: Penalty applying to this subsection: 12 penalty units.

- (17) No action lies against a registered medical practitioner or an approved health professional in respect of anything properly and necessarily done by the practitioner or approved health professional in the course of taking any sample of blood which the practitioner or approved health professional believed on reasonable grounds was allowed to be taken under subsection (13).
- (18) A person who is required under this section to provide a sample of oral fluid may, immediately after being given a part of the sample under subsection (11), request the person making the requirement to arrange for the taking in the presence of any police officer (or, if the requirement for the provision of the sample was made by an enforcement officer, any police officer or any enforcement officer) of a sample of that person's blood for analysis at that person's own expense by a registered medical practitioner or an approved health professional nominated by the police officer or the enforcement officer in whose presence the sample is taken.
- (19) A part of a sample of blood taken under subsection (18) must be delivered to the person who required the oral fluid sample to be provided under this section.
- (20) Nothing in subsection (18) relieves a person from any penalty under section 49(1)(eb) for refusing to provide a sample of oral fluid.
- (21) Evidence derived from a sample of oral fluid provided in accordance with a requirement made under this section is not rendered inadmissible by a failure to comply with a request under subsection (18) if reasonable efforts were made to comply with the request.
- (22) In any proceeding under this Act—
 - (a) the statement of any officer of the Corporation or of the Department of Economic Development, Jobs, Transport and Resources that on a particular date he or she was authorised under section 55D(2) for the purposes of section 55D; or
 - (b) a certificate purporting to be issued by the Corporation or signed by the Secretary, as the case requires, certifying that a particular officer of the Corporation or of the Department of Economic Development, Jobs, Transport and Resources named in it is authorised under section 55D(2) for the purposes of section 55D; or
 - (c) the statement of any police officer, police custody officer or officer of the Corporation or of the Department of Economic Development, Jobs, Transport and Resources that on a

particular date he or she was authorised under subsection (6) for the purposes of this section; or

- (d) a certificate purporting to be signed by the Chief Commissioner of Police, issued by the Corporation or signed by the Secretary, as the case requires, certifying that a particular police officer, police custody officer or officer of the Corporation or of the Department of Economic Development, Jobs, Transport and Resources named in it is authorised under subsection (6) for the purposes of this section—

is admissible in evidence and, in the absence of evidence to the contrary, is proof of the authority of that police officer, police custody officer or officer of the Corporation or of the Department of Economic Development, Jobs, Transport and Resources.

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15Certificate under section 57(4B)

A certificate under section 57(4B) of the Act must contain the following particulars—

- (a) a statement by the approved expert that he or she is an approved expert within the meaning of section 57 of the Act; and
- (b) a statement as to the usual effect of a specified substance or substances on behaviour when consumed or used (including its effect on a person's ability to drive properly); and
- (c) the name and signature of the approved expert.

16 Oral fluid testing devices

- (1) The device prescribed for the purposes of section 55D of the Act is the oral fluid testing device known as the SECURETEC DRUGWIPE TWIN or the SECURETEC DRUGWIPE II TWIN.
- (2) The devices prescribed for the purposes of section 55E of the Act are—
 - (a) the oral fluid testing device known as the SECURETEC DRUGWIPE II TWIN COMBO; and
 - (b) the oral fluid testing device known as the Cozart RapiScan.

17 Procedure for carrying out preliminary oral fluid test

For the purposes of section 55D of the Act, the prescribed procedure for carrying out a preliminary oral fluid test is that the police officer or person authorised under section 55D(2) of the Act who conducts the test—

- (a) provides a fresh oral fluid collection unit for use by a person required to provide a preliminary oral fluid sample; and
- (b) uses only an oral fluid collection unit that, until required for taking the oral fluid sample, has been kept in a sealed container; and
- (c) tests the oral fluid sample by using the device, or the oral fluid testing unit that is part of the device, that was used to obtain the sample.

18 Procedure for taking oral fluid samples under section 55E

For the purposes of section 55E of the Act, an authorised officer, in taking an oral fluid sample, must—

- (a) provide a fresh oral fluid collection unit for use by each person required to provide an oral fluid sample; and
- (b) use only an oral fluid collection unit which, until required for taking the oral fluid sample, has been kept in a sealed container.

19 Procedure after taking oral fluid sample

An authorised officer who takes a sample of oral fluid under section 55E of the Act must ensure that the sample or, if the sample is broken into parts, each part has attached to it a label bearing—

- (a) the name and signature of the authorised officer who took the oral fluid sample; and
- (b) the date and time the sample was taken; and
- (c) the name of the person from whom the sample was taken or, if the name of the person is not known, sufficient information to enable the sample to be identified with the person from whom it was taken.

20 Certificate under section 57B(3)

A certificate under section 57B(3) of the Act must contain the following particulars—

- (a) a statement by the person who carried out the oral fluid test that he or she is an authorised officer within the meaning of section 55E of the Act; and

- (b) a statement as to whether the requirements of these Regulations for the taking and testing of oral fluid samples have been complied with; and
- (c) a statement as to whether the result of the oral fluid tested indicated the oral fluid sample provided by the person contained a prescribed illicit drug; and
- (d) the name of the person from whom the oral fluid sample was taken; and
- (e) the time and date the oral fluid sample was taken; and
- (f) the name and signature of the authorised officer who took the oral fluid sample.

21 Certificate under section 57B(4)

A certificate under section 57B(4) of the Act must, in addition to a statement as to the presence of a prescribed illicit drug in that sample of oral fluid, contain the following particulars—

- (a) a statement by the analyst that he or she is an approved analyst within the meaning of section 57B of the Act; and
- (b) a statement as to the method of analysis used; and
- (c) the name and signature of the analyst; and
- (d) the date on which the analysis was conducted; and
- (e) a description of the contents of the identification label referred to in regulation 19 that was attached to the part of the oral fluid received for analysis.