Ada Evans Chambers Conference

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Motor Traffic Law:

Case law update

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1. ROAD RULES 2008

RR 10-2 - NSW rule: penalties and disqualifications for speeding offences

Disqualification commencement

It is clear that an automatic period of disqualification under this rule results from conviction and must commence on the date of conviction. The court may order a different period of disqualification, subject to the restraints in the rule, but it is not given any power to order the disqualification commencing from a date other than the date of conviction. In so far as a disqualification order under this rule is made to commence on a date other than the date of conviction, it is without power and involves jurisdictional error: *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258.

RR 56 - Stopping for a red traffic light or arrow

Elements

The police evidence was that the driver drove through a red light without stopping at all. The defence put a no prima facie case submission, arguing the driver had been issued with an infringement for the wrong offence, an essential element of the offence being charged that the driver actually stops. In the event that a vehicle drives through the intersection without stopping, when the light is red, it is only a breach of r 59 which could result. This submission was accepted and the charge dismissed. On appeal it was held that the finding was illogical and contrary to the express statutory provision. A failure to stop cannot establish the absence of an essential ingredient of the offence. That a breach of r 59 may also have occurred was irrelevant to the question of whether or not r 56 had been breached: *Director of Public Prosecutions (NSW) v Abouali* [2011] NSWSC 110.

RR 59 - Proceeding through a red traffic light

Elements

The essential elements of the offence are (a) while the traffic lights at the intersection are showing red (b) the defendant was the driver of the motor vehicle, and (c) he entered the intersection: *Director of Public Prosecutions (NSW) v Abouali* [2011] NSWSC 110.

RR 287 - Duties of a driver involved in a crash

The driver submitted that she was not guilty on the basis that as the other vehicle had left the scene immediately after the crash, there had been no-one present to whom she could give her name and address or other particulars, notwithstanding she also failed to give her particulars when the police attended her house later that day. Held, as she could have provided her particulars to the police, she was properly convicted: *Bialek v Police* [2011] SASC 195.

RR 352 - References to stopping as near as practicable to a place

"as near as practicable"

The phrase indicates a requirement of physical proximity. What may be as near as practicable in any given context may vary according to the circumstances of the individual case. Rule 352 makes it plain that a driver will not comply with r 67(2) simply by stopping his or her vehicle behind a vehicle which has already stopped at a stop line: *Choong v Police* [2011] SASC 168.

2. ROAD TRANSPORT (GENERAL) ACT 2005

S 56 - Liability of operator

"Breach of a ... dimension ... requirement" – no double jeopardy where multiple dimension breaches charged arising from one incident

"Dimension requirement" is defined in s 20. Each defendant in this case, faced two charges for one vehicle and one incident, one charge alleging the vehicle exceeded the height limitation and the other the width limitation. In both cases, the Magistrate at first instance held that the breach of the width and height requirements constituted one offence and to prosecute for both placed the defendants in double jeopardy. In both cases, a conviction was recorded and penalty imposed for one charge with the other being permanently stayed. On appeal by the RTA, it was held that the breaches of the height and width requirements are separate offences and not mere particulars of the same offence, and that there was no breach of the double jeopardy provision at s 177: *Roads and Traffic Authority of New South Wales v Booth Produce Pty Ltd & Christopher James Edwards* [2011] NSWSC 1018.

s 187 - Court may impose penalty and disqualify driver on conviction

Requirement for conviction

If a court for an offence under this division imposes a penalty under s 10A of the *Crimes (Sentencing Procedure) Act 1999* (that is, convicting an offender "without imposing any other penalty") in the belief that, because licence disqualification is a "penalty", there will be no disqualification of the offender from holding a driver licence and then emphasises that intention by purporting to make an order to that effect (ie that the offender is not to be disqualified from holding a driver licence), such an interpretation of the law is incorrect and such an order is beyond power. A penalty under s 10A gives rise to a conviction and the consequence of a conviction, by operation of the provisions in this division, is disqualification: *Davis v Director of Public Prosecutions (NSW) & Another* [2011] NSWSC 153.

Commencement and end of disqualification period

James J adopted the obiter of Rothman J in *Hei Hei*[1], accepting that an interpretation of the power conferred by s 188(2)(d)(ii), that it does not include power to make a period of disqualification commencing from a date other than the date of the offender's conviction for the major offence, can produce results which would frustrate the evident purpose of the Act. However, the terms and the context of s 188(2)(d)(ii)Act require an interpretation of the provision such that a court ordered period of disqualification can commence only from the date of the conviction of the driver for the major offence: *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258.

It is not necessary for the sentencing court to state an end date to the disqualification, since apart from any other matter the end date would be the product of the period of the order (in this case 12 months). Nor could an end date be stated, since the running of the period of disqualification might be interrupted by a stay pending an appeal, whereby the product of the period of 12 months would not be 12 calendar months after [the date of commencement]: *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151.

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[1] The purpose of the Act is best served by construing this section as granting, to any judicial officer required to exercise the powers under s 188(2)(d)(ii), the discretion and flexibility to set appropriate commencement and conclusion dates for the period of disqualification in question. The power in s 187(1) does not readily imply a restriction on the manner by which courts may set the period. However, Rothman J went on to make the following obiter dictum (not needing to finally determine the issue). *Hei Hei v The Queen* (2009) 52 MVR 473; [2009] NSWCCA 87:

> [t]he difficulty with adopting a construction that implemented the above stated purpose … (and which purpose ought, to the extent possible, be given effect) is that s 188(2)(d) is a sub-paragraph immediately following on a provision relating to automatic disqualification. Section 188(2)(d)(i) provides that the offender is "automatically disqualified for a period of 3 years from holding a driver licence". It is axiomatic that, absent an order varying the period, the automatic disqualification would apply on and from the date of conviction. The jurisdiction and power conferred on the Court by the provisions of the next sub-paragraph, s 188(2)(d)(ii), is a capacity to order "a shorter period ... or longer period of disqualification. Further, it would seem that, once an order for disqualification issues from a court, the period of disqualification is no longer "automatic".
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> The context of s 188(2)(d)(ii), following immediately upon the terms of subpara (i) seems to indicate that the "period" is a period that commences on the date of conviction.

Severity appeals – obligation on appellant to put disqualification in issue

On a conviction and severity appeal against offences of drive manner dangerous and mid-range PCA, the appeals against severity were successful in that the sentences of periodic detention were quashed and the driver was re-sentenced to a period of community service. That Magistrate's disqualification orders for the two offences were not disturbed (the driver was disqualified for longer than the maximum automatic period provided for multiple offences in s 188(4)). The driver's argument, amongst others, on a question of law to the Court of Appeal was that there was a failure to take into account a relevant consideration in respect of a sentence. That is, the District Court judge should have considered, pursuant to s 188(4) whether the offences called for a longer period of disqualification or only the maximum automatic period. Held, there cannot be a failure to take into account a relevant consideration in respect of sentence that was not in issue in the proceedings. The appellant gave evidence in the appeal. His counsel did not ask any question about whether the appellant needed his licence for any purpose, or what his transport needs were, or how he was managing his transport arrangements without a licence. The only reference to his motor vehicle was a question as to what he had done with it, the appellant's response being he sold it. If the period of disqualification was in issue, questions would have been asked that directly concerned it: *Meakin v Director of Public Prosecutions* (NSW) [2011] NSWCA 373.

S 188 - Disqualification for certain major offences

Automatic and minimum disqualification periods

In the case of an offender being sentenced for dangerous driving occasioning death, the offender was at first instance sentenced to four years imprisonment with a non-parole period of three years. He was disqualified from driving for five years commencing from the date of his likely release from prison on parole (a practice that has in any event been criticised by the CCA in *Hei Hei v The Queen* (2009) 52 MVR 473; [2009] NSWCCA 87). He was a 60 year old professional truck driver who was of good character and who, apart from some very old PCA convictions, had a remarkably clean driving record. On appeal to the CCA both the sentence and the disqualification were reduced (the disqualification to two years and to commence at the same time as the sentence, making it expire six months into the new non-parole period) with Beazley JA making the following observations regarding the disqualification: One of the purposes of a period of disqualification is to impress upon the offender the seriousness of the offences and the necessity of complying with the road rules.

Both of these purposes have been brought home to the applicant by his conviction and his imprisonment. I see no other relevant purpose in this case to warrant the applicant not being permitted to drive shortly after his release from prison: *Preston v The Queen* [2011] NSWCCA 25 at [48].

S 189 - Effect of disqualification

Permanently – subs (1)

It was suggested in obiter dicta by Nicholson DCJ that the word "permanently" must be understood as having the words "for the specified period of disqualification" or words to that effect as qualifying the word "permanently": *Fewel v Director of Public Prosecutions* (2010) 12 DCLR (NSW) 1; [2010] NSWDC 195. It is doubtful whether this understanding of the subsection is correct. The disqualification operates upon the driver. The cancellation operates upon the licence (see s 25A *Road Transport (Driver Licensing) Act 1998*). It is suggested that a more accurate qualification of the phrase "to cancel, permanently" is that cancellation of the driver licence persists beyond the expiration of the disqualification period and until a new driver licence is applied for and granted. That is, upon a driver being disqualified his or her licence is cancelled. Upon the driver no longer being disqualified, the status of the licence remains cancelled, although there is no longer any impediment to the driver applying for a new licence. See also *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151 per Young JA at [135].

Reconciling subs (6) and s 68 Crimes (Appeal and Review) Act 2001

Can s 189(6) be read without conflict with s 68 of the *Crimes (Appeal and Review) Act 2001*? The question was considered in the District Court: *Fewel v Director of Public Prosecutions* (2010) 12 DCLR(NSW) 1; [2010] NSWDC 195. This case decided that there was no conflict and that a District Court hearing a sentence appeal could in effect backdate a disqualification period notwithstanding any stay of execution of the disqualification pursuant to s 63 *Crimes (Appeal and Review) Act 2001*.

The question has subsequently been decided by the NSW Court of Appeal: *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151, a case in which the defendant upon conviction was disqualified in the Local Court pursuant to s 188(2)(d)(ii) for 12 months, to date from 8

June 2010. The defendant lodged an appeal against his sentence to the District Court, resulting in an automatic stay of sentence and disqualification. That stay continued until the disposal of the appeal on 26 July 2010 when the judge ordered, inter alia, disqualification for 12 months, to date from 8 June 2010 and expire on 7 June 2011.

The Court of Appeal also found there was no conflict, although its reasoning lead to a different result. The Court looked at the relationship between ss 188, 189 and ss 63, 68 and 71 *Crimes (Appeal and Review) Act 2001*. It held the District Court could backdate the start date but it could not set an end date. The application of s 189(6) would then mean that any stay of execution of the disqualification pursuant to s 63 was not counted as part of the disqualification. The District Court could not state an end date inconsistent with that which would come from the operation of s 189(6) and purporting to do so would exceed the court's jurisdiction. That is because the effect of the District Court's order was that the defendant would have been in effect disqualified for less than the 12 months minimum under s 188(2)(d)(ii). By force of s 71 *Crimes (Appeal and Review) Act 2001*, the judge could not state an end date inconsistent with the statutory minimum period of 12 months, any more than the Magistrate could have done so.

Section 68(1A) does not permit a court to disregard other mandatory requirements in respect of sentencing. As for s 68(2), it does not enable an order overriding the length of a period of disqualification calculated as required by s 189(6): *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151.

Effect of a stay – subs 6

As s 189(1) makes it clear that the effect of disqualification is that "the disqualification operates to cancel, permanently, any driver licence held" by that person, the effect of the "stay" is actually to make the relevant person eligible to apply for a fresh licence. There is no automatic revival of the original licence: *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151 per Young JA at [135] (Giles and Basten JA did not discuss this issue).

S 205 - Immediate suspension of licence in certain circumstances

Subs 6 - Disqualification – taking suspension into account

Section 205(6) does not confer any power on a magistrate to make an order under s 188(2)(d)(ii), commencing from a date other than the date of the relevant conviction, notwithstanding the production of a result which frustrates the evident purpose of the Act. In the present case, the mandatory minimum period of disqualification was 12 months. The magistrate could have utilised para (b) of s 205(6) so as to impose a period of disqualification which was less than 12 months (but not less by any more than the period of the suspension) but was not empowered by para (b) to make the period of disqualification commence from a date different from the date of the conviction. The terms and the context of s 188(2)(d)(ii), require an interpretation of the provision such that a court ordered period of disqualification can commence only from the date of the conviction of the driver for the major offence: *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258.

S 219 - Impounding, clamping or forfeiture of vehicles on finding of guilt of driver who is a registered operator of the vehicle

Ameliorating operation of section where "extreme hardship" demonstrated – subsection 5

The following case looked at a cognate provision to subs 5 in South Australian legislation that used the phrase "severe physical or financial hardship". It was held that, given that it was the intention of parliament by such a provision to create a measure of hardship over and above the prescribed penalties for the relevant offences, it is clear that if a defendant is to avail him/herself of the hardship provisions, he/she is require to establish something more than ordinary hardship. The magistrate was not obliged to consider that the significant monetary penalty and disqualification imposed for the substantive offence were of themselves matters that brought the case beyond the threshold of ordinary hardship: *Frohling v Police* [2011] SASC 53.

It is incumbent upon a defendant who asks a court to decline to make an order to adduce the evidence necessary to satisfy the court of the severe consequences to the defendant if the order is made. If severe financial hardship will be caused, this will usually require evidence of the defendant's assets and income: *Rogers v Police* [2011] SASC 215.

3. ROAD TRANSPORT (GENERAL) REGULATION 2005

Cl 14 - Determination of appeals concerning examiner's authorities and proprietor's authorities

Determination of appeal – relevant considerations

In considering an appeal made to the Local Court under this regulation by an authorised examiner against a decision by the RTA to cancel his examiner's authority, the Supreme Court held that the Magistrate made the following errors of law in determining the appeal:

(i) failing to consider not only the individual defects that the examiner allowed to pass rather than withhold a pink slip but also the totality of the defects, both in number and seriousness, particularly against the background that, under cl 60(3) of the *Road Transport (Vehicle Registration) Regulation 2007*, it was a condition of the examiner's authority that he comply with the RTA rules.

(ii) failing to consider the examiner's deficiencies in record keeping.

(iii) failing to consider the question of the extent to which the examiner's failure to ensure defects were fixed prior to issuing a pink slip was deliberate, accidental or the product of gross negligence or incompetence.

(iv) remarking upon the cancellation of the examiner's livelihood where there was no evidence that suspension or cancellation of the examiner's authority would effectively cancel his livelihood. The impact of any order upon the examiner was a relevant consideration. Undoubtedly, the protection of the public and the effectiveness of the inspection system were of more importance: *RTA v Love* [2011] NSWSC 987.

Cl 20 - Determination of appeals concerning driver licensing

Decision is "final and binding"

The applicant lodged an appeal to the Local Court under cl 18 against an RTA imposed suspension. The matter was fixed for hearing. The applicant failed to appear at the hearing and his application was dismissed. He filed an appeal to the District Court. The District Court had no jurisdiction to hear the appeal: *Massarani v Roads and Traffic Authority (NSW)* [2011] NSWSC 1520.

Cl 39 - Definitions

"Major rest break"

There is no ambiguity or conflict between the definition of "major rest break" in cl 39 and the phrase "relevant major rest break" in cl 60. "Major rest break" is defined flexibly in cl 39 because it is intended to apply to each of the clauses dealing with minimum rest periods for the different regimes and the different categories of driver. It is defined as "*at least* 5 continuous hours" in recognition of the fact that for a 24 hour work period cl 66 requires a break of 5 continuous hours but other clauses require longer periods.

In any given case it is necessary to identify the clause of the Regulation which governs the situation, which will depend on the category of the driver and the regime under which he works. Any rest break under that clause of 5 continuous hours or more will be a major rest break for the purpose of the clause. This is what is meant by "relevant major rest break" in cl 60(3)(a): *Roads & Traffic Authority of NSW v Frank Trinci* [2011] NSWSC 211.

Cl 60 - Counting time, including work and rest time

"Relevant major rest break"

There is no ambiguity or conflict between the definition of "major rest break" in cl 39 and the phrase "relevant major rest break" in cl 60. "Major rest break" is defined flexibly in cl 39 because it is intended to apply to each of the clauses dealing with minimum rest periods for the different regimes and the different categories of driver. It is defined as "*at least* 5 continuous hours" in recognition of the fact that for a 24 hour work period cl 66 requires a break of 5 continuous hours but other clauses require longer periods.

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Cl 68 - BFM hours - solo drivers

Counting time

Clause 68 is silent as to the time at which any 24 hour period might begin. It is cl 60(3), in conjunction with one of the definitions in cl 39, which bears on this question: *Roads & Traffic Authority of NSW v Frank Trinci* [2011] NSWSC 211.

4. ROAD TRANSPORT (SAFETY & TRAFFIC MANAGEMENT) ACT 1999

S 9 - Presence of prescribed concentration of alcohol in person's breath or blood

Defence of automatism /voluntariness

In defence to a PCA charge the driver relied upon expert evidence of an undiagnosed liver dysfunction exacerbated by a prescribed drug, that unknown to her, inhibited her metabolism of alcohol at the relevant time. It was held that this was a misconceived reliance on the concept of voluntariness. The driver's ability to metabolise alcohol is not an act over which she would normally have control and is not something consciously done by a driver. Nor could automatism be relevant where there is no evidence the driver was deprived of her capacity to control her actions. In any event there was no clear evidence that, had her ability to metabolise alcohol not been impaired, she would not have committed the offence: *Watson v Police* [2011] SASC 240.

S 15 - Breath analysis following arrest

Defence: Medical grounds

After providing a valid first sample, the driver was unable to provide any further valid sample on his subsequent blows. An experienced heart specialist provided evidence that the driver suffered from atrial fibrillation (irregular heart rate) and that in a stressful situation his increased heart rate would lead to breathlessness. The court was satisfied the defence was proved: *Murphy v Police* [2011] SASC 138.

Certificate of authorisation by Commissioner of Police

In a case dealing with a cognate South Australian provision (s 47K *Road Traffic Act 1961*) the prosecution tendered an extract from the Government Gazette naming the relevant officer as being authorised to conduct breath analysis testing in place of a signed certificate certifying the officer was so authorised by the Commissioner of Police. The court held that the Gazette was not evidence of

authorisation as required by the section: *Police v Short* [2011] SASC 131.

On a different point in the same case it was held that the certificate on its face must show that the authority is current at the time of the offence: *Police v Short* [2011] SASC 131.

s 32 - Evidence of alcohol concentration revealed by breath or blood analysis in proceedings for offence under section 9

Displacement of statutory presumption – unless the defendant proves

In looking at a cognate South Australian provision, it was held that expert evidence that the driver's blood alcohol concentration at the time of driving "could have been as low as 0.04%" was insufficient to rebut the statutory presumption. That it is possible that there was a lower reading at the time of driving is not enough: *Police v Tully* [2011] SASC 242. NB - the above opinion was the expert's revised evidence. Initially his opinion was the driver's blood alcohol concentration "was probably about 0.04%". The court made no comment at to what it would have found had the expert remained of his initial opinion. Arguably it would have been sufficient to displace the presumption, subject to further clarification of his use of the word "about".

Displacement of statutory presumption – conflicting breath analysis and blood test readings

The defendant's breath analysis sample provided at 10.20pm returned a reading of 0.098 grams of alcohol in 100 millilitres of his blood. Two hours and ten minutes later at 12.30am the defendant provided a blood sample which was analysed and returned a reading of 0.034 grams. This was an elimination rate of 0.027 grams per hour. There was no issue about the conduct of the breath analysis nor any operator error. The expert evidence at first instance was that the discrepancy between readings was outside the normal process of metabolism and elimination, however it was possible for a very high elimination rate to be achieved by a chronic alcoholic. There was no evidence before the court that the defendant was a heavy drinker or chronic alcoholic. The magistrate found that the two results were reconcilable allowing for the defendant having a higher than normal elimination rate. On appeal it was held that the presumption as to the accuracy of the result had been rebutted and that the magistrate erred in reconciling the results in the absence of any evidence: *Douglas v Police* [2011] SASC 50.

s 33 - Certificate evidence about breath or blood analysis in proceedings for offences under section 9

Certificate of authorisation by Commissioner of Police

In Victoria a certificate under a cognate provision was produced stating that the relevant police officer 'is authorised' to operate a breath analysing instrument. The certificate was dated after the date of the alleged offence. The court found that although it was a certificate admissible under the evidentiary provision, it was only proof of the operator's authority from the date of the certificate. The certificate could not establish the operator was authorised on the date of the offence. However there was other evidence before the court that the operator was authorised at the time of the alleged offence: *Rugolino v Howard* [2010] VSC 590; (2011) 57 MVR 178.

s 42 - Negligent driving, furious or reckless driving

Defence of automatism

The driver was charged with driving in a manner dangerous. An expert gave evidence that the driver suffered a mental impairment (a manic episode) such that he had no understanding or control over the manner of his driving. Held, driving a motor vehicle in a manner dangerous does not require knowledge or belief on the part of a defendant that the driving is dangerous. The relevant willed act is that of driving, ie that the driving was a voluntary and willed act. It was not in issue that the driver intended to drive and that accordingly his driving was a willed act. The question of his willed acts thereafter and in particular as to his erratic and dangerous driving was to be assessed objectively. As a strict liability offence, voluntariness is relevant to establishing the element of driving but not the manner of driving: *Schwark v Police* [2011] SASC 212, applying *R v Coventry* (1938) 59 CLR 633; [1938] HCA 31.

s 73A - Rebuttal of evidence of matters of specialised knowledge

Documents dealing with specialised expert knowledge

At the hearing of a radar detected speeding case, the defendant driver tendered a publication of Standards Australia titled "Australian Standard – Radar Speed Detection Part 2: Operational Procedures AS2898.2-2003". The tender was rejected. That ruling was upheld on appeal. The court held that as the document dealt with specialised expert knowledge needing scientific evidence for its proper application, it would only be admissible if supported or authenticated by suitably qualified expert evidence. Even if admitted, the document could, at the most, only establish the general proposition that a radar scan may, in certain circumstances, give an incorrect reading. For any use to be made of such a general operational guide, a suitably qualified expert would be needed who could offer an opinion on the likelihood of any particular interference having occurred on the occasion in question: *Willis v Endall* (2011) 57 MVR 304; [2011] WASC 45.

5. ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) REGULATION 1999

Cl 156 - Testing of speed measuring devices: section 46(1)(b) of Act

Testing – adequacy of fixed distance check

The fixed distance check is a type of check conducted by police operators of speed measuring devices (including in NSW). It typically involves the officer at the police station being situated at a fixed point and targeting the device at another fixed point on a wall over a known distance (for example, 50 metres). A properly operating speed gun would be expected to show a speed reading of 0 km/h and a distance reading the same as the known distance.

In a South Australian case the equivalent to the s 46 certificate relating to a laser speed gun device (Lidar) was challenged on the basis of deficiencies in the testing, particularly the fixed distance test. The three tests conducted by the officer operating the unit prior to commencing duty were a screen integrity test, a scope alignment test and a fixed distance check. The first two checks were built into the device and operated by depressing the relevant button. The third was a testing by the officer of the device against a precise distance which was set up in the police complex (placing the speed gun over a painted mark in the car park and targeting a point on a wall exactly 50 metres away). The manufacturer's specifications were that the device was accurate + or – 2 km/h. It was argued that as a matter of logic and science a test involving a fixed object could not give rise to a valid result + or – 2 km/h and that therefore the certificate could not prove the accuracy of the device. Only a test on a moving target would enable a result capable of being expressed within the manufacturer's accuracy tolerance. The court expressed no concluded view on whether this test met legislative requirements as it decided the case on another basis: *Such v Police* (2011) 57 MVR 313; [2011] SASCFC 4.

NB –There are speed measuring devices used in NSW that also have an accuracy tolerance of + or – 2 km/h (such as the Pro-Laser III). In NSW any question of whether a speed measuring device was tested for the purposes of s 46 would require an analysis of whether the testing complied with the requirements of cl 156 (a) or (b) and was conducted within the prescribed time.